No. 18-11479

IN THE

United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants,

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

Intervenor Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Texas
Case No. 4:17-cv-868 (Hon. Reed O'Connor)

OPPOSED MOTION OF THE NAVAJO NATION TO INTERVENE OR TO FILE A BRIEF AS AMICUS CURIAE

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January 16, 2019

CERTIFICATE OF INTERESTED PERSONS

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Defendants-Appellants,

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

Intervenor Defendants-Appellants.

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

Plaintiffs-Appellees State of Texas, State of Indiana, and State of Louisiana, as well as Defendants-Appellants, are governmental parties outside the scope of this certificate under Fifth Circuit Rule 28.1. Intervenor Defendants-Appellants, as

well as Proposed Intervenor Navajo Nation, are also governmental parties outside the scope of this certificate under Fifth Circuit Rule 28.1.

Plaintiffs-Appellees with a direct interest in this case are the following:

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TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF AUTHORITIES v

INTRODUCTION 1

BACKGROUND 2

A. The Navajo Nation 2

B. A.L.M.'s Adoption 3

C. Procedural History 4

ARGUMENT 7

I. THE NATION IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT 8

A. The Nation's Motion To Intervene Is Timely 9

B. The Nation Has A Vital Interest In The Defense Of ICWA And The Proper Interpretation Of Its Membership Laws 11

C. The Disposition Of This Suit Could Impair The Nation's Interests 14

D. The Existing Parties Will Not Adequately Represent The Nation's Interest 16

1. The Nation has a unique interest in the Brackeens' suit 16

2. The Nation has a unique interest in interpreting and defending its own membership laws 17

II. PERMISSIVE INTERVENTION UNDER RULE 24(b) IS ALSO WARRANTED 20

TABLE OF CONTENTS—Continued

Page

III. IF INTERVENTION IS DENIED, THE NATION REQUESTS LEAVE TO FILE THE ACCOMPANYING BRIEF AS AMICUS CURIAE 22

CONCLUSION 22

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Page(s)

CASES:

Atkinson Trading Co. v. Shirley,
532 U.S. 645 (2001)....................2

Brackeen v. Zinke,
338 F. Supp. 3d 514 (N.D. Tex. 2018)....................6, 13, 19

Edwards v. City of Houston,
78 F.3d 983 (5th Cir. 1996)....................9, 14

Entergy Gulf States La., LLC v. EPA,
817 F.3d 198 (5th Cir. 2016)....................9, 16, 18, 19

Heaton v. Monogram Credit Card Bank of Ga.,
297 F.3d 416 (5th Cir. 2002)....................14, 21

In re A.M.,
No. 02-17-00298-CV, 2017 WL 6047677 (Tex. App. —
Fort Worth Dec. 7, 2017, no pet.)....................4

In re Lease Oil Antitrust Litig.,
570 F.3d 244 (5th Cir. 2009)....................9

Int'l Union, United Auto. Workers, Local 283 v. Scofield,
382 U.S. 205 (1965)....................8

Kneeland v. Nat'l Collegiate Athletic Ass'n,
806 F.2d 1285 (5th Cir. 1987)....................21

Kobach v. U.S. Election Assistance Comm'n,
No. 13-cv-4095-EFM-DJW, 2013 WL 6511874 (D. Kan. 2013)....................22

League of United Latin Am. Citizens, Council No. 4434 v. Clements,
884 F.2d 185 (5th Cir. 1989)....................20

Massachusetts v. EPA,
549 U.S. 497 (2007)....................21

TABLE OF AUTHORITIES—Continued

Page(s)

Michigan v. Bay Mills Indian Cmty.,
572 U.S. 782 (2014) 2

Miss. Band of Choctaw Indians v. Holyfield,
490 U.S. 30 (1989) 12

New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.,
732 F.2d 452 (5th Cir. 1984) 9

Peyote Way Church of God, Inc. v. Thornburgh,
922 F.2d 1210 (5th Cir. 1991) 17

Ross v. Marshall,
426 F.3d 745 (5th Cir. 2005) .... *passim*

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 13, 17, 21

Sierra Club v. Glickman,
82 F.3d 106 (5th Cir. 1996) 14

Stallworth v. Monsanto Co.,
558 F.2d 257 (5th Cir. 1977) 10, 11

Texas v. U.S. Dep't of Energy,
754 F.2d 550 (5th Cir. 1985) 8, 22

Texas v. United States,
805 F.3d 653 (5th Cir. 2015) .... *passim*

Trbovich v. United Mine Workers of Am.,
404 U.S. 528 (1972) 16

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977) 10, 11

United States v. Bursey,
515 F.2d 1228 (5th Cir. 1975) 8

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Franklin Parish Sch. Bd.,
47 F.3d 755 (5th Cir. 1995) 14

Williams v. Lee,
358 U.S. 217 (1959) 2

STATUTES:

25 U.S.C. § 1903(4) 3

25 U.S.C. § 1911 15

25 U.S.C. § 1911(c) 12

25 U.S.C. § 1912 15

25 U.S.C. § 1914 15

28 U.S.C. § 2403 21

Indian Child Welfare Act of 1978 .... *passim*

Treaty with the Navajo, Sept. 9, 1849, 9 Stat. 974 2

Treaty with the Navajo, June 1, 1868, 15 Stat. 667 2

1 Navajo Nation Code § 701 .... 6, 14

1 Navajo Nation Code § 703 14

1 Navajo Nation Code § 753 14

RULES:

Fed. R. App. P. 29 22

Fed. R. App. P. 29(a)(3) 22

Fed. R. App. P. 29(a)(4)(E) 22

Fed. R. Civ. P. 24 .... 1, 8

TABLE OF AUTHORITIES—Continued

Page(s)

Fed. R. Civ. P. 24(a) ... *passim*

Fed. R. Civ. P. 24(a)(2) ... 9

Fed. R. Civ. P. 24(b)(1) ... 20

Fed. R. Civ. P. 24(b)(1)(B) ... 20

REGULATIONS:

25 C.F.R. pt. 23 ... 4

Exec. Order No. 13,592, 76 Fed. Reg. 76,603 (Dec. 8, 2011) ... 3

Indian Entities Recognized and Eligible to Receive Services From the U.S. Bureau of Indian Affairs, 81 Fed. Reg. 5019 (Jan. 29, 2016) ... 2

Tribal Consultation: Memorandum for the Heads of Executive Departments And Agencies, 74 Fed. Reg. 57,881 (Nov. 9, 2009) ... 2, 3

LEGISLATIVE MATERIAL:

H.R. Rep. No. 95-1386 (1978) ... 15

S. Rep. No. 104-335 (1996) ... 17

OTHER AUTHORITY:

7C Charles Alan Wright et al., Federal Practice & Procedure: Civil § 1908.2 (3d ed. 2007) ... 13

INTRODUCTION

Plaintiffs in this case seek to challenge the application of the Indian Child Welfare Act of 1978 ("ICWA") and its implementing regulations (the "Final Rule") to the finalized adoption of a child who is an enrolled member of the Navajo Nation ("the Nation"). And at the core of the District Court's opinion striking down ICWA was a basic misunderstanding of the Nation's tribal membership law. The Nation's people and its laws are therefore at the center of this case. The Nation seeks to intervene to protect both.

All the requirements of intervention are met here. *See* Fed. R. Civ. P. 24. First, this motion is timely: The Nation initially sought to intervene in the District Court early in the case soon after the motions to dismiss were filed, and the Nation renewed its motion immediately after the District Court's ruling on summary judgment made clear that the Nation's membership law would be a central point of contention in this appeal. Further, granting intervention would not require any modification of this Court's existing briefing schedule. Second, the Nation has a "direct, substantial, [and] legally protectable" interest in ICWA and the proper interpretation of its laws and the adoption proceeding of one of its members. *Ross v. Marshall*, 426 F.3d 745, 757 (5th Cir. 2005). Third, none of the existing parties has the impetus or expertise to protect or adequately represent the Nation's interests, which extend both to the merits and questions of justiciability.

This Court should therefore grant intervention. If the Court denies intervention, it should at the very least grant leave for the Nation to file the attached brief as amicus curiae.

The Nation has contacted all other parties. Plaintiffs-Appellees will file an opposition to the motion to intervene, but do not oppose the Nation's participation as amicus curiae. Defendants-Appellants do not oppose this motion.

BACKGROUND

A. The Navajo Nation.

The Nation is a federally-recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive Services From the U.S. Bureau of Indian Affairs, 81 Fed. Reg. 5019, 5022 (Jan. 29, 2016). It has land stretching across Arizona, New Mexico, and Utah. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 648 (2001). The Nation's inherent sovereignty predates the Constitution. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); Treaty with the Navajo, June 1, 1868, 15 Stat. 667; Treaty with the Navajo, Sept. 9, 1849, 9 Stat. 974. Based on its unique, sovereign status, the Nation has a trust relationship with the United States and exercises its right to self-determination and self-governance. *See Williams v. Lee*, 358 U.S. 217, 221-222 (1959); Tribal Consultation: Memorandum for the Heads of Executive Departments and

Agencies, 74 Fed. Reg. 57,881 (Nov. 9, 2009); Exec. Order No. 13,592, 76 Fed. Reg. 76,603 (Dec. 8, 2011).

Protecting Navajo children is of paramount importance to the Nation, and ICWA plays a key role in safeguarding the Nation's children and their families. There are 1,153 Navajo-eligible children who are presently subject to ICWA placement proceedings or who will soon become subject to those proceedings. Dkt. 186-1 at 2.

B. A.L.M.'s Adoption.

A.L.M. is one of the three children at the heart of this suit. A.L.M.'s biological mother is an enrolled member of the Nation, and A.L.M. himself became an enrolled member of the Nation on March 26, 2018. Dkt. 78-1 at 5. A.L.M. is thus an "Indian child" for purposes of ICWA. 25 U.S.C. § 1903(4).

When A.L.M. was 10 months old, he was removed from the custody of his paternal grandparents and placed in foster care with Plaintiffs-Appellees Chad and Jennifer Brackeen ("the Brackeens"). A.L.M. was in the process of being placed with a Navajo family when the Brackeens, who are not members of any tribe, filed a petition to adopt him. Dkt. 35, ¶ 134. The family court denied the Brackeens' adoption petition, concluding that the Brackeens had not shown good cause to depart from ICWA's adoption preferences. *Id.* ¶ 143.

The Brackeens obtained a stay pending appeal from the state appellate court. *See* Dkt. 78 at 3. Because the stay prevented any change in A.L.M.'s placement for the duration of the potentially years-long appeal, the Navajo family withdrew from consideration as adoptive parents. Dkt. 78-1 at 8-9. The Brackeens, the Texas Department of Family and Protective Services, and A.L.M.'s guardian *ad litem* then entered into and filed a settlement agreement approving the Brackeens' adoption, and successfully moved the state appellate court to set aside the trial court's judgment. *In re A.M.*, No. 02-17-00298-CV, 2017 WL 6047677, at *1 (Tex. App. — Fort Worth Dec. 7, 2017, no pet.) (per curiam).

In January 2018, the Brackeens successfully petitioned to adopt A.L.M. MTD Op. 13 (Dkt. 155).

C. Procedural History.

In October 2017, the Brackeens brought this suit against the United States in federal court challenging the Texas state court's initial application of ICWA, which favored A.L.M.'s placement with the Navajo family over the Brackeens. Together with the State of Texas, the Brackeens alleged that ICWA was unconstitutional and that the accompanying regulations (the "Final Rule," codified at 25 C.F.R. pt. 23) were unlawful. *See* Dkt. 35, ¶¶ 152, 259. Two other sets of individual plaintiffs and two additional States subsequently joined the suit, and the

Brackeens continued to press their claims even after finalizing the adoption of A.L.M.

The District Court allowed four tribes to intervene as of right in the Brackeens' suit as defendants, reflecting the fact that the Federal Defendants would not adequately represent the tribes' interests. *See* Dkt. 45. However, when the Navajo Nation also sought to intervene as a defendant for the limited purpose of seeking dismissal on the basis of its sovereign immunity, the District Court denied the motion. *See* Dkts. 77, 139. The District Court acknowledged that the Nation had an interest in the case and its motion was timely. But the District Court concluded that the Nation had not shown that it was entitled to intervene as a matter of right because, in its view, the existing parties would adequately represent the Nation's interests. *See* Dkt. 139 at 8. The District Court also denied permissive intervention because it feared the Nation's sovereign immunity defense could "prolong[] the suit." *Id.* at 10.

