PRISCILLA R. OWEN, Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority opinion. But I conclude that certain provisions of the Indian Child Welfare Act (ICWA)[1] and related regulations violate the United States Constitution because they direct state officers or agents to administer federal law. I therefore dissent, in part.

The offending statutes include part of 25 U.S.C. § 1912(d) (requiring a State seeking to effect foster care placement of an Indian child to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful"), § 1912(e) (prohibiting foster care placement unless a State presents evidence from "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 damage to the child"), and § 1915(e) (requiring that "[a] record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section" and that "[s]uch record[s] shall be made available at any time upon the request of the Secretary or the Indian child's tribe"). Regulations requiring States to maintain related records also violate the Constitution.[2]

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[1] 25 U.S.C. §§ 1901 et seq.

[2] *See* 25 C.F.R. § 23.141:

> (a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

The Supreme Court has made clear that Congress cannot commandeer a State or its officers or agencies: "[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[3] "The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States."[4] "The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms."[5] The Supreme Court has recognized that "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority."[6]

The defendants in the present case contend that the Indian Commerce Clause[7] empowers Congress to direct the States as it has done in the ICWA.

> (b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.
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> (c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

[3] *Printz v. United States*, 521 U.S. 898, 925 (1997).
[4] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018).
[5] *Id.* at 1476.
[6] *Id.*
[7] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

They are mistaken. "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[8]

The panel's majority opinion concludes that the ICWA does "not commandeer state agencies"[9] because it "evenhandedly regulate[s] an activity in which both States and private actors engage."[10] This is incorrect with respect to the part of 25 U.S.C. § 1912(d) addressed to foster care placement, § 1912(e), § 1915(e), and 25 C.F.R. § 23.141.

Though § 1912(d) nominally applies to "[a]ny party seeking to effect a foster care placement of . . . an Indian child under State law,"[11] as a practical matter, it applies only to state officers or agents. Foster care placement is not undertaken by private individuals or private actors. That is a responsibility that falls upon state officers or agencies. Those officers or agencies are required by § 1912(d) to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[12] That directive means that a State cannot place an Indian child in foster care, regardless of the exigencies of the circumstances, unless it first provides the federally specified services and programs without success. Theoretically, a State could decline to protect Indian children in need of foster care. It could, theoretically, allow Indian children to remain in abusive or even potentially lethal circumstances. But that is not a realistic choice, even if state

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[8] *Murphy*, 138 S. Ct. at 1477 (quoting *New York v. United States*, 505 U.S. 144, 178 (1992)).

[9] *Brackeen v. Bernhardt*, __ F.3d __, __, 2019 WL 3759491, at *14 (5th Cir. 2019).

[10] *Id.* (quoting *Murphy*, 138 S. Ct. at 1478).

[11] 25 U.S.C. § 1912(d).

[12] *Id.*

law did not apply across the board and include all children, regardless of their Indian heritage.

Certain of the ICWA's provisions are a transparent attempt to foist onto the States the obligation to execute a federal program and to bear the attendant costs. Though the requirements in § 1912(d) are not as direct as those at issue in *Printz v. United States*,[13] the federal imperatives improperly commandeer state officers or agents:

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. *See Texas v. White*, 7 Wall. [700,] 725 [(1868)]. It is no more compatible with this independence and autonomy that their officers be "dragooned" (as Judge Fernandez put it in his dissent below, [*Mack v. United States*], 66 F.3d[1025,] 1035 [(9th Cir. 1995)]) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.[14]

Similarly, § 1912(e) provides that "[n]o foster care placement may be ordered" unless there is "qualified expert witness[]" testimony "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[15] This places the burden on a State, not a court, to present expert witness testimony in order to effectuate foster care for Indian children. If the federal government has concluded that such testimony is necessary in every case involving an Indian child's foster care placement, then the federal government should provide it. It cannot require the States to do so.

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[13] 521 U.S. 898 (1997).
[14] *Id.* at 928.
[15] 25 U.S.C. § 1912(e).

The requirements in 25 U.S.C. § 1912(d) apply to termination of parental rights, not just foster care placement.[16] The laws of Indiana, Louisiana, and Texas each permit certain individuals to petition for the termination of parental rights in some circumstances,[17] and § 1912(d) applies to all parties seeking termination, not just state actors.[18] At least superficially, § 1912(d) appears to be an evenhanded regulation of an activity in which both States and private actors engage.[19] But it is far from clear based on the present record that § 1912(d) applies in a meaningful way to private actors and if so, how many private actors, as compared to state actors, have actually met its requirements. Additionally, it appears that the State plaintiffs contend that "the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments."[20] I would remand for further factual development. It may be that in the vast majority of *involuntary* parental termination proceedings, the party seeking the termination is a state official or agency. It also seems highly unlikely that individuals or private actors seeking termination of parental rights (if and when permitted to do so under a State's laws) will have been in a position "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."[21] It seems much more likely that these requirements fall, de facto, on the shoulders of state actors and agencies.

