No. 18-11479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

DAVID BERNHARDT, ACTING SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants - Appellants

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,
Intervenor Defendants - Appellants

Appeal from the United States District Court for the Northern District of Texas, Case No. 4:17-CV-00868-O

REPLY BRIEF OF APPELLANTS CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, AND MORONGO BAND OF MISSION INDIANS

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CERTIFICATE OF INTERESTED PERSONS

Brackeen, et al. v. Bernhardt, et al., *and Cherokee Nation*, *et al.*, No. 18-11479.

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

1. Cherokee Nation (Intervenor-Defendant)
2. Oneida Nation (Intervenor-Defendant)
3. Quinault Indian Nation (Intervenor-Defendant)
4. Morongo Band of Mission Indians (Intervenor-Defendant)
5. Chad Everet and Jennifer Kay Brackeen (Plaintiffs)
6. Frank Nicholas and Heather Lynn Libretti (Plaintiffs)
7. Altagracia Socorro Hernandez (Plaintiff)
8. Jason and Danielle Clifford (Plaintiffs)
9. State of Texas (Plaintiff)
10. State of Louisiana (Plaintiff)
11. State of Indiana (Plaintiff)
12. United States of America (Defendant)

13. Bureau of Indian Affairs and its Director, Bryan Rice (Defendants)

14. John Tahsuda III, Bureau of Indian Affairs Principal Assistant Secretary for Indian Affairs (Defendant)

15. United States Department of the Interior and its Secretary, Ryan Zinke (Defendants)

16. United States Department of Health and Human Services and its Secretary, Alex Azar (Defendants)

17. Navajo Nation (Intervenor)

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45. Amber Blaha, U.S. Department of Justice, counsel for Federal Defendants

46. John Turner, U.S. Department of Justice, counsel for Federal Defendants

47. Jeffrey H. Wood, Acting Assistant Attorney General, counsel for Federal Defendants

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52. Thomas Schmidt, Hogan Lovells US LLP, counsel for the Navajo Nation

53. Maria Wyckoff Boyce, Hogan Lovells US LLP, counsel for the Navajo Nation

54. Paul Spruhan, Assistant Attorney general, Navajo Nation Department of Justice, counsel for the Navajo Nation

55. Hon. Reed O'Connor, United States District Judge, Northern District of Texas

s/ Adam H. Charnes
Attorney for Appellants

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INTRODUCTION

Congress enacted ICWA, after extensive hearings, upon finding it "clear … that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole." H.R. Rep. 95-1386, at 9 (1978). Congress tailored the law to remediate the very problems it identified, and tied application to an Indian child's political relationship with a sovereign tribal nation. None of Plaintiffs' various arguments establish ICWA's invalidity.

At bottom, Plaintiffs ask this Court to return Indian children to the arbitrary and discriminatory whims of state courts and state agencies, unfettered by the centuries-old trust obligations this nation owes to Indian tribes and Indian peoples. Plaintiffs talk a good game about the "best interests" of Indian children, paternalistically contending that they know better than Indian families and tribes what is best for their children. In reality, however, Plaintiffs seek to subject Indian children to indifferent, discriminatory, and abusive state agencies—like Texas's Department of Family and Protective Services, which this Court just recently found violated the constitutional rights of

children in its care by "expos[ing] them to a serious risk of abuse, neglect, and harm to their physical and physiological well-being," *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 243 (5th Cir. 2018), and operating a foster-care system in which sexual abuse of children "is the norm." *Id.* at 291 (Higginbotham, J., concurring and dissenting). Indian children deserve better, as Congress recognized when it enacted ICWA, and as 21 states reaffirmed in their amicus brief.

This Court should reverse.

ARGUMENT

I. The Equal Protection and Non-Delegation Claims Should Be Dismissed for Lack of Standing.

The Tribes' opening brief explained that the equal protection and non-delegation claims should be dismissed for lack of standing. Plaintiffs' explanation for why they have standing is wrong.

A. The Individual Plaintiffs lack standing to assert an equal protection violation.

In their opening brief, the Tribes explained that the Brackeens have no injury-in-fact and the Cliffords and Librettis lack redressability. The Individual Plaintiffs' response betrays a misunderstanding of basic standing principles.

