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.

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

REPLY BRIEF OF INTERVENOR NAVAJO NATION

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February 19, 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 Intervenor Navajo Nation, are also governmental parties outside the scope of this certificate under Fifth Circuit Rule 28.1.

Persons and entities with a direct interest in this case are the following:

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INTRODUCTION

The Indian Child Welfare Act was enacted by Congress more than forty years ago to preserve the integrity of the tribes and the welfare of tribal children. Plaintiffs provide no reason for this Court to depart from four decades of precedent upholding the law as a constitutional exercise of Congress's authority to legislate with respect to Indian tribes.

Indeed, Plaintiffs cannot even establish that they meet the requirements for Article III jurisdiction. Plaintiffs assert that this Court has jurisdiction to hear the Brackeens' suit, but any live controversy was mooted when A.L.M.'s adoption was finalized. They contend that *all* of the Plaintiffs have standing, despite black letter law holding that state courts must decide constitutional challenges in their own right. And they argue that the States have standing to press equal protection claims in a *parens patriae* suit, disregarding Supreme Court precedent dictating that "[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).

As to the merits, Plaintiffs primarily contend that ICWA is unconstitutional because classifications based on tribal membership are presumptively race based, ignoring the Supreme Court's holding that a law that applies "'only to members of federally recognized tribes'" makes a classification that is "'political rather than

racial in nature.'" *Rice v. Cayetano*, 528 U.S. 495, 519-520 (2000) (quoting *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974)). Plaintiffs also contend that ICWA was not enacted for a constitutionally permissible purpose, even though it fulfills multiple treaty obligations, and even though the Supreme Court has held that "Congress may fulfill its treaty obligations . . . by enacting legislation dedicated to their circumstances and needs." *Id*. at 519.

Contrary to Plaintiffs' assertions, ICWA and the Final Rule are lawful and constitutional, and thus, the District Court's judgment should be reversed.[1]

ARGUMENT

I. PLAINTIFFS CANNOT SATISFY THE REQUIREMENTS OF ARTICLE III.

A. This Court Lacks Jurisdiction Over The Brackeens' Suit.

The Brackeens initially brought suit alleging that they were injured by the application of ICWA in the state court proceedings for A.L.M., a member of the Navajo Nation. ROA.579-580, 3731-72, 2524. But the Brackeens have finalized their adoption of A.L.M. and the Nation has made clear that it will not contest that adoption. ROA.3733; Nation Br. 12. As the Ninth Circuit has held, the finalizing of an adoption moots any live controversy that once existed. *But see Carter v.*

[1] In the interests of avoiding duplicative briefing, the Nation focuses its arguments on jurisdiction and equal protection, as it did in its opening brief. The Nation again incorporates by reference the arguments made by the Tribal Intervenors and Federal Defendants with respect to commandeering, non-delegation and the Administrative Procedure Act.

Tashuda, 743 F. App'x 823, 824 (9th Cir. 2018), *petition for cert. filed*, No. 18-923 (Jan. 14, 2019).

1. The Individual Plaintiffs' main attempt to circumvent mootness is to point to recent state proceedings regarding A.L.M.'s sister, Y.R.J., which the Brackeens initiated in December of 2018. Indiv. Pls. Br. 13, 26-27. The Brackeens assert that this state proceeding overcomes mootness because ICWA will also apply to the Y.R.J.'s state court case. *Id.* But it is well-settled that there must be "an actual controversy [in existence] at all stages of review." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). By the Brackeens' own account, they adopted A.L.M. in January of 2018. ROA.3733; *see also* ROA.580, 615. At that point, any live controversy ended. The Brackeens did not even begin proceedings to terminate Y.R.J.'s parental rights until *eleven* months later, almost two months after the District Court issued the October 2018 order. The Brackeens were therefore unable to satisfy Article III's requirements when the District Court issued its order. They cannot resuscitate their standing now through state proceedings that did not exist when this suit was filed.[2]

[2] The Individual Plaintiffs fault the Nation for failing to acknowledge the import of the Y.R.J. proceedings, in which the Nation is a participant. Indiv. Pls. Br. 26. In fact, the Nation's opening brief recognized the Brackeens' stated intent to adopt Y.R.J., but accurately observed that Y.R.J.'s parental rights had not even been terminated, and explained the various reasons that any proceedings with respect to Y.R.J. could not possibly affect the Brackeens' ability to satisfy Article III. *See* Nation Br. 21 n.4.