The case thus proceeded without the Nation. In July 2018, the District Court denied Defendants' motions to dismiss. In particular, the District Court held that the Brackeens have standing despite the fact that A.L.M.'s adoption was finalized, relying in part on the Brackeens' assertions that—under ICWA—A.L.M.'s adoption is open to collateral attack for two years. MTD Op. 25-26 & n.6.

Plaintiffs then moved for summary judgment. The District Court granted the motions in part and denied in part, concluding—among other things—that multiple provisions of ICWA violate the Equal Protection Clause because of the statute's alleged reliance on ancestry alone. *See Brackeen v. Zinke*, 338 F. Supp. 3d 514, 519 (N.D. Tex. 2018) (Dkt. 166). The District Court's understanding of the Nation's membership law was a key part of this holding. It first observed that the definition of an Indian child includes both tribal members and the biological children of tribal members so long as those children are also eligible for membership. The District Court then asserted that the eligibility prong of this definition is impermissibly race-based because many tribes make eligibility turn on "tribal ancest[ry] by blood." *Id.* at 525, 533. To support that characterization, the court cited Title 1 Section 701 of the Navajo Nation Code. *Id.* at 533. The Court went on to invalidate ICWA and the Final Rule on multiple grounds, declaring that a law that has protected the Nation's children for more than forty years is unconstitutional several times over.

Shortly after the District Court issued this order, the Nation timely moved to intervene in the District Court for purposes of appeal. Dkt. 185. However, Texas promptly directed state agencies not to apply ICWA based on the summary judgment order in pending child custody proceedings, including those involving Navajo children. *See* Dkt. 189-1 at 43-45; Dkt. 186-1 at 2. In light of this action

by Texas, the Intervenor Tribes filed a notice of appeal, Dkt. 187, which Plaintiffs argued deprived the District Court of jurisdiction over the Nation's pending intervention motion. Dkt. 188 at 1. The District Court deferred a ruling on the Nation's motion to intervene, leaving the Nation to file its motion directly with this Court. Dkt. 195.

ARGUMENT

The Nation has multiple vital and unique interests in this suit that can only be protected through intervention: The Brackeens initiated this suit to challenge A.L.M.'s potential placement with a Navajo family. Now that A.L.M. has been adopted, they claim standing based on speculation that the Nation might make a collateral attack on the finalized adoption or interfere with the Brackeens' speculative hopes of adopting again in the future. Given that A.L.M. and the Nation's procedural rights under ICWA are at the core of the Brackeens' claims, the Nation has a strong, individualized interest in the jurisdictional arguments in this suit.

On the merits, the Nation also has a particular interest in defending against the District Court's erroneous determination that the eligibility requirements of the Nation and other tribes amount to an unlawful race-based classification. Only the Nation can offer an authoritative understanding of its own membership laws, and

the District Court's invocation of those laws gives the Nation an especially strong interest in the equal protection issue as a whole.

The Nation's motion also satisfies each of the other requirements for intervention that this Court has identified in the past. Although "[n]o specific provision in the Federal Rules of Appellate Procedure or the Rules of this Circuit provides for intervention on appeal, . . . the Supreme Court has recognized that 'the policies underlying intervention (in the District Courts) may be applicable in appellate courts.'" *United States v. Bursey*, 515 F.2d 1228, 1238 n.24 (5th Cir. 1975) (quoting *Int'l Union, United Auto. Workers, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965)). Accordingly, this Court has referred to Federal Rule of Civil Procedure 24 in evaluating requests to intervene at the appellate stage. *See Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 552 (5th Cir. 1985). Because the Nation readily meets all of the criteria for intervention under Rule 24, its motion should be granted.

I. THE NATION IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Under Rule 24(a), the Court "*must* permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties

adequately represent that interest." Fed. R. Civ. P. 24(a)(2) (emphasis added). Intervention as a matter of right thus has four separate requirements:

> (1) [T]he application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Texas v. United States, 805 F.3d 653, 657 (5th Cir. 2015) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc)). The inquiry "'is a flexible one, which focuses on the particular facts and circumstances surrounding each application,' and 'intervention of right must be measured by a practical rather than technical yardstick.'" *Entergy Gulf States La., LLC v. EPA*, 817 F.3d 198, 203 (5th Cir. 2016) (quoting *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996)). The rule is liberally construed, and any doubts are resolved in favor of the proposed intervenor. *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009). Even without this favorable construction, the Nation easily satisfies all four requirements of Rule 24(a).

A. The Nation's Motion To Intervene Is Timely.

To determine whether a motion to intervene is timely filed, courts consider (1) "[t]he length of time during which the would-be intervenor actually kn[ew] or reasonably should have known of his interest in the case before he petitioned for leave to intervene," (2) "[t]he extent of the prejudice that the existing parties to the

litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case," (3) "[t]he extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied," and (4) "[t]he existence of unusual circumstances militating either for or against a determination that the application is timely." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-266 (5th Cir. 1977).

Each of these considerations weighs in favor of the Nation. "The length of time" between the Nation's discovery of its new interest in this suit and the filing of its motion to intervene was minimal: The Nation filed its renewed motion to intervene in the District Court just a few weeks after that Court issued its summary judgment opinion citing the Navajo Nation Code, and before any party had filed a notice of appeal. *See Ross*, 426 F.3d at 755 (post-judgment motion to intervene was timely because motion was entered within the time a named party could have taken to appeal and, prior to judgment, intervenor's interests were being adequately represented by another party); *see also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-396 (1977). When the District Court deferred decision on the Nation's request, the Nation filed this motion in time for its proposed brief to be submitted along with the parties' opening briefs.

Moreover, permitting the Nation to intervene now will not prejudice the existing parties. All of the other parties have been on notice of the Nation's desire to participate in this case since the Nation filed its first motion to intervene in April 2018, and the Nation's second motion before the District Court provided ample notice of the Nation's intent to participate at the appellate stage. *See McDonald*, 432 U.S. at 395. Further, granting the Nation's current motion should not impact the briefing schedule. On the other side of the ledger, the prejudice to the Nation would be substantial if the Court were to deny intervention. *Stallworth*, 558 F.2d at 265-266. The District Court itself acknowledged the Nation's interest in this case, Dkt. 139 at 5, and relied on the Nation's law in reaching its summary judgment ruling. Each time the Nation's interests were impacted by this case, it has promptly sought to intervene. *Id.*

B. The Nation Has A Vital Interest In The Defense Of ICWA And The Proper Interpretation Of Its Membership Laws.

To be granted intervention as of right under Rule 24(a), the proposed intervenor "must point to an interest that is direct, substantial, [and] legally protectable." *Ross*, 426 F.3d at 757 (brackets in original) (internal quotation marks omitted). This "interest must be 'one which the *substantive law* recognizes as belonging to or being owned by the applicant.'" *Id.* (emphasis in original) (citation omitted). Further, "[w]ith respect to a potential intervenor seeking to *defend* an interest being attacked by a plaintiff in a lawsuit, . . . the intervenor is a real party

in interest when the suit was intended to have a 'direct impact' on the intervenor." *Id.* at 757 n.46 (emphasis in original).

This Court has held that individuals who "are the intended beneficiaries of [a] challenged federal policy" have an interest in the challenged legislation. *Texas*, 805 F.3d at 660. As even the District Court recognized, that standard is met here because the Nation has "an interest in its member children generally, as well as a specific interest in A.L.M." Dkt. 139 at 5. The Nation's specific interest is sharpened because the Brackeens have sought to secure standing based on the suggestion that the Nation might attempt to launch a collateral attack on A.L.M.'s adoption under ICWA. The Nation is the only party that can fully refute this spurious basis for jurisdiction.

More broadly, ICWA protects "not only the interests of individual Indian children and families, but also [the interest] of the tribes themselves." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989). If ICWA and the Final Rule were invalidated, the Nation could lose its ability to participate in state placement proceedings of children eligible for membership in the Nation, such as A.L.M. *See* 25 U.S.C. § 1911(c).

Since the District Court's ruling, the strength of the Nation's interest has only become clearer. After the District Court invalidated ICWA, Texas quickly sought to apply the District Court's holding to the 18 pending adoption

proceedings involving Navajo children in Texas state courts. *See* Dkt. 189-1 at 43-45; Dkt. 186-1 at 2. This Court's stay appropriately halted that effort, but the State's immediate attempt to cease applying ICWA demonstrates what may be at stake for the Nation: its ability to apply ICWA to the hundreds of children in state custody proceedings nationwide. That interest is undoubtedly sufficient to satisfy Rule 24(a), which "allow[s] intervention by those who might be practically disadvantaged by the disposition of the action." 7C Charles Alan Wright et al., Federal Practice & Procedure: Civil § 1908.2 (3d ed. 2007).

In addition, the District Court's decision greatly magnified the Nation's interest in the case because it relied in part on the Nation's membership law to conclude that ICWA makes impermissible racial classifications. *See Brackeen*, 338 F. Supp. 3d at 533. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court recognized that a tribe's self-definition of membership is essential to its identity as "a culturally and politically distinct entity" and is "central to its existence as an independent political community." *Id*. at 72 & n.32. Given that a tribe's definition of its membership is based on determinations of "traditional values [that] will promote cultural survival" that "should be made by the people of [that specific tribe]," the Nation has a compelling interest in interpreting and defending the nature of its own membership law. *Id.* at 54 (internal quotation marks omitted).

The Nation is a sovereign, federally-recognized tribe that has the inherent authority to determine the criteria for its membership, which it has done and codified into law. *See, e.g.*, 1 Navajo Nation Code §§ 701, 703, 753. Its membership criteria are unique to the Nation, and the Nation has an undisputed interest in explaining, interpreting, and defending those criteria in the face of a constitutional challenge.

C. The Disposition Of This Suit Could Impair The Nation's Interests.

Rule 24(a) also requires a movant to "show that disposition of the action may impair or impede the [movant's] ability to protect [its] interest." *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 422 (5th Cir. 2002) (quoting *United States v. Franklin Parish Sch. Bd.*, 47 F.3d 755, 756 (5th Cir. 1995)). The movant need not prove that it would "be bound by the disposition of the action." *Edwards*, 78 F.3d at 1004. Rather, "[t]he stare decisis effect of an adverse judgment constitutes a sufficient impairment to compel intervention." *Heaton*, 297 F.3d at 424 (quoting *Sierra Club v. Glickman,* 82 F.3d 106, 109-110 (5th Cir. 1996) (per curiam)). Intervention is warranted here because of the tremendous ramifications an affirmance of the District Court could have for the Nation.

If ICWA and the Final Rule were invalidated, the Nation could lose statutory rights under ICWA and several sovereign prerogatives, such as the ability to participate in state proceedings, have matters transferred to tribal court, receive

notice about pending child custody proceedings, and challenge final placement decisions. *See* 25 U.S.C. §§ 1911, 1912, 1914. These losses would be significant and tangible.

Even more fundamentally, the disposition of the suit could interfere with the Nation's vital interest in seeing that ICWA remains the governing law for the custody placement of Indian children, such as A.L.M. and the more than 1000 similarly situated Navajo children presently in custody proceedings. ICWA helps ensure that these children will have the opportunity to remain connected to the Navajo community, to speak the Navajo language, and to become full participants in the cultural and political life of the Nation. *See* H.R. Rep. No. 95-1386, at 23 (1978) (noting the rationale for establishing standards for placement of Indian children in Indian foster or adoptive homes).

Further, the disposition of this suit could install a mistaken interpretation of the Nation's membership laws in federal precedent. If this Court were to adopt the District Court's reasoning with respect to the equal protection holding, then it would be at least tacitly embracing the District Court's erroneous understanding of the Navajo Nation Code. Because tribes have an important interest in defining their own membership, that would be a significant incursion on the Nation's sovereignty.