1. The Tribes argued that the Brackeens failed to establish "certainly impending" future injury because, with respect to collateral attacks on A.L.M.'s adoption, ICWA incorporates the state limitations period, so doesn't harm them, and any collateral attack was too speculative. (Tribes' Br. 16-19.) The Individual Plaintiffs respond by doubling down on their collateral attack argument and also contending that ICWA injures the Brackeens in their efforts to adopt A.L.M.'s sister, Y.R.J. Both arguments fail.[1]

a. ICWA's collateral attack provisions, sections 1913(d) and 1914, do not injure the Brackeens. As explained in the Tribes' brief, section 1913(d) does not apply to A.L.M. because his biological parents did not consent to the Brackeens' adoption of him. (Tribes' Br. 17.) The Individual Plaintiffs do not dispute that the biological parents terminated their parental rights, and did not consent to adoption, and they never explain why the statutory language refutes the Tribes' argument. Instead, they simply contend that "[c]ourts disagree" with the Tribes. (Individuals' Br. 25 n.3.) But the two cases they cite use only

[1] The Libretti's adoption of Baby O. recently was finalized (Individuals' Br. 16), so their claims are moot for the same reasons that the Brackeens have no injury.

general language in *dicta* to describe these provisions. That does not trump clear statutory terms.

The Individual Plaintiffs also deny that section 1914 incorporates the state statute of limitations, as *In re Adoption of Erin G.*, 140 P.3d 886, 889-93 (Alaska 2006), held. (Tribes' Br. 17-18.) But they only cite authorities stating that section 1914 itself imposes no limitation period (Individuals' Br. 26 n.3), which is correct. Like 42 U.S.C. § 1983, *see Owens v. Okure*, 488 U.S. 235, 240 (1989), section 1914 borrows state law.

The Individual Plaintiffs also deny that the Brackeens' claim of injury is speculative. "Sections 1913 and 1914 require unequal treatment of state-law adoptions of Indian children," and, they contend, this "unequal treatment" "itself constitutes the injury." (Individuals' Br. 25.) But no collateral attack has been asserted. Accordingly, "[t]he basis upon which [the Individual Plaintiffs] rel[y] to justify standing is simply the existence of a racial classification, not being denied equal treatment." *Carroll v. Nakatani*, 342 F.3d 934, 946 (9th Cir. 2003). This is insufficient because a "[p]laintiff must plead that he was personally subjected to discriminatory treatment." *Moore v. Bryant*, 853 F.3d 245,

249 (5th Cir. 2017). As this Court has explained: "'Being subjected to a racial classification differs materially from having personally been denied equal treatment. … [W]e do not find[] any authority supporting the proposition that racial classification alone amounts to a showing of individualized harm.'" *Id.* "[A] plaintiff, to challenge such classification, must establish standing through showing a particularized denial of equal treatment." *Carroll*, 342 F.3d at 946. As no collateral attack has been filed or is "certainly impending," the Brackeens' injury is too speculative to support standing.

In the cases cited by the Individual Plaintiffs (Br. 25), the plaintiffs had been subjected to differential treatment. *See Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (finding standing when plaintiff's members could not compete for contracts reserved for minority businesses); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012) (finding standing when plaintiffs were denied statewide franchises available to competitors). As sections 1913(d) and 1914 have not been applied to the Brackeens, they have not been subjected to "unequal treatment."

b. The Individual Plaintiffs also argue that the application of ICWA to the Brackeens' efforts to adopt Y.R.J. "independently support[s] Article III standing."[2] (Individuals' Br. 26.) Their evidence related to Y.R.J., however, was first filed in the district court *after* final judgment, and they seek to supplement it on appeal. (ROA.4102-09.) They cannot use those efforts to establish standing.

Two principles dispose of the Individual Plaintiffs' arguments. First, as the Tribes noted (Br. 16 n.6), "standing is to be determined as of the commencement of suit." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992). The Brackeens' *later* efforts to adopt Y.R.J.—which apparently began six months after filing the operative complaint—are therefore irrelevant for standing. As this Court has held, "[t]he party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing." *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005). Second, "evidence" tendered after final judgment or on appeal is also irrelevant. "If [plaintiffs] had not met the challenge to their standing at the time of

[2] Nothing in the record, or in the court order for which they seek judicial notice, supports their assertion that the Navajo Nation is invoking ICWA to oppose their adoption of Y.R.J.

judgment, they could not remedy the defect retroactively." *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009).

2. The Tribes explained why any injury suffered by the Cliffords was not redressible in this case. (Br. 19-23.) The Individual Plaintiffs' response consists of one sentence, contending that the Cliffords have standing because a favorable decision "would 'significant[ly] increase the likelihood' that the Cliffords would obtain relief" in a Minnesota court. (Br. 31.) The Tribes explained at length why this assertion was wrong. Rather than address that explanation, the Individual Plaintiffs simply ignored it.

B. The State Plaintiffs lack standing to assert an equal protection violation.

The district court, in its motion to dismiss order, explained which Plaintiffs had standing to assert which claims—and it did not find that the State Plaintiffs had standing to assert the equal protection claim. (ROA.3753.) The State Plaintiffs contend nonetheless that they have standing with respect to equal protection. But the order speaks for itself; they cannot challenge it now, because they failed to cross-appeal; and in any event they lack standing to allege an equal protection violation.