Further, even if one could somehow revive a suit that has been mooted, the Y.R.J. state proceedings do not create a live controversy because a federal court cannot redress the injury that is allegedly inflicted when a state court applies ICWA because the orders of a federal district or circuit court do not bind the state courts. Nation Br. 24-25. Thus, the District Court's order cannot prevent the Texas courts from applying ICWA to Y.R.J.'s case.[3]

The Individual Plaintiffs do not deny the basic fact that a federal court order cannot bind the state court. Rather, they argue that their alleged injury may be redressed because the Nation—which has now intervened—and Texas will be bound by the District Court's order. But Plaintiffs repeatedly opposed the Nation's intervention—including before this Court; they cannot now assert that intervention serves as the basis of their standing. For one thing, intervention at the appellate stage cannot give rise to standing at the moment that matters—when the operative complaint was filed. *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570 (2004). For another, Plaintiffs have not even attempted to show that issue preclusion would operate against the Nation in the Y.R.J. state court proceedings,

[3] State Plaintiffs suggest that the Intervenor Tribes' successful request for a stay pending appeal shows that state courts would otherwise be affected by the District Court's ruling. State Br. 17 n.2. But a stay was obtained because the Texas Attorney General was improperly seeking to prevent state courts from applying ICWA, not because the District Court's ruling would have had an independent effect. And it is unsurprising that this Court agreed to stay a District Court decision that purported to invalidate a federal statute that has been on the books for more than forty years.

and preclusion could not prevent a party that has not participated in these federal proceedings (such as a prospective Indian foster parent) from seeking to apply ICWA. *See* Restatement (Second) of Judgments § 28 (issue preclusion may be inapplicable due to "potential adverse impact . . . on the public interest or the interests of persons not themselves parties in the initial action"); *id*. § 29 (non-mutual issue preclusion disfavored). Accordingly, the Nation's participation in this suit cannot prevent ICWA from applying in the Y.R.J. proceedings.

The same is true for Texas. That State is a *plaintiff* in this suit. "An injunction enjoins a *defendant* . . . ." *Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) (emphasis added). If plaintiffs could manufacture standing by agreeing to be bound by the orders of a federal court, Article III's careful limits would dissolve. Even worse, Plaintiffs' theory would permit litigants to bring suit in federal court anytime a federal constitutional issue arises in a state court proceeding. That would run directly contrary to the Supreme Court's "repeated[] and emphatic[]" holdings that state courts are "competent to adjudicate federal constitutional claims." *Moore v. Sims*, 442 U.S. 415, 430 (1979).

Indeed, Plaintiffs at this very moment are arguing that ICWA is unconstitutional in the pending Y.R.J. state proceeding, making plain that the

question is properly left to state courts.[4] This Court should allow those state proceedings to unfold rather than permitting an end run around the state courts. The Eighth Circuit recently held as much when it dismissed a federal suit challenging the application of ICWA in state court proceedings, explaining that any challenge to the application of ICWA in state proceedings must be made in *state* court. *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 610 (8th Cir. 2018); *see Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013); *Moore*, 442 U.S. at 430. The same outcome is appropriate here.[5]

2. The Individual Plaintiffs further assert that A.L.M.'s adoption is not moot because it remains open to collateral attack under ICWA for longer than it would under state law. Indiv. Pls. Br. 24-25. The same collateral attack provisions applied in *Carter*, but that did not alter the Ninth Circuit's holding that when the plaintiffs' contested adoptions were finalized, their suit became moot. 743 F. App'x at 824.

[4] Plaintiffs did not include this briefing in their motion for judicial notice regarding the Y.R.J. proceeding. If the Court desires, the Nation can provide that material to the Court.

[5] Individual Plaintiffs suggest that a decision from this Court might be reviewed by the Supreme Court, producing an opinion that would be binding on state courts. Indiv. Pls. Br. 29. That possibility did not save the plaintiffs in *Oglala Sioux Tribe*, and the Supreme Court has said that the possibility of its review cannot confer standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 570 n.5 (1992) (plurality op.).

