Meeting Families Where They Are: Cultural Humility, Client Engagement, and Empowerment

Sheri Freemont, Casey Family Programs
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DISCUSSIONS ABOUT “RACE” ARE INHERENTLY SENSITIVE.
Silent Contemplation #1

• Being effective in serving child clients comes through years of experience.
Silent Contemplation #2

• Cultural connections for children begins when a child begins talking.
Silent Contemplation #3

Children should not have to live in stress and poverty and this should be considered in permanency decisions. (Best interest)
History of Indian Child Welfare

• Tribal people in communities, clans, societies, etc.

• Impact of colonization, genocide, starvation, and forced reservations systems.

• Assimilation – Boarding Schools. Adoption Placement. Relocation.

• Compounded trauma (Separation + trauma of loss of nationhood, culture)
Boarding Schools

Your son died quietly, without suffering, like a man. We have dressed him in his good clothes and tomorrow we will bury him the way the white people do.

CAPT. RICHARD H. PRATT, 1880
Impact on Indian Families

“I look to the future. I will sleep easy if I die if my children are prepared to meet the struggle that is coming when they must cope with the white settlers.”

Wajapa (Omaha, 1881)
Sheri Freemont Maternal Line
Relocation
Competency verse Humility

Cultural Humility: challenges us to *learn* from the people with whom we interact, reserve judgement, and bridge the cultural divide between our perspectives, in order to facilitate well-being, and promote improved quality of life.
Serving our Child Clients

• Engaging with our clients in *culturally-humble* and *trauma informed* ways

• A legal skill many of us haven’t been trained in

• What we are/represent to them as safe, educated, employed, agents of the traumatic experience.
Who decides a child’s culture?

- Not attorneys
- Not judges
- The families
- *Cultural Humility* is our greatest asset to serve in a trauma-informed, culturally respectfully and effective way.
ABA Model Rules of Professional Conduct

Rule 2.1 Advisor

Counselor

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.
Learning Humanity as a Litigator

• Some of us are great at this from the beginning
• Sometimes there is very little time to build communication with clients
• Practicing skills of counseling and listening
• Humility – knowing we have bias and our own views/values/experience impacts our work
Representing Intentionality

Where do we learn our cultures?
How can we help see these differences?
How can we help children and families see and identify cultural strengths?
Practice Ideas

Preparation
Awareness of Bias
Mind clearing
Writing
Forgiveness of our mistakes
Patience
Word choices
Listen and hear
Focus --- SAFETY, LONG TERM OUTCOMES related to values
Some Tips

Forgiveness of our mistakes

Preparation
Writing
Awareness of bias
Mind Clearing
Patience
Section 23.131 of the Proposed ICWA Regulations – Restrictions on the use of bonding and attachment

Overview

Section 23.131 of the proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings states that the “extraordinary physical or emotional needs of the child” may qualify as “good cause” to depart from the ICWA placement preferences, “provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement…”

In the ICWA Guidelines issued in February, the Bureau of Indian Affairs (BIA) explained its rationale for this provision. It noted that “‘good cause’ has been liberally relied upon to deviate from the placement preferences in the past.” It noted that state courts have not applied the placement preferences in circumstances where an Indian child has spent significant time with a family, even though the placement was made in violation of ICWA. Thus, this provision is included to “prevent such circumstances from arising…”

The proposed section acts as a preventive measure to encourage compliance with ICWA. Without this provision, those advocating for the departure from the placement preferences may be rewarded for the attachment or bonding that occurs from intentional or unintentional noncompliance with ICWA. Congress has determined that placing Indian children with their families, tribal members or other Indian families is in their best interest in most cases. If significantly more Indian children are placed in preferred placements by reason of this proposal, then many more children will have been placed consistent with their best interests.

Some adoption advocates are arguing that failing to consider attachment or bonding in ICWA cases will lead to decisions that are not in the best interests of Indian children. This argument is flawed in several respects:

1. It fails to acknowledge the problem that the BIA is seeking to address with the provision. Specifically, agencies and attorneys have sometimes thwarted ICWA’s placement preferences -- which Congress has found advance the best interests of Indian children -- by placing Indian children with non-preferred families, resisting efforts to move the child for an extended period even when a family member is available, and then justifying the initial improper placement by arguing bonding or attachment. When these arguments are successful, they incentivize non-compliance with the law and therefore promote placement insecurity for Indian children.

2. The adoption advocates’ argument assumes that the use of bonding and attachment is essential for a court to make decisions based upon the best interests of the child. This ignores two salient facts:

   a. Attachment theory (which is the underlying basis for the bonding/attachment criteria used by courts) is based squarely on Western (i.e., Euro-American)
cultural norms. The viability of its application outside that context, particularly in the context of indigenous cultures, has been questioned by a number of researchers and social scientists.

b. There has been increasing criticism of the use of bonding and attachment in child custody proceedings and serious questions raised about how probative such evaluations are for all children, not just Indian children.

3. The provision prevents consideration of “ordinary” bonding and attachment. Presumably, this would mean if there is some extraordinary situation above and beyond the usual relationship formed by a caregiver and child, this could be considered by a court.

Purpose of the Proposed Regulation – Legal Basis

As described above, the provision is a preventive measure to increase compliance with the ICWA. The United States Supreme Court has recognized bonding and attachment cannot be grounds to override the larger purposes that the Act which has been crafted to advance the best interests of Indian children. In Mississippi Band of Choctaw Indians v. Holyfield, the Court overturned a state court adoption three years later, stating that “[h]ad the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to ‘reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.’”

Bonding and Attachment in child welfare cases

Application of Bonding and Attachment theory in the Context of Non-Western Cultures

The theoretical assumptions and considerations in regard to attachment theory apply mainly to and were derived from studies of middle-class European and Euro-American parents from the twentieth century. Indeed, much of the traditional attachment research has often overlooked or downplayed the role of culture.

While studies are limited, those that have taken place have “reported inconsistencies of attachment security across cultures.” For example, scholars have questioned “the relevance of attachment theory to (Canadian) Aboriginal parents who do not adhere to the mother-infant dyad

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2 Cara Flanagan, Early socialization: sociability and attachment (1999); John W. Berry et al., Cross-Cultural Psychology: Research and Applications (1992).
4 Anemarie Huiberts et al., Connectedness with parents and behavioural autonomy among Dutch and Moroccan adolescents, 29 ETHNIC AND RACIAL STUDIES 315 (2006); Chia-Chih D. Wang & Brent S. Mallinckrodt, Differences between Taiwanese and US cultural beliefs about ideal adult attachment, 53 J. COUNSELING PSYCHOLOGY 192 (2006); Maureen E. Kenny et al., Self-image and parental attachment among late adolescents in Belize, 5 J. ADOLESCENCE 649 (2005); Fred Rothbaum et al., Attachment and culture: Security in the United States and Japan, 55 AMERICAN PSYCHOLOGIST 1093 (2000).
as the sole contributor to the child’s sense of security."⁵ Instead, those cultures emphasize a “multi-layered” set of bonds and a “dense network of relationships”.⁶ Studies have been made of similar cultures, including Australian aborigines and tribal people in Nigeria, which have concluded that an attachment network approach would be preferable in evaluating the quality of a child’s emotional health, as opposed to one basis upon a dyadic perspective.⁷

Caution in using bonding and attachment as a basis for making decisions about the long-term well-being of Indian children is confirmed by a study of resilience among American Indian adolescents in the Upper Midwest. For children who have been placed in foster care or adoptive placement, resilience is often a key quality that determines their successful transition. Resilience is the “capacity to face challenges and to become somehow more capable despite adverse experiences.”⁸ This study found that although higher levels of maternal warmth had a positive impact on resilience, the “strongest predictor of higher levels of resilience [for American Indian adolescents] was enculturation”, i.e., greater engagement with traditional culture.⁹ “The level of community support for pro-social outcomes” was also significantly associated with resilience, confirming earlier studies highlighting the importance of individuals such as community leaders and teachers.¹⁰

These studies are confirmed by anecdotal stories of Indian children who have been separated from their biological parents. American Indian children placed out of home, alumni of the foster care system and adult adoptees describe their experiences as a search for a connection to their culture, language and relatives during and after out of home placement, a search essential to developing positive self-esteem.¹¹

In short, the research on how attachment theory should be applied in different cultures is limited. Given that the theory is based almost entirely upon Western values and subjects, it must be employed in the context of Indian children with great caution. Studies such as the resilience study confirm that the framework for security in American Indian cultures is often based on an independency of family, culture, nature and spirituality. “Evidence-based” practices that may have shown promising results in one context do not automatically translate to positive results when applied to Indian children and families.

Limitations in the Application of the Attachment Theory in general

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⁵ Raymond Neckoway et al., Is Attachment Theory Consistent with Aboriginal Parenting Realities?, 3 First Peoples Child & Fam. Rev. 65 (2007).
⁶ Id.
⁷ Soo See Yeo, Bonding and Attachment of Australian Aboriginal Children, 12 Child Abuse Rev. 292 (2003).
⁹ Id.
¹⁰ Id.
Even aside from concerns about the application of attachment theory to American Indian children specifically, the scientific literature has raised concerns about the over-reliance on concepts of ordinary bonding or attachment in child custody proceedings in general. While there is certainly considerable literature about the significance of attachment theory, there is also significant research and scholarship which (1) reveals serious flaws in the use of bonding and attachment as practical tools in real-life child placement determinations by state courts; and (2) supports the notion that children can and do form multiple attachments and that having at least one secure attachment “buffers” a child from further developmental issues.

Use of Attachment Theory in Practice

Serious questions have been raised concerning the use of bonding and attachment to make child custody determinations. The concepts have been viewed by some judges and agency professionals as having “limitations” and “pitfalls” and of “limited use in juvenile and family court.”

Some of the reasons for these conclusions are that

- the terms are used loosely and have different meanings for mental health care professionals, attorneys, experts, and judges;
- attachment theory tends to divide child and caregiver relationships into a limited number of types (gradations in attachment exist but some view it as present or not with no middle ground);
- the terms do not explicitly address the issue of different child and caregiver temperaments;
- over-reliance on signs of attachment can result in social workers mistaking dependence for developmental progress;
- attachment and bonding focus on security-seeking aspects of a child’s relationship to a caregiver and disregard other important developmental needs;
- bonding studies assume that the bond with one adult does not change as the child develops, and
- the theory assumes that one primary attachment is the normative concept as opposed to recognizing that having several attachments may be healthier for the child.

They note also that when recommendations are made, often a distinction is not made (but should be) between “temporary emotional pain” and “permanent emotional damage.”

These observations are supported by the findings of researchers who have concluded that the “use of attachment-related assessments provides no improvement in the scientific foundation of child custody evaluation.” The researchers note that the use of attachment theory in practice has passed from the hands of researchers to “inexperienced users who in many cases believe that there is far more evidence about attachment than actually exists.” In essence, many judicial

13 Id.
14 Id.
16 Id.
decisions are based upon “misunderstandings of attachment theory and research” and “simplistic
approaches to this complex aspect of development.” This “popularized” version can lead to
analyses that tie all behavioral issues back to early childhood experiences, rather than recognizing
behavior as an ongoing process of adaptation.

Another researcher described the best interests test as “vague” and the system as “deeply
flawed” in part because of the “limited science” supporting these determinations. The researcher
further noted that the vagueness of the best interest concept leads to a “low scientific standard” for
expert testimony.

It is also worth noting that there is evidence that babies can and do form more than one
attachment relationship. As discussed previously, in indigenous communities it is often normal
to have multiple attachments and for less reliance to be placed upon an attachment with a single
caregiver. In addition, research shows that a secure attachment with at least one caregiver in early
childhood buffers a child from the poor development that might otherwise follow with insecure
attachment. Thus, such children are better able to deal with change in a placement than children
who have never had such an attachment.

Thus, while it is certainly true that there is some support for bonding and attachment as
bases for child custody decisions in the literature, it is incorrect to think of these principles as
sacrosanct. Indeed, there is reason to question about how often (as currently practiced in the
courtroom) the decisions that are based upon bonding and attachment are actually in the long-term
best interests of the children before the court, and specifically whether there is over-reliance by
courts upon a short-term evaluation of the quality of the child’s relationship with his or her
caregiver when making decisions with long-term implications for the child. Certainly, broad
generalizations regarding the impact of attachment and bonding theory upon a large population of
children should be viewed with great skepticism.

Application of the Regulation

The regulation prohibits the consideration of the ordinary attachment or bonding that
develops between a family and a child. If there is some extraordinary circumstance, e.g., a child
with special medical needs, the regulation does not preclude consideration of that extraordinary
circumstance. Thus, it is a carefully crafted regulation which balances the findings of the literature
above, the intent of the Indian Child Welfare Act as defined by Congress, and the needs of Indian
children.

17 Id.
19 Id.
21 See id.
Conclusion

The Bureau of Indian Affairs has proposed a regulation that would preclude classifying “ordinary bonding and attachment” occurring in a non-preferred placement as being the basis for a finding that the child has “extraordinary needs” that would justify a finding of “good cause” to place a child outside of the placement preferences. It has done this to encourage compliance with the placement preferences in the Act which Congress and the BIA have concluded will promote the best interests of Indian children in the vast majority of cases. This is an appropriate preventive measure that will result in more decisions in the best interests of Indian children, not fewer.

In addition, the literature suggests that the scientific validity of bonding and attachment as a component of the best interests test is weak, particularly as it is utilized in practice in the courtroom. Moreover, even if the test is viewed as having some probative value in the context of Caucasian children who are in family court, its application outside of the Euro-American culture from which it was derived has been seriously questioned as concepts of healthy emotional child development can vary significantly between cultures. For example, Native cultures tend to emphasize multiple caregivers, as opposed to the mother-infant dyad which is the focus of attachment theory.

For all of these reasons, the BIA’s proposed regulation in terms of bonding and attachment is defensible as a mechanism to promote compliance with the ICWA.