1. In its order denying the motion to dismiss, the district court precisely stated its holding:

> [T]he State Plaintiffs have standing to challenge the Final Rule as not in accordance with law under the APA (Count One); the ICWA, §§ 1901-23 and 1951-52 violates the Commerce Clause and the Tenth Amendment (Counts Two and Three), and §§ 1915(c) and § 23.130(b) of the Final Rule violate Article 1, §§ 1 and 8 of the Constitution (Count Seven).

(ROA.3753.) The State Plaintiffs contend that the court merely "neglected to list equal protection" in its standing finding. (States' Br. 19.) They have no evidence that the district court made a sloppy mistake rather than a deliberate decision—and, if the court did make an oversight, their recourse was to move to correct the opinion.

2. Since the district court did not hold that the State Plaintiffs have standing, they cannot argue now that they have standing. (Tribes Br. 25 n.9.) Because their argument would entitle them to judgment on a *new* claim, it is not an alternative ground to affirm and required a cross-appeal, as it would "enlarge[e] [their] own rights." *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015).

3. Even if the State Plaintiffs' standing to assert an equal protection claim were properly before the Court, the Court should hold

that they lack standing. The State Plaintiffs contend that they have "a quasi-sovereign interest" in "the protection and welfare of resident children." (States' Br. 20.) But they cannot assert such an interest in challenging *a federal statute.* As the Tribes explained (Br. 25 n.9), "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). The State Plaintiffs contend that *Massachusetts v. Mellon*, 262 U.S. 447 (1923), permits such an action (States' Br. 19), but that case simply declined to go as far as *Alfred L. Snapp* later did. And even in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which represents the high water mark of state standing, the Court reaffirmed that, while a state has standing "to assert its rights under federal law," a state lacks standing "to protect her citizens from the operation of federal statutes." *Id.* at 520 n.17.

Nor, contrary to the State Plaintiffs' argument (Br. 20), does *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016), assist them. There, this Court relied on two essential considerations: the states sought to vindicate their own financial interests, as they had proven that the challenged

federal policy "would have a major effect on the states' fiscs," and it would "impos[e] substantial pressure on them to change their laws." *Id.* at 152-53. Neither consideration is present here.

C. The State Plaintiffs lack standing to assert a non-delegation claim.

The Tribes explained that the State Plaintiffs lacked standing to assert the non-delegation claim because there is no record evidence that any tribe's change to the order of adoptive or foster-care preferences under section 1915(c) affected a child-placement decision. (Tribes Br. 53.) The State Plaintiffs do not respond with even one example of a child-placement decision in Texas, Indiana, or Louisiana that was impacted by section 1915(c), or with evidence that a future impact is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Instead, they contend that the standing argument "is defeated" by (1) "the general ability of Indian tribes to change the law at any time" and (2) the fact that the Alabama-Coushatta Tribe of Texas has changed the placement preferences. (States' Br. 21.) Neither establishes their standing.

The "general" fact that a tribe can change the preferences "at any time," and the specific example of the Alabama-Coushatta Tribe, do not

"demonstrate a 'personal stake in the outcome.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). The State Plaintiffs "must show that [they] 'ha[ve] sustained or [are] immediately in danger of sustaining some direct injury' as the result of" section 1915(c). *Id.* at 101-02. They offer "no more than conjecture" that a tribe's exercise of section 1915(c) will apply to, and substantively change, a child-placement decision in Texas or the other two states. *Id.* at 108. They present no evidence, for example, that the Alabama-Coushatta Tribe's change in preferences has been applied to, and changed the placement of, any child. Their standing claim, therefore, is akin to those rejected in cases like *Lyons* and *Rizzo v. Goode*, 423 U.S. 362 (1976), where the Court held that the "general" existence of unconstitutional police policies did not give those *specific* plaintiffs standing in the absence of a "real and immediate threat of injury." *Lyons*, 461 U.S. at 103. The State Plaintiffs' "'some day'" claims of injury—"without … any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that [Fifth Circuit] cases require." *Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 343 (5th Cir. 2012). The State Plaintiffs contend that they "do[] not have to wait for the other shoe to drop"

before suing (States' Br. 21), but that is the precise argument that Lyons and Rizzo made—and that the Supreme Court rejected.[3]

II. ICWA and the Final Rule Do Not Violate Equal Protection.

In their brief, the Tribes explained that (1) ICWA establishes a political, not racial, classification, which is subject to rational-basis review,[4] and (2) even if ICWA were race-based, the classification survives strict scrutiny. (Tribes' Br. 24-39.) In response, Plaintiffs portray ICWA as a race-based statute that cannot survive strict scrutiny. Plaintiffs' arguments are wrong on both counts.

A. ICWA is a political classification.

The Tribes explained that ICWA's definition of "Indian child" is a political classification subject to rational-basis review. (Tribes' Br. 25-36.) Plaintiffs' arguments otherwise are unavailing.