D. The Existing Parties Will Not Adequately Represent The Nation's Interest.

Finally, to intervene as of right, the would-be intervenor must make the "minimal" showing of inadequate representation. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Entergy*, 817 F.3d at 203. The "potential intervenor need only show that representation by the existing parties *may* be inadequate." *Ross*, 426 F.3d at 761 (emphasis in original) (internal quotation marks omitted). If the would-be intervenor shares the same "ultimate objective" as a party to the lawsuit, the intervenor has only to "demonstrate that its interests diverge from the putative representative's interests in a manner germane to the case." *Entergy*, 817 F.3d at 203-204 (quoting *Texas*, 805 F.3d at 662).

In this case, the Nation's interests cannot be adequately represented by the existing parties for at least two major reasons.

1. The Nation has a unique interest in the Brackeens' suit.

The Nation has a unique perspective with respect to matters involving A.L.M. because A.L.M. is an enrolled member of the Nation and because the Brackeens initially filed this suit to challenge A.L.M.'s placement with a Navajo family. The Nation's perspective is particularly germane to this appeal because the Brackeens allege that they continue to have standing based on the assertion that A.L.M.'s adoption is open to collateral attack by the Nation under ICWA. As the Nation explains in its proposed brief, that assertion is based on an erroneous

understanding of ICWA's collateral attack provisions and the erroneous supposition that the Nation might seek to attack the adoption.

2. *The Nation has a unique interest in interpreting and defending its own membership laws.*

The Nation has an interest in protecting and articulating its *own* tribal eligibility requirements and in defending its own Code, which in turn, could determine the fate of future members of the Nation. Nothing is more sacrosanct to a tribe than defending its own determination as to who is a member of that tribe and how a child who is separated from a parent member is placed. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara*, 436 U.S. at 72 n.32; *see also Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991) ("[W]e will not ignore the fact that 'tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments.'" (emphasis omitted) (quoting *Santa Clara*, 436 U.S. at 71)). Indeed, "[i]n recognition of long-standing and fundamental principles of Federal Indian law . . . tribal determinations of membership under tribal law are conclusive for the purpose of determining whether a child is an Indian child subject to ICWA." S. Rep. No. 104-335, at 16 (1996).

Neither the Federal Defendants nor the Intervenor Tribes can adequately represent the Nation's interests in this respect because they lack the Nation's expertise with respect to the meaning of its own laws and they lack the Nation's incentive to vigorously defend those laws. *Entergy*, 817 F.3d at 203-204. The Federal Defendants obviously do not have the in-depth knowledge of the Navajo law that the Nation itself holds, and their primary incentive is to protect the interests of the United States and the tribes in general, not the specific interests of the Navajo Nation. The Nation therefore holds a "significantly different" legal position from the United States. *Texas*, 805 F.3d at 662 (internal quotation marks omitted). The District Court recognized that the Federal Defendants cannot adequately represent tribal interests when it permitted several other tribes to intervene as a matter of right despite the presence of the Federal Defendants. Dkt. 45.

The Intervenor Tribes are similarly unable to adequately represent the Nation's interests. While the other Intervenor Tribes will defend their own membership laws, none has a sufficient interest in vindicating those of the Nation. Indeed, the Intervenor Defendants have already relied on the particulars of the Cherokee's membership process in their motion for stay before this Court, seeking to distinguish it from the Nation's eligibility requirements. *See* Intervenor Defendants-Appellants' Motion to Stay Pending Appeal at 10, 12.

The District Court also presumably recognized that one tribe cannot adequately represent the interests of a different tribe because it allowed all four Intervenor Tribes to join the suit, as opposed to concluding that one tribe could speak for them all. Yet when the Nation first sought to intervene given its own unique interests, the District Court inconsistently concluded that the existing tribes, and in particular the Cherokee Nation, could adequately represent the Nation's interests. Dkt. 139 at 9. The District Court's incongruent approach became even more inappropriate when it cited the Nation's law in finding ICWA unconstitutional. The Nation is distinctly suited to expound and defend its own law on appeal, and intervention is thus appropriate.

Furthermore, the Nation's divergent interests in the proper interpretation of its own membership requirements are "germane to the case." *Entergy*, 817 F.3d at 204 (quoting *Texas*, 805 F.3d at 662). For divergent interests to be "germane," it is sufficient for them to have "*any* concrete effects on the litigation." *Texas*, 805 F.3d at 662 (emphasis added). A potential conflict is germane when it is "sufficient to demonstrate that the representation *may* be inadequate." *Id*. Here, the District Court struck down parts of ICWA because those parts implicitly incorporated allegedly racial classifications embedded in the membership laws of the Nation and other tribes. *Brackeen*, 338 F. Supp. 3d at 533. Given the District Court's reliance on those tribal membership laws, the Nation's *own* interpretation

of its Code is obviously "germane" to the case. That is particularly so because—as the accompanying proposed brief explains—the District Court misconstrued the Nation's tribal membership laws and misconstrued the nature of tribal membership more broadly. Tribal membership is not a racial classification; it is a political status. Notably, under the Navajo Nation Code, *no* individual can obtain membership based on blood alone. Even a person who has 100% Navajo blood will not be granted membership unless she can demonstrate a close connection to the Nation. Br. 7-9.

II. PERMISSIVE INTERVENTION UNDER RULE 24(b) IS ALSO WARRANTED.

Rule 24(b)(1) allows a court to "permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention is appropriate when: "(1) timely application is made by the intervenor, (2) the intervenor's claim or defense and the main action have a question of law or fact in common, and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 n.2 (5th Cir. 1989). "In acting on a request for permissive intervention the district court may consider, among other factors, whether the intervenors' interests are adequately represented by other parties and whether intervention will unduly delay the proceedings or prejudice existing

parties." *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir. 1987) (internal citation omitted). "Federal courts should allow intervention where no one would be hurt and the greater justice could be attained." *Heaton*, 297 F.3d at 422 (internal quotation marks omitted).

The Nation satisfies all of the requirements for permissive intervention. As previously discussed, the Nation's motion has been timely filed; the Nation has an interest in the outcome of the litigation regarding the constitutionality of ICWA; and no delay will result if the Nation intervenes at this juncture. *See supra* pp. 9-15.

Further, the Nation brings something to this action that no other party can: expertise on the proper interpretation of the Nation's laws. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *Santa Clara,* 436 U.S. at 72 & n.32. A sovereign's interest in ensuring the proper understanding of its own law is so great that federal law requires a court to allow a state or federal government to intervene when the constitutionality of its law is at stake. *See* 28 U.S.C. § 2403. The Nation seeks to protect a similar right and, as the Supreme Court recognized in *Santa Clara*, sovereign Indian nations have a fundamental right to define and protect their own membership laws from challenge. Because the Nation's participation in this appeal would contribute in a unique way to the Court's understanding of the membership laws put at issue by the District Court's decision, and would neither

prejudice the existing parties nor delay the resolution of this appeal, the Nation should be granted permissive intervention. *See Kobach v. U.S. Election Assistance Comm'n*, No. 13-cv-4095-EFM-DJW, 2013 WL 6511874, at *4 (D. Kan. 2013) (granting permissive intervention where movant's "experience, views, and expertise . . . will help to clarify, rather than clutter the issues in the action, which will in turn assist the Court in reaching its decision").

III. IF INTERVENTION IS DENIED, THE NATION REQUESTS LEAVE TO FILE THE ACCOMPANYING BRIEF AS AMICUS CURIAE.

If the Court denies the motion to intervene, the Nation respectfully requests leave to file the attached brief as *amicus curiae* in accordance with Federal Rule of Appellate Procedure 29.[1] *Dep't of Energy*, 754 F.2d at 553. For the reasons already discussed in connection with intervention, the Nation has an "interest" in the constitutionality of ICWA and the proper interpretation of its laws, the Nation's participation would be "desirable," and the proposed brief is "relevant to the disposition of the case." Fed. R. App. P. 29(a)(3).[2]

CONCLUSION

For the foregoing reasons, the motion should be granted.

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[1] Because the Nation is filing its brief as a proposed intervenor, the brief does not conform to the word limits for an amicus brief. The Nation therefore respectfully requests leave to exceed the amicus brief word limit if it is only permitted to participate as amicus. Plaintiffs-Appellees oppose this request.

[2] No party's counsel authored the attached brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on January 16, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A), because it contains 5,196 words according to the word-count feature of Microsoft Word 2010, excluding the parts of the motion exempted by Rule 32(f).

This motion complies with the typeface and style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2010.

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No. 18-11479

IN THE

United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants,

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

Intervenor Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Texas
Case No. 4:17-cv-868 (Hon. Reed O'Connor)

[PROPOSED] OPENING BRIEF OF INTERVENOR NAVAJO NATION

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

Plaintiffs-Appellees,

v. No. 18-11479

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants,

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

Intervenor Defendants-Appellants.

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

Plaintiffs-Appellees State of Texas, State of Indiana, and State of Louisiana, as well as Defendants-Appellants, are governmental parties outside the scope of this certificate under Fifth Circuit Rule 28.1. Intervenor Defendants-Appellants, as

well as Proposed Intervenor Navajo Nation, are also governmental parties outside the scope of this certificate under Fifth Circuit Rule 28.1.

Plaintiffs-Appellees with a direct interest in this case are the following:

1. Plaintiffs-Appellees:

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    Altagracia Socorro Hernandez

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STATEMENT REGARDING ORAL ARGUMENT

Proposed Intervenor Navajo Nation respectfully requests oral argument in this case. This case involves a constitutional challenge to the Indian Child Welfare Act of 1978 and the regulatory guidance accompanying it, and whether that challenge is justiciable. The Navajo Nation believes oral argument could provide substantial assistance to this Court in understanding the issues in the case.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS i

STATEMENT REGARDING ORAL ARGUMENT iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

JURISDICTIONAL STATEMENT 4

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 4

STATEMENT OF THE CASE 4

A. Membership in the Navajo Nation 4

B. The Navajo Nation's ICWA Program 9

C. A.L.M.'s Adoption 10

1. The State Court Proceedings 10

2. Federal Court Proceedings 13

SUMMARY OF THE ARGUMENT 13

ARGUMENT 18

I. THIS CASE IS NOT JUSTICIABLE 18

A. The Brackeens' Suit Does Not Satisfy Article III 18

B. No Plaintiff Has Standing To Challenge ICWA Or The Final Rule 21

II. ICWA IS CONSTITUTIONAL 30

A. The Constitution Permits Congress To Draw Distinctions Based On A Person's Membership In A Federally Recognized Tribe 30

TABLE OF CONTENTS—Continued

Page

1. *The Constitution contemplates legislation focused on the tribes and their members* 31

2. *Distinctions based on tribal membership are political, not racial* 33

3. *Tribal membership laws seek to define a political community, not a particular race* 34

B. ICWA Does Not Violate The Equal Protection Clause.................36

1. *The "eligibility" prong of ICWA's definition of "Indian child" is not a proxy for race*................................37

2. Rice v. Cayetano *does not support the District Court's holding*..39

3. *The District Court misconstrued the Supreme Court's recent ICWA precedent*..40

4. *ICWA is constitutional even under strict scrutiny*...............41

5. *There is* no *justification for the wholesale invalidation of ICWA's core provisions* 44

CONCLUSION..46

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Page

CASES:

Adoptive Couple v. Baby Girl,
570 U.S. 637 (2013)..*passim*

Ashwander v. TVA,
297 U.S. 288 (1936)..44, 45

Brackeen v. Zinke,
338 F. Supp. 3d 514 (N.D. Tex. 2018) ....*passim*

Carter v. Tashuda,
743 F. App'x 823 (9th Cir. 2018) 18

City of Los Angeles v. Lyons,
461 U.S. 95 (1983)..19

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013)..20, 29

Cotton Petroleum Corp. v. New Mexico,
490 U.S. 163 (1989)..31

Duarte ex rel. Duarte v. City of Lewisville,
759 F.3d 514 (5th Cir. 2014) 26

EEOC v. Peabody W. Coal Co.,
773 F.3d 977 (9th Cir 2014) 30, 31

Ex parte Young,
209 U.S. 123 (1908)..28

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010)..45

Freeman v. Lane,
962 F.2d 1252 (7th Cir. 1992) 24

Grupo Dataflux v. Atlas Glob. Grp., L.P.,
541 U.S. 567 (2004)..21

TABLE OF AUTHORITIES—Continued

Page

In re Adoption of Erin G.,
140 P.3d 886 (Alaska 2006) 12, 20

In re A.M.,
No. 02-17-298-CV, 2017 WL 6047677
(Tex. App. — Fort Worth Dec. 7, 2017, no pet.) 12