This paper was prepared by the Association on American Indian Affairs pursuant to a contract with Casey Family Programs.
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; QUINALT INDIAN NATION; MORONGO BAND
OF MISSION INDIANS,

Intervenor Defendants-Appellants

On Appeal from the United States District Court
for the Northern District of Texas, No. 4:17-CV-00868-O
Honorable Reed O’Connor

BRIEF OF THE AMICUS STATES OF CALIFORNIA, ALASKA, ARIZONA,
COLORADO, IDAHO, ILLINOIS, IOWA, MAINE, MASSACHUSETTS, MICHIGAN,
MINNESOTA, MISSISSIPPI, MONTANA, NEW JERSEY, NEW MEXICO, OREGON,
RHODE ISLAND, UTAH, VIRGINIA, WASHINGTON, AND WISCONSIN IN
SUPPORT OF THE UNITED STATES AND INTERVENOR TRIBES AND REVERSAL
January 14, 2019

Attorneys for Amicus Curiae

State of California

(Additional counsel listed on signature page)
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INTRODUCTION AND INTEREST OF AMICI STATES

The States of California, Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Virginia, Washington, and Wisconsin (Amici States) file this amicus curiae brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). Amici States urge the Court to preserve the Indian Child Welfare Act, 25 U.S.C. §§ 1901–63 (ICWA), a comprehensive statutory scheme designed to safeguard “the continued existence and integrity of Indian tribes” by protecting their greatest treasure—their children. 25 U.S.C. §§ 1901(3), 1902. ICWA is an appropriate exercise of Congressional powers and an important means of supporting Indian tribes and families, as well as strengthening state-tribal relationships.

ICWA plays a critical role in protecting the best interests of American Indian and Alaska Native children residing in Amici States, and supports the cultural integrity and survival of the tribes within their borders. The continued stability and security of Indian tribes are of vital importance to the Amici States, which are
home to eighty-five percent of the federally-recognized tribes in the United States\(^1\) and more than half of the overall American Indian and Alaska Native population.\(^2\)

ICWA also furthers important state-tribal relations. Amici States value their relationships with Indian tribes and have a strong interest in continuing to partner with tribal entities to protect the health and welfare of Indian children. Amici States work cooperatively with their tribal partners on child welfare matters to seek the best outcomes for Indian children. This interest is most significantly manifested by the statutory schemes of the Amici States that are predicated upon, have incorporated, or supplement the federal ICWA. Amici States California\(^3\),


Alaska, Colorado, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, New Mexico, Oregon, Utah, Washington, and Wisconsin have enacted statutes, regulations, and rules governing state court proceedings.

7 Iowa Code Ann. §§ 232B.1-.14.
11 Minn. Stat. §§ 257.0651, 260.755, subds. 2a & 17a, 260.761, subd. 2(d), 260B.163, subd. 2, 260C.168, 260D.01(g); Minn. R. 9560.0040, subp. 2, .0221, subp. 3, .0223, .0535, subps 2, 4, .0542, .0545, subp. 1, .0606, subp. 1.
17 Wis. Stat. § 48.028.
proceedings incorporating the requirements of ICWA. California,\textsuperscript{18} Illinois,\textsuperscript{19} Maine,\textsuperscript{20} New Mexico,\textsuperscript{21} and Washington\textsuperscript{22} have also enacted detailed procedures relating to state agency collaboration with tribes in custody proceedings relating to Indian children. Based on Amici States’ experience, ICWA provides a productive framework to further the best interests of Indian children, preserve the Indian family unit, and promote productive government-to-government relationships between states and tribes. The district court’s opinion invalidating ICWA significantly harms all of the above interests of Amici States, is based on fundamental errors of law, and should be reversed.


\textsuperscript{19} Ill. Dep’t of Children and Fam. Svcs, Proc., §§ 307.10, .15, .20, .25, .30, .35, .40, .45.

\textsuperscript{20} Me. Dep’t of Health and Hum. Svcs., Off. of Child and Fam. Svcs. Policy, § III (A) (Effective 2/1/2016).


ARGUMENT

I. ICWA IS AN APPROPRIATE EXERCISE OF CONGRESS’ PLENARY POWER TO LEGISLATE IN THE FIELD OF INDIAN AFFAIRS.

The district court’s opinion misapprehends the trust relationship between the federal government and sovereign tribes and fails to accord the proper deference to Congress’ broad authority to adopt statutes like ICWA in this context. Native American tribes and nations have a unique status in their relationships with both the federal government and the states comprising the United States. Native American tribes have been described by our Supreme Court as “domestic dependent nations,” *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831); “wards” of the United States, *id.*; “quasi-sovereign nations,” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978); “distinct, independent political communities,” *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (citation omitted); and “unique aggregations possessing attributes of sovereignty over both their members and their territory,” *United States v. Wheeler*, 435 U.S. 313, 323 (1978). This relationship imposes upon Congress “moral obligations of the highest responsibility and trust.” *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The judiciary has consistently recognized Congress’ constitutional authority to define the trust relationship through various federal statutes. See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) (recognizing “the organization and management of the trust is a sovereign function subject to
the plenary authority of Congress”). A key part of those obligations is a duty to respect tribal sovereignty, and Congress does so by protecting tribal resources. See United States v. Mitchell, 463 U.S. 206, 224–25 (1983) (stating federal government’s duty to manage Indian forests and property for benefit of Indians “is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people”); see generally Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 Utah L. Rev. 1471 (1994). ICWA reflects Congress’ determination that, if it is important to protect a tribe’s material resources, it is vastly more important to protect a tribe’s children, which Congress found to be vital to tribes’ continued existence and integrity. See 25 U.S.C. §§ 1901(2), (3).

The Constitution vests Congress with “plenary power to legislate in the field of Indian affairs.” United States v. Lara, 541 U.S. 193, 200 (2004). This plenary power includes the ability to regulate the relationship between states and tribes. This power derives from Congress’ enumerated powers to enact treaties (U.S. Const. art. II, § 2, cl. 2) and the tri-partite Commerce Clause (U.S. Const. art. I, § 8, cl. 3), by which Congress is vested with authority to regulate commerce among the states, with foreign entities, and with Indian tribes. See Lara, 541 U.S. at 200 (citing the Indian Commerce Clause and the Treaty Clause as the sources of Congress’ “broad general powers to legislate in respect to Indian tribes”). The
Supreme Court has recognized the federal government’s power to intervene on behalf of tribes to protect their integrity, resources, and sovereignty. See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) and Morton v. Mancari, 417 U.S. 535, 555 (1974), discussed infra. ICWA is comfortably within these broad powers.

The power Congress exercised in enacting ICWA is analogous to the power it has exercised in other cross-jurisdictional family law legislation involving multiple sovereigns, such as the Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901-54. That law similarly imposes burdens on state family law courts, see, e.g., id. § 14932, but is necessary to implement the treaty obligations of the United States to the other signatories of the Hague Convention. See Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption, Art. 4, May 29, 1993, 32 I.L.M. 1134 (requiring specific findings of the court finalizing the intercountry adoption of a child). Likewise, ICWA implements obligations the United States has undertaken to the sovereign tribes through treaties and statutes. Many of the treaties the United States has implemented with tribal nations contain language by which the United States assumes responsibility to protect tribal resources and redress “depredations” committed against the tribe. See, e.g., Treaty with the Cheyenne and Arapaho, October 14, 1865, Art. I, 14 Stat. 703. Further, in such treaties Congress often specifically undertakes obligations
for the welfare of American Indian and Alaska Native children. See, e.g., Treaty with the Navajo, 1868, Art. 6, 15 Stat. 667 (providing a schoolhouse and elementary teacher for every 30 Navajo children between the ages of 6 and 16). Congress has undertaken, through treaties, special obligations to American Indian tribes, including American Indian and Alaska Native children.

II. **ICWA IS A CONSTITUTIONAL STATUTE.**

ICWA is an effort by Congress to fulfill its responsibility to help ensure the ability of tribes to self-govern—indeed, to continue to exist—and has been successfully implemented across the country and in the Amici States over the last forty years. Far from impeding states’ ability to protect the best interests of children whose welfare may be at risk from alleged abuse or neglect, ICWA has been recognized as the “gold standard” of child welfare practices. See Brief of Casey Family Programs, et al. as Amici Curiae in Support of Respondent Birth Father, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 2013 WL 1279468 at *2-3 (March 28, 2013). Congress correctly identified the need to address child welfare practices that threatened the very existence of American Indian and Alaska Native tribes by separating Indian children—current and future tribal members—from their families, tribes, and cultures. Congress’ response in enacting ICWA is a permissible exercise of its obligation to tribes that does not violate the anti-commandeering doctrine of the Tenth Amendment or Equal Protection principles.
A. ICWA Does Not Violate the Tenth Amendment’s Anti-Commandeering Rule.


The anti-commandeering doctrine serves vital interests by preventing Congress from issuing commands to state legislatures, or conscripting state executive officials to enforce federal policy. *Printz v. United States*, 521 U.S. 898, 925 (1997). But it does not apply here, where Congress merely requires state courts to enforce federal law and prohibits state courts from infringing on federally created rights. “Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause.” *New York*, 505 U.S. at 178–79; *see also Printz*, 521 U.S. at 906–08 (noting statutes enacted by the earliest Congresses demonstrate the Founders understood the Constitution to permit
“imposition of an obligation on state judges to enforce federal [laws]”) (emphasis in original).

ICWA’s provisions are consonant with the principles set forth in Murphy, New York, and Printz. In enacting ICWA, Congress established “minimum Federal standards” that “protect the best interests of Indian children and . . . promote the stability and security of Indian tribes and families.” 25 U.S.C. § 1902. Congress’ plenary authority to legislate in the field of Indian affairs empowers it to confer the rights set forth in ICWA on Indian tribes, Indian children, and their parents, as discussed supra. ICWA confers upon Indian children and parents the right to have tribal membership considered when children’s placements are changed23 and the right to culturally appropriate reunification services.24 The statute confers upon Indian tribes rights to receive notice of such proceedings25 and to have their voices heard in them,26 as well as a preference for their members and potential members to be placed in homes where these young people can be exposed to their tribal culture and help ensure the tribes’ continued existence.27 The anti-commandeering doctrine does not bar Congress from issuing directives to state

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courts to protect these kind of federal rights in the field of Indian affairs. Cf. 

Understanding these principles, in National Council for Adoption v. Jewell No. 1:15-CV-675, 2015 WL 12765872, at *7 (E.D. Va. Dec. 9, 2015), judgment vacated as moot on joint motion of parties, No. 16-1110, 2017 WL 9440666 (4th Cir. Jan. 30, 2017) (Jewell), the only other decision addressing ICWA and commandeering, the court explained that even state rules of practice and procedure can be prescribed by federal law, when those prescriptions are adequately limited. Jewell applied to ICWA New York’s principle that Congress can require state courts to enforce federal laws. The court further held those courts’ actions can be limited by federal standards designed to ensure vindication of the rights created in ICWA:

Just as Congress may pass laws enforceable in state courts, Congress may direct state judges to enforce those laws. [New York, 505 U.S. at 178.] Where a state court is applying the rights and protections provided for by ICWA the federal government can act to prevent state “rules of practice and procedure” from “dig[ging] into substantive

Congress is empowered to make these rights real by requiring state courts—which (along with tribal courts) are the forums for child custody matters—to enforce them, and by forbidding state courts from striking a balance different from that crafted by Congress regarding Indian children.

Further, ICWA applies to both state and private actors. Murphy, 138 S. Ct. at 1478 (“The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.”); see, e.g., Reno v. Condon, 528 U.S. 141, 151 (2000) (holding the Tenth Amendment does not bar Congress from regulating states along with other participants in commercial data marketplace); Garcia v. San Antonio, 569 U.S. 528, 556 (1985) (holding the Tenth Amendment does not bar Congress from applying minimum wage and overtime requirements to state as well as private actors). The district court incorrectly characterized ICWA’s placement provisions as applying only when the state initiates an adoptive, preadoptive, or foster care

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28 See also Quinn v. Walters, 881 P.2d 795, 811–12 (Or. 1994) (Unis, J., dissenting) (arguing ICWA Guidelines’ requirement that trial court make pretrial inquiry of child’s status as “Indian child” was aligned with principle that “if the state procedural rule is regarded as unduly restricting a litigant’s opportunity to assert his or her federal claim, it may be displaced by federal standards”) (citing Dice v. Akron, C. & Y.R. Co., 342 U.S. 359, 363 (1952); Brown v. Western R. of Alabama, 338 U.S. 294, 296 (1949)).
placement. See Slip Op. at 36 (citing 25 U.S.C. §§ 1915(a)-(c)). In fact, the placement preferences state courts must apply are equally applicable to custody changes initiated by private parties. See 25 U.S.C. § 1915(a) (requiring “[i]n any adoptive placement of an Indian child under State law,” the placement preferences must be followed) (emphasis added); see, e.g., S.S. v. Stephanie H., 388 P.3d 569, 574 (Ariz. Ct. App. 2017) (applying ICWA to a private abandonment and step-parent adoption proceeding, stating “Congress did not intend that ICWA would apply only to termination proceedings commenced by state-licensed or public agencies . . . ”); Matter of Adoption of T.A.W., 383 P.3d 492, 501–02 (Wash. 2016) (holding the provisions of ICWA apply to stepparent adoption cases); In re N.B., 199 P.3d 16, 20 (Colo. App. 2007) (holding ICWA applies to stepparent adoption cases). The applicability of ICWA to activities in which both state and private actors engage severely undercuts any argument that it unconstitutionally commandeers the states.

An example illustrates this point. The district court found significant to its commandeering analysis that ICWA requires state agencies to provide notice of matters involving Indian children to several entities. See Slip Op. at 5 (citing 25 U.S.C. § 1912). But these notice requirements apply to “any involuntary proceeding in State court,” 25 U.S.C. § 1912(a) (emphasis added), and are not limited to those initiated by public agencies. See Abigail Boudewyns, et al.,
Thus, ICWA imposes notice requirements on anyone seeking adoptive or foster care placement, including private parties.

In short, all of the provisions at issue either (1) impose requirements on state courts to ensure the enforcement of federal rights, and/or (2) impose requirements on parties to child custody proceedings—requirements that apply to both private and public parties. These provisions do not unconstitutionally commandeer state governments.