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[3] The State Plaintiffs contend that there "would not be time" to assert a claim once a tribe's preference changes impacted a child-custody proceeding. (States' Br. 21.) But a state could assert its non-delegation argument to the judge overseeing the child's placement.

[4] Plaintiffs do not dispute that ICWA survives rational-basis review. (Tribes' Br. 36.)

1. As the Tribes explained (Tribes' Br. 25-31), this case is governed by *Morton v. Mancari*, 417 U.S. 535 (1974). Plaintiffs' attempts to distinguish *Mancari* fail.

First, Plaintiffs contend that *Mancari* was "effectively overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)." (Individuals' Br. 41.) This assertion is wrong. *Rice v. Cayetano*, 528 U.S. 495 (2000), discussed *Mancari* without any hint that it had been "effectively overruled." Moreover, as the Court has directed: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). This Court remains bound by *Mancari*.

Second, Plaintiffs argue that *Mancari* is limited only to legislation that concerns "tribal members and further[s] Indian self-government," concerns activities on a reservation, or concerns the BIA. (Individuals' Br. 42-48; States' Br. 35-39.) Plaintiffs misread *Mancari*. While one purpose of the hiring preference in *Mancari* was related to Indian self-

government, the Court found the preference justified by other governmental interests similar to those animating ICWA—"to further the Government's trust obligation toward the Indian tribes" and "to reduce negative effect of having non-Indians administer matters that affect Indian tribal life." 417 U.S. at 541-42. Although the preference applied to *individual* Indians, the Court found them justified by "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress … to legislate on behalf of federally recognized Indian tribes." *Id.* at 551.

This Court has recognized this broad interpretation of *Mancari*, holding that it applied when legislation allowed peyote use by Indians, and only Indians, because "peyote use is rationally related to the legitimate governmental objective of preserving Native American culture." *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991). This Court has thus rejected Plaintiffs' contention (Individuals' Br. 39) that preserving Indian "culture" is race-based. Moreover, Plaintiffs misrepresent *Peyote Way* in two respects. First, contrary to their assertion (*id.* at 45), *Peyote Way*'s reasoning was not based on the fact that "most" church members lived on reservations; its

holding applies equally to members living in Manhattan. 922 F.2d at 1216. Second, contrary to their contention (Individuals' Br. 49), the statute in *Peyote Way* was not "tethered to Indian self-government of tribal lands or their residents." *Peyote Way* controls here. *See Sammons v. United States*, 860 F.3d 296, 299-300 (5th Cir. 2017) (explaining that "one panel of this Court may not overrule another," and "[t]he binding force of a prior-panel decision applies not only to the result but also to those portions of the opinion necessary to that result.").

Plaintiffs also ignore the fact that *Mancari* applies even if the definition of "Indian child" is based on ancestry or a blood quantum. (Individuals' Br. 34-40; States' Br. 40-42.) The preference that was upheld in *Mancari* required an Indian to have 25% or more Indian blood, 417 U.S. at 553 n.24, and *Peyote Way* upheld a statute restricting peyote use to Indians who likewise had "at least 25% Native American ancestry," 922 F.2d at 1216. This Court found that the statute nonetheless "represents a political classification." *Id.*

Third, as the Tribes explained (Tribes' Br. 35-36), *Rice v. Cayetano* does not apply here. Plaintiffs contend that *Rice* limited *Mancari* to the "*sui generis* factual scenario there." (Individuals' Br. 46; States' Br. 39-

40.) That is wrong. The statute in *Rice* allowed only Hawaiians to vote for state offices, effectively "fenc[ing] out whole classes of its citizens from decisionmaking in critical state affairs. " 528 U.S. at 522. This is a far cry from ICWA. Plaintiffs ignore the fact (Tribes' Br. 35-36) that other circuits have expressly held that *Rice* "reaffirmed" *Mancari*.

Plaintiffs also argue that *Rice* is inconsistent with a contention that the over- and under-inclusiveness of ICWA means that it is not race-based. (States' Br. 39-40; Individuals' Br. 38-40.) But Plaintiffs misunderstand the significance of ICWA's over- and under-inclusiveness. That "Indian child" includes children without Indian blood, and does not cover all children with Indian blood, illustrates that it is the political connection to a tribal sovereign—not race—that is the basis of ICWA.

Finally, even were *Mancari* limited as Plaintiffs suggest, it would still control. Congress enacted ICWA out of specific concern that prevailing child-welfare practices threatened "'the tribes' ability to continue as self-governing communities.'" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 & n.3 (1989). Congress recognized that "there is no resource that is more vital to the continued existence

and integrity of Indian tribes than their children." § 1901(3). Congress also recognized that a tribe has an equally strong interest in its children who live off the reservation, as a significant proportion do.[5] *See* S. Rep. 95-597, at 51 (1977). While Plaintiffs take issue with these findings (Individuals' Br. 50-51), they are binding under rational-basis review. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

2. Plaintiffs also contend that even apart from *Mancari*, the definition of "Indian child" itself is racial, not political. (Individuals' Br. 34-40; States' Br. 41.) But the definition of "Indian child" cannot be viewed without reference to *Mancari*. And, in any event, as the Tribes explained (Tribes' Br. 29-31), the definition is political because it is based on tribal affiliation.