In re A.M.K.,
9 Nav. R. 399 (Nav. Sup. Ct. 2010)...9

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990)..18

Livingston v. Ewing,
601 F.2d 1110 (10th Cir. 1979) 30

Lockhart v. Fretwell,
506 U.S. 364 (1993)..24

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992)..21, 26, 27

Michigan v. Bay Mills Indian Cmty.,
572 U.S. 782 (2014)..4, 5

Miss. Band of Choctaw Indians v. Holyfield,
490 U.S. 30 (1989)..42

Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,
425 U.S. 463 (1976)..30

Moore v. Sims,
442 U.S. 415 (1979)..25

Morton v. Mancari,
417 U.S. 535 (1974)..*passim*

Nouri v. Crownpoint Family Court,
No. SC-CV-41-14, slip op. (Nav. Sup. Ct. July 22, 2014) 9

TABLE OF AUTHORITIES—Continued

Page

Okpalobi v. Foster,
244 F.3d 405 (5th Cir. 2001) 14, 23, 26

Perez v. Ledesma,
401 U.S. 82 (1971) 24

Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.,
458 U.S. 832 (1982) 1, 2

Rice v. Cayetano,
528 U.S. 495 (2000) ....*passim*

Robb v. Connolly,
111 U.S. 624 (1884) 25

Roff v. Burney,
168 U.S. 218 (1897) 5

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 5, 34, 44

Soc'y of Separationists, Inc. v. Herman,
959 F.2d 1283 (5th Cir. 1992) 19

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016) 21, 23

Steffel v. Thompson,
415 U.S. 452 (1974) 24

Talton v. Mayes,
163 U.S. 376 (1896) 5

Trump v. Hawaii,
138 S. Ct. 2392 (2018) 34

United States v. Antelope,
430 U.S. 641 (1977) 30

TABLE OF AUTHORITIES—Continued

Page

United States v. Lara,
541 U.S. 193 31

United States v. Salerno,
481 U.S. 739 (1987)..45

Utah v. Evans,
536 U.S. 452 (2002)...26, 27

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008)...44, 45

Williams v. Lee,
358 U.S. 217 (1959)..5

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. I, § 8, cl. 3...1

U.S. Const. art. VI, cl. 2...24

U.S. Const. amend. V...5

STATUTES:

8 U.S.C. § 1253(d) 33

8 U.S.C. § 1401 6

25 U.S.C. § 1901(1) 36

25 U.S.C. § 1901(3) 36

25 U.S.C. § 1903(4) 37

25 U.S.C. § 1903(4)(b)...18

25 U.S.C. § 1913(d) 12, 19

25 U.S.C. § 1914 ....12, 19

TABLE OF AUTHORITIES—Continued

Page

25 U.S.C. § 1915(a) 11

28 U.S.C. § 1291 4

28 U.S.C. § 1331 4

42 U.S.C. § 622(b)(9)..28, 29

42 U.S.C. § 677(b)(3)(G) 28, 29

Administrative Procedure Act..3

Endangered Species Act..26

Indian Child Welfare Act of 1978 ....*passim*

Social Security Act...15, 28

Treaty with the Navajo, art. XI, Sept. 9, 1849, 9 Stat. 974..........................1, 32, 43

Treaty with the Navajo, art. VI, June 1, 1868, 15 Stat. 667 ....1, 32, 43

1993. évi LV. törvény a magyar állampolgárságról (Act LV of 1993
on Hungarian Citizenship) (Hung.) 7

Irish Nationality and Citizenship Act, 1956 (Act No. 26/1956) (Ir.),
http://www.irishstatutebook.ie/eli/1956/act/26/enacted/en/html.........................7

Tex. Fam. Code Ann. § 162.012...20

1 Navajo Nation Code § 701...7, 8, 35

1 Navajo Nation Code § 703..8, 35

1 Navajo Nation Code § 705...35

1 Navajo Nation Code § 751...9

1 Navajo Nation Code § 753..7, 9, 34, 35

2 Navajo Nation Code § 103...6

TABLE OF AUTHORITIES—Continued

Page

2 Navajo Nation Code § 423(B)(5) 6

2 Navajo Nation Code § 824 6

2 Navajo Nation Code § 1004 6

3 Navajo Nation Code § 708 6

15 Navajo Nation Code § 603(D) 6

15 Navajo Nation Code § 604(A) 6

15 Navajo Nation Code § 604(B) 6

15 Navajo Nation Code § 604(C) 6

RULE:

Fed. R. Civ. P. 65(d)(2) 14, 23

REGULATIONS:

25 C.F.R. § 23.132 11

25 C.F.R. § 23.136 .... 12, 19

45 C.F.R. § 1355.34(a) 29

45 C.F.R. § 1355.36(b)(1) 29

45 C.F.R. § 1355.39 29

LEGISLATIVE MATERIAL:

H.R. Rep. No. 95-1386 (1978) 39

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TABLE OF AUTHORITIES—Continued

Page

Indian Census Rolls, 1885-1940, *microformed on* Microfilm Publication M595, 692 rolls (Nat'l Archives), *from* Record Group 75, Records of the Bureau of Indian Affairs, 1793-1999 (Nat'l Archives) 8

Navajo Div. of Health & Navajo Epidemiology Ctr., Navajo Population Profile: 2010 U.S. Census (Dec. 2013), *available at* http://www.nec.navajo-nsn.gov/Portals/0/Reports/NN2010PopulationProfile.pdf 6

Navajo Nation Government, www.navajo-nsn.gov (last visited Jan. 16, 2019) 5

INTRODUCTION

In our constitutional democracy, Indian tribes and their members hold a unique status that is enshrined in the Constitution itself. The Commerce Clause grants Congress special authority to "regulate Commerce with . . . the Indian Tribes," acknowledging the unique sovereign status of the tribes. U.S. Const. art. I, § 8, cl. 3. The Treaty Clause, too, gives the Federal Government the power to make binding agreements with the tribes, and Congress is empowered to legislate to fulfill those treaty obligations.

For well over a century, the Federal Government has used these constitutional powers to enact a wide array of policies targeting the welfare of tribes and their members in general, and tribal children in particular. Notably, the Federal Government's 1849 Treaty with the Navajo Nation ("the Nation") states that "the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty with the Navajo, art. XI, Sept. 9, 1849, 9 Stat. 974. As the Supreme Court has recognized, these "first treaties between the United States and the Navajo Tribe" also reflected the United States' special "concern with the education of Indian children." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 839 (1982); *see* Treaty with the Navajo, art. VI, June 1, 1868, 15 Stat. 667. And, from early on, Congress has "enacted numerous statutes" vindicating this federal interest in the welfare of

Indian children, both on and off the reservation. *Ramah Navajo Sch. Bd.*, at 839-840.

Despite this clear constitutional text and history, the District Court held that multiple provisions of the Indian Child Welfare Act of 1978 ("ICWA") violate the equal protection guarantees of the Constitution because they apply in part based on a child's eligibility for membership in a federally recognized Indian tribe. According to the District Court, many tribes—and specifically the Navajo Nation—make eligibility for membership turn on ancestry alone, rendering eligibility an unconstitutional racial classification. That is wrong many times over: The Constitution itself permits Congress to pass legislation that applies based on an individual's current or potential membership in a tribe, and tribal membership is a political—not a racial—status. Moreover, the District Court was simply incorrect to characterize the Nation's membership law (and tribal membership laws more generally) as exclusively race-based. Like most sovereigns, the Nation grants the political status of tribal membership based on a combination of ancestry and ties to the political community.

The District Court's erroneous conclusions to the contrary are particularly egregious because the District Court lacked jurisdiction to issue them. The Brackeens and the State of Texas filed suit to challenge the application of ICWA in state child custody proceedings involving A.L.M. The Brackeens, who have no

relationship to any tribe, feared that ICWA would lead to A.L.M.'s placement with a Navajo family. But long before the District Court issued its decision, the Brackeens finalized their adoption of A.L.M. without protest from the Navajo Nation. Thus, their primary asserted basis for Article III standing is now a spurious and speculative allegation that the Tribe or another entity might launch a collateral attack on the adoption under ICWA.

Further, while several other plaintiffs joined the Brackeens' suit, *none* of these Plaintiffs can establish standing because each one ultimately seeks to challenge the application of ICWA in state court child custody proceedings. Basic principles of federalism dictate that an order issued by a federal court against the Federal Defendants and Intervenors in this case will not bind state courts in those proceedings. As a result, no Plaintiff can satisfy one of the key requirements for Article III standing: redressability.

The District Court's erroneous holdings with respect to equal protection and jurisdiction are not the only defects in its decision. The District Court also failed to abstain under the *Younger* doctrine, wrongly concluded that ICWA and its regulatory guidance (the "Final Rule") violate the anti-commandeering and non-delegation principles in the Constitution, and erroneously held that the Final Rule violates the Administrative Procedure Act. The Federal Defendants and the Tribal Intervenors have fully briefed these issues, and, in the interests of judicial

economy, the Nation will not duplicate those arguments here.[1] The Nation instead focuses on the District Court's deficient jurisdictional and equal protection analyses, which have particular salience for the Nation, and which are emblematic of the District Court's deeply flawed approach to this case as a whole.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. Dkt. 35 at 10. On October 4, 2018, the district entered final judgment. Dkt. 167. Intervenor Defendants timely filed a notice of appeal on November 19, 2018, Dkt. 187, and Federal Defendants timely filed a notice of appeal on November 30, 2018, Dkt. 190. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether this case is justiciable.
2. Whether ICWA and the Final Rule are unconstitutional.

STATEMENT OF THE CASE

A. Membership in the Navajo Nation.

The Navajo Nation is a federally recognized Indian tribe. As such, it possesses inherent sovereignty "pre-existing the Constitution." *Michigan v. Bay*

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[1] The Nation adopts and incorporates the briefing by Federal Defendants with respect to *Younger*, and the briefing of the Tribal Intervenors with respect to the issues of non-delegation, commandeering, and the statutory authority for the ICWA Final Rule.

Mills Indian Cmty., 572 U.S. 782, 788 (2014) (internal quotation marks omitted). It is a "distinct, independent political communit[y], retaining [its] original natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (internal quotation marks omitted); *see also Williams v. Lee*, 358 U.S. 217 (1959) (recognizing the sovereignty of the Navajo Nation); *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that the Fifth Amendment does not apply to the tribes because they possess a special sovereignty that predates the Constitution). The Nation exercises its right to self-determination and self-governance in a comprehensive and complex fashion, through its three branches of government, its broad statutory regime, and its vast array of government services and programs. *See Navajo Nation Government*, www.navajo-nsn.gov (last visited Jan. 16, 2019).

One of the key aspects of the Nation's right to self-government is its ability to "confer" tribal "citizenship." *Roff v. Burney*, 168 U.S. 218, 222 (1897). Over a century ago, the Supreme Court recognized that a tribe's right "to legislate in respect to its internal affairs" necessarily includes a right to control the "privileges of membership in the community." *Id.* And the Supreme Court has since emphasized that "[a] tribe's right to define its own membership" is "central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

In many ways, enrolled membership in the Navajo Nation is akin to citizenship in any other "political community." Membership carries with it the right to vote and hold office in the Nation. 2 Navajo Nation Code §§ 103, 1004. Members are entitled to receive housing assistance and other funds allocated by the Nation's government. *Id.* §§ 423(B)(5), 824. And tribal membership is a prerequisite for involvement in numerous other tribal affairs, from managing a Nation-conferred grazing right, 3 Navajo Nation Code § 708, to receiving tribal employment preferences, 15 Navajo Nation Code §§ 603(D), 604(A)-(C). In total, the Nation has approximately 330,000 enrolled members, over 156,000 of whom reside on the reservation. Navajo Div. of Health & Navajo Epidemiology Ctr., Navajo Population Profile: 2010 U.S. Census, at 7 (Dec. 2013), *available at* http://www.nec.navajo-nsn.gov/Portals/0/Reports/ NN2010PopulationProfile.pdf.