B. ICWA Does Not Violate Equal Protection Principles.

The district court also erred in holding “ICWA relies on racial classifications.” Slip Op. at 26. Decades of Supreme Court precedent recognize federal laws that treat Indians differently are not based on suspect classifications but are based, instead, on political classifications and therefore are constitutional. See, e.g., Mancari, 417 U.S. at 552-55 (upholding hiring preference for Indians, finding the “preference does not constitute ‘racial discrimination’” because it does not apply “to Indians as a discrete racial group but, rather, as members of quasi-

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29 Relatedly, ICWA defines a “foster care placement” as “any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand,” 25 U.S.C. § 1903(1)(i) (emphasis added), and does not limit this definition to actions initiated by state authorities.
sovereign tribal entities”); United States v. Antelope, 430 U.S. 641, 646 (1977) (upholding tribal court criminal jurisdiction over Indian defendants’ crimes against non-Indians: “[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a “‘racial’ group consisting of ‘Indians’. . . .” (quoting Mancari, 417 U.S. at 533 n.24)); see also Washington v. Confederated Tribes & Bands of the Yakima Nation, 439 U.S. 463, 499–502 (1979) (upholding provision treating Indians residing in “Indian Country” differently than non-Indians with respect to both civil and criminal tribal court jurisdiction); Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 479–80 (1976) (affirming exemption from state taxes for Indians residing on reservation); Fisher v. Dist. Ct. of Sixteenth Jud. Dist., 424 U.S. 382, 390–91 (1976) (recognizing exclusive jurisdiction in tribal court over adoption proceedings regarding tribal members even before ICWA was enacted).

In the seminal Mancari case, the Supreme Court upheld a Bureau of Indian Affairs (BIA) hiring preference for Indian applicants over non-Indian applicants, finding no violation of the Fifth Amendment. Mancari, 417 U.S. at 552–55. The Mancari Court determined the BIA’s preference did not violate equal protection
because the classification was not racial in nature and the special treatment of Indians was “reasonable and rationally designed to further Indian self-government.” *Id.*

Like the hiring statute in *Mancari*, ICWA’s definition of “Indian child” is tied directly to the child’s tribal citizenship: To be covered by the statute, a minor must either be “a member of an Indian tribe or . . . eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4). This definition is a political, rather than racial, classification because it distinguishes American Indians and Alaska Natives based not on their race or ethnicity but, instead, on their membership or eligibility for membership (if their parent is a tribal member) in “political communities.” *Antelope*, 430 U.S. at 646. In fact, ICWA’s definition of “Indian child” is more specifically tied to tribal membership than the hiring language at issue in *Mancari* because it contains no specific blood quantum requirement. The hiring preference in *Mancari* required that “to be eligible for preference . . . an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.” *Mancari* at 553 n.24 (emphasis added).

Similarly, this Court upheld a federal regulation exempting a church whose membership was limited to “Native American members of federally recognized tribes who have at least 25% Native American ancestry” from the generally
applicable prohibition on peyote use. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991). The court held the regulation was not impermissible under the Equal Protection clause because it represented a “political classification . . . rationally related to the legitimate governmental objective of preserving Native American culture.” *Id.* ICWA, on the other hand, contains no separate or additional blood quantum requirement and relies solely on tribes’ decisions regarding membership and eligibility for membership if the child is the “biological child of a member of an Indian tribe.” 42 U.S.C. § 1903(4)(b). *A fortiori,* it does not offend Equal Protection principles.

There are several factors underscoring the political nature of tribal membership. First, individuals voluntarily decide whether to assert (or renounce) their tribal membership. *See Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005) (“[Petitioner] has chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe. His Indian status is therefore political, not merely racial.”). Additionally, tribes have the sole discretion to accept or reject individuals as tribal members. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (explaining federal court lacked jurisdiction regarding tribe’s membership determination because “[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”) (citation omitted). Finally, the group of
American Indians and Alaska Natives who are members of or eligible for membership in a federally recognized tribe is a subset of the group of people who are American Indian or Alaska Natives by ancestry or descent. *Mancari*, 417 U.S. at 553 n.24 (recognizing, where “Indian” means “members of ‘federally recognized’ tribes[,] this operates to exclude many individuals who are racially classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”).

Once Congress’ use of tribal membership to determine ICWA’s applicability is viewed in the correct (non-racial) light, the reason for its decision to adopt ICWA is evident, and the statute easily survives rational basis review. In enacting ICWA, Congress acknowledged a disproportionate number of Indian children were being removed from their homes—and, ultimately, the parental rights of Indian parents were being terminated—because of state social workers’ ignorance of “Indian cultural values and social norms,” misevaluations of parenting skills, unequal considerations of such matters as parental alcohol abuse, and other cultural biases. H.R. Rep. No. 95-1386 (1978) at 10. It was in light of this evidence that Congress, “concerned with the rights of Indian families and Indian communities vis-à-vis state authorities,” adopted ICWA. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1988). A national standard promulgated through federal legislation was needed because Congress “perceived the states and their
courts as partly responsible for the problem it intended to correct.” *Id.* (citing 25 U.S.C. § 1901(5)); *see also* 124 Cong. Rec. 38,103 (1978) (ICWA sponsor Rep. Morris Udall stating “state courts and agencies and their procedures share a large part of the responsibility” for the uncertain future threatening the “integrity of Indian tribes and Indian families”). As explained above, ICWA has been a useful tool in combating cultural bias in custody proceedings and furthering the important goal of tribal sovereignty.

Moreover, even if, contrary to decades of Supreme Court precedent, the district court was correct that ICWA’s reliance on membership in an Indian tribe constituted a racial classification, ICWA would still survive strict scrutiny by being “narrowly tailored to further a compelling governmental interest.” *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). The federal government has trust obligations with regard to Indian tribes, which emanate both from the Constitution (*see, e.g., Antelope*, 430 U.S. at 645–49 (“classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government’s relations with Indians”)) and the treaties signed with Indian tribes to acquire their lands (*see, e.g., Treaty with the Navajo, 1868, Art. 6, 15 Stat. 667*). These trust obligations give rise to a compelling federal interest in protecting the integrity of Indian families and the sovereignty of tribal communities from ignorant and problematic child
welfare practices that threatened the future of Indian tribes. Indeed, as discussed above, the legislative history of ICWA makes the compelling interest clear; it was because of this historical trust relationship—and in recognition that a nationwide remedy was necessary to redress biased state child welfare practices—that Congress enacted ICWA. Holyfield, 490 U.S. at 44–45.

ICWA is narrowly tailored to cover neither too many nor too few people to further this compelling interest. The district court interpreted the statute’s preference for placement with “other Indian families” as treating “all Indian tribes as an undifferentiated mass.” Slip Op. at p. 28 (citing United States v. Bryant, 136 S. Ct. 1954, 1968 (2016) (Thomas J., concurring)). In fact, by including placement with “other Indian families” as a possibility within the list of possible priority placements, Congress appropriately accommodated the best interests of an Indian child who may be best served by such a placement.30 In enacting ICWA, Congress was not merely protecting the ability of sovereign tribes to continue to exist and thrive but was doing so in response to the existential threat posed by unwarranted

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30 Specifically allowing placement with “other Indian families” was another way to combat Congress’ concern that white middle class standards were being applied by state and private foster care or adoptive placement agencies to foreclose placements with Indian families to the detriment of Indian children. See H.R. Rep. No. 95-1386 (1978) at 9-11 & 24 (discussion the importance of using standards prevailing in the Indian community when establishing placement preferences to help avoid the problem of Indian children who “have to cope with the problems of adjusting to a social and cultural environment much different than their own”).
removal of Indian children from their parents and cultures. H.R. Rep. No 95-1386 (1978) at 10 (explaining ICWA was necessary because “many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life.”). Therefore, Congress not only needed to consider the needs of tribes but also had to consider an appropriate scheme for establishing the best interests of Indian children, as the child’s best interest is the touchstone of child welfare law.\(^\text{31}\) See, e.g., 42 U.S.C. § 621(a) (stating the purpose of federal-state cost sharing child welfare program is to ensure “all children are raised in safe, loving families by . . . protecting and promoting the welfare of children”). Congress rationally concluded placing an Indian child with an Indian family, even from a different tribe, could better help the child maintain ties with Indian culture than placement with a non-Indian family. See Quinn, 881 P.2d at 810. Congress enacted ICWA to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or

\^\text{31} Courts have noted that “[u]nder the ICWA, what is best for the ‘Indian child’ is to maintain ties with the Indian tribe, Indian culture, and Indian family.” Quinn v. Walters, 881 P.2d 795, 810 (Or. 1994) (citing Holyfield, 490 U.S. at 50 n. 24).
institutions which will reflect the unique values of Indian culture.” H.R. Rep. No. 95-1386 (1978) at 8.

As this Court has held, ICWA’s goal of “preserving Native American culture” is a “legitimate governmental objective.” *Peyote Way*, 922 F.2d at 1216. A robust body of research shows “identification with a particular cultural background and a secure sense of cultural identity is associated with higher self-esteem [and] better educational attainment . . . and is protective against mental health problems, substance use, and other issues.” 32 Conversely, forcing children to be part of a cultural group different from the one into which they were born is associated with increased risk of suicide, substance use, and depression among American Indians and Alaska Natives. *Id.* This is especially so where being separated from a cultural group also results in alienation from the benefits of citizenship in a tribe. ICWA encourages “child welfare agencies [to] partner with Native agencies and community-based providers to incorporate cultural values, traditions, spirituality, and kinship practices in services,” helping Indian children’s “successful transition into adulthood.” 33  *In re Baby Boy D.*, 742 P.2d 1059, 1075 (Okla. 1985) (Kauger,

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J., concurring in part, dissenting in part) (recognizing the “significant social and psychological problems among Indian children placed in non-Indian homes”).

Additionally, the district court improperly found that ICWA is “broader than necessary because it establishes standards that are unrelated to specific tribal interests and applies those standards to potential Indian children.” Slip Op. at p. 28. ICWA’s definition of “Indian child”—which includes an unmarried person under the age of eighteen who is “eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe,” 42 U.S.C. § 1903(4)(b)—is consistent with tribal membership requirements and the practical limitations on children’s ability to apply for membership. Membership in an Indian tribe is not necessarily automatic, often requiring putative members to take affirmative action to become members. Thus, Congress specifically extended ICWA protections to children who are eligible for membership (but not yet members) to ensure their

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34 Further, to the extent the district court found ICWA’s placement preference for placement with “other Indian families” over placement with non-Indian families unconstitutional, it should have excised only the unconstitutional portion of the placement preference, rather than invalidating the entire statute. See e.g., Booker v. U.S., 543 U.S. 220, 258 (2005) (holding that courts “must refrain from invalidating more of the statute than is necessary”).

35 See, e.g., Modoc Tribe, Tribal Enrollment, https://tinyurl.com/ya3vc7nb (requiring applicants to submit “documented proof of ancestry”); see generally Tanana Chiefs Conf., Tribal Enrollment, https://tinyurl.com/yatbj4m2 (describing enrollment process for Alaska tribes, including providing documentation of lineal descent from member of tribe).
inability to take those steps did not prejudice them. H.R. Rep. (1978) 95-1386 (1978) at 17 (recognizing a minor child “does not have the capacity to initiate the formal, mechanistic procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom”). Applying ICWA to children who are eligible for membership and the biological child of a member recognizes that an Indian child’s rights should be protected even if the child is limited in his or her ability (due to his or her age) to register as a tribal member.36 This provision does nothing to change the fundamentally political nature of an American Indian or Alaska Native child’s membership, which is the focus of ICWA and key to the constitutional analysis.

III. ICWA IS A CRITICAL TOOL THAT FOSTERS STATE-TRIBAL COLLABORATION IN ORDER TO IMPROVE THE HEALTH AND WELFARE OF INDIAN CHILDREN.

ICWA creates an important framework that has allowed robust state-tribal collaboration on the shared interest in improving the health and welfare of Indian children. Amici States have employed ICWA as a means of strengthening and deepening their important, government-to-government relationships with tribes in this critical area. ICWA authorizes states and tribes to “enter into agreements with

36 See H.R. Rep. No. 95-1386 (1978) at 17 (citing, inter alia, Stephens v. Cherokee Nation, 174 U.S. 445 (1899)) (explaining that including children who are eligible for tribal membership as well as actual members is important because “Indian children . . . because of their minority, cannot make a reasoned decision about their tribal and Indian identity”).
care in Utah are placed with relatives.\textsuperscript{44} This is consistent with broader studies showing that in states where a high percentage of placements of Indian children are made in accordance with ICWA’s placement preferences, there is a correspondingly high level of state-tribal cooperation in working with Indian families and children.\textsuperscript{45}

Amici States’ experience has shown adherence to ICWA’s standards—in particular, its requirement that active efforts be made to preserve the family—reduces unwarranted removals of children from their Indian homes, removals that have been found to have profound negative short- and long-term effects on children.\textsuperscript{46} ICWA’s mandate that parties make “active efforts” to “provide remedial services and rehabilitative programs designed to prevent the breakup of

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\textsuperscript{46} See, e.g., Vivek S. Sankaran & Christopher Church, \textit{Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care}, 19 U. Penn. J. of L. and Soc. Change 207, 211–13 (2016) (citing studies showing foster home placement and multiple successive non-familial caregivers negatively impact children’s ability to form healthy attachments, capacity for social and emotional functioning, adaptive coping, self-regulation, decision making, ability to develop secure attachments, and maintenance of healthy relationships); see also part II.B., \textit{supra} (explaining ICWA’s important role in facilitating an Indian child’s ability to retain cultural ties).
\end{flushright}
the Indian family,” 25 U.S.C. § 1912(d), is working. While studies show disparities still exist in child removals, those disparities are significantly lower than the rates before ICWA. For example, in Utah, in 1976, an Indian child was 1,500 times more likely to be in foster care than a non-Indian child; that disparity dropped to 4 times by 2012. In short, ICWA provides a valuable tool for Amici States to both further Indian children’s best interests and protect tribal sovereignty through partnerships with Indian tribes.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court’s order granting plaintiffs’ motions for summary judgment.

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Dated: January 14, 2019

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I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4, because it contains 6,218 words, according to the count of Microsoft Word. I further certify that this brief complies with typeface requirements of Rule 27(d)(1)(E) because it has been prepared in 14-point Times New Roman font.

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I certify that on January 14, 2019, the foregoing Brief of the Amicus States of California, Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Virginia, Washington, and Wisconsin in Support of the United States and Intervenor Tribes and Reversal was served electronically via the Court’s CM/ECF system upon all counsel of record.

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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  

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

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CERTIFICATE OF INTERESTED PERSONS

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.