Plaintiffs repeatedly state—incorrectly—that whether a child is an "Indian child" is based solely on ancestry. (States' Br. 40; Individuals' Br. 33-34.) But the definition of Indian child depends on

[5] *See* U.S. Census Bureau, American Indian and Alaska Native Population 12 (Jan. 2012), https://www.census.gov/content/dam/Census/library/publications/2012/dec/c2010br-10.pdf.

either the child's tribal membership or her eligibility for membership if she is the child of a member; the definition contains no ancestry requirement whatsoever.

Plaintiffs also contend that "Indian child" cannot be political because it includes children who are potential members of a tribe (with a parent who is a member) in addition to actual members. (Individuals' Br. 36, 52-54.) But as the Tribes explained (Tribes Br. 32-33), this is necessary given that ICWA applies to newborns. Plaintiffs never explain how actual tribal membership is even possible for newborns,[6] or how Congress could possibly protect newborns and their biological parents if only actual tribal membership were the statutory trigger.

Plaintiffs further point to ICWA's third placement preferences as an indication that "Indian" is a race-based classification. (Individuals' Br. 51.) But under *Mancari*, this preference is subject to rational-basis

[6] Plaintiffs' assertion (Individuals' Br. 40 n.8) that some tribes automatically make children members is wrong. While some tribes grant children the *right* to become members at birth, even referring to this right as "automatic," the children must still go through the administrative application process to become enrolled members. *See* 1 Navajo Nation Code tit. 1, § 752(B); 16 Oglala Sioux Tribe Law & Order Code §§ 201-202; Hopi Indian Tribe Law & Order Code, Enrollment Ordinance § 8.

review, and Plaintiffs offer no reason why it is irrational for Congress to seek to ensure that an Indian child is raised in a family familiar with "the cultural and social standards prevailing in Indian communities and families." § 1901(5). The Ninth Circuit rejected a similar argument in *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005), where the court upheld under *Mancari* the 1990 amendments to the Indian Civil Rights Act, which extended to tribes criminal jurisdiction over all Indians (but not non-Indians)—including Indians who are members of *different* tribes. *Id.* at 929-30.

Nor did Congress recognize that ICWA was race-based when it exempted it from the Multi-Ethnic Placement Act of 1994, 42 U.S.C. § 1996b(1)(B). (Individuals' Br. 38.) Congress simply sought to avoid any potential claim related to ICWA—no matter how far-fetched—in light of repeated (unsuccessful) challenges to ICWA.

3. Finally, Plaintiffs point to dicta in *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013), stating that certain applications of ICWA "would raise equal protection concerns." (Individuals' Br. 54.) But the Court did not make any equal protection holdings in *Adoptive Couple,*

nor did it overrule or limit *Mancari*, so this Court remains bound by *Mancari*.

B. ICWA survives strict scrutiny.

The Tribes explained why ICWA survives strict scrutiny. (Tribes' Br. 37-38.) Plaintiffs arguments otherwise are unavailing.

First, the Tribes did not waive this argument; it was clearly raised at the summary judgment hearing (ROA.4548-50), which is sufficient. *See Belt v. EmCare, Inc.*, 444 F.3d 403, 408-09 (5th Cir. 2006); *United States v. Huntington Nat'l Bank*, 574 F.3d 329, 333 (6th Cir. 2009).

Second, while Plaintiffs do not dispute that there is a compelling governmental interest (States' Br. 42-43; Individuals' Br. 56), they argue that the statute is not narrowly tailored. (States' Br. 44; Individuals' Br. 56-58.) But Plaintiffs fail to offer any explanation for how Congress *could* have crafted ICWA any more narrowly given that it intended to protect Indian children and infants from state courts and agencies. The Individual Plaintiffs say that there are "many such alternatives," but the only one they mention—funding incentives for Indians to move to Indian country (Individuals' Br. 57)—does not address the problem Congress intended to correct. The State Plaintiffs

contend that "banning unrelated non-Indians" from the placement preferences "is an extraordinarily broad remedy" (States' Br. 44), but they ignore the fact that ICWA allows a court to override the preferences when there is good cause to do so, § 1915(a), (b)—an authority that courts use flexibly to advance the child's best interests.[7] Further, ICWA requires that, notwithstanding the preferences, foster-care placements must be "in the least restrictive setting which most approximates a family" and "within reasonable proximity to [the child's] home." § 1915(b). All this represents precisely the narrow tailoring the law requires.[8]

III. ICWA Does Not Commandeer the States.

A. In their brief, the Tribes explained that ICWA establishes substantive and procedural rules to be followed by state *courts*, and that federal commands to state *courts* are exempt from the commandeering

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[7] *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,847 (June 14, 2016) (explaining that the good-cause standard "provide[s] flexibility for courts to appropriately consider the particular circumstances of the individual children and to protect those children."); *In re Alexandria P.*, 1 Cal. App. 5th 331, 349-50 (2016) (explaining the relevance of best interests to good cause, citing cases).