Moreover, Individual Plaintiffs do not and cannot contend that the Nation or any other party will launch a collateral attack on their adoption. Their only asserted injury from these provisions is their awareness that a different law applies. But the Supreme Court long ago rejected the assertion that the mere awareness of an allegedly discriminatory law is sufficient to establish standing: In *Allen v. Wright*, the Court held that a party cannot establish standing unless he is "personally denied equal treatment" under the challenged statutory provisions. 468 U.S. 737, 755 (1984) (internal quotation marks omitted). The Brackeens cannot show that they will be "denied equal treatment" as a result of ICWA's collateral attack provisions because they have not shown any likelihood their adoption will be subject to collateral attack.

Nor does their precedent suggest otherwise: *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012), and *Northeastern Florida Chapter of Associate General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993), establish only that a business may demonstrate standing by alleging that a competitor is eligible for a benefit the plaintiff-business is barred from receiving. That competitive disadvantage is a harm in its own right; the Brackeens can point to no such harm with respect to ICWA's collateral attack provisions. *See also Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) (equal protection standing

is shown through "differential governmental treatment, not differential government messaging.").

B. None Of The Remaining Individual Or State Plaintiffs Have Standing.

The redressability problem that bars the Brackeens' suit also prevents the other Plaintiffs from establishing standing. Nation Br. 14-15. Each Plaintiff's alleged injuries stem from the application of ICWA in state court proceedings, and no decision from this Court or the District Court can prevent the state courts from applying ICWA. *See* p. 4, *supra*.

1. Beyond their failed attempts to resurrect the Brackeens' standing, the Individual Plaintiffs' only rejoinder is the assertion that the Cliffords' case is currently on appeal before the state courts and any decision in this case might "increase . . . the likelihood" that the Cliffords will win before the state appellate court. Indiv. Pls. Br. 31 (internal quotation marks omitted).[6] But standing cannot be premised on the fact that a decision in a federal case might create favorable precedent for a state court suit at any level: "Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive

[6] The Individual Plaintiffs briefly suggest that the Nation's redressability argument amounts to an acknowledgement that ICWA *commandeers* the state courts. Indiv. Pls. Br. 28-29. That is false. The application of federal law in state court proceedings is a natural consequence of the Supremacy Clause, not a violation of federalism principles. And the Federal Defendants and Tribal Intervenors have explained why no feature of ICWA violates anti-commandeering principles. *See* Fed. Br. 43-48; Intervenor-Tribes Br. 39-51.

or even awe-inspiring effect of the opinion explaining the exercise of its power." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring)).

2. For their part, the State Plaintiffs freely acknowledge that—whatever the outcome of this suit—"state courts remain free to decide whether to follow ICWA." State Br. 18. Nonetheless, the State Plaintiffs maintain that they have standing because an injunction will relieve the States of the burdens ICWA places directly on the state "agencies and judicial officers." That does not follow. Because ICWA applies in state courts, it is those courts that will decide whether state agencies and officers must comply with the law. If the state courts continue to find ICWA constitutional, then they will continue to insist that the state agencies and officers who appear before them adhere to that law.

Further, even if the State Plaintiffs were correct that a federal injunction could exempt state agencies from ICWA's requirements, that theory would—at the very most—give the States standing to challenge the provisions of ICWA that directly regulate state agencies as opposed to state courts. After all, "standing is not dispensed in gross." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (internal quotation marks omitted). A "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* (internal quotation marks omitted). The State Plaintiffs cannot establish

standing to challenge provisions of ICWA that apply in state court proceedings by asserting injuries from entirely distinct statutory provisions that apply to the agencies themselves.

Nor can the States establish standing by reciting the various statutory requirements under ICWA, without showing how each provision inflicts a "concrete and particularized" injury on the States. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (internal quotation marks omitted). The States have been implementing ICWA for decades, yet—instead of explaining how that implementation harms the States—the complaint asserts the obvious fact that the child welfare process changes when ICWA applies. States are not new to situations where Congress crafts an intergovernmental solution that addresses the needs of separate tribal sovereigns. *See, e.g.*, *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016) (principles of state sovereignty did not impair federal government's power to acquire land on tribe's behalf), *cert. denied*, Nos. 16-1320 & 17-8, 2017 WL 5660979 (Nov. 27, 2017); *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwartzenegger*, 602 F.3d 1019 (9th Cir. 2010) (noting interplay of state and tribal sovereign interests in the Indian Gaming Regulatory Act). Alleging that ICWA crafts such a scheme is not enough, without more, to establish an injury under Article III.