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2. Oneida Nation (Intervenor-Defendant)
3. Quinault Indian Nation (Intervenor-Defendant)
4. Morongo Band of Mission Indians (Intervenor-Defendant)
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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)

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49. Hon. Reed O’Connor, United States District Judge, Northern District of Texas

s/ Adam H. Charnes
Attorney for Appellants
REQUEST FOR ORAL ARGUMENT

In this case, the district court found unconstitutional a 40-year-old federal law, the Indian Child Welfare Act. Given the importance of the statute to Indian tribes and communities, the decades-long reliance on the statute as a central feature of state-court child-welfare proceedings, and the presumption of constitutionality of congressional enactments, Appellants Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians respectfully request oral argument.

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INTRODUCTION

Forty years ago, Congress enacted the Indian Child Welfare Act (“ICWA”), 25 U.S.C. §§ 1901-1963, to remedy an unconscionable crisis: the prevalence of abusive child-welfare practices by states and private agencies that separated a large percentage of Indian children from their families and tribes. Exercising its plenary power over Indian affairs, and fulfilling its “moral obligations of the highest responsibility and trust” to Indians and tribes,\(^1\) Congress adopted “minimum Federal standards,” applicable in state courts, “for the removal of Indian children from their families.” § 1902.\(^2\) ICWA dramatically succeeded in improving the lives of Indian children and maintaining their relationships with their families, tribes, and communities. Indeed, child-welfare organizations now consider ICWA’s substantive and procedural requirements to represent the “gold standard” for child-welfare practices.

The district court’s decision that ICWA is unconstitutional, if affirmed, will overturn that success. Bypassing binding Supreme Court

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\(^2\) Unless otherwise noted, all statutory citations are to 25 U.S.C.
authority, the district court granted Plaintiffs summary judgment on four of their claims. The decision was erroneous. The Individual Plaintiffs lack standing to assert their claims, leaving no plaintiff with standing to assert an equal protection violation. Moreover, the district court’s equal protection, commandeering, and non-delegation holdings ignore settled Supreme Court precedent, and its invalidation of the challenged regulations misapplies basic administrative law principles. ICWA is constitutional, and this Court should reverse.

**JURISDICTIONAL STATEMENT**

The Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (the “Tribes”), intervenor-defendants below, appeal from the October 4, 2018 final judgment. (ROA.4055.) The Tribes filed a timely notice of appeal on November 19, 2018. (ROA.4458-59.) The Federal Defendants filed a timely notice of appeal on November 30, 2018. (ROA.4762.) This Court has jurisdiction under 28 U.S.C. § 1291. This Court stayed the judgment below.

ISSUES PRESENTED

1. Do the Individual Plaintiffs have standing in the absence of either an injury-in-fact or redressability?

2. Do ICWA and the regulations issued by the Department of the Interior violate equal protection when Supreme Court precedent has definitively and consistently held that “Indian” is a political, not racial, classification?

3. Does ICWA unconstitutionally commandeer the states when it merely imposes substantive and procedural requirements on state courts, which the Supreme Court has held are not subject to anti-commandeering principles, and alternatively when ICWA’s mandates are permissible under the Spending Clause?

4. Does ICWA, which merely reaffirms inherent tribal sovereign authority, violate the Non-Delegation Doctrine even though Congress is permitted to delegate to Indian tribes?

5. Do Interior’s regulations violate the APA when the agency possessed statutory authority to promulgate the Final Rule, provided a reasoned explanation for doing so, and is owed deference with respect to its reasonable placement-preference regulation?
STATEMENT OF THE CASE

A. The Indian Child Welfare Act

In 1978, Congress passed ICWA in response to “rising concern … over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.” Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989). The congressional findings “make[] clear that the underlying principle of [ICWA] is in the best interest of the Indian child.” H.R. Rep. No. 95-1386, at 19 (1978) (“House Report”). Congress largely succeeded in crafting a law that protects Indian children, families, and tribes, as ICWA is regarded as the “gold standard” of child-welfare practices.3

1. The need to protect Indian children, families, and tribes.

ICWA resulted from years of congressionally commissioned reports and wide-ranging testimony taken from “the broad spectrum of concerned parties, public and private, Indian and non-Indian.” House

Report at 28. Congress enacted ICWA after determining that state and private child-welfare agencies were removing American Indian children from their families at alarming rates—far disproportionate to those of non-Indian families. Specifically, Congress determined that upwards of one-third of Indian children had been removed from their families, Holyfield, 490 U.S. at 32, and that these removals were “often unwarranted,” § 1901(4); see House Report at 10. Approximately 90 percent of Indian children removed from their families were placed in non-Indian homes. Holyfield, 490 U.S. at 33. These removals not only harmed the children, who often had serious adjustment problems, but they also unsurprisingly had a devastating impact on parents and tribes. Id. Congress was concerned that, should these removals continue, tribes would be unable to continue as self-governing political communities. Id. at 34-35.

Congress concluded that “the States and their courts [were] partly responsible for the problem it intended to correct.” Id. at 45. State courts often removed Indian children without proof that their parents were unfit. Parents were denied fundamental due process when their children were taken by state agencies. In fact, parents were rarely
represented by counsel or given notice of hearings. House Report at 11. Further, in removing Indian children, state officials “fail[ed] ... to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.” Id. at 19. Child-welfare officials were “at best ignorant of [Indian] cultural values, and at worst contemptful of the Indian way.” Holyfield, 490 U.S. at 35.

2. **ICWA and the Final Rule**

ICWA “seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society ... by establishing ‘a Federal policy that, where possible, an Indian child should remain in the Indian community.’” Id. at 37 (quoting House Report at 23). ICWA is implemented by state courts with the intention “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.” § 1902.

ICWA does not apply to every child who is racially Indian. Instead, the law defines “Indian child” as a child who is either (a) an
enrolled member of a federally recognized tribe or (b) eligible for membership in, and is the biological child of a member of, a federally recognized tribe. § 1903(4).

ICWA’s provisions apply to four types of state child-custody proceedings: (1) foster-care placement; (2) termination of parental rights; (3) preadoptive placement; and (4) adoptive placement. § 1903(1). ICWA requires notice to parents and the child’s tribe, court-appointed counsel to indigent parents, and the testimony of a qualified expert witness before a court can place a child in foster care or terminate parental rights. § 1912(a), (b), (e). ICWA also permits a parent to challenge a voluntary consent to adoption upon a showing of improper removal or fraud, § 1913(d), or a termination of parental rights in violation of ICWA, § 1914. Finally, when children are removed due to an emergency, ICWA mandates their return to their homes once the emergency has passed. § 1922.

Central to ICWA’s protections are its placement preferences, which (except when there is good cause to order otherwise) require courts to place Indian children in adoptive or foster-care homes with a member of the child’s extended family (whether or not Indian), a
member of the Indian child’s tribe, or other Indian families. § 1915(a), (b). Congress enacted these preferences in response to “evidence of the detrimental impact on the children themselves of ... placements outside their culture.” *Holyfield*, 490 U.S. at 49-50. Congress also contemplated that an Indian child’s tribe could establish under tribal law a different order of preference. § 1915(c).

In 2016, the Department of the Interior promulgated ICWA regulations ("Final Rule"). Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (codified at 25 C.F.R. pt. 23). Interior intended the Final Rule to bring nationwide consistency to the implementation of ICWA—a goal supported by states, tribes, and child-welfare organizations. Id. at 38,782. Interior noted that similarly situated Indian children and their parents in different states received inconsistent treatment, contrary to Congress’s goal of “minimum Federal standards.” § 1902. The Final Rule clarifies, *inter alia*, when ICWA applies, when a state court is required to provide notice of a child-custody proceeding to parents and the child’s tribe, and what constitutes good cause to deviate from the placement preferences. 25 C.F.R. §§ 23.103, 23.111, 23.129-23.132. In many respects, the Final
Rule adopts consensus state approaches as the national standards. 81 Fed. Reg. at 38,779.

B. This litigation.

Texas, Louisiana, and Indiana (“State Plaintiffs”) and seven Individual Plaintiffs brought this action seeking to declare key sections of ICWA unconstitutional and invalidate the Final Rule. (ROA.43-101.) The Individual Plaintiffs are (1) Chad and Jennifer Brackeen, the adoptive parents of A.L.M., who live in Texas, (2) Nick and Heather Libretti, foster parents of Baby O., who live in Nevada, (3) Altagracia Soccorro Hernandez, birth mother of Baby O., who lives in Nevada, and (4) Jason and Danielle Clifford, foster parents of Child P., who live in Minnesota. A.L.M., Baby O., and Child P. each qualifies as an “Indian child” under ICWA (ROA.580-81), but none is a party to this case.

The Individual Plaintiffs and State Plaintiffs filed a joint second amended complaint (“Complaint”) alleging seven claims under the Constitution and the APA. (ROA.579-716.) All Plaintiffs alleged that sections 1901-23 and 1951-52 of ICWA violate the Commerce Clause (ROA.641-44); that ICWA, the Final Rule, and 42 U.S.C. §§ 622(b)(9) and 677(b)(3)(G) violate the Tenth Amendment (ROA.644-51); and that
ICWA’s adoptive preferences and provisions governing vacature for fraud and duress violate equal protection (ROA.651-54). The State Plaintiffs alleged that ICWA and the Final Rule violate the Non-Delegation Doctrine. (ROA.660-61.) Plaintiffs also alleged violations of the APA.\(^4\) (ROA.635-41, 654-57.)

The Tribes intervened (ROA.761), and the Federal Defendants and the Tribes filed motions to dismiss, arguing, \textit{inter alia}, that Plaintiffs lacked standing. (ROA.793-94, 861-62.) The district court denied the motions, holding that the Individual Plaintiffs have standing to assert equal protection and APA claims, and that the State Plaintiffs have standing to bring APA, Commerce Clause, Tenth Amendment, and non-delegation claims. (ROA.3749, 3753.)

All parties filed motions for summary judgment. On October 4, 2018, the district court granted summary judgment to Plaintiffs (ROA.4008-54) and entered judgment (ROA.4055). In its Order, the district court declared that ICWA was unconstitutional on three grounds and it also invalidated the Final Rule. First, the court held that

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\(^4\) The Individual Plaintiffs also alleged that section 1915 violates substantive due process. (ROA.657-60.) The court granted judgment to Defendants on this claim, and Plaintiffs did not appeal.
ICWA and the Final Rule violate equal protection. The court stated that because a child is an “Indian child” under ICWA if she is enrolled or eligible for enrollment in a tribe (when a parent is enrolled), the definition of Indian child “uses ancestry as a proxy for race.” Thus, the court held that strict scrutiny applies, and that ICWA cannot survive strict scrutiny. (ROA.4028-36.)

Second, the court held that section 1915(c) of ICWA and section 23.230 of the Final Rule, which allows tribes to change the order of the placement preferences, are unconstitutional delegations of federal legislative authority. (ROA.4036-40.)

Third, the court held that ICWA unconstitutionally commandeers the states “by directly regulat[ing] the State Plaintiffs.” (ROA.4040-45.) The court also found, on this basis, that ICWA violated the Indian Commerce Clause. (ROA.4053-54.)

Fourth, the court held that the Final Rule exceeded Interior’s authority. (ROA.4046-53.)

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5 Plaintiffs argued that ICWA exceeded Congress’s authority under Article I, but the court ruled solely on commandeering.
SUMMARY OF THE ARGUMENT

The Court should reverse the judgment.

First, the Individual Plaintiffs lack standing. The Brackeens have no injury-in-fact. Contrary to the court’s holding, ICWA does not impose a longer collateral-attack period than does Texas law, because section 1914 (which incorporates the state limitations period) applies, not section 1913(d). Moreover, the uncertain possibility that someone with standing might collaterally attack their adoption is too speculative to confer standing. The remaining Individual Plaintiffs cannot show redressability because any judgment in this action is not binding in Nevada and Minnesota, and therefore will not benefit them. Because the district court did not find that the State Plaintiffs had standing to assert the equal protection claim, that claim should be dismissed.

Second, ICWA does not violate equal protection. The Supreme Court has consistently held that laws regarding “Indians” make a political, not racial, classification. ICWA’s “Indian child” definition is consistent with that precedent. ICWA is thus subject to rational-basis review, which it satisfies. Even if ICWA were subject to strict scrutiny,
it is constitutional because it is narrowly tailored to advance the
government’s trust obligations toward Indian children and tribes.

Third, ICWA does not unconstitutionally commandeer the states.
ICWA imposes substantive and procedural requirements on state
courts. Anti-commandeering principles apply only to congressional
commands to state executive officials and legislatures, not state courts.
Alternatively, ICWA represents a condition on federal funding of states’
foster-care and adoption programs, which is permissible under the
Spending Clause.

Fourth, the State Plaintiffs lack standing to allege that section
1915, which allows tribes to re-order the placement preferences, violates
the Non-Delegation Doctrine. The claim is also meritless. Section 1915
recognizes Indian tribes’ inherent authority over the domestic relations
of their members. In any event, Congress may delegate federal
authority to an Indian tribe.

Finally, the Final Rule does not violate the APA. ICWA expressly
provided Interior with authority to promulgate regulations. Interior
offered a reasoned explanation for why regulations were necessary.
Further, the suggestion that states apply a clear-and-convincing
standard to depart from the placement preferences is entitled to

*Chevron* deference and is reasonable.

**ARGUMENT**

The Supreme Court has long recognized that “the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court] ha[s] consistently described as ‘plenary and exclusive.’” *United States v. Lara*, 541 U.S. 193, 200 (2004). The “plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.” *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). The Indian Commerce Clause provides that “Congress shall have Power ... [t]o regulate Commerce with ... the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. “[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The Court has also noted that Congress’s plenary authority “rest[s] in part, not upon ‘affirmative grants of the Constitution,’ but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government.” *Lara*, 541 U.S. at 201.
Further, Congress’s plenary authority extends beyond the borders of Indian reservations. Indeed, “Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States.” United States v. McGowan, 302 U.S. 535, 539 (1938) (emphasis added); see also Perrin v. United States, 232 U.S. 478, 482 (1914) (explaining that congressional power extends to Indians “whether upon or off a reservation and whether within or without the limits of a state”).

Ignoring Congress’s plenary authority and misconstruing the relevant constitutional principles, the district court erred in granting Plaintiffs summary judgment. This Court reviews that order, and the order denying dismissal, de novo. St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 440 n.8 (5th Cir. 2000).

I. The Individual Plaintiffs Lack Standing.

At the outset, the district court erred in not dismissing all claims by the Individual Plaintiffs for lack of standing. “To establish Article III standing, a plaintiff must show ‘an injury-in-fact caused by a defendant’s challenged conduct that is redressable by a court.’” Dep’t of Tex., Veterans of Foreign Wars v. Tex. Lottery Comm’n, 760 F.3d 427,
The Brackeens cannot show injury-in-fact, and the other Individual Plaintiffs cannot show redressability.