[8] Plaintiffs never defend the district court's failure to engage in a severability analysis. (Tribes' Br. 38-39, 46 n.17.)

doctrine. (Tribes' Br. 39-47.) The State Plaintiffs respond with many pages explaining how ICWA changes the substantive and procedural rules applicable in state-court child-welfare cases. But despite a lengthy description of ICWA, they never manage to respond to the Tribes' demonstration that *Printz*, *New York*, and *Murphy* expressly hold that Congress can "direct state judges to enforce" federal statutes. *New York v. United States*, 505 U.S. 144, 178-79 (1992). This omission is telling.

Instead, Plaintiffs' only argument is that "Congress may not compel state courts to implement federal standards within state-created causes of action." (States' Br. 26.) As the Tribes demonstrated (Tribes Br. 47-49), that assertion is wrong. Once again, instead of engaging with the Tribes' argument, Plaintiffs simply ignore it.

Rather than address the cases upholding federal laws that change state causes of action, the State Plaintiffs cite only one case: *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996). But contrary to their assertion, *Koog* did *not* involve a law that "change[d] the rules of decision in state-law claims" (States' Br. 26); instead, *Koog* was one of the challenges to the Brady Act that preceded the *Printz* decision, involving commands to *executive* officials. *Koog* therefore is inapposite.

Moreover, *Koog* preceded *Printz* and *Murphy*, and indeed *Printz* rejected the Brady Act on grounds different from that in *Koog*. Accordingly, *Koog* has no continuing vitality.

Finally, the State Plaintiffs briefly contend that ICWA "demand[s] that state officials perform certain functions." (States' Br. 30.) The Tribes explained, however, that this does not represent commandeering for two reasons. First, the statute is best read as prohibiting *judicial orders* in *pending court cases* unless certain actions are undertaken, so—unlike the statute in *Printz*—ICWA directs courts, not executive officials. (Tribes' Br. 45-46.) Plaintiffs simply ignore this argument. Second, the Tribes explained that ICWA's generally applicable provisions apply to both state agencies and private parties, immunizing them from a commandeering challenge. (*Id.* at 45; *see also* Br. of Amici California, *et al.* 12-14.) The State Plaintiffs respond that they "have devoted agencies, employees, and laws" to protect child welfare, so it is irrelevant that private agencies are also subject to ICWA. (States' Br. 29 n.5.) This argument is refuted by *Reno v. Condon*, 528 U.S. 141 (2000). In that case, the Court upheld a federal law "requir[ing] time

and effort on the part of state employees," because it was "generally applicable" and regulated private actors and states alike. *Id.* at 150-51.

B. The Tribes also explained that, to the extent that it commandeered at all, ICWA was authorized by the Spending Clause. (Tribes Br. 49-51.) The State Plaintiffs make two contrary arguments. First, they contend that the Tribes forfeited this argument below because they argued it at the summary judgment hearing but not expressly in their briefs. (States' Br. 33.) However, as noted above, an argument is preserved when argued orally. *See supra*, at 20.

Second, though the State Plaintiffs concede that the Spending Clause authorizes federal funding of child-welfare services and that states "must certify compliance with ICWA as a condition of receiving" these funds, they contend that "[t]he Spending Clause … does not authorize ICWA, which stands alone as a federal mandate to States." (States' Br. 33.) This assertion, unaccompanied by citation or explanation, is little more than an *ipse dixit*. When Texas, Louisiana, and Indiana accepted federal funds conditioned on compliance with ICWA—as they *concede* they did—they voluntarily agreed to that condition, and cannot claim unconstitutional commandeering. *See*

Miller v. Tex. Tech Univ. Health Sci. Ctr., 421 F.3d 342, 348 (5th Cir. 2005) (*en banc*).

IV. Congress Has Authority to Enact ICWA.

Plaintiffs contend that Congress does not possess the authority to enact ICWA for three principal reasons: congressional authority is (1) limited to "commerce"; (2) geographically restricted to on or near the reservation; and (3) only applicable where tribal affairs are concerned and ICWA is not a tribal matter. (States' Br. 30-33; Individuals' Br. 58-61.) In addition, the States further contend that section 1915(c) is an impermissible delegation of Congress's lawmaking powers. The district court did not enter judgment on the basis that ICWA exceeds Congress's authority. As Plaintiffs did not cross-appeal, this Court lacks jurisdiction over this argument. *See supra*, at 8. In any event, these arguments are wrong.