Further, the Nation's membership requirements are similar to the eligibility qualifications for citizenship in a country, which are typically based on some combination of ancestry and other ties to the country. Indeed, the governments of many countries confer citizenship based on ancestry alone. For example, the United States typically grants citizenship to persons born of citizen parents regardless of their other ties to the United States. *See* 8 U.S.C. § 1401. Other countries go further, granting citizenship based on more distant relatives regardless of whether a person has other connections with the country. *See, e.g.*, Irish

Nationality and Citizenship Act, 1956 (Act No. 26/1956) (Ir.), http://www.irishstatutebook.ie/eli/1956/act/26/enacted/en/html (granting citizenship to non-residents so long as they can prove the existence of an Irish grandparent); 1993. évi LV. törvény a magyar állampolgárságról (Act LV of 1993 on Hungarian Citizenship) (Hung.) (granting citizenship where an individual can point to a Hungarian great-grandparent).

The Navajo Nation, too, makes individuals eligible for membership based on Navajo ancestry, but it also considers an individual's other ties to the Navajo Nation's community. A person who has at least one-quarter Navajo blood may obtain citizenship if she can demonstrate that she has a parent who is an enrolled member, or if she can show some other strong political, social, or economic tie to the Nation's community. *See* 1 Navajo Nation Code § 701 (recognizing that the child of an enrolled member is automatically entitled to membership if she meets the ancestry requirement); *id.* § 753 (instructing the membership screening committee to grant membership to other applicants based on considerations such as "how long [a person] has lived among the Navajo people," and "whether he can speak the Navajo language").

The Nation also has a bar on membership similar to the bars on citizenship established by countries: Regardless of her ancestry or other connections with the Nation, an individual may not be a member of the Nation if she is an enrolled

member of another tribe. *Id.* § 703. By the same token, many countries bar individuals from obtaining citizenship if they simultaneously hold citizenship in a different country. *See, e.g.*, *Dual Citizenship: List of Countries that Recognize It and Those that Don't*, Flagtheory.com (last visited Jan. 16, 2019), *available at* https://flagtheory.com/dual-citizenship.

In other ways, however, the criteria for membership in the Nation are different from the criteria for citizenship in a particular country, in part because of the tribal sovereign's unique relationship with the United States. Because of that unique relationship, the United States government has played a role in the way in which the Nation has defined its membership. Notably, ancestry is determined based on an individual's familial relationships with those listed "on the official roll of the Navajo Nation maintained by the Bureau of Indian Affairs." 1 Navajo Nation Code § 701. That roll was first established not by the Navajo Nation itself, but rather by the United States in 1940. Indian Census Rolls, 1885-1940, *microformed on* Microfilm Publication M595, 692 rolls (Nat'l Archives), *from* Record Group 75, Records of the Bureau of Indian Affairs, 1793-1999 (Nat'l Archives). The Federal Government based its original enrollment determinations on its assessment as to which families fell within the cultural and linguistic group known as the Navajo.

Membership in the Navajo Nation is also different from citizenship in many countries in that *every* person who wishes to become an enrolled member of the Nation must submit an application. 1 Navajo Nation Code § 751. That is very different from citizenship in countries like the United States, where a child born to citizen parents within the United States typically has no need to take additional steps to claim her citizenship. A similarly situated child who is born on the Navajo Nation's reservation to enrolled parents is not an enrolled member of the Nation unless and until the Nation approves her application for enrollment. *Id.* §§ 751, 753.

B. The Navajo Nation's ICWA Program.

The Navajo Nation has a very strong interest in the welfare of its children, and in adoption and custody matters that affect those children. That interest stems from the fact that Navajo children are viewed as the future, ensuring the existence and survival of the Navajo people in perpetuity. *In re A.M.K.*, 9 Nav. R. 399, 404 (Nav. Sup. Ct. 2010). In addition, traditional Navajo law, or *Diné bi beenahaz'áanii*, teaches that children occupy a holy or sacred space in Navajo culture. *Nouri v. Crownpoint Family Court*, No. SC-CV-41-14, slip op. at 3-4 (Nav. Sup. Ct. July 22, 2014).

The Navajo Nation vindicates its commitment to its children in part through an ICWA program that monitors state child custody proceedings, including

adoption cases for children who are enrolled members of the Navajo Nation or who are eligible for membership and qualify as Indian children under ICWA. These cases are filed in state courts across the country. Indeed, there are 1,153 Navajo-eligible children who are either currently subject to ICWA placement proceedings or will soon become subject to those proceedings. *See* Dkt. 186-1 at 2.

C. A.L.M.'s Adoption.

1. The State Court Proceedings.

This case arises in part from adoption proceedings in a Texas state court regarding A.L.M., a child who is an enrolled member of the Navajo Nation.[2] MTD Op. at 11 (Dkt. 155). Soon after his birth, A.L.M.'s mother brought him to live with his paternal grandmother in Texas. When he was 10 months old, the Texas Department of Family and Protective Services ("DFPS") placed A.L.M. in foster care with the Brackeens. *Id*. The Nation has been involved in state court proceedings regarding custody of A.L.M. from early on, and after a Texas state court terminated the parental rights of A.L.M.'s biological parents—thereby making him eligible for adoption—the Nation notified the State that it had located a Navajo couple willing to adopt A.L.M. in New Mexico. *Id*.; Dkt. 78-1 at 8. Two

[2] A.L.M.'s biological mother is a member of the Navajo Nation and his father is a member of the Cherokee Nation. MTD Op. 11. The Navajo Nation and Cherokee Nation agreed to designate the Navajo Nation as A.L.M.'s tribe for purposes of ICWA. *Id*. at 11-12. A.L.M. himself became an enrolled member of the Nation on March 26, 2018. Dkt. 78-1 at 5.

weeks later, the Navajo couple was notified that they could start visiting and communicating with A.L.M. Dkt. 78-1 at 8. The Navajo couple responded the same day that they were eager to visit. *Id*. Two weeks after that, they visited A.L.M. in El Paso, Texas. *Id*. The Navajo couple said the visit went well, and that they were excited about the adoption. *Id*. A baby shower was even arranged prior to A.L.M.'s arrival in the Navajo couple's home. *Id.*

Two days before the El Paso visit, the Brackeens filed an original petition seeking to adopt A.L.M. MTD Op. 11. The state court denied the petition, finding that the Brackeens had not established "good cause" to depart from ICWA's preference for placing A.L.M. with members of the tribe in which A.L.M.'s mother was enrolled. *See* MTD Op. 12; 25 U.S.C. § 1915(a); 25 C.F.R. § 23.132; Dkt. 78-1 at 11-12. The Brackeens immediately sought and obtained a stay of the trial court's decision pending appeal. Dkt. 1 at 3. When the Navajo couple was informed that the appeals process could take years to complete, they felt that it would be "too much in the long run, as it would make the transition of A.L.M. from his foster parents to their home that much harder." Dkt. 78-1 at 8. The Navajo couple therefore withdrew from consideration. *Id*. at 9. That left the Brackeens as the only parties seeking to adopt A.L.M. The Brackeens, Texas DFPS, and A.L.M.'s guardian *ad litem* entered into and filed a settlement agreement approving the Brackeens' adoption and moved the Texas state court of

appeals to set aside the trial court's judgment. The court of appeals agreed and "remand[ed] . . . to the trial court to render judgments in accordance with the parties' settlement agreement. *In re A.M.*, No. 02-17-298-CV, 2017 WL 6047677, at *1 (Tex. App. — Fort Worth Dec. 7, 2017, no pet.) (per curiam). In January 2018, the Brackeens finalized their adoption of A.L.M., with no objection by the Nation. *See* MTD Op. 13.

Under ICWA, a final decree of adoption can be set aside during the two-year period after the adoption is finalized in very narrow circumstances. Specifically, the birth parents may contest the adoption during that time "upon the grounds that consent was obtained through fraud or duress." 25 U.S.C. § 1913(d); *see* 25 C.F.R. § 23.136. Here, the record contains no indication of fraud or duress; to the contrary, both of A.L.M.'s biological parents voluntarily terminated their rights, making it highly unlikely that they will seek to disturb the adoption. Dkt. 81 at 61.

Section 1914 of ICWA also permits tribes and other parties to petition to set aside an adoption. *See In re Adoption of Erin G.*, 140 P.3d 886, 889-893 (Alaska 2006). The Nation, which raised no objection when A.L.M.'s adoption was finalized, certainly does not plan to launch a collateral attack now, and nothing in the record suggests that any other party will pursue such a course.

2. *Federal Court Proceedings.*

In October of 2017, the Brackeens filed a complaint in federal court against the United States and several federal officials ("Federal Defendants") challenging the constitutionality of ICWA (1) as applied to their adoption of A.L.M., and (2) as it may apply to future adoptions that the Brackeens may decide to pursue. The District Court granted intervention to four Indian tribes ("Tribal Intervenors") but denied the Navajo Nation's motion to intervene in the suit, despite recognizing the Nation's strong interest in the case. The District Court also denied the Federal Defendants' and Tribal Intervenors' motions to dismiss the Brackeens' suit, despite the fact that the Brackeens' adoption of A.L.M. was finalized well before the District Court considered those motions. Finally, the District Court granted partial summary judgment to the Brackeens and other Plaintiffs, holding ICWA and the Final Rule unconstitutional and granting declaratory relief. This appeal followed.

SUMMARY OF THE ARGUMENT

I. A. Federal courts lack jurisdiction over this case. First, Article III requires that a live dispute exist through all stages of federal judicial proceedings. Even assuming that the Brackeens had an injury-in-fact sufficient to confer standing at some point, their suit was mooted when they successfully finalized A.L.M.'s adoption in January of 2018, well before the District Court issued its decisions. The fact that the Brackeens may have been burdened by ICWA in the

past is not sufficient to give them standing to seek prospective equitable relief in this suit. Further, the possibility that the adoption might be collaterally attacked is far too speculative to confer standing. The Nation did not object when the adoption was finalized and will not do so now, and the Brackeens have made *no* allegation suggesting that a collateral attack is impending or likely. Similarly, the fact that the Brackeens may wish to adopt another Indian child in the future is too speculative to give this dispute the requisite concreteness.

B. Further, none of the Plaintiffs have ever had standing because none of their alleged injuries are redressable by relief issued by this Court against the Defendants. The injuries claimed by Plaintiffs flow from child custody proceedings in state court. But the Plaintiffs sued the United States and various federal officials who are not parties to those state proceedings and have no power to influence those proceedings. Thus, no relief issued in this suit can redress Plaintiffs' injuries: An injunction would be confined to the Defendants to this action, *see* Fed. R. Civ. P. 65(d)(2), and because "[a]n injunction enjoins a defendant, not a statute," that equitable relief would not erase ICWA from the books. *Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc). State courts would still be under an obligation, pursuant to the Supremacy Clause of the Constitution, to apply ICWA unless they independently determine that it is unconstitutional. In essence, Plaintiffs are asking this Court to write an opinion

that *might* persuade a state court in a manner that would redress their injuries. But that speculative possibility does not give rise to Article III jurisdiction.

In a final effort to show standing, the State Plaintiffs have claimed that, if they cease complying with ICWA, the Department of Health and Human Services will withhold federal funds under the Social Security Act. But Plaintiffs have failed to allege any specific facts indicating that the Department has threatened or intends to withhold any funding on that basis, and the statutory provisions Plaintiffs reference do not mandate that funds be automatically withheld if a State disregards ICWA. For these reasons, no Plaintiff has Article III standing to pursue this suit and the case should be dismissed at the threshold.

II. A. On the merits, ICWA and the Final Rule are fully compatible with the Constitution's equal protection guarantees for at least three reasons. *First*, the Constitution itself treats the tribes as distinct entities and grants Congress special power to enact legislation concerning the tribes and their members. The Supreme Court has found it obvious that equal protection principles do not bar Congress from exercising the very powers the Constitution elsewhere confers. *Rice v. Cayetano*, 528 U.S. 495, 519 (2000). *Second*, laws that classify based on tribal membership target an individual's political status—enrollment in a tribal sovereign's political community. They do not target individuals based on race. *Third*, tribal membership laws, like those of the Navajo Nation, define the

boundaries of a tribe's political community rather than seeking to define a race. For example, blood alone is never enough to qualify as a member of the Navajo Nation. An application is required, and the Tribe grants applications based on a variety of factors that ensure an individual's ties to the tribal community.