The State Plaintiffs attempt to overcome that difficulty by alleging that they may lose federal funds if they do not enforce ICWA. *See* State Br. 18. But the provisions do not mandate the withdrawal of funds and any funding withdrawal would not occur before further administrative processes. Nation Br. 28-29. The State suggests that any further process is irrelevant because it will inevitably result in the termination of federal funding, State Br. 18, but if the State wishes to challenge ICWA because of some consequences that will result from *another* proceeding, it needs to bring its challenge in *that* proceeding. It cannot launch a collateral attack in this one.

The State Plaintiffs also contend that they at least have standing to challenge ICWA's Final Rule under the APA because the States are the objects of the regulation. State Br. 19 n.3 (citing *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015); Indiv. Pls. Br. 23 (citing same). But the APA obviously cannot eliminate the requirements of Article III. *Contender Farms* holds only that the objects of regulation *generally* have standing because "there is *ordinarily* little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." 779 F.3d at 264 (emphasis added) (internal quotation marks omitted). In this case, however, the ordinary rule does not apply because the States are attempting to challenge a

regulation that applies to state court proceedings that cannot be controlled by a decision in this case.

Finally, the States argue that they have standing to press their equal protection challenge because they do so on a *parens patriae* theory. But the Supreme Court long ago held that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 610 n.16. Contrary to the States' argument, the Supreme Court did not *sub silentio* overrule that proposition in *Massachusetts v. EPA*, 549 U.S. 497 (2007). That case held only that Massachusetts had standing to challenge environmental regulations because it "own[ed] a substantial portion of the state's coastal property." *Id.* at 522 (internal quotation marks omitted). That form of proprietary interest is very different from the *parens patriae* claims that the States rely on here. Nor does *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), alter that calculus: The *Texas* Court found standing based on alleged tangible economic harms to the State, not generalized claims of discrimination against the State's citizens. *Id.* at 152 (States had standing to challenge federal program because it "would have a major effect on the states' fiscs").

Indeed, even the District Court did not hold that the States have standing to press the equal protection clause challenge, *see* ROA.3723, 3749, 3753, and the

States' failure to appeal that holding serves as an independent basis for rejecting their claim of standing here.

In short, *none* of the Plaintiffs can satisfy the requirements of Article III, and the suit must be dismissed at the threshold.

II. ICWA IS FULLY COMPATIBLE WITH EQUAL PROTECTION.

Classifications based on tribal membership are inherently political, and laws directed at tribal members must be upheld so long as they are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. ICWA is directed at the affairs of members of federally recognized Indian tribes and their children; its purpose is to protect the integrity of the tribes and the welfare of tribal children. As such, ICWA is compatible with the Constitution's equal protection guarantee. Plaintiffs' arguments to the contrary are unavailing.

A. Tribal Membership Is A Political Classification.

In *Morton v. Mancari*, the Supreme Court held that 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). Plaintiffs urge the Court to rewrite that holding: State Plaintiffs suggest that "classifying Indians is race-based *unless* there is a permissible purpose." State Br. 36 (emphasis added). Individual Plaintiffs similarly suggest that a law that classifies based on tribal membership is

political *only* if it "relates to the tribes' self-governance" or "regulate[s] tribal land." Indiv. Pls. Br. 33, 49.