A. **The Brackeens cannot demonstrate injury-in-fact.**

When they filed the initial complaint, the Brackeens' adoption of A.L.M. was pending. (ROA.69.) That adoption was finalized in January 2018 (ROA.615)—well before the filing of the Complaint. While the district court found that their effort to adopt “had been burdened ... by the ICWA and the Final Rule” (ROA.3745), the Individual Plaintiffs sought only prospective relief (ROA.661-62), requiring them to show a likelihood of future injury in order to establish standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003). Since A.L.M.’s adoption was final, the Brackeens suffered no ongoing injury when the Complaint was filed. In the absence of injury, they lack standing.

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6 The Brackeens’ standing is determined at the time they filed the Complaint. *See Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) (“when a plaintiff ... voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction”); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (analyzing standing when the “second amended complaint was filed”). If their standing were determined at the time of the initial complaint, their claims became moot when the adoption was finalized. *See Campbell-Ewald Co. v.*
The district court disagreed, finding that the Brackeens suffered injury because the “adoption of A.L.M. is open to collateral attack for two years under ICWA and the Final Rule,” see § 1913(d), which is longer than the six-month period under Texas law, see Tex. Fam. Code Ann. § 162.012. (ROA.3745-46.) There are two fatal infirmities with this holding: it misreads ICWA and it is too speculative.

First, the district court erred in believing that the period for challenging the Brackeens’ adoption was longer under ICWA than state law. As its text indicates, section 1913(d)’s two-year period applies only to a biological parent’s challenge to her voluntary consent to adoption. That provision does not apply to the Brackeens’ adoption; the biological parents of A.L.M. did not consent to the Brackeens’ adoption of A.L.M, but instead voluntarily terminated their parental rights to the state, before the Brackeens’ adoption occurred. (ROA.610, 2684.) Therefore,

_Gomez_, 136 S. Ct. 663, 669 (2016). Either way, they present no case or controversy.

7 Section 1913(d) begins: “After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto ....”
the collateral-attack provision applicable to A.L.M. is section 1914,\(^8\) which incorporates the relevant state limitations period. See In re Adoption of Erin G., 140 P.3d 886, 889-93 (Alaska 2006); see also 81 Fed. Reg. at 38,847 (explaining that section 1913(d)’s two-year statute of limitations does not apply to “actions to invalidate ... terminations of parental rights”). Because the same Texas limitations period applies to challenges to the termination of parental rights under state law and ICWA, federal law does not injure the Brackeens.

Second, even if ICWA imposes a longer challenge period, any resulting injury is far too speculative. There is no evidence that A.L.M.’s biological parents or tribe might challenge the termination of parental rights. Indeed, both biological parents supported the Brackeens’ adoption of A.L.M. (ROA.612, 2684), and the tribe withdrew its opposition to their adoption (ROA.2686). The Supreme Court has “repeatedly reiterated that ‘threatened injury must be certainly impending to constitute injury in fact,’ and that ‘[a]llegations of possible future injury’ are not sufficient.” Clapper v. Amnesty Int’l USA, 568 U.S. 8

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\(^8\) Section 1914 applies to “any parent or Indian custodian from whose custody” is removed an “Indian child who is the subject of any action for ... termination of parental rights under State law.”
398, 409 (2013) (emphasis added). Here, the possibility of any future challenge “is too speculative to satisfy the well-established requirement that threatened injury must be ‘certainly impending.’” Id. at 401.

B. **The remaining Individual Plaintiffs cannot demonstrate redressability.**

The remaining Individual Plaintiffs lack standing for a different reason: absence of redressability. For standing, “it must be ‘likely,’ ... that the injury will be ‘redressed by a favorable decision.’” *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 606 (5th Cir. 2018). “[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself.” *Dep’t of Tex.*, 760 F.3d at 432. “Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court....” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998). None of the other Individual Plaintiffs satisfy this standard.

Nick and Heather Libretti live, and seek to adopt Baby O., in Nevada. (ROA.616-18.) Altagracia Socorro Hernandez, who is Baby O.’s biological mother, also lives in Nevada. (ROA.616.) Nevada was not a party to this action, so neither Nevada’s child-welfare agencies nor its courts are bound by the judgment. *See Blanton v. N. Las Vegas Mun.*
Court, 748 P.2d 494, 500 (Nev. 1987). Likewise, Danielle and Jason Clifford, who are the foster parents of Child P. and are attempting to adopt her, live in Minnesota. (ROA.619.) As Minnesota also is not a party to this lawsuit, neither its child-welfare agencies nor its courts are bound by the judgment either. See Citizens for a Balanced City v. Plymouth Congregational Church, 672 N.W.2d 13, 20 (Minn. Ct. App. 2003). The judgment therefore will have no effect on the Librettis’ ability to adopt Baby O. or the Cliffords’ ability to adopt Child P., and it will not redress any injury they suffer from application of ICWA or the Final Rule by their state courts. “Because … declaratory relief” against Defendants “would not benefit” the Individual Plaintiffs, “any possibility of future injury is not redressable by the court and [they] lack[] standing....” Campbell v. Lamar Inst. of Tech., 842 F.3d 375, 382 (5th Cir. 2016).

This Court addressed a similar issue en banc in Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001). There, abortion providers sued Louisiana’s governor and attorney general, challenging the constitutionality of a state law making abortion providers liable to patients for damages caused by abortions. This Court held that the
plaintiffs failed to show redressability. The statute was enforced by private plaintiffs, the Court explained, so “defendants are powerless to enforce Act 825 against the plaintiffs (or to prevent any threatened injury from its enforcement).” Id. at 426-27. Accordingly, “their injury cannot be *redressed* by these defendants—that is, these defendants cannot prevent purely private litigants from filing and prosecuting a cause of action under Act 825 and cannot prevent the courts of Louisiana from processing and hearing these private tort cases.” Id. at 427. Likewise, Defendants in this case cannot prevent state agencies or state courts in Nevada and Minnesota from complying with ICWA.

The district court sought to avoid this argument in two ways, both meritless. First, the court said that, with a judgment for Plaintiffs, “the obligation to follow these statutory and regulatory frameworks will no longer be applied to the states.” (ROA.3748.) As noted above, this is wrong; the judgment does not bind Nevada or Minnesota or their courts. Indeed, the South Dakota Supreme Court recently held that it was not bound by the judgment below. *In re M.D.*, 920 N.W.2d 496, 799 n.4 (S.D. 2018). Nor does the invalidation of the Final Rule apply to courts in those states, as the South Dakota Supreme Court also recognized. Id. at
503-04 (following the Final Rule). An agency can decline to acquiesce in a court’s decision invalidating its regulations in a court not bound by that decision. See Indep. Petroleum Ass’n v. Babbitt, 92 F.3d 1248, 1261 (D.C. Cir. 1996).

Second, the district court held that “[t]he redressability requirement is met if a judgment in plaintiffs’ favor ‘would at least make it easier for them’ to achieve their desired result.” (ROA.3748 (quoting Duarte ex rel. Duarte v. City of Lewisville, 759 F.3d 514, 521 (5th Cir. 2014)).) The court reasoned that “a declaration of the ICWA’s unconstitutionality … would have the ‘practical consequence’ of increasing ‘the likelihood that the plaintiff would obtain relief.’” (ROA.3748 (quoting Utah v. Evans, 536 U.S. 452, 464 (2002)).) This reasoning fails. In both Evans and Duarte, a favorable judgment would directly benefit the plaintiff through a remedy imposed on the defendants. In Evans, a favorable judgment would require the defendant to issue a new census report, increasing the likelihood that Utah would receive an additional congressional seat, see 536 U.S. at 463-64; in Duarte, a favorable judgment would dramatically increase the number of houses the plaintiff could purchase or rent, see 759 F.3d
at 521. A favorable judgment here has no similar direct impact on Nevada or Minnesota. “It is well settled that ‘[a] claim of injury generally is too conjectural or hypothetical to confer standing when the injury’s existence depends on the decisions of third parties.’” Hotze v. Burwell, 784 F.3d 984, 995 (5th Cir. 2015); see also Clapper, 568 U.S. at 413 (“we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment”).

The district court seemed to imply that the precedential effect of the judgment might help the Librettis or the Cliffords, but that alone is not enough for standing. As the Tenth Circuit explained:

[I]t must be the effect of the court’s judgment on the defendant that redresses the plaintiff’s injury, whether directly or indirectly. ... “Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power.”


In short, the Individual Plaintiffs lack standing, and the district court should have dismissed their claims.
II. **ICWA and the Final Rule Do Not Violate Equal Protection.**

ICWA applies to proceedings involving an “Indian child”—which the statute defines as “either (a) a member of an Indian tribe or (b) [a person who] is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” § 1903(4). Based on this provision, the district court held that ICWA and the Final Rule violate the Fifth Amendment’s equal protection guarantee because it purportedly relies on a racial classification and cannot survive strict scrutiny. (ROA.4028-36.) This is wrong for two reasons. First, ICWA establishes a political, not racial, classification, which is subject to rational-basis review. Second, even were it race-based, the classification survives strict scrutiny.

A. **No plaintiff has standing to assert an equal protection claim, so that claim should have been dismissed.**

“[A] plaintiff must demonstrate standing for each claim he seeks to press.” *Davis v. FEC*, 554 U.S. 724, 734 (2008). As explained above, the Individual Plaintiffs lack standing, including standing to assert an equal protection violation. *See supra*, at 15-23. Moreover, the district court excluded the equal protection claim from its holding that the State
Plaintiffs had standing. As no plaintiff has standing to assert an equal protection claim, the Court should reverse the judgment as to that claim.

**B. ICWA is based on a political classification.**

In any event, the district court’s holding that ICWA’s definition of Indian child is race-based is wrong. The Supreme Court has definitively held that “Indian” is a political, not racial, classification. ICWA is consistent with this precedent.

1. **“Indian” is a political, not racial, classification.**

The Supreme Court has consistently held that legislation giving special treatment to “Indians” is based on a political classification subject to rational-basis review. The seminal case is *Morton v. Mancari*. *Mancari* upheld a policy of the Bureau of Indian Affairs (“BIA”) that gave hiring preferences to tribal Indians over non-Indians. The

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9 The State Plaintiffs did not cross-appeal this holding, as required for them to challenge it. See *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015). Further, the holding is correct: “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).
plaintiffs alleged that the preference constituted invidious racial discrimination. The Court rejected this argument.

The Court explained that this issue “turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress ... to legislate on behalf of federally recognized Indian tribes.” 417 U.S. at 551. The Indian Commerce Clause “singles Indians out as a proper subject for separate legislation.” Id. at 552. The Court noted that if legislation providing special treatment to Indians “were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased.” Id.

The Court found that the hiring preference “is not even a ‘racial’ preference.” Id. at 553. “The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.” Id. at 554. The Court explained that “[t]he preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in
nature.” *Id.* at 553 n.24. This was so even though the definition of “Indian” required “one-fourth or more degree Indian blood.” *Id.* The Court concluded that “[a]s 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.” *Id.* at 555.

The Court further confirmed that federal legislation relating to members of Indian tribes is not an impermissible racial classification—even when it burdens rather than benefits Indians—in *United States v. Antelope*, 430 U.S. 641 (1977). *Antelope* concerned enrolled tribal members who were criminally charged in federal court rather than state court under the Major Crimes Act, 18 U.S.C. § 1153. 430 U.S. at 642. The defendants contended that subjecting them to federal charges, simply because they were Indians, constituted unconstitutional racial discrimination. *Id.* at 642-44. Rejecting this claim, the Court conclusively stated that “[t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the
Constitution and supported by the ensuing history of the Federal Government’s relations with Indians.” *Id.* at 645. Reaffirming *Mancari*, the Court further noted that federal regulation of Indian affairs “is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a ‘racial’ group consisting of ‘Indians.’” *Id.* at 646.

In short, under *Mancari* and *Antelope*, legislation giving special treatment to “Indians” is based on a political, not racial, classification. Based on these cases, the Court has repeatedly upheld a variety of Indian-specific legislation. Moreover, courts generally use the rational-basis standard when (as here) the power of Congress is plenary. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (rational basis review over “exclusion of foreign nationals”); *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (Territories Clause).

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2. Consistent with Mancari, ICWA’s definition of “Indian child” is a political distinction.

Consistent with Mancari, under ICWA “Indian child” is a political, not racial, classification. “Indian child” is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” § 1903(4). And “Indian tribe” is limited to federally recognized tribes. § 1904(8). ICWA thus applies only when a child (1) is already a citizen of a federally recognized tribe or (2) has a parent who is a citizen of a federally recognized tribe and herself is eligible to become a citizen. In short, the statute is triggered by political affiliation: enrolled membership (or eligibility for it) in a sovereign nation—not race—is the basis for application of ICWA. The contention that ICWA is premised on a race-based classification is simply wrong.

Indeed, “Indian child” includes children without Indian blood. Take appellant Cherokee Nation as an example. Membership in the Cherokee Nation includes descendants of “freedmen,” former slaves of tribal citizens who became members after the abolition of slavery. (ROA.3032-33.) The freedmen were African-Americans and had no
Indian blood. Cherokee citizens also include descendants of various categories of “adopted whites.” (ROA.3033.)

Conversely, many children who are racially Indian do not qualify as Indian children under ICWA. For example, even if a child were entirely Oneida, if neither parent was an enrolled member of the Oneida Nation, she would not meet the definition of “Indian child” and ICWA would not apply. (ROA.3050.) See, e.g., In re J.L.M., 451 N.W.2d 377, 387, 395-97 (Neb. 1990); In re Smith, 731 P.2d 1149, 1151-53 (Wash. Ct. App. 1987). Because only 60% of Indians are enrolled members of a tribe, the definition of “Indian child” excludes hundreds of thousands of racially Indian children from ICWA’s protections.


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Moreover, unlike race, tribal membership is a voluntary status, see Duro v. Reina, 495 U.S. 676, 694 (1990), and, like U.S. citizenship, see 8 U.S.C. § 1484, can be renounced. Tribes generally have rules regarding relinquishment of citizenship. (See, e.g., ROA.3034 (Cherokee Nation).)

Therefore, the definition of “Indian child” is political and race-neutral.