B. Despite the fact that ICWA is constitutional under all three of these rationales, the District Court erroneously held that the central provisions of the law violate equal protection principles because they apply on the basis of race. That conclusion was based on a series of missteps. First and foremost, the District Court misinterpreted ICWA's definition of "Indian child," falsely concluding that the definition is race-based because it includes children who are eligible for membership in an Indian tribe. That is wrong because eligibility for tribal membership is not a proxy for race, and because ICWA's definition only includes those children who are both eligible for membership *and* have a biological parent who is an enrolled member of a tribe. The latter requirement ensures that the definition of Indian child applies based on the political status of the child or her parents, not race.

The District Court also falsely believed that its holding was supported by the Supreme Court's decisions in *Rice v. Cayetano* and *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). In fact, both opinions support the constitutionality of ICWA. *Rice* reaffirmed that laws that apply based on membership in a federally

recognized tribe are compatible with equal protection. And, confronted with a different ICWA provision, the *Adoptive Couple* Court explained that a proper understanding of the text avoided any constitutional problems with the statute.

ICWA and the Final Rule are therefore constitutional under the rational basis test that the Supreme Court has long applied to laws that apply based on tribal membership. The District Court was wrong to conclude that strict scrutiny should instead apply, and wrong to decide that ICWA could not survive strict scrutiny even if that was the correct standard. The District Court further compounded these errors by striking down the central provisions of ICWA based on the unfounded belief that *some* parts of the statute might lead to *some* unconstitutional applications. The Supreme Court has made clear that a facial challenge like the one Plaintiffs mounted cannot survive unless the statute is wholly unconstitutional. Thus, the District Court should have rejected Plaintiffs claims or, at a bare minimum, severed the part of the definition of "Indian child" that the Court found invalid. Instead, the District Court adopted a maximalist approach under which it struck down the heart of the statute on equal protection grounds, and then erroneously held that ICWA and the Final Rule were invalid for several other reasons as well. Because the District Court's analysis was wrong at every turn, the decision should be reversed.

ARGUMENT

I. THIS CASE IS NOT JUSTICIABLE.

A. The Brackeens' Suit Does Not Satisfy Article III.

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). "This case-or-controversy requirement subsists through *all* stages of federal judicial proceedings, trial and appellate." *Id*. (emphasis added). Thus, in order to maintain this lawsuit, the Brackeens "must continue to have a personal stake in the outcome." *Id*. at 478 (internal quotation marks omitted). They do not: There is currently no live dispute concerning the Brackeens or their adoption of A.L.M. The Brackeens have already successfully completed their adoption of A.L.M., and that adoption has been embodied in a final judicial decree. To the extent the Brackeens had ever suffered an injury-in-fact sufficient to confer standing to challenge ICWA and the Final Rule, their claim has thus been "rendered moot." *Id*. at 474; *see Carter v. Tashuda*, 743 F. App'x 823 (9th Cir. 2018) (holding that plaintiffs' constitutional challenges to ICWA were moot, where plaintiffs' adoptions "all became final" during the pendency of the appeal).[3]

[3] Further, because A.L.M. is an enrolled member of the Nation, *see* Dkt. 78-1 at 5, his case does not present a live controversy regarding the meaning or constitutionality of the "eligible" prong of the definition of "Indian child." 25 U.S.C. § 1903(4)(b).

The District Court found that the suit was not moot because it concluded that the Brackeens still had standing under two misguided theories. *First*, the District Court stated that the Brackeens' "attempts to adopt Indian children *have been burdened* . . . by the ICWA and the Final Rule." MTD Op. 25 (emphasis added). But the fact that the law may have imposed burdens in the past does not give the Brackeens standing to seek prospective injunctive or declaratory relief. As the Supreme Court explained in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), a party cannot rely on a past injury to establish standing to obtain equitable relief; the plaintiff must demonstrate a "real or immediate threat that [she] will be *wronged again*." *Id.* at 111 (emphasis added)); *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992) (en banc).

Second, the District Court found that "the Brackeens' adoption of A.L.M. is open to collateral attack for two years under the ICWA and the Final Rule." MTD Op. 25-26. But the ICWA provision to which the District Court referred, 25 U.S.C. § 1913(d), is exceedingly unlikely to have any applicability to the Brackeens' adoption. Under Section 1913(d), a court may "vacate" a "final decree of adoption" at the request of the biological parents if the court finds that it "was obtained through fraud or duress." *Id.*; *see* 25 C.F.R. § 23.136 (reiterating the statutory provision). The Brackeens have never even alleged that A.L.M.'s biological parents might withdraw consent or that there is any colorable claim of

fraud or duress. Nor is there any evidence in the record that such a potential claim might arise. Moreover, although ICWA also incorporates a provision permitting tribes to petition to overturn a decision in certain circumstances, *see* 25 U.S.C. § 1914, state law limitations periods apply, *see In re Adoption of Erin G.*, 140 P.3d at 889-893, and the six-month limitations period in Texas has long since expired, *see* Tex. Fam. Code Ann. § 162.012. The Nation thus will not make any attack on the completed adoption of A.L.M. Indeed, the Navajo Nation did not object to the adoption when it was finalized, and the Brackeens have not pointed to *any* evidence suggesting that *any* party intends a collateral attack on their adoption. The Brackeens' unsubstantiated fear of "hypothetical future harm" does not give rise to a live case or controversy. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

The Brackeens have attempted to overcome the mooting of their claim with respect to A.L.M. by asserting that they intend to foster and potentially adopt *other* children and that ICWA may frustrate their "intention and ability" to provide a home for Indian children. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 526 (N.D. Tex. 2018) (Dkt. 166). But that is sheer speculation. They have not offered anything

close to the concrete, particularized showing required to establish standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).[4]

B. No Plaintiff Has Standing To Challenge ICWA Or The Final Rule.

Even apart from the lack of any live controversy with respect to the Brackeens' claims, there is still another significant jurisdictional flaw that affects all of the Plaintiffs: *None* of the parties that brought suit can establish Article III standing because none can establish an injury "that is fairly traceable to the challenged conduct of the" Federal Defendants or "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Although Plaintiffs have sued *Federal* Defendants in federal court, any harm to them has occurred or will occur in *state* court proceedings in which the Federal Defendants do not take part. Thus, Plaintiffs' injuries are not the result of conduct

[4] In a belated attempt to defeat mootness, the Brackeens have submitted a post-judgment letter to the District Court indicating that A.L.M.'s parents have had a second child that the Brackeens *might* want to adopt. *See* Dkt. 173 at 4. This letter is immaterial. First, it does not make their A.L.M.-related claims any less moot. Second, because standing is assessed at the time a complaint has been filed, any newly-hatched plan to adopt cannot be a separate basis for standing. *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570 (2004). Further, the prospect of adoption is still speculative: The new child's parental rights have not even been terminated, the child is not up for adoption, and, even if she were up for adoption, under state law, the Brackeens are not first in the line of preference. In any event, if the Brackeens move forward with their inchoate plans, they will have an opportunity to challenge ICWA in the state court proceedings, which is the more appropriate venue for their arguments. *See* pp. 22-26, *infra*.

by the Federal Defendants, and Plaintiffs will not receive relief through orders binding those Defendants, because the Federal Defendants have no power to compel a state judiciary to decide cases in any particular fashion. To put it bluntly, Plaintiffs have sued the wrong parties and sought relief in the wrong court.

1. The Complaint seeks two types of relief against the Federal Defendants, including the United States, the Secretary of the Interior, the Director of the Bureau of Indian Affairs, and others. Plaintiffs seek an injunction prohibiting the Federal Defendants from "implementing or administering" ICWA, and a declaratory judgment that ICWA and the Final Rule are invalid. Dkt. 35, ¶ 18; *see also id.* at pp. 83-84.

Despite having sued *Federal* Defendants, the injuries alleged by the Individual Plaintiffs all stem from ongoing *state* adoption proceedings: The Individual Plaintiffs each seek to challenge the application of ICWA in adoptions handled by *state* courts, MTD Op. 13, 26, and—with a single exception discussed below—the injuries alleged by the State Plaintiffs similarly stem from the application of ICWA in pending or future *state* family court proceedings. This presents an intractable problem for Plaintiffs because the Federal Defendants are not the ones who will decide whether ICWA applies in these state court proceedings. Indeed, they are not party to these state court proceedings *at all.*

This mismatch between the source of Plaintiffs' alleged injuries and the parties they have sued defeats standing. The alleged injuries cannot be "fairly trace[d]" to the Federal Defendants because the Defendants are not even participants in the proceedings in which those alleged injuries were or will be inflicted. *Spokeo*, 136 S. Ct. at 1547. And the District Court's decision cannot "redress[]" Plaintiffs' injuries because it will not have any effect on the state court proceedings. *Id.* Rather, the decision and accompanying injunction will only bind Federal Defendants, who play no role in those proceedings. *See* Fed. R. Civ. P. 65(d)(2) (an injunction generally binds only "the parties" and their agents). As this Court has explained, "[a]n injunction enjoins a defendant, not a statute." *Okpalobi*, 244 F.3d at 426 n.34. "Because these defendants have no powers to redress the injuries alleged, the plaintiffs have no case or controversy with these defendants that will permit them to maintain this action in federal court." *Id.* at 427.

Plaintiffs seem to believe that they can trace their injuries to the Federal Defendants and demonstrate redressability based on potential *indirect* effects on state court proceedings. Indeed, the State of Texas even took the remarkable step of informing state courts that it would not apply ICWA in state court proceedings anymore because of the District Court's decision in this case. *See* Intervenor Defendants-Appellants Motion to Stay Pending Appeal, Ex. A. But neither Texas nor any other State can prevent its courts from applying federal law. Under the

Supremacy Clause, state courts are bound to apply federal law unless they themselves find ICWA to be unconstitutional. The Supremacy Clause provides that "the Laws of the United States . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. It does not contain an exception for federal laws that have been enjoined by a lower federal court.

Nor are the state courts required to follow the District Court's decision in this case, or even an opinion of this Court affirming that decision. As then-Justice Rehnquist explained, a federal court of appeals' decision is not "accorded the stare decisis effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction." *Steffel v. Thompson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring); *see also Perez v. Ledesma*, 401 U.S. 82, 125 (1971) (Brennan, J., concurring in part and dissenting in part) (lower federal court decision accorded "persuasive force" in state court); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); *Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992) ("[T]he Supremacy Clause did not require the Illinois courts to follow Seventh Circuit precedent.").

Moreover, state courts are perfectly competent to adjudicate federal constitutional questions without taking directions from federal courts. The Supreme Court has "repeatedly and emphatically rejected" the "postulate" that "state courts [a]re not competent to adjudicate federal constitutional claims." *Moore v. Sims*, 442 U.S. 415, 430 (1979). Indeed, it has specifically repudiated the proposition "that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise *in child-welfare litigation*." *Id.* at 435 (emphasis added); *see Robb v. Connolly*, 111 U.S. 624, 637 (1884) ("Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect . . . the [C]onstitution of the United States . . . ."). Finding jurisdiction in this case would undermine those holdings by implicitly embracing the proposition that a federal district court can issue an order that usurps the state courts' ability to decide the constitutionality of a federal statute they are charged with applying.

In the end, then, the most that a judgment from the District Court or this Court could achieve is to serve as potentially persuasive authority in a pending or future state court proceeding—a proceeding that would not even necessarily be in a state that falls within the Fifth Circuit. *See* Dkt. 35 at ¶¶ 173, 175-176 (Cliffords' adoption proceedings are taking place in Minnesota). That eventuality is far too speculative to establish standing. Article III does not confer federal jurisdiction on

federal courts to write briefs to lower state courts. "For all practical purposes," then, "the injunction granted by the District Court is utterly meaningless," and there is thus no Article III standing. *Okpalobi*, 244 F.3d at 426.[5]

2. The District Court incorrectly found otherwise. It reasoned: "If the Federal Defendants are enjoined from applying the ICWA and the Final Rule, then the obligation to follow these statutory and regulatory frameworks will no longer be applied to the states." MTD Op. 28. That is simply not true, and the cases cited by the District Court only prove the point.