Neither rule finds grounding in the precedent of the Supreme Court or this Court. In *Mancari*, the Supreme Court held that the difference between a racial and a political classification lies in the way in which Congress defines the targeted group. Where a law defines Indians "as a discrete racial group," it obviously makes a racial classification. *Mancari*, 417 U.S. at 554. But where a law instead defines Indians "as members of quasi-sovereign tribal entities," it makes a *political* classification. *Id.*

The Supreme Court applied the same logic in *Rice v. Cayetano*, observing that the unconstitutional laws in that case were directed at the Hawaiian "peoples," a term the drafters understood to "mean 'races.'" 528 U.S. at 515-517. The Court drew a sharp contrast between those laws that are directed at members of federally recognized Indian tribes. *Id.* at 519-520. And this Court applied the same framework in *Peyote Way Church of God, Inc. v. Thornburgh*, analyzing whether a classification was political by assessing how the targeted group was defined. 922 F.2d 1210, 1216 (5th Cir. 1991) ("We hold that the record conclusively demonstrates that [Native American Church] membership is limited to Native American members of federally recognized tribes who have at least 25% Native

American ancestry, and *therefore* represents a political classification." (emphasis added)).

Whether a classification is political therefore turns on whether a law defines the targeted class based on membership in a federally recognized tribe. Purpose enters into the equation only in assessing whether the classification withstands the appropriate level of scrutiny. *See, e.g.*, *id.* (stating, after concluding definition of Native American Church was political, "[t]hus, under *Morton*, we must now consider whether the preference given the [Native American Church] 'can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians'" (quoting *Mancari*, 417 U.S. at 555)).

Plaintiffs' other attempts to portray classifications based on tribal membership as race-based similarly fail.

1. The Supreme Court has not overruled Mancari.

Plaintiffs suggest that the Supreme Court's decisions in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), somehow displace the *Mancari* Court's determination that classifications based on tribal membership are political. In fact, *Adarand* had nothing to do with the nature of classifications based on tribal membership. Plaintiffs attempt to rely on an exaggerated concern about the implications of the *Adarand* majority's decision that was voiced by the dissent. Indiv. Pls. Br. 41

(quoting *Adarand*, 515 U.S. at 244-245 (Stevens, J., dissenting)). But "comments in [a] dissenting opinion . . . are just that: comments in a dissenting opinion." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980). The *Adarand* majority said nothing about *Mancari*. And *Adarand* cannot have silently overruled *Mancari* because the majority opinion in *Rice* reiterated *Mancari*'s force five years later. *Rice*, 528 U.S. at 519-520.

Similarly, Plaintiffs badly over-read the Supreme Court's decision in *Adoptive Couple*. Plaintiffs point to dicta in the case suggesting that there might be an equal protection problem *if* ICWA applied to a child "solely because an ancestor—even a remote one—was an Indian." Indiv. Pls. Br. 54 (quoting *Adoptive Couple*, 570 U.S. at 655-656). But that dicta does not suggest that laws that classify based on tribal membership necessarily draw impermissible distinctions based on ancestry or race. Instead, the *Adoptive Couple* Court was merely suggesting that the *erroneous* interpretation of ICWA forwarded by respondents in that case was unacceptable for the additional reason that—if accepted—it could have led to ICWA's application based on ancestry alone. But the Court avoided that possibility by rejecting respondents' interpretation. Indeed, if anything, *Adoptive Couple* suggests that the Supreme Court continues to believe

that laws like ICWA that classify based on tribal membership are constitutional so long as they are not erroneously read to apply solely based on ancestry.[7]

2. Membership in a tribe is not a proxy for race.

In addition to their misreadings of the precedent, Plaintiffs offer several arguments from first principles as to why tribal membership should be viewed as a proxy for race. Indiv. Pls. Br. 34-35. Because the Supreme Court has held otherwise, these arguments are beside the point. In any event, the arguments are wholly without force.

Plaintiffs suggest that tribal membership is necessarily a racial classification because many tribes establish membership based on blood quantum. That assertion fails out of the gate because the law at stake in *Mancari* included an explicit blood quantum requirement and the Court nonetheless held that the law drew a political classification. 417 U.S. at 553 n.24. But even setting aside

[7] Plaintiffs briefly argue that Congress itself has acknowledged that ICWA is race-based because Congress exempted ICWA from the Multi-Ethnic Placement Act of 1994. Indiv. Pls. Br. 38 (quoting 42 U.S.C. § 1996b(1)(B)); State Br. 41-42 (same). But Congress often takes a belt and suspenders approach, explicitly indicating that a law excludes an item from its reach even where that clarification is unnecessary. *See, e.g.*, *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 646 (1990) (explaining that "technically unnecessary" examples may have been "inserted out of an abundance of caution"); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 551 (1987). Moreover, Congress's decision to explain the interaction between ICWA and the Multi-Ethnic Placement Act is natural given the common subject matter of the two laws.