3. The district court’s distinguishing of Mancari and reliance on Rice are error.

Instead of applying Mancari, the district court attempted to distinguish it on grounds that cannot withstand scrutiny. First, the court was flat wrong that Mancari is a “decision uniquely tailored to that particular set of facts.” (ROA.4031.) It is true that Mancari mentioned BIA’s “unique” role, but the Court subsequently applied Mancari in areas unrelated to BIA, including state taxes, Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 479-81 (1976), and federal criminal law, Antelope, 430 U.S. at 645-47; see also Peyote Way, 922 F.2d at 1220.

Second, the district court erred when it contended that Mancari is distinguishable because that case applied only to members of federally
recognized tribes. (ROA.4031.) The district court concluded that because the definition of “Indian child” includes children “simply eligible for membership who have a biological Indian parent,” the definition is based on blood and is not political. (ROA.4032.) This reasoning is quite wrong. First, the district court misapprehended the significance of the fact that the child eligible for membership must be the “biological child of a member of an Indian tribe.” § 1903(4) (emphasis added). This provision requires an Indian child to have a political connection to a tribal sovereign. See Means v. Navajo Nation, 432 F.3d 924, 934 (9th Cir. 2005) (“formal enrollment in a tribe is not an ‘absolute’ requirement for Indian status”). Sovereigns—including the U.S.—commonly determine eligibility for citizenship based on ancestry.12

Moreover, the district court overlooked the context of ICWA. ICWA applies to children, including those only days old. See § 1913(a) (consent to termination of parental rights invalid if given within 10 days after birth). No tribe grants automatic membership to eligible

newborns or children; those eligible for membership must apply, which can be a lengthy and detailed process. To apply for membership in appellant Cherokee Nation, for example, the applicant must complete a detailed application and submit (inter alia) copies of a birth certificate and citizenship documents for an immediate relative who is a member or, if none, certified state birth and death records documenting lineage back to the Dawes Rolls. See Citizenship, Cherokee Nation, http://www.cherokee.org/Services/Tribal-Citizenship/Citizenship (last visited Jan. 6, 2019). It is impossible for this paperwork to be completed and approved for a newborn. The extension of ICWA’s requirements to a child who is eligible for tribal membership, and whose parent is a member, furthers ICWA’s goals; otherwise thousands of parents could lose their parental rights before ICWA even applies—undermining Congress’s purpose. Congress drafted ICWA with these considerations in mind, concluding that “[t]he constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to

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hinge upon the cranking into operation of a mechanical process established under tribal law.” House Report at 17.

The district court also ignored cases finding no constitutional difficulty when application of federal Indian statutes turned on political affiliation short of membership. In *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (*en banc*), for example, the Ninth Circuit held that the Major Crimes Act was triggered by criteria including, in addition to tribal membership, receipt of government benefits by someone “eligible to become” a member and even “social recognition” of affiliation with a recognized tribe. *Id.* at 1114. *Mancari*’s reach is far broader than supposed by the district court.

*Third,* contrary to the district court’s view (ROA.4031), *Mancari* is not limited to preferences applicable only on or near Indian reservations. Indeed, the Indian preference upheld in *Mancari* was not limited to employment on or near a reservation. 417 U.S. at 537-38, 553 n.24; see also *Peyote Way*, 922 F.2d at 1212, 1214-16. And, as explained above, Congress’s plenary authority over Indians extends to “wherever they may be within the territory of the United States.” *McGowan*, 302 U.S. at 539 (emphasis added).
Finally, the district court also erred when it held (ROA.4032) that ICWA “mirrors the impermissible racial classification in *Rice* [v. *Cayetano*, 528 U.S. 495 (2000)].” In *Rice* the challenged law allowed only members of a particular racial group (persons of Hawaiian descent) to vote for members of a state agency charged with overseeing state property. *Id.* at 509-10. After a lengthy discussion of the history and purpose of the 15th Amendment, *id.* at 511-14, the Court explained that sometimes “[a]ncestry can be a proxy for race,” *id.* at 514. On the unique facts of *Rice*, the Court found that Hawaii “used ancestry as a racial definition and for a racial purpose,” *id.* at 515, because—expressly rejecting the analogy to tribal Indians—“the elections ... are elections of the State, not of a separate quasi sovereign,” *id.* at 522. Further, *Rice* expressly reaffirmed *Mancari*, explaining that the Indian hiring preference there “was not directed towards a racial group consisting of Indians, but rather only to members of federally recognized tribes. In this sense, the Court held, the preference was political rather than racial in nature.” *Id.* at 519-20 (cleaned up) (quoting *Mancari*, 417 U.S. at 553 n.24); see also *United States v. Wilgus*, 638 F.3d 1274, 1287 (10th Cir. 2011) (*Rice* “reaffirm[ed] the core holding of [*Mancari*]”);
Kahawaiolaa v. Norton, 386 F.3d 1271, 1279 (9th Cir. 2004) (same).

Courts therefore have continued to apply Mancari after Rice. See, e.g.,

EEOC v. Peabody W. Coal Co., 773 F.3d 977, 986-88 (9th Cir. 2014);


C. **ICWA has a rational basis.**

D. **ICWA survives strict scrutiny.**

Even if this Court concludes that ICWA is race-based, it is still constitutional because it survives strict scrutiny. The district court’s holding otherwise (ROA.4033-36) is wrong.

In order to survive strict scrutiny, “racial classifications … must serve a compelling governmental interest, and must be narrowly tailored to further that interest.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). The government may use race-based classifications to respond to the “unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country.” *Id.* at 237. As the Tribes argued below (ROA.4548-50), the classification here is narrowly tailored to serve a compelling governmental interest.

The government has a compelling interest based on the “general trust relationship between the United States and the Indian people,” *United States v. Mitchell*, 463 U.S. 206, 225 (1983), under which the United States “has charged itself with moral obligations of the highest responsibility and trust.” *Jicarilla Apache Nation*, 564 U.S. at 176. Pursuant to those obligations, the federal government is responsible
“for the protection and preservation of Indian tribes.” § 1901(2). The protection of Indian children is essential to protecting tribes. § 1901(3). Therefore, it is the public policy of the United States to protect the best interests of Indian children and tribes. § 1902. Indeed, Congress documented the large-scale and unwarranted removal of Indian children from their families and tribes, a problem states had failed to correct. § 1901(4)-(5); House Report at 9-11, 19. Those interests are compelling. See McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 473 (5th Cir. 2014); Wilgus, 638 F.3d at 1284-87; Gibson v. Babbitt, 223 F.3d 1256, 1258 (11th Cir. 2000) (per curiam).

ICWA is narrowly tailored to those interests. It applies only to citizens of Indian tribes and children eligible for citizenship. ICWA is therefore constitutional under strict scrutiny.

E. **To the extent that the inclusion of eligible, non-member children violates equal protection, that part of the “Indian child” definition should have been severed.**

The inclusion in the definition of “Indian child” of children who are eligible for membership, with a parent who is a member, was the only basis for the district court’s conclusion that ICWA “relies on racial classifications.” (ROA.4032-33.) Even were this conclusion correct, the
district court erred in invalidating virtually all of ICWA on that basis. ICWA contains a severability clause. § 1963 (“If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.”) The district court was therefore required to “take special care to attempt to honor the legislature’s policy choice to leave the statute intact.” *Veasey v. Abbott*, 830 F.3d 216, 269 (5th Cir. 2016). Rather than invalidate the entire statute on equal protection grounds, the court simply should have limited the definition of “Indian child” to tribal members.

**III. ICWA Does Not Unconstitutionally Commandeer the States.**

The district court held that ICWA unconstitutionally commandeers the states by “requiring the States to apply federal standards to state created claims” and, as a result, “ICWA regulates states.” (ROA.4041, 4043.) This holding is error. ICWA and the Final Rule impose substantive and procedural requirements on state courts, and the Supreme Court has held that Tenth Amendment anti-commandeering principles apply only to federal commands to state executive officials and legislatures. In any event, ICWA represents a
condition on federal funding of states’ foster-care and adoption programs that is permissible under the Spending Clause.¹⁴

A. **The anti-commandeering principle does not apply to congressional commands to state courts.**

“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.” *Printz v. United States*, 521 U.S. 898, 925 (1997). As the Court explained, “conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.” *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

This principle applies to federal commands to both state legislatures and state executive-branch officials. In *Printz*, the Brady Handgun Act required state law-enforcement officials to perform a background check on prospective handgun purchasers. 521 U.S. at 903. The Court invalidated this requirement, holding that the Constitution does not permit Congress to “conscript[] the State’s officers.” *Id.* at 935. Nor can Congress commandeer the state legislature. In *Murphy*, a federal statute “prohibit[ed] state authorization of sports gambling.”

¹⁴ For these same reasons, the district court erred in holding (ROA.4053-54) that ICWA violated the Indian Commerce Clause.
138 S. Ct. at 1478. The statute was unconstitutional, the Court held, because it “unequivocally dictates what a state legislature may and may not do.” *Id.*

The Court has acknowledged, however, that the anti-commandeering principle has a significant exception: it does not restrict federal dictates to state courts. *Printz* explained that “the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.” 521 U.S. at 907; *see* The Federalist No. 82, at 494 (Hamilton) (Clinton Rossiter ed., 1961) ("[T]he national and State [judicial] systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union…"). “Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them,” the Court has recognized, “but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause.” *New York v. United States*, 505 U.S. 144, 178-79 (1992); *see* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the*
Judges in every State shall be bound thereby, any Thing in the
Constitution or Laws of any State to the Contrary notwithstanding.”
(emphasis added). Put simply, “Congress ha[s] the power to require that
state adjudicative bodies adjudicate federal issues and to require that
States … follow federally mandated procedures.” South Carolina v.

B. ICWA’s mandates apply to state courts, not state
executive-branch officials.

The district court’s commandeering holding is erroneous for a
simple reason: ICWA and the Final Rule impose obligations on state
courts and, therefore, are immune from a commandeering challenge.
Take the example mentioned in the district court’s order: the placement
preferences in section 1915, which the court contended are “a direct
command from Congress to the states.” (ROA.4043.) Those preferences
govern the substantive adjudicative decision with respect to adoptive,
pre-adoptive, and foster-care placements made by state judges; they are
not mandates requiring that state executive-branch employees enforce
federal law. The same is true of the other challenged provisions of
ICWA and the Final Rule.
The Complaint alleges that sections 1911, 1912, 1913, 1917, and 1951 impermissibly “command” the states. (ROA.645-47.) Like section 1915, each of these provisions is directed at procedural rules followed and substantive law applied by state courts. Section 1911(b) and (c) both begin with the phrase “[i]n any State court proceeding” and address when a court must transfer a case and allow intervention by specified parties. Section 1911(d) requires that state courts accord full faith and credit to child-custody proceedings of an Indian tribe. Section 1912 provides procedures to be followed in specified court proceedings, including requisite notice, appointment of counsel, the types of evidence required before a court can issue certain orders, and the standard to be applied in considering foster-care and parental-rights termination orders. Section 1913 governs the validity in court of consents for foster care or voluntary termination of parental rights and collateral attack in court of adoption decrees. Section 1917 directs courts to provide certain information to the person subject to an adoption proceeding. Section 1951(a) requires state courts to provide the Secretary of the Interior with the adoption decree and other information. Similarly, the Final

To be sure, a few provisions of ICWA as written could appear to impose obligations on parties to court proceedings—which sometimes (though not always) are state agencies—rather than the courts. Specifically, section 1912(a) imposes a notice requirement on “the party seeking the foster care placement of, or termination of parental rights to, an Indian child”; section 1912(d) requires “[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law” to “satisfy the court” that they engaged in “active efforts … to prevent the breakup of the Indian family”; and section 1915(c) requires “the agency or court” effecting a placement to comply with a tribe’s placement preferences. These provisions do not commandeer for two reasons. First, these generally applicable requirements apply to private parties and state agencies alike. They therefore do not unconstitutionally commandeer. See Murphy, 138 S. Ct. at 1478 (“The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.”).
Second, in *substance* these provisions are properly read—and, pursuant to the constitutional-doubt canon,\(^{15}\) *must* be read—as conditions that must occur before *the court* may order a foster-care placement or termination of parental rights.\(^{16}\) ICWA does not subject state officials to a freestanding obligation to provide the specified notice, engage in active efforts, or adhere to the placement preferences—instead, unless those things occur, the *court* cannot approve the placement or termination. Indeed, each of these provisions is specifically tied to a pending state-court proceeding. In this way, ICWA functions entirely differently from the Brady Act in *Printz*, which “direct[ed] state law enforcement officers to participate ... in the

\(^{15}\) *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (“It is ... incumbent upon us to read the statute to eliminate [constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress.”).

\(^{16}\) This reading is consistent with the Final Rule, which places the burden on the *court*. *See* 25 C.F.R. § 23.111(a) (“the court must ensure”); *id.* § 23.120(a) (“the court must conclude”); *id.* § 23.130(c) (“The court must ... also consider”).
administration of a federally enacted regulatory scheme.” 521 U.S. at 904. That simply is not the case here.\textsuperscript{17}


\textsuperscript{17} To the extent that any provision commandeers unconstitutionally, that provision should be severed from the statute. Veasey, 830 F.3d at 269.
cases. *Id.* § 671(a)(15)(B). Plaintiffs complain about ICWA’s notice requirement. But Congress has required specific notice in *all* foster-care cases. *Id.* § 675(5)(G). If affirmed, the commandeering holding would destroy the entire edifice of federal law intended to protect vulnerable children.

C. **Congress is permitted to modify state law.**

The district court never directly addressed the fact that the commandeering rule does not apply to requirements imposed on state courts. Instead, the court contended that this principle was inapplicable because “Congress directs state courts to implement the ICWA by incorporating federal standards that modify *state created* causes of action.” (ROA.4042.) “[R]equiring the States to apply federal standards to state created claims,” the court believed, “contradicts the rulings in *Murphy, Printz, and New York.*” (ROA.4041.)