A. Congress's power is plenary and not limited to commerce.

Plaintiffs' arguments that congressional authority is limited to economic activity is wrong. The "Constitution grants Congress *broad general powers* to legislate in respect to Indian tribes, powers that we have consistently described as *plenary and exclusive*." *United States v.*

Lara, 541 U.S. 193, 200 (2004) (emphasis added). Contrary to Plaintiffs' assertions, congressional authority is not merely founded in the Indian Commerce Clause, but "rest[s] in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'" *Id.* at 201.

As a result, Congress has repeatedly legislated on matters unrelated to economic activity. Indeed, the first Congress enacted the Trade and Intercourse Act of 1790, 1 Stat. 137, which, *inter alia*, extended federal criminal law and jurisdiction into Indian Country as applied to non-Indians. The fact is Congress has always exercised broad authority over matters involving tribes and Indians well beyond the ambit of economics. *See, e.g.*, Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b) (extending United States citizenship to all Indians born in the U.S.); Major Crimes Act, 18 U.S.C. § 1153 (providing federal jurisdiction over certain enumerated crimes); Violence Against Women Act, 25 U.S.C. § 1304 (extending tribal jurisdiction over non-Indians for crimes

of domestic violence); Johnson-O'Malley Act, 25 U.S.C. §§ 452-457 (providing educational and health assistance to *off-reservation* Indians).

B. Congress's plenary authority extends throughout the United States.

Plaintiffs' contention that congressional authority is restricted to regulating activity on or near the reservation is equally erroneous. "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." *United States v. McGowan*, 302 U.S. 535, 539 (1938); *see also Perrin v. United States*, 232 U.S. 478, 482 (1914) (explaining that congressional power extends "whether upon or off a reservation and whether within or without the limits of a state"). As the Supreme Court explained, with respect to the "power of the General Government" over Indian affairs, "the theater of its exercise is within the geographical limits of the United States." *United States v. Kagama,* 118 U.S. 375, 384-85 (1886). This Court in *Peyote Way* permitted an exemption from criminal law solely for Indians, irrespective of where they live. 922 F.2d at 1214. Further, the BIA hiring preference upheld in *Mancari* applied far from any reservation, including the BIA's Eastern Regional Office in Nashville, Tennessee—a state with no federally recognized tribes.

C. Congress's authority is broad and extends to both tribes and individual Indians.

The Individual Plaintiffs also err in asserting that ICWA is unconstitutional because it involves individual Indians as opposed to "tribal matters" (Individuals' Br. 61) for two reasons.

First, congressional plenary authority extends to protections of both tribes and individual Indians. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (addressing the Snyder Act, which gives assistance to individual Indians on and off the reservation). That is because Congress possesses the "plenary powers to legislate on *problems of Indians*." *Antoine v. Washington*, 420 U.S. 194, 203 (1975) (emphasis added); *see also Md. Cas. Co. v. Citizens Nat'l Bank of W. Hollywood*, 361 F.2d 517, 520 (5th Cir. 1966) ("The paramount authority of the federal government over *Indian tribes and Indians* is derived from the Constitution, and Congress has the power and the duty to enact legislation for their protection." (emphasis added)). And, of course, *Mancari* held that *individual Indians* could constitutionally receive a hiring preference over non-Indians since Congress was exercising its "plenary power … to deal with the special problems of Indians." 417 U.S. at 551-52.

Second, Plaintiffs are simply incorrect that ICWA is not a "tribal matter." Congress recognized in ICWA that "[r]emoval of Indian children from their cultural setting seriously impacts a long-term *tribal survival*," and for this reason the Court concluded "[t]he protection of this *tribal interest* is at the core of the ICWA." *Holyfield*, 490 U.S. at 50, 52 (emphasis added).

D. Section 1915(c) does not violate the non-delegation doctrine.

Plaintiffs repeat their erroneous contention that section 1915(c) is an impermissible delegation of congressional lawmaking authority because they misunderstand governing law. They fail to understand that this is not a delegation at all. Congress merely recognized that tribes "exercise inherent sovereign authority over their *members*." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (emphasis added). "One area of extensive tribal power is domestic relations among tribal members." *Cohen's Handbook of Federal Indian Law* 216 (2012 ed.). ICWA merely recognizes existing tribal sovereign power to decide what are the preferred placement priorities for their own children. But even if it were a recognition of

greater tribal authority, it would also be permissible. *Lara,* 541 U.S. at 207.