Mancari, Plaintiffs misunderstand the nature of classifications based on tribal membership and mischaracterize tribal law itself.

As to the nature of classifications based on tribal membership, they are based on an individual's membership in a particular sovereign entity—the tribe. As the Nation has explained, classifications based on tribal membership are therefore no different than classifications based on citizenship in a foreign nation. Nation Br. 6-7. When Congress draws distinctions based on either criterion, it is targeting the individual based on her political affiliation, not her race or ancestry. That remains true whether or not the separate sovereign (be it tribe or foreign nation) itself defines its membership based in whole or in part on ancestry. Indeed, it is as appropriate for the Navajo Nation to define eligibility for membership based on whether an individual is an ancestor of another Navajo person as it is for Hungary to grant citizenship where an individual can point to a Hungarian great-grandparent. *Id.*

Plaintiffs offer no response to this argument, other than a fleeting assertion that distinctions based on citizenship are themselves forbidden because they are impermissibly based on national origin. Indiv. Pls. Br. 52-53. If that were true, it would render much of the United States' immigration code unconstitutional. *See* Nation Br. 33-34. But in fact, Congress may use its plenary power over immigration to draw rational, citizenship-based distinctions that are predicated on a

person's affiliation with a particular foreign sovereign. By the same token, Congress may use its authority with respect to Indian tribes to enact laws that rationally distinguish based on tribal membership.

Plaintiffs also misrepresent the nature of tribal membership laws, suggesting that eligibility for membership *only* requires ancestry or a "genetic link." State Br. 44. As the Nation has explained, tribal laws typically do not make membership turn on ancestry alone. Nation Br. 7-9. Notably, in the Navajo Nation, one must *apply* to become a member, and membership is often meted out based on the strength of one's ties to the Nation's political community. *See* 1 Navajo Nation Code § 751 (requiring application for enrollment). Plaintiffs fail to confront this argument in any meaningful way.[8] Instead, in a footnote, Individual Plaintiffs cite the Nation as an example of one of "many tribes" that allegedly "*automatically* enroll children as members." Indiv. Pls. Br. 40 n.8. But Plaintiffs mischaracterize the sources they cite. No individual is a member of the Navajo Nation until an application has been submitted and granted. 1 Navajo Nation Code § 751. To be sure, the children of enrolled members are automatically granted membership when they apply *if* they are not enrolled in another tribe. *See* 1 Navajo Nation

[8] Plaintiffs anecdotally cite a handful of laws from various tribes that they claim grant membership based on ancestry alone without any analysis. Most of these citations are out of context, and—regardless of what the laws of these particular tribes mandate—they cannot form a basis for invalidating a statute that applies to *all* federally recognized Indian tribes.

Code § 703. But those children have a strong connection to the tribe through a tribal member parent, and individuals who lack such a connection must show another close tie such as speaking the language or being familiar with the culture. *See* 1 Navajo Nation Code § 753. The Nation's membership laws are therefore designed to define the contours of a political community, not a race.[9]

3. ICWA classifies based on political status, not race.

Plaintiffs' inability to refute the simple fact that tribal membership is a political classification leads inexorably to the conclusion that ICWA is constitutional. ICWA's definition of "Indian child" includes only tribal members and the biological children of tribal members who are themselves eligible for membership.[10] In other words, ICWA applies based on the political affiliation of a child or her parent and *not* based on race.

[9] Individual Appellees' additional assertion, allegedly supported by a single citation to the Hopi Tribe's enrollment statute, that a child may not renounce membership, is also false. *See* Indiv. Pls. Br. 40 n.8. A legal guardian for a child may renounce the child's Navajo membership. *See* 1 Navajo Nation Code § 705.