In *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 515 (5th Cir. 2014), the plaintiffs sued a city, challenging the constitutionality of one of the city's ordinances. The plaintiffs thus appropriately sued the entity directly responsible for enforcing the ordinance against them. Similarly, in *Utah v. Evans*,

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[5] The Supreme Court faced a similar circumstance in *Lujan*. There, the plaintiffs challenged the lawfulness of a regulation promulgated by the Secretary of the Interior rendering part of the Endangered Species Act applicable only in the United States or on the high seas. 504 U.S. at 557-558. But the plaintiffs only sued the Secretary; they did not sue the agencies actually "fund[ing] [the] particular projects allegedly causing them harm." *Id*. at 568 (plurality op.). As Justice Scalia wrote, relief in that suit "would not remedy [the plaintiffs'] alleged injury unless the funding agencies were bound by the Secretary's regulation." *Id*. But that was "very much an open question." *Id*. The plaintiffs' injuries would thus not be redressed by a ruling in their favor. Because the funding agencies "were not parties to the suit," there was "no reason they should be obliged to honor an incidental legal determination the suit produced." *Id*. at 569 (plurality op.). The same is doubly true here: It is not just an "open question" whether state courts are bound by lower federal courts, it is an axiom of federalism that they are *not*.

536 U.S. 452 (2002), the State of Utah challenged the methodology used in the decennial census. The State sued the Secretary of Commerce and the Acting Director of the Census, "the officials to whom the statutes delegate authority to conduct the census." *Id*. at 459. A victory would have required the Defendants to "recalculate the numbers and to recertify the official census result," and thus "would bring about the ultimate relief that Utah seeks"—an additional representative in Congress. *Id*. at 461, 463. There is no comparable relief that the Federal Defendants could provide here.

Individual Plaintiffs argued below that their injury would be redressed because the Supreme Court *might* grant *certiorari* in the case, which would mean the state courts would be bound as a matter of precedent. Dkt. 80 at 31-32. Justice Scalia rejected an almost identical argument in *Lujan*:

> Since . . . standing is to be determined as of the commencement of suit; since at that point it could certainly not be known that the suit would reach [the Supreme] Court; and since it is not likely that [a state court] would feel compelled to accede to the legal view of a District Court expressed in a case to which it was not a party; redressability clearly did not exist.

504 U.S. at 570 n.5 (plurality op.). The possibility that the Supreme Court *might* grant *certiorari* to review this case thus does not confer standing.

In short, basic principles of Article III standing and federalism dictate that plaintiffs who wish to challenge a state court's application of a federal statute must bring that challenge in the state court itself. They cannot ask a federal court to

dictate to a state court how to decide its cases. *Ex parte Young*, 209 U.S. 123, 163 (1908) ("[A]n injunction against a state court would be a violation of the whole scheme of our Government."). And they certainly may not attempt an end-run around state court by suing federal defendants in federal court.

3. The State Plaintiffs have one last theory of standing. They claim standing against the Department of Health and Human Services and Secretary Alex Azar (the "HHS Defendants") on the ground that the HHS Defendants may, at some point in the future, withhold federal funds under the Social Security Act related to foster care and child and family services. Dkt. 35, ¶¶ 243-245. That theory is plainly insufficient.

State Plaintiffs allege that the Federal Defendants are directly responsible for their ICWA injuries because "States that refuse to follow ICWA risk having . . . federal child welfare funding pulled." *Id.* ¶ 9. Plaintiffs point to two provisions of the Social Security Act under which they claim funds will be withheld, 42 U.S.C. § 622(b)(9) and § 677(b)(3)(G). But Plaintiffs have failed to allege any specific facts indicating that HHS has threatened or intends to withhold any funding from the States under those provisions, and the provisions themselves do not mandate the withdrawal of funds on that basis. *Id.*

Section 677(b)(3)(G) requires a state seeking certain funding to certify that "each Indian tribe in the State has been consulted," that "there have been efforts to

coordinate the programs with such tribes," and that "benefits and services" under the Federal program "will be made available to Indian children in the State on the same basis as to other children in the State." 42 U.S.C. § 677(b)(3)(G). But the statute contains no express provision that requires a State to comply with ICWA in order to receive funding; any claim that HHS will withhold funding under this provision is wholly speculative.

Section 622(b)(9) is similar. It requires—as one of 19 separate criteria—that a State "plan for child welfare services . . . contain a description . . . of the specific measures taken by the State to comply with the Indian Child Welfare Act." 42 U.S.C. § 622(b)(9). But the provision does *not* say that declining to apply ICWA would necessarily result in a withdrawal of funding. Indeed, HHS regulations make clear that a plan need only be in "substantial conformity," not perfect conformity, with the many requirements. 45 C.F.R. § 1355.34(a). And if a plan is not in substantial conformity, a State has "the opportunity to develop and complete a program improvement plan prior to any withholding of funds." *Id.* § 1355.36(b)(1). The regulations also provide for administrative appeals and judicial review if funding is withheld from a State. *Id.* § 1355.39. The State Plaintiffs have gone through *none* of these steps. Their claim to standing rests on no more than a "speculative chain of possibilities" and therefore fails. *Clapper*, 568 U.S. at 414.

Finally, even if this theory of standing could somehow support jurisdiction with respect to the States, there still would not be any jurisdiction to decide the State Plaintiffs' equal protection claims. The District Court held that the Individual Plaintiffs have standing to bring an equal protection challenge, but it did not make a similar holding regarding the States. MTD Op. 29. The States did not challenge this holding. It is therefore final.

II. ICWA IS CONSTITUTIONAL.

A. The Constitution Permits Congress To Draw Distinctions Based On A Person's Membership In A Federally Recognized Tribe.

The Supreme Court has long held that laws that apply exclusively to tribes and their members may be consistent with the equal protection guarantees in the United States Constitution. *Morton v. Mancari*, 417 U.S. 535 (1974) (preference for Indians in BIA hiring does not violate equal protection requirement); *United States v. Antelope*, 430 U.S. 641, 646-647 (1977) (statute bringing crimes committed by Indians on Indian reservations under Federal jurisdiction did not violate due process or equal protection); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-480 (1976) (tax immunity for reservation Indians is not racial discrimination); *see also, e.g.*, *Livingston v. Ewing*, 601 F.2d 1110, 1115-16 (10th Cir. 1979) (rejecting equal protection challenge to state policy and city resolution providing Indian preference in the sale of crafts at a city museum and state government building); *cf. EEOC v. Peabody W. Coal Co.*,

773 F.3d 977, 981 (9th Cir. 2014) (Navajo Nation's employment preferences do not constitute impermissible racial discrimination because they are based on political status, not race).

At least three rationales underpin this conclusion: *First,* the Constitution itself contemplates that Congress has the authority to legislate based on tribal membership; *second,* tribal membership is a political, not a racial, classification; and *third*, tribal membership requirements—such as those of the Navajo Nation—are not designed to draw racial distinctions but instead to fulfill a political purpose as part of the tribes' self-governance powers.

1. The Constitution contemplates legislation focused on the tribes and their members.

The very text of the Constitution recognizes the unique status of the tribes and their members. The Indian Commerce Clause confers special authority on Congress to regulate relations with the tribes, above and beyond the general treaty and legislative powers conveyed elsewhere in the Constitution. *Mancari*, 417 U.S. at 551-552. The Supreme Court has recognized this congressional authority not only with regard to affirmative regulation of Indian affairs, but also to reaffirm and remove any restrictions on the exercise of inherent tribal authority. *United States v. Lara*, 541 U.S. 193, 200 (upholding Congress' statutory recognition of tribes' inherent authority to criminally prosecute non-member Indians).

In addition, the Treaty Clause authorizes the Federal Government to make treaties with the tribes, and the United States has long exercised that power to assume responsibilities with respect to the tribes and their members. The Navajo Nation Treaty of 1849, for example, dictates that "the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty with the Navajo, art. XI, Sept. 9, 1849, 9 Stat. 974; *see also* Treaty with the Navajo, art. VI, June 1, 1868, 15 Stat. 667 (recognizing the need to provide education for Indian children).

The Supreme Court has found it obvious that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Rice*, 528 U.S. at 519. Such legislation is necessarily compatible with constitutional equal protection guarantees, even though statutes "dealing with Indian tribes and reservations" inevitably "single[ ] out for special treatment a constituency of tribal Indians." *Id.* (internal quotation marks omitted); *see also Mancari*, 417 U.S. at 552 ("an entire Title of the United States Code (25 U.S.C.) would be effectively erased" if laws targeted at tribal members necessarily violated the Equal Protection clause). "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 555. In particular, laws that are "reasonable and

rationally designed to further Indian self-government" do not fall afoul of the Equal Protection Clause. *Id.*

2. Distinctions based on tribal membership are political, not racial.

Permitting Congress to legislate based on tribal membership is also fully compatible with the Constitution's bar on race-based statutes because laws that classify based on an individual's tribal membership are properly regarded as "political rather than racial in nature." *Id.* at 553 n.24; *see also Rice*, 528 U.S. at 519-520 (reaffirming the same principle for federally-recognized tribes). When a law is directed at tribal members, it does not apply to Indians "as a discrete racial group." *Mancari*, 417 U.S. at 554. Instead, it applies to Indians based on their political status "as members of quasi-sovereign tribal entities." *Id.* To be sure, tribes often consider ancestry in conferring tribal membership, but a sovereign government's choice as to how it grants membership in its political community cannot convert a political classification into a racial one.

That principle is well-illustrated in the analogous context of immigration: Many countries grant citizenship based on ancestry, *see* pp. 6-7, *supra*. Nonetheless, the Constitution permits Congress to use its plenary power over immigration to enact statutes that draw rational, citizenship-based distinctions without falling afoul of equal protection guarantees. 8 U.S.C. § 1253(d) (authorizing consular officers within certain countries to refuse to issue visas to

"citizens" of those countries); *see generally Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (holding that the Constitution does not prohibit federal policies that rationally restrict the entry of nationals of certain countries). These laws draw distinctions based on an individual's political status—her affiliation with a particular sovereign; the separate sovereign's criteria for deciding who is eligible for that political status are generally beside the point.

Indeed, it is particularly inappropriate for courts to look behind Congress's distinctions based on tribal membership in order to assess whether the tribes apply race-based membership criteria. The Supreme Court has long cautioned against federal judicial "intru[sions] on" the "delicate matters" involved in tribal membership determinations. *Santa Clara*, 436 U.S. at 72 n.32.

3. Tribal membership laws seek to define a political community, not a particular race.

Treating tribal membership as a racial rather than a political classification also badly misinterprets the nature of tribal membership laws. Those laws are not designed to make racial distinctions, but rather to establish the parameters of each tribe's "independent political community." *Id.* Accordingly, tribal membership is typically granted only upon application, and tribal law often conditions membership on a combination of ancestry and other links to the tribe.

For example, blood alone is never determinative of membership in the Navajo Nation. *See* 1 Navajo Nation Code § 753. Every prospective member

must submit an application or have an application submitted on her behalf, and in most cases the Nation will only grant an application if the individual has some tangible connection to the Tribe. *Id.* Having a biological parent who is an enrolled member is *per se* evidence of such a connection. *See id.* § 701. Like the United States, which typically confers citizenship on the children of citizens, the Nation assumes that a person born to a member of its political community has a sufficient connection to the Tribe. But, also like the United States, the Nation recognizes that parentage is not the only way to demonstrate the requisite connection. A person whose parents are unenrolled may obtain citizenship if a membership screening committee determines that enrollment is appropriate. *See id.* § 753. The committee's determinations are generally based on factors such as "how long [the person] has lived among the Navajo people," and "whether he can speak the Navajo language." *Id.*; *see also* pp. 7-8, *supra*.

Further, regardless of an individual's parentage or ancestry, no person will be granted membership in the Navajo Nation if she is already a member of another tribe, 1 Navajo Nation Code § 703, and an individual with Navajo blood may also opt out of tribal membership altogether, *id.* § 705. If a person does become a member, that classification carries with it a host of rights and responsibilities, including the ability to vote in tribal elections and serve in various leadership roles. *See* p. 6, *supra*.