Plaintiffs contend that whatever powers tribes have over their members, they do not extend to citizens of Texas, Louisiana, and Indiana. (States' Br. 46.) But this is erroneous for the simple reason that all tribal members, on and off the reservation, are citizens of the states in which they reside. If a tribe does not have power over members who are citizens of a state, they would have no power over any tribal member.

Finally, even if this Court were to construe ICWA as a delegation, Congress can delegate federal authority to an Indian tribe. *See, e.g.*, *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975). Nothing in cases such as *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), relied on by Plaintiffs (States' Br. 46), is to the contrary. *Plains Commerce* stands for the unremarkable proposition that *absent congressional authorization* there are limits to inherent tribal powers over non-Indians. Here, Congress has acted.

V. The Final Rule Complies with the APA.

The Tribes explained why the district court erred when it held that the Final Rule violates the APA. Interior possessed statutory authority to promulgate the Final Rule; it provided a reasoned explanation for its change in position; and it is entitled to *Chevron* deference. (Tribes' Br. 59-68.) Plaintiffs' arguments otherwise are wrong.

A. Plaintiffs claim that the BIA lacked authority to issue the Final Rule. But Plaintiffs largely ignore the Tribes' explanation otherwise (Tribes' Br. 60-63), including that Interior is entitled to deference in exercising its authority under section 1952—a general conferral of rulemaking authority. *See City of Arlington v. FCC*, 569 U.S. 290, 306 (2013). Plaintiffs point to no clear congressional intent to withhold such authority. Indeed, Congress expressly charged BIA with management of Indian affairs and relations, including the provision of child welfare and social services. 81 Fed. Reg. at 38,785-88. And Interior retains broad authority to change its position so long as the agency believes the new approach to be better and explains the reasons for the change. *See FCC*

v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). Interior did so here.

Plaintiffs attempt to sidestep these basic tenets of administrative law by clutching to the 1979 guidance and casting Interior's rulemaking as an "unexplained inconsistency." (Individuals' Br. 64.) But Plaintiffs ignore Interior's extensive explanation of why, even in light of its 1979 guidance, it believed its new approach was the better one. 81 Fed. Reg. at 38,782-89.

Plaintiffs also take issue with Interior's policy judgment that the Final Rule is necessary, claiming that it is contrary to the "flexibility and the ability of state courts to do justice in particular cases." (Individuals' Br. 66.) But this again ignores the fact that, as Interior explained, the regulations promote consistent application of ICWA's provisions to avoid "arbitrary outcomes" while maintaining state court flexibility consistent with the Act, its purpose, its legislative history, and *Holyfield*. *See* 81 Fed. Reg. at 38,788, 38,838, 38,844. Plaintiffs also argue that "the Department has not shown why the Final Rule must necessarily be binding" (States' Br. 48), but Interior explained in detail

the need for binding regulations and that the rule in many respects reflected state court decisions. 81 Fed. Reg. at 38,779, 38,782-90.

B. Plaintiffs' argue that the Final Rule's good cause recommendation is inconsistent with ICWA. (Individuals' Br. 66-68.) Plaintiffs frame the Final Rule as imposing "a fixed definition of 'good cause,' limiting state courts to five enumerated factors," without addressing the clear language of the regulation. (*Id.* at 66.) Interior expressly provided that good cause "'*should*' be based on" enumerated factors; Interior made plain that, "given the particular facts of an individual case," a court may find good cause for "some other reason." 81 Fed. Reg. at 38,839, 38,847. Plaintiffs ignore the fact that Interior's thoughtful approach provides flexibility to state courts and remains consistent with Congress's intent that good cause "be a limited exception, rather than a broad category that could swallow the rule." *Id.* at 38,788, 38,847.

Further, Interior appropriately found that the clear and convincing standard should apply to a good-cause showing to depart from ICWA's placement preferences. Contrary to Plaintiffs' assertion (Individuals' Br. 67-68), Interior and numerous state courts that have

examined this very issue concluded that a heightened standard is most consistent with ICWA and congressional intent. 81 Fed. Reg. at 38,843; *Native Vill. of Tununak* v. *State Dep't of Health & Social Servs.,* 303 P.3d 431, 447-49 (Alaska 2013), *vacated in part on other grounds,* 334 P.3d 165 (Alaska 2014). And contrary to Plaintiffs' assertion (Individuals' Br. 67 n.12), *Texas* does not support applying the *expressio unius* maxim here. In *Texas*, this Court noted the limited usefulness of this maxim in the administrative context, 809 F.3d at 182, consistent with the D.C. Circuit's approach (*see* Tribes' Br. 66).

C. Plaintiffs contend that Interior has no authority even to *recommend* a clear-and-convincing standard. (Individuals' Br. 68.) But Plaintiffs fail to cite to *any* authority that a *non-binding* standard violates the APA.

CONCLUSION

The Court should reverse the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this response contains 6,494 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Century Schoolbook 14-point font using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2019, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

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