This holding is error, plain and simple. *Murphy, Printz, and New York* did not involve federal statutes that modified state-created claims, and those cases say *nothing* of relevance to that situation. Nor have the Tribes located any other case supporting the district court’s position. In fact, the law is directly contrary.
Courts repeatedly have held that Congress may change state procedural or substantive rules in service of federal interests.\textsuperscript{18} As far back as \textit{Stewart v. Kahn}, 78 U.S. 493 (1870), the Court upheld Congress’s authority to extend state statutes of limitations applicable to state claims during the Civil War. More recently, the Court rejected arguments that the supplemental jurisdiction statute, 28 U.S.C. § 1367(d), which modifies state limitations periods for state claims, exceeds Congress’s authority “because it violates principles of state sovereignty.” \textit{Jinks v. Richland Cty.}, 538 U.S. 456, 464-65 (2003). Likewise, in \textit{Freier v. Westinghouse Elec. Corp.}, 303 F.3d 176 (2d Cir. 2002), the Second Circuit upheld the Superfund Amendments, which dictated to state courts when a state statute of limitations began to run, \textit{id.} at 196, concluding that they did not exceed Congress’s authority under the Tenth Amendment, \textit{id.} at 203-05. The court explained that the challenged provision “requires no action by a state’s legislative or executive officials, but only the application of federal law by the courts....” \textit{Id.} at 205. And the Supreme Court has repeatedly held that


**D. Alternatively, ICWA is authorized by the Spending Clause.**

The Spending Clause grants Congress the power to “pay the Debts and provide for the ... general Welfare of the United States.” U.S. Const. art. I, § 8, cl. 1. “Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States’ ‘taking certain actions that Congress could not require them to take.’” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) (“NFIB”) (opinion of Roberts, C.J.) (citation omitted). Through such conditions, Congress may “encourage a State to regulate in a particular way” and may “hold out incentives to the States as a method of influencing a State’s policy choices.” *New York*, 505 U.S. at 166. Conditions on federal spending are constitutional when the state “voluntarily and knowingly accepts the terms of the ‘contract.’” *NFIB*, 567 U.S. at 577 (opinion of
Roberts, C.J.). “But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.” Id. at 577-78 (citation omitted).

As the Tribes argued below (ROA.4554-56), ICWA represents a permissible condition on federal spending. Federal funding under Title IV-B (grants for child-welfare services) and Title IV-E (funding for foster and adoptive families and related programs) of the Social Security Act is conditioned on a state’s compliance with ICWA. Title IV-B conditions funding on “a plan for child welfare services” that describes “the specific measures taken by the State to comply with [ICWA].” 42 U.S.C. § 622(a)-(b). If “the Secretary determines” that the state’s compliance plan is inadequate, the state’s funding would be reduced. 45 C.F.R. § 1355.36. Similarly, to receive full Title IV-E funding, states must certify compliance with ICWA. 42 U.S.C. § 677(b); 45 C.F.R. § 1355.34(b). The Complaint alleges that in Fiscal Year 2018, Texas was appropriated $410 million in such funding, Louisiana $64 million, and Indiana $189 million. (ROA.598.) Indeed, the district court held the possible loss of such funding provided the State Plaintiffs with standing. (ROA.3752.)
Plaintiffs have never proven—or even alleged—that the requirement that the states comply with ICWA to receive their full appropriation of Title IV-B and IV-E funding crosses the line from “pressure ... into compulsion.” *NFIB*, 567 U.S. at 577 (opinion of Roberts, C.J.). In *NFIB*, the Court invalidated the Affordable Care Act’s Medicaid expansion because the penalty imposed on a state that refused to comply with federal policy was so large—20% of the state’s overall budget—that it represented “a gun to the head.” *Id.* at 581. Here, by contrast, Congress has not “indirectly coerce[d],” *id.* at 578, the State Plaintiffs to comply with ICWA, because the penalty for non-compliance is tiny compared to that in *NFIB*. See 45 C.F.R. § 1355.36(b)(5) (penalty begins at 1% of foster care and adoption grants). Accordingly, ICWA does not exceed Congress’s authority under the Tenth Amendment.

**IV. Section 1915 Does Not Violate the Non-Delegation Doctrine.**

In section 1915, Congress set default placement preferences for children under ICWA. However, Congress also recognized that because of factors unique to each tribe, flexibility is essential. So Congress expressly mandated that placements must be made with consideration
of “the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.” § 1915(d). Congress also understood that a tribe may need to set different preferences from ICWA’s default. ICWA therefore permits a tribe—exercising inherent governmental authority—to enact a law that reorders the placement preferences. § 1915(c). Section 1915(c) requires state courts to “follow such order” but only if “the placement is the least restrictive setting appropriate to the particular needs of the child.” Moreover, section 1915(c) also requires that the placement preference of the Indian child and parent should be “give[n] weight ... in applying the preferences.” Id. This unremarkable provision ensures flexible application of ICWA.

The district court ignored this context and held that section 1915 violated the Non-Delegation Doctrine. First, the court concluded that an Indian tribe is “like a private entity” and since it is “not part of the [federal] Government at all,” it “cannot exercise ... governmental power.” (ROA.4039 (alterations in original) (internal quotations omitted).) Second, the court ruled that tribes departing from the default
placement order was an exercise of authority that “can only be
described as legislative” and therefore a violation of the Non-Delegation
Doctrine.\(^{19}\) (ROA.4038.) Both holdings are wrong. Moreover, the State
Plaintiffs lack standing to assert this claim.\(^{20}\)

A. **The State Plaintiffs lack standing to assert the non-
delegation claim.**

The non-delegation claim was asserted by the State Plaintiffs alone. (ROA.660-61.) They have not established injury-in-fact for this claim. There is no evidence that any tribe’s change to the order of preferences impacted even a single child-placement decision in Texas, Indiana, or Louisiana, or that such an impact is “certainly impending,” Clapper, 568 U.S. at 409. In the absence of such injury-in-fact, they lack standing and the claim should be dismissed.

\(^{19}\) A default rule from which another governmental body can depart is hardly unusual. For example, while the Clean Water Act provides default rules concerning water quality standards, it permits states and tribes to establish more stringent standards. See Wisconsin v. EPA, 266 F.3d 741, 744 (7th Cir. 2001).

\(^{20}\) For the same reasons, the district court’s invalidation of 25 C.F.R. § 23.130(b) on non-delegation grounds should be reversed.
B. Section 1915 recognizes inherent tribal authority over domestic relations matters.


Moreover, the Court has confirmed that Indian tribes fully “retain their inherent power … to regulate domestic relations among members.” *Montana v. United States*, 450 U.S. 544, 564 (1981); see
Fisher, 424 U.S. at 390 (holding that tribe had exclusive jurisdiction in child-custody proceedings); Cohen’s Handbook of Federal Indian Law 216 (2012 ed.) (“Cohen”) (“One area of extensive tribal power is domestic relations among tribal members.”).

Accordingly, section 1915(c) is properly viewed as congressional confirmation of inherent tribal power over the proper placement of Indian children and, at most, “relax[es] restrictions on the bounds of the inherent tribal authority.” Lara, 541 U.S. at 207; see Holyfield, 490 U.S. at 42. Moreover, if Congress—as it did in the statute reviewed in Lara—could recognize inherent tribal criminal jurisdiction over non-members, a fortiori Congress can recognize a tribe’s authority over placement of its children. In this sense, section 1915(c), like the statute in Lara, is not a delegation at all. See also United States v. Long, 324 F.3d 475, 482 (7th Cir. 2003) (finding that the Menominee Restoration Act was a confirmation of preexisting governmental powers instead of a delegation).

C. If this Court finds section 1915 is a delegation, it is permissible under well-settled law.

The district court nevertheless concluded that a tribe is “like a private entity” and thus “not part of the [federal] Government at all,
which would necessarily mean that it cannot exercise ... governmental power.” (ROA.4039 (internal quotations omitted) (ellipsis in original).) This is error. It is indisputable that Congress can delegate federal authority to an Indian tribe. In United States v. Mazurie, 419 U.S. 544 (1975), the Court upheld Congress’s delegation to an Indian tribe to control the introduction of alcoholic beverages into the tribal community. Id. at 557. Writing for a unanimous Court, then-Justice Rehnquist explained that, while the “Court has recognized limits on the authority of Congress to delegate its legislative power,” such “limitations are ... less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.” Id. at 556-57. The Court pointed out that the “important aspect of this case” is that it addresses a delegation to Indian tribes, “unique aggregations possessing attributes of sovereignty over both their members and their territory.” Id. at 557. Tribal governmental powers are particularly substantial “over matters that affect the internal and social relations of tribal life.” Id. Accordingly, the Court concluded, “the independent tribal authority is quite sufficient to protect Congress’ decision to vest in tribal councils this portion of its
own authority.” *Id.*; see also *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1213 (9th Cir. 2001) (*en banc*) (affirming congressional delegation to tribes over non-Indian lands); *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287-92 (D.C. Cir. 2000) (affirming Congress’s delegation to tribes to establish air quality standards under Clean Air Act); *Cohen* at 216 (“tribes are governments capable of exercising legislative powers delegated by Congress”). The district court cited not a single instance when any court has invalidated a congressional delegation to a tribe.21

Finally, Congress adequately legislates when the statute sets forth an “intelligible principle”—not a demanding requirement.

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21 The district court purported to quote the Court as stating “Congress ‘cannot delegate its exclusively legislative authority at all,’” citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980), and *White Mountain Apache Tribe v. Arizona Department of Game & Fish*, 649 F.2d 1274, 1281 (9th Cir. 1981). (ROA.4038.) But this language does not appear in either case. And neither case supports the court’s assertion. *Confederated Tribes* addressed whether, absent a federal statute, state taxation of cigarette sales to non-Indians was preempted. 447 U.S. at 160-61. The Court expressly noted that “the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so.” *Id.* at 156. Similarly, *White Mountain Apache* explained that “Congress has manifested no intent whatsoever to delegate to tribes” the power at issue. 649 F.2d at 1281.
Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 474 (2001). As Justice Scalia explained:

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

Id.

The “intelligible principle” test is satisfied here. The power recognized in section 1915(c) is a narrow one. It merely provides that tribes are able to reorder the congressionally selected placements to better fit their communities. This is nothing close to the “authority to regulate the entire economy” mentioned in Whitman. Moreover, reordering of placements can occur only when a tribal sovereign enacts a law. § 1915(c). Further, the reordering must be followed in a particular case only “so long as the placement is the least restrictive setting appropriate to the particular needs of the child,” and the court must consider “the preference of the Indian child or parent” for any placement. Id. And, even if a tribe reorders the placement preferences, a “court would still have the power to determine whether ‘good cause’
exists to disregard the tribe’s order of preference.” *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655 n.11 (2013). In short, if section 1915(c) is a delegation of congressional authority, the intelligible principles test is met.

The ruling that section 1915(c) violates the Non-Delegation Doctrine should be reversed.

V. **The Final Rule Does Not Violate the APA.**

The district court held that the Final Rule violates the APA for two reasons. First, because Interior failed to explain its change from its 1978 view about its authority to issue regulations, “those regulations remain not *necessary* to carry out the ICWA.” (ROA.4047-49.) Second, even if Interior could issue regulations, the court held that the suggestion that “good cause” should be established by clear and convincing evidence is contrary to the statute and therefore not entitled to *Chevron* deference. (ROA.4050-53.) The district court is wrong on both points.22

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22 As explained, the court’s holding (ROA.4046) that the Final Rule violated the APA because it implements an unconstitutional statute is wrong.
A. **Interior possessed statutory authority to promulgate the Final Rule.**

ICWA provides Interior with express authority to promulgate the Final Rule: “the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.” § 1952. As explained in the Final Rule and the opinion issued by the Solicitor of Interior, section 1952 is substantively identical to other statutes that courts have repeatedly confirmed provide broad delegations of rulemaking authority. 81 Fed. Reg. at 38,785; Memorandum M-37037 from Solicitor of Interior to Sec’y of Interior on Implementation of the Indian Child Welfare Act by Legislative Rule 15 (June 8, 2016) (“Solicitor’s Opinion”), available at www.doi.gov/sites/doi.gov/files/uploads/m-37037.pdf.

*City of Arlington v. FCC*, 569 U.S. 290 (2013), relied upon in both the Final Rule and the Solicitor’s Opinion, is instructive. There, the Supreme Court affirmed that a grant of statutory authority to “prescribe such rules and regulations as may be necessary in the public interest” authorized the FCC to impose deadlines on states and local governments to process siting applications for wireless facilities. *Id.* at 293, 307. The Court held that *Chevron, U.S.A., Inc. v. Natural*
Resources Defense Council, Inc., 467 U.S. 837 (1984), applies to an agency’s determination of its own jurisdiction. 569 U.S. at 301. The Court explained that there was not “a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support Chevron deference for an exercise of that authority within the agency’s substantive field.” Id. at 306.

Here, Interior explained in detail why the Final Rule was necessary. Drawing on its expertise in directly providing child-welfare services to tribes, its delivery of technical assistance to state social workers and courts, and its expertise in Indian affairs, Interior reasonably concluded that the Final Rule was necessary to carry out ICWA. 81 Fed. Reg. at 38,784-85. In particular, the agency emphasized the need to provide uniform federal standards for certain ICWA provisions. 81 Fed. Reg. at 38,782; Solicitor’s Opinion at 10. Interior highlighted that state courts themselves had noted courts’ inconsistency in applying key provisions of ICWA. 81 Fed. Reg. at 38,782; Solicitor’s Opinion at 10 nn.78, 80. Interior concluded that the current variation among states was contrary to Congress’s intent, undermined ICWA, and was inconsistent with Holyfield. 81 Fed. Reg. at 38,782. Comments
from states, tribes, national child welfare organizations and professionals, and the public affirmed the need for regulations to provide uniform standards to carry out ICWA. The Tribes are not aware of a single state or child-welfare agency that disputed the need for regulations during the rulemaking process.

In addition to uniform standards, Interior also concluded that the lack of binding guidelines hindered the necessary protection of tribal citizens living outside of Indian country. *Id.* at 38,782-83. Noting that Native children were still disproportionally overrepresented in the foster-care system, Interior believed that regulations would help reunify children with their parents. *Id.* at 38,783-84; Solicitor’s Opinion at 9-10.

Ignoring these explanations, the district court relied on *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018). The court read *Chamber* to say that Interior’s interpretation is not due deference because Interior’s position changed over time. (ROA.4048-49.) But *Chamber* is inapposite. The *Chamber* court held that rule under review was not entitled to deference since it was outside the congressional mandate and conflicted with the statutory text. 885
F.3d at 369. Interior here had express statutory authority for issuing the Final Rule.