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[16] *Id.* § 1912(d).

[17] *See*, *e.g.*, IND. CODE §§ 31-35-2-4, 31-35-3.5-3 (2018); IND. CODE § 31-35-3-4 (2013); LA. CHILD. CODE ANN. art. 1122 (2019); TEX. FAM. CODE ANN. § 102.005 (West 2019); TEX. FAM. CODE ANN. § 161.005 (West Supp. 2019).

[18] 25 U.S.C. § 1912(d).

[19] *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018) ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.").

[20] *Printz v. United States*, 521 U.S. 898, 932 (1997).

[21] 25 U.S.C. § 1912(d).

The records-keeping requirements in 25 U.S.C. § 1915(e) and 25 C.F.R. § 23.141 are direct orders to the States.[22] They do not apply to private parties in parental termination or foster care placement proceedings. They do not apply "evenhandedly [to] an activity in which both States and private actors engage."[23]

The Supreme Court expressly left open in *Printz* whether federal laws "which require only the provision of information to the Federal Government" are an unconstitutional commandeering of a State or its officers or agents.[24] But the principles set forth in *Printz* lead to the conclusion that Congress is without authority to order the States to provide the information required by § 1915(e) and related regulations. Even were the burden on the States of creating, maintaining, and supplying the required information "minimal and only temporary," the Supreme Court has reasoned that "where . . . it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate."[25] The Supreme Court stressed, "It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."[26]

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[22] *Id.* at § 1915(e) ("A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made . . . ."); 25 C.F.R. § 23.141 ("The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child . . . .").

[23] *Brackeen v. Bernhardt*, __ F.3d __, __, 2019 WL 3759491, at *14 (5th Cir. 2019) (quoting *Murphy*, 138 S. Ct. at 1478).

[24] 521 U.S. at 918.

[25] *Id.* at 932.

[26] *Id.*

The panel's majority opinion concludes that the requirements of 25 U.S.C. § 1915(e) and 25 C.F.R. § 23.141 do not commandeer state officers or agents because they "regulate state activity and do not require states to enact any laws or regulations, or to assist in the enforcement of federal statutes regulating private individuals."[27] But the statute orders States to maintain records of each placement of an Indian child and requires those records to "evidenc[e] the efforts to comply with the order of preference specified in this section."[28] That directs States to assist in the enforcement of the ICWA by requiring States to document efforts to comply with the ICWA's preferences. The panel's majority opinion also cites three Supreme Court decisions, none of which supports its holding regarding the creation and maintenance of records.[29] The statute at issue in *Condon* prohibited States from disclosing or selling personal information they obtained from drivers in the course of licensing drivers and vehicles, unless the driver consented to the disclosure or sale of that information.[30] The Court's decision in *Condon* focused on that prohibition rather than the statute's additional requirement that certain information be disclosed to carry out the purposes of federal statutes including the Clean Air Act and the Anti Car Theft Act of 1992.[31] The *Baker* decision did not concern a requirement that States create and maintain records.[32] The federal statute at issue in *Baker* allowed a tax exemption for registered, but not bearer, bonds, and the statute "cover[ed] not only state bonds but also

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[27] *Brackeen*, __ F.3d at __, 2019 WL 3759491, at *14.

[28] 25 U.S.C. § 1915(e).

[29] *Brackeen*, __ F.3d at __, 2019 WL 3759491, at *14 (citing *Reno v. Condon*, 528 U.S. 141, 151 (2000); *Printz*, 521 U.S. at 918; *South Carolina v. Baker*, 485 U.S. 505, 514 (1988)).

[30] *Condon*, 528 U.S. at 143-44 (citing the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725).

[31] *Id*. at 145, 148-51.

[32] *See Baker*, 485 U.S. at 508-10.

bonds issued by the United States and private corporations."[33] As already discussed above, the *Printz* decision expressly left open the question of whether federal statutes requiring States to provide information was constitutional,[34] but the rationale of *Printz* compels the conclusion that some of the ICWA's commandments result in a commandeering of state officers and agents.

I agree with the panel's majority opinion that in some respects, the ICWA "merely require[s] states to 'take administrative . . . action to comply with federal standards regulating' child custody proceedings involving Indian