Thus, membership in the Navajo Nation—like membership in any tribe—is not a racial classification in any sense. It is a political status granted by the Nation based on one's ties to existing members of the Tribe, ancestry, and other connections to the Tribe.[6]

B. ICWA Does Not Violate The Equal Protection Clause.

The three rationales for upholding the constitutionality of laws that classify based on tribal membership all apply with full force to ICWA.

First, as the law itself states, ICWA was passed as an exercise of Congress's "constitutional authority" with respect to "Indian affairs." 25 U.S.C. § 1901(1). Through ICWA, Congress fulfills its treaty obligations to promote tribal welfare and its special mandate to promote tribal self-governance because "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." *Id.* § 1901(3). Thus, like the law in *Mancari*, ICWA is "tied

[6] The mere fact that enrolled members must be at least one-quarter Navajo blood does not convert that political status into a proxy for race. Indeed, the law that the *Mancari* Court held constitutional conferred an employment preference on individuals if they were both a member of a federally-recognized tribe and at least one-quarter Indian blood. 417 U.S. at 553 n.24. As the Supreme Court acknowledged in a later case, the law had a "racial component," *Rice*, 528 U.S. at 519, but that component did not render the law unconstitutional because the law imposed other requirements that went to political affiliation and "exclude[d] many individuals who [we]re racially to be classified as 'Indians,'" *Mancari*, 417 U.S. at 553 n.24. The same is true of the Nation's membership laws.

rationally to the fulfillment of Congress' unique obligation toward the Indians" and "rationally designed to further Indian self-government." 417 U.S. at 555.

Second, ICWA draws distinctions based on tribal membership rather than applying to Indians "as a discrete racial group." *Id*. at 554. The law defines an Indian child as "a member of an Indian tribe" or a person who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Thus, as in *Mancari*, no individual may claim coverage under ICWA based solely on her Indian blood; she must be able to show that either she or her parent has a political affiliation with a tribe.

Third, ICWA defines tribal membership with reference to the tribes' own membership laws. As noted, those laws delineate the scope of the tribes' political communities, rather than attempting to define the contours of a particular race.

Despite the fact that ICWA comfortably satisfies each of these rationales, the District Court struck down several of ICWA's central provisions as incompatible with the Constitution's equal protection guarantees. *Brackeen*, 338 F. Supp. 3d at 530-536. The District Court's conclusion was wrong for at least five separate reasons.

1. *The "eligibility" prong of ICWA's definition of "Indian child" is not a proxy for race.*

The District Court held that although tribal membership may be an acceptable basis for a classification, ICWA's definition of "Indian child"

impermissibly includes not only tribal members, but also the biological children of tribal members who are themselves eligible for tribal membership. The District Court incorrectly reasoned that including those who are "simply *eligible* for membership who have a biological Indian parent" means that one qualifies as an Indian child so long as one "is related to a tribal ancestor by blood." *Id.* at 533. That is doubly incorrect: *First*, eligibility for tribal membership generally turns on more than just ancestry, as evidenced by the Nation's Code. *See* pp. 6-9, *supra.* *Second*, even if eligibility for membership in some tribes did turn exclusively on ancestry, that purportedly "racial component" of the definition of "Indian child" would be offset by the definition's accompanying political status requirement—having a parent who is an enrolled member of the tribe. *See Mancari*, 417 U.S. at 553 n.24. Because of this requirement, ICWA is no different from the law at issue in *Mancari* in that it never applies simply because a child has Indian blood. The child must have some further political affiliation with the tribe, either in her own right or through her parent.

Further, the District Court's focus on the "eligible for membership" prong of the definition of "Indian child" ignores how tribal membership typically works. Unlike with United States' citizenship, a child born to Indian parents is not automatically an enrolled member of the tribe; instead, an application must be submitted. Even in cases where the child's eligibility for membership is obvious,

there will inevitably be at least some period of time after a baby's birth when her enrollment is not yet complete because an application cannot be instantaneously submitted or processed. That lag will lengthen if the application is delayed or the child's eligibility is less clear. Congress defined the term "Indian child" to prevent a giant loophole with respect to these children. As the legislative history makes clear, Congress wanted to ensure that ICWA would protect a "minor, perhaps infant, Indian" who "does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe." H.R. Rep. No. 95-1386 at 17 (1978). Indeed, it was particularly important for ICWA to cover eligible but unenrolled children because the families ICWA is designed to protect—those who come to the attention of state child protective services—are often in difficult situations that make it less likely that a parent will have had the time or opportunity to submit a formal enrollment application for her child.

2. Rice v. Cayetano *does not support the District Court's holding.*

The District Court invalidated ICWA in part by analogizing it to the classifications based on Hawaiian ancestry that were struck down in *Rice v. Cayetano*. *Brackeen*, 338 F. Supp. 3d at 533 & n.9. But the *Rice* Court specifically distinguished the unconstitutional laws it confronted in that case, which restricted certain kinds of state voting to those of Native Hawaiian descent, from constitutionally permissible legislation addressing federally recognized

Indian tribes and their members. 528 U.S. at 519-520. The *Rice* Court noted that Native Hawaiians are not part of a federally recognized tribe, and that the statutes at stake in *Rice* were directed at the Hawaiian "peoples," a term the drafters understood to "mean races." *Id.* at 515 (internal quotation marks omitted). The *Rice* Court distinguished that language from statutes directed at federally recognized tribes and their members, echoing the Supreme Court's prior statements that laws that "single[] out for special treatment a constituency of tribal Indians" are an appropriate means by which Congress fulfills "its treaty obligations and its responsibilities to the Indian tribes." *Id.* at 519 (internal quotation marks omitted). The *Rice* Court further reiterated that distinctions predicated on tribal membership are "political rather than racial in nature." *Id.* at 520 (internal quotation marks omitted). Thus, far from supporting the District Court's decision, *Rice* reaffirms the constitutionality of laws like ICWA that cover individuals based on the political link they have with a federally recognized tribe, through their own membership or through that of a biological parent who is an enrolled tribal member.

3. The District Court misconstrued the Supreme Court's recent ICWA precedent.

The District Court seems to have believed that its decision was supported by dicta in *Baby Girl*, 570 U.S. 637, a case in which the Supreme Court suggested that interpreting ICWA to apply based solely on a child's ancestry might raise equal

protection concerns. *Brackeen*, 338 F. Supp. 3d at 533 n.10. Once again, the District Court misunderstands the precedent. Far from suggesting that ICWA as a whole is unconstitutional, the Supreme Court was merely observing that certain provisions of ICWA "would raise" constitutional concerns *if* they were interpreted to apply to a child "solely because an ancestor—even a remote one—was an Indian." *Baby Girl*, 570 U.S. at 655-656. But the *Baby Girl* Court was speaking of a particular concern: the possibility that a non-custodial biological father with no connection with the child might attempt to play an "ICWA trump card" to impede the child's adoption. *Id.* at 656. And the Court was quick to note that the statutory interpretation it adopted in *Baby Girl* foreclosed the possibility that ICWA would apply in this way. *Id.* Thus, *Baby Girl* itself resolved the very constitutional concerns that it raised.

4. ICWA is constitutional even under strict scrutiny.

The District Court's first three errors led it to erroneously hold that ICWA's provisions draw race-based distinctions that can be sustained only if they survive strict scrutiny. That error in turn led to a fourth set of missteps: The District Court assessed how strict scrutiny should apply to ICWA, even though the parties had not fully briefed the issue. Then, lacking guidance from the Federal Defendants and Intervenors, the District Court applied a flawed analysis that led it to mistakenly conclude that ICWA fails strict scrutiny.

The District Court began by assuming, but not deciding that, the Government has a compelling interest in fulfilling its obligation to the tribes and "maintaining the Indian child's relationship with the tribe." *Brackeen*, 338 F. Supp. 3d at 534 (brackets omitted). That was selling the Government's interests very short. Before enacting ICWA, Congress collected extensive evidence regarding "the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Baby Girl*, 570 U.S. at 642 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). Congress documented how Indian families were being unnecessarily broken up so that children could be placed with white families far from the homes and tribal cultures they knew. *Holyfield*, 490 U.S. at 32. Congress further documented the difficulties these children faced as they grew up in families with no connections to tribes. *Id.* at 32-33. Congress enacted ICWA because of the compelling need to protect Indian children and families, and the tribes themselves, which cannot thrive without their children. *Id.* at 32-34. By failing to recognize the strength of this governmental interest, the District Court skewed the strict scrutiny analysis.

Moreover, the District Court failed altogether to consider another compelling interests that justifies ICWA: The statute fulfills the United States'

treaty obligations towards the Tribes and their children. *See* Treaty with the Navajo, art. XI, Sept. 9, 1849, 9 Stat. 974 (promising to "legislate and act as to secure the permanent prosperity and happiness of said Indians"); Treaty with the Navajo, art. VI, June 1, 1868, 15 Stat. 667 (recognizing the need to provide for education for tribal children).

The District Court also erroneously held that, whether or not ICWA was adopted to serve a compelling interest, it is not narrowly tailored to further that interest. Virtually its only evidence of this was the fact that ICWA creates a preference for placing Indian children not only with members of their own tribe, but also with non-tribal family members and members of different Indian tribes. The Court held that the latter two placement preferences "have no connection to a child's tribal membership." *Brackeen*, 338 F. Supp. 3d at 536. Not so. Because every Indian child who is covered by ICWA is either a member of a tribe herself or the biological child of an enrolled member, a family member of that Indian child will often have a connection with the tribe through blood or marriage. That greatly increases the chance that the Indian child will have an opportunity to grow up with links to her tribal community. As for the potential that a child will be placed with a different tribe, that kind of placement is a last alternative and—where it does occur—it is generally designed to ensure that the child has some familiarity with tribal entities and culture, providing the possibility that she will one day become a

participating member of her own tribe. Thus, all of the preference placement options are designed to increase the likelihood that an Indian child will develop a relationship with her tribe and tribal community, preserving the tribes' ability to continue to exist as "independent political communit[ies]," *Santa Clara*, 436 U.S. at 72 n.32, and providing Indian children with the benefits of membership in those communities.

5. *There is* no *justification for the wholesale invalidation of ICWA's core provisions.*

As the foregoing discussion demonstrates, the District Court lacked any basis for its conclusion that ICWA violates the Constitution's equal protection guarantees. But, even if the District Court were correct that *some* potential applications of *some* provisions of ICWA might be unable to pass constitutional muster, that could not possibly justify that Court's wholesale invalidation of multiple provisions of the statute and the Final Rule.

The Supreme Court has made clear that "[f]acial challenges" to statutes "are disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). They "often rest on speculation," and "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 346-

347 (1936) (Brandeis, J., concurring)). "A facial challenge to a legislative Act is" therefore "the most difficult challenge to mount successfully": The "challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Here, the challengers did not come close to making that showing. Accordingly, their constitutional claims should have been rejected. At a bare minimum, the District Court should have severed the eligibility prong of ICWA's definition of "Indian child" because—by the District Court's own account—that is the language that renders the statute unconstitutionally race-based. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508-509 (2010) (noting that courts should generally "sever[] any problematic portions [of a statute] while leaving the remainder intact," and thus "excis[ing]" only the problematic "tenure restrictions" from challenged law (internal quotation marks omitted)).

Indeed, the District Court's maximalist approach was particularly inappropriate with respect to the Brackeens because A.L.M. is not merely eligible for enrollment, he actually is an enrolled member of the Navajo Nation. *See* p. 10 & n.2, *supra*. Thus, even if ICWA were unconstitutional as applied to unenrolled children (which it is not), it would still be constitutional as applied to A.L.M. himself. Perhaps for that reason, the Brackeens' complaint does not even

challenge the constitutionality of the definition of "Indian child," instead focusing on imaginary defects in other portions of the statute.

Nor do the District Court's errors end there. The District Court accepted not only Plaintiffs' spurious facial challenge under the Equal Protection Clause, but also their claims under multiple provisions of the Constitution. The Federal Defendants and the Intervenor Tribes have amply catalogued the reasons that each of these constitutional claims should have been rejected. The Nation embraces and adopts those arguments, which it will not duplicate here. Instead, the Nation simply notes that—under any analysis and any doctrine—ICWA is constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on January 16, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,069 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

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