[10] As in *Mancari*, the definition excludes many persons who might have been included in an actual racial definition, including members of non-recognized tribes, those who claim Indian ancestry but are not members of any tribe, and Indians whose ancestry comes from Canadian, Central American, or South American indigenous groups. This fact further bolsters the conclusion that "Indian child" is at its base a political definition. *Rice* is not to the contrary. The *Rice* Court merely noted that excluding some part of a race does not make the smaller group any less of a race. 528 U.S. at 517. Here, "Indian child" is not defining a subset of a larger Indian "race," as it is not defining a race at all, but a political group made up of members of tribal sovereigns.

Plaintiffs briefly suggest that defining "Indian child" to include the children of tribal members who are themselves eligible for membership means that ICWA applies to children who have "no political connection to a tribal sovereign." Indiv. Pls. Br. 52 (internal quotation marks omitted). But a child whose parent is a member of the tribe necessarily has a "political connection to a tribal sovereign" through the parent, and that connection is deepened by her own eligibility for membership. Moreover, it is incongruent to suggest that a child's lack of cultural or political connection to her tribe is indicative of the classification's unconstitutional nature when the very point of ICWA is to provide an opportunity for that child to build a connection so that when the child becomes an adult, she can have a full-fledged political relationship with the tribe.

B. ICWA Fulfills Congress's Obligations To The Tribes.

Under *Mancari*, a law that classifies based on tribal membership is constitutional if it is "tied rationally to the fulfillment of Congress's unique obligations toward the Indians." 417 U.S. at 555. Plaintiffs do not argue that even if "Indian child" is political, ICWA fails standard rational basis review. And Plaintiffs appear to create their own standard, arguing that the test is satisfied only when Congress establishes laws that "regulate tribal land or property"[11] or

[11] Individual Plaintiffs contend that Congress's authority extends primarily to the regulation of *on reservation* conduct. But Congress frequently legislates with respect to off-reservation Indian affairs. *See, e.g.*, National Historic Preservation

"otherwise touch on tribal self-government." Indiv. Pls. Br. 55. Plaintiffs are mistaken and the *Mancari* test is satisfied here.

The Supreme Court has recognized that the Treaty Clause of the U.S. Constitution, art. II, § 2, cl. 2, is an independent source of Congress's power to deal with Indian affairs. *Mancari*, 417 U.S. at 552; *United States v. Lara*, 541 U.S. 193, 201 (2004). As the *Rice* Court explained, "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; *see also Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 78-82, 85 (1977) (exclusion of individual Indians from statutory fund rationally tied to fulfillment of treaty per *Mancari*). That fact—which Plaintiffs virtually ignore—is important in at least two ways. *First*, it reinforces the point that classifications based on tribal membership are not race-based. Simply put, the United States does not make treaties with races, but with political sovereigns.

Act, 80 Stat. 915 (1966) (consultation rights to Indian tribes who claim an interest in cultural resources located outside tribal lands); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1990) (providing protections for repatriation of tribal ancestors found outside Indian lands); *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992) (Indian Reorganization Act provides for "acquiring, on behalf of the tribes, lands within or without existing reservations"); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (upholding tribes' sovereign immunity off-reservation). Accepting Plaintiffs' proposition would therefore represent a major contraction of Congress's power.

Second, it means that Plaintiffs' concept of the permissible purposes for legislation involving the tribes is woefully under-inclusive. The United States' treaty obligations extend well beyond "tribal land or property" and "tribal self-government." Indiv. Pls. Br. 55; *see, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (upholding Tribe's treaty rights to off-reservation hunting and fishing and rejecting implicit divestiture of such rights by statehood or executive order).

One of ICWA's stated purposes is to fulfill Congress's obligations under its trust responsibility arising from treaties. 25 U.S.C. § 1911(a). As discussed in the Nation's Opening Brief, and not refuted (or even mentioned) by Plaintiffs, ICWA fulfills two treaty obligations that the United States assumed in its treaties with the Navajo Nation in 1849 and 1868. In the 1849 treaty, the United States promised to "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. In the 1868 treaty, the United States promised to provide for the education of Navajo children. Treaty with the Navajo, art. VI, June 1, 1868, 15 Stat. 667. In both provisions, the federal government assumed obligations to provide for the stability of the Navajo people, and for the welfare of Navajo children. Treaties with other tribes include similar provisions through which the federal government assumed obligations to

provide for the welfare of Indian children. *See* Indian Law Scholars' Amicus Br. 3-5, 12-13.