**B. Interior provided a reasoned explanation of its change in position and the Final Rule was within Congress’s delegation of authority in section 1952.**

The district court erred in concluding that Interior “does not explain its change in position” from its 1978 guidance. (ROA.4049.) Because an agency “must consider ... the wisdom of its policy on a continuing basis,” *Chevron*, 467 U.S. at 863-64, the APA does not subject an agency’s change in position to a more searching review. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). An agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one.” *Id.* at 515. Rather, “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.” *Id.*

Here, Interior did not ignore its 1978 guidance. Rather, it discussed the previous guidance in both the Final Rule and the Solicitor’s Opinion, carefully explaining why its previous position that regulations were unnecessary was no longer correct. First, Interior
explained that decades of “real-world ICWA application have thoroughly disproven [its prior position] and underscored the need for ... regulation.” 81 Fed. Reg. at 38,786; Solicitor’s Opinion at 18. Second, Interior explained that at the time of its prior guidance it did not have the benefit of *Holyfield*, which affirmed Congress’s intent that ICWA have nationwide uniform application and that ICWA’s provisions were not dependent on state law. 81 Fed. Reg. at 38,786-87; Solicitor’s Opinion at 18-19. Third, Interior specifically addressed those parts of its earlier guidance questioning whether section 1952 allowed regulations applicable in state courts. 81 Fed. Reg. at 38,788-89; Solicitor’s Opinion at 19-22. Finally, Interior carefully analyzed its authority to issue the Final Rule. 81 Fed. Reg. 38,785-90.

In sum, the record demonstrates that Interior explained that “the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.” *Fox*, 556 U.S. at 515. Interior’s reasoned analysis therefore satisfies the APA.

**C. The Final Rule is entitled to *Chevron* deference.**

Plaintiffs argued below that the Final Rule’s clarification of the meaning of “good cause” and the imposition of a “clear and convincing”
evidentiary standard are not entitled to *Chevron* deference. The district court ruled that the “clear and convincing” evidence standard in section 23.132(b) was not entitled to *Chevron* deference and was contrary to law. (ROA.4051-53.)

This ruling is wrong in two respects. First, the good-cause regulation is entitled to *Chevron* deference. Second, Interior appropriately concluded that what constitutes “good cause” to depart from ICWA’s placement preferences under ICWA was ambiguous and that the “clear and convincing” evidentiary standard was appropriate.

*First, Chevron* established a familiar two-part test. First, where “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” 467 U.S. at 842-43. However, where “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

The district court held that the good-cause regulation failed at *Chevron* step one because Congress intended a preponderance of the evidence standard to govern departures from the placement
preferences. The court reasoned that, because “other portions of the ICWA specifically included heightened evidentiary burdens,” while section 1915 is silent, Congress intended the preponderance standard to apply to section 1915. (ROA.4052.) But this *expressio unius* reasoning has been expressly rejected in the APA context. “The *expressio unius* canon operates differently in our review of agency action than it does when we are directly interpreting a statute.” *Van Hollen v. FEC*, 811 F.3d 486, 493 (D.C. Cir. 2016). As the D.C. Circuit explained:

> When interpreting statutes that govern agency action, we have consistently recognized that a congressional mandate in one section and silence in another often “suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion.” Silence, in other words, may signal permission rather than proscription. For that reason, that Congress spoke in one place but remained silent in another … “rarely if ever” suffices for the “direct answer” that *Chevron* step one requires.


*Second*, the good-cause regulations are reasonable. Interior closely examined the issue of what constitutes “good cause.” Finding ambiguities, Interior then set forth five factors upon which a good cause finding may be based and discussed each factor in detail. 81 Fed. Reg.
at 38,838-40, 38,843-47. This guidance effectuated Congress’s intent that good cause be a limited exception rather than a broad category that swallows the rule. *Id.* at 38,839. Interior expressly provided for flexibility, moreover, explaining that “the final rule says that good cause ‘should’ be based on one of the five factors, but leaves open the possibility that a court may determine, given the particular facts of an individual case, that there is good cause to deviate from the placement preferences because of some other reason.” *Id.* at 38,839, 38,847.

Regarding the application of the “clear and convincing” evidence standard to a determination of good cause to depart from the placement preferences, Interior noted that, unlike other sections of ICWA, a burden of proof standard was not articulated in section 1915. *Id.* at 38,843. Accordingly, Interior examined the statute, legislative history, and state cases and found that “[state] courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress’s intent in ICWA to maintain Indian families and Tribes intact.” *Id.* Interior found the analysis of these state decisions convincing. Finally, while Interior opined that “the clear and convincing
standard ‘should’ be followed,” it expressly declined to “categorically require that outcome.” Id.

Accordingly, the judgment on Plaintiffs’ APA claim should be reversed.

CONCLUSION

For the foregoing reasons, 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. 27(d)(2)(A) because this response contains 12,973 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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I hereby certify that on January 16, 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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Indian Child Welfare Act,
CHAPTER 21 INDIAN CHILD WELFARE

Sec 1903. Congressional findings.
1902. Congressional declaration of policy.
1903. Definitions.

SUBCHAPTER I CHILD CUSTODY PROCEEDINGS

1911. Indian tribe jurisdiction over Indian child custody proceedings.
1912. Pendent court proceedings.
1913. Parental rights; voluntary termination.
1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations.
1915. Placement of Indian children.
1916. Return of custody.
1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court.
§ 1903. Congressional findings
Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds

(1) that clause 3, section 8, article I of the United States Constitution provides that “The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes”; and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian children are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

(Pub. L. 95 608, §2, Nov. 8, 1978, 92 Stat. 3069.)

§ 1902. Congressional declaration of policy
The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

(Pub. L. 95 608, §3, Nov. 8, 1978, 92 Stat. 3069.)

§ 1903. Definitions
For the purposes of this chapter, except as may be specifically provided otherwise, the term

(1) “child custody proceeding” shall mean and include

(i) “foster care placement” shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent child relationship;

(iii) “preadoptive placement” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents;

(2) “extended family member” shall be as defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother in law or sister in law, niece or nephew, first or second cousin, or stepparent;

(3) “Indian” means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43;

(4) “Indian child” means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the
biological child of a member of an Indian tribe;
(5) “Indian child’s tribe” means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of one tribe, the Indian tribe with which the Indian child has the more significant contacts;
(6) “Indian custodian” means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;
(7) “Indian organization” means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;
(8) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, in cluding any Alaska Native village as defined in section 1602(c) of title 43;
(9) “parent” means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, in cluding adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;
(10) “reservation” means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or in dividual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;
(11) “Secretary” means the Secretary of the Interior; and
(12) “tribal court” means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code, or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.


§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such ap
pointment is in the best interest of the child. Where State law makes no provision for ap
tpointment of counsel in such proceedings, the
court shall promptly notify the Secretary upon
appointment of counsel, and the Secretary, upon
certification of the presiding judge, shall pay
reasonable fees and expenses out of funds which
may be appropriated pursuant to section 13 of
this title.

(c) Examination of reports or other documents

Each party to a foster care placement or ter-
mination of parental rights proceeding under
State law involving an Indian child shall have
the right to examine all reports or other docu-
ments filed with the court upon which any deci-
sion with respect to such action may be based.

(d) Remedial services and rehabilitative pro-
grams; preventive measures

Any party seeking to effect a foster care
 placement of, or termination of parental rights
to, an Indian child under State law shall satisfy
the court that active efforts have been made to
provide remedial services and rehabilitative pro-
grams designed to prevent the breakup of the In-
dian family and that these efforts have proved
unsuccessful.

(e) Foster care placement orders; evidence; de-
termination of damage to child

No foster care placement may be ordered in
such proceeding in the absence of a determi-
nation, supported by clear and convincing evi-
dence, including testimony of qualified expert
witnesses, that the continued custody of the
child by the parent or Indian custodian is likely
to result in serious emotional or physical dam-
age to the child.

(f) Parental rights termination orders; evidence;
determination of damage to child

No termination of parental rights may be or-
dered in such proceeding in the absence of a de-
termination, supported by evidence beyond a
reasonable doubt, including testimony of qual-
ified expert witnesses, that the continued cus-
tody of the child by the parent or Indian custo-
dian is likely to result in serious emotional or
physical damage to the child.

3071.)

§1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid
consents

Where any parent or Indian custodian volun-
tarily consents to a foster care placement or to
termination of parental rights, such consent
shall not be valid unless executed in writing and
recorded before a judge of a court of competent
jurisdiction and accompanied by the presiding
judge’s certificate that the terms and conse-
quences of the consent were fully explained in
detail and were fully understood by the parent
or Indian custodian. The court shall also certify
that either the parent or Indian custodian fully
understood the explanation in English or that it
was interpreted into a language that the parent
or Indian custodian understood. Any consent
given prior to, or within ten days after, birth of
the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw
consent to a foster care placement under State
law at any time and, upon such withdrawal, the
child shall be returned to the parent or Indian
custodian.

(c) Voluntary termination of parental rights or
adoptive placement; withdrawal of consent;
return of custody

In any voluntary proceeding for termination
of parental rights to, or adoptive placement of,
an Indian child, the consent of the parent may
be withdrawn for any reason at any time prior
to the entry of a final decree of termination or
adoption, as the case may be, and the child shall
be returned to the parent.

(d) Collateral attack; vacation of decree and re-
turn of custody; limitations

After the entry of a final decree of adoption of
an Indian child in any State court, the parent
may withdraw consent thereto upon the grounds
that consent was obtained through fraud or du-
ress and may petition the court to vacate such
decree. Upon a finding that such consent was ob-
tained through fraud or duress, the court shall
vacate such decree and return the child to the
parent. No adoption which has been effective for
at least two years may be invalidated under the
provisions of this subsection unless otherwise
permitted under State law.

3072.)

§1914. Petition to court of competent jurisdiction
to invalidate action upon showing of certain
violations

Any Indian child who is the subject of any ac-
 tion for foster care placement or termination of
parental rights under State law, any parent or
Indian custodian from whose custody such child
was removed, and the Indian child’s tribe may
petition any court of competent jurisdiction to
invalidate such action upon a showing that such
action violated any provision of sections 1911,
1912, and 1913 of this title.

3072.)

§1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child
under State law, a preference shall be given, in
the absence of good cause to the contrary, to a
placement with (1) a member of the child’s ex-
tended family; (2) other members of the Indian
child’s tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; cri-
teria; preferences

Any child accepted for foster care or pre-
adoptive placement shall be placed in the least
restrictive setting which most approximates a
family and in which his special needs, if any,
may be met. The child shall also be placed with
in reasonable proximity to his or her home, tak-
ing into account any special needs of the child.
In any foster care or preadoptive placement, a
preference shall be given, in the absence of good
cause to the contrary, to a placement with
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§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or where the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.


§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual’s biological parents and provide such other information as may be necessary to protect any rights flowing from the individual’s tribal relationship.


§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 568), as amended by title IV of the Act of April 11, 1966 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multithreat occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.
(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.


REFERENCES IN TEXT

Act of August 15, 1933, referred to in subsec. a, is act Aug. 15, 1933, ch. 506, 57 Stat. 588, as amended, which enacted section 1162 of Title 18, Crimes and Criminal Procedure, section 1360 of Title 28, Judiciary and Judicial Procedure, and provisions set out as notes under sections 1369 and 1370 of Title 28. For complete classification of this Act to the Code, see Tables.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for or allow the transfer of jurisdiction on a case by case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.


§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child; danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly relinquished custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.


§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.


§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.


§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.


SUBCHAPTER II INDIAN CHILD AND FAMILY PROGRAMS

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establish
ment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to:

1. a system for licensing or otherwise regulating Indian foster and adoptive homes;
2. the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;
3. family assistance, including homemaker and home counselors, day care, after-school care, and employment, recreational activities, and respite care;
4. home improvement programs;
5. the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;
6. education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;
7. a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and
8. guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally-assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non Federal matching share in connection with funds provided under titles IV B and XX of the Social Security Act [42 U.S.C. 620 et seq., 1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.


REFERENCES IN TEXT

The Social Security Act, referred to in subsec. b , is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles IV B and XX of the Social Security Act are classified generally to part B §620 et seq. of subchapter IV and subchapter XX §1397 et seq. of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off reservation Indian child and family service programs which may include, but are not limited to:

1. a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;
2. the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;
3. family assistance, including homemaker and home counselors, day care, after-school care, and employment, recreational activities, and respite care; and
4. guidance, legal representation, and advice to Indian families involved in child custody proceedings.


§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.


CHANGE OF NAME

“Secretary of Health and Human Services” and “Department of Health and Human Services” substituted for “Secretary of Health, Education, and Welfare” and “Department of Health, Education, and Welfare”, respectively, in subsec. a, pursuant to section 3508 b of Pub. L. 96 88, which is classified to section 3508 b of Title 20, Education.
§ 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c)1 of this title.

(Pub. L. 95 608, title II, §204, Nov. 8, 1978, 92 Stat. 3077.)

REFERENCES IN TEXT

Section 1603(c) of this title, referred to in text, was redesignated section 1603(c) of this title by Pub. L. 111 148, title X, §10221 a., Mar. 23, 2010, 124 Stat. 955.

SUBCHAPTER III RECORDKEEPING, INFORMATION AVAILABILITY, AND TIME TABLES

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order to gether with such other information as may be necessary to show

(1) the name and tribal affiliation of the child;
(2) the names and addresses of the biological parents;
(3) the names and addresses of the adoptive parents; and
(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

(Pub. L. 95 608, title III, §301, Nov. 8, 1978, 92 Stat. 3077.)

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.


SUBCHAPTER IV MISCELLANEOUS PROVISIONS

§ 1961. Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.


CHANGE OF NAME

"Department of Health and Human Services" substituted for "Department of Health, Education, and Welfare" in subsec. b. pursuant to section 509 b of Pub. L. 96 88 which is classified to section 3508 b of Title 20, Education.

Select Committee on Indian Affairs of the Senate redesignated Committee on Indian Affairs of the Senate by section 25 of Senate Resolution No. 71, Feb. 25, 1993, One Hundred Third Congress.

Committee on Interior and Insular Affairs of the House of Representatives changed to Committee on Natural Resources of the House of Representatives on Jan. 5, 1993, by House Resolution No. 5, One Hundred Third Congress.

§ 1962. Copies to the States

Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter.


§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

(Pub. L. 95 608, title IV, §403, Nov. 8, 1978, 92 Stat. 3078.)