ICWA implements those obligations by maintaining, as much as possible under the unique circumstances of each child's case, the relationship of the tribes to their children, and by providing for the best interests of tribal children by maintaining their connections to their extended biological families and to their tribal communities. *See* 25 U.S.C. § 1902. Because ICWA fulfills these important treaty obligations, it is precisely the sort of law that the *Mancari* and *Rice* Courts deemed constitutional.

Plaintiffs argue otherwise by pointing to language in *Rice* emphasizing that *Mancari* concerned "the authority of BIA." Indiv. Pls. Br. 48 (quoting *Rice*, 528 U.S. at 520). But the *Rice* Court drew attention to that fact to distinguish the law at stake in *Mancari* from the unconstitutional state laws at stake in *Rice*: The federal law in *Mancari* governed the authority of the BIA and was therefore directed squarely at the welfare of tribal Indians. By contrast, the state laws in *Rice* applied to state elections of "public officials" who would represent the interests of the State as a whole. 528 U.S. at 520-521. The fact that States may not pass laws that confine participation in state elections to certain classes of citizens in no way suggests that Congress may not pass a law like ICWA that is directed at the integrity of tribes and the welfare of tribal children. Indeed, the Court in *Rice*

contrasted the state elections at stake in that case with federal elections held for tribal governments; those tribal elections permissibly exclude non-Indians because they concern the "internal affair of a quasi-sovereign." *Id.* at 521.

Moreover, even Plaintiffs admit that a law may classify based on tribal membership where it implicates tribal self-government. Indiv. Pls. Br. 55; State Br. 34, 36-38, 45. ICWA undoubtedly does just that. Congress enacted ICWA based on its finding that keeping tribal children connected with their tribes and tribal communities is essential to the "continued existence and integrity of Indian tribes." 25 U.S.C. § 1901(3). Plaintiffs challenge that holding, but it is not for Plaintiffs to question Congress's findings, and the Supreme Court has acknowledged the wealth of evidence underlying the ICWA findings. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989) (quoting congressional testimony that "[c]ulturally, the chances of Indian survival are significantly reduced if our children . . . are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, *these practices seriously undercut the tribes' ability to continue as self-governing communities* . . . ." (emphasis added)). Indeed, common-sense dictates that tribes cannot survive—let alone govern—if their children are taken away.

C. ICWA Survives Strict Scrutiny.

Because ICWA establishes a political classification, strict scrutiny does not apply But even if strict scrutiny applied, ICWA would survive. Plaintiffs barely dispute the Government's "compelling interest in preventing Indian children from being removed from reservations, or preserving Indian culture," Indiv. Pls. Br. 56, and they cannot credibly challenge the Government's compelling interest in fulfilling its treaty obligations. Instead, Plaintiffs argue that the law is not narrowly tailored. That is incorrect.

Plaintiffs' argument rests almost exclusively on their challenge to the statutory provisions governing the placement preferences for Indian children. They argue that the preferences are irrational because they do not apply in tribal courts, ignoring the fact that ICWA was passed because of the ample evidence that *States*—not tribes—were inappropriately separating tribal children from their families and tribes. *Holyfield*, 490 U.S. at 45.

Plaintiffs also challenge the idea that placing a child with a member of her extended family or with another tribe will not serve the Government's interest in preserving the integrity of tribes and their culture. But Congress found these preferences increase the likelihood an Indian child will be placed in "foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902. It is the "judicial duty to give faithful meaning to the language Congress

adopted in the light of the evident legislative purpose in enacting the law." *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 298 (2010).

Finally, even if Plaintiffs were correct that the placement preferences are not narrowly tailored, that would—at most—demand their severance. It would not justify the wholesale invalidation of the Act that the District Court ordered. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508-509 (2010) (courts should generally "sever[] any problematic portions [of a statute] while leaving the remainder intact").[12]

CONCLUSION

For the foregoing reasons and those discussed in the Nation's opening brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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[12] In any event, as the Federal Defendants have explained, it is doubtful that any Plaintiff has standing to challenge these placement preferences. *See* Federal Br. 19-22.

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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 February 19, 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 6,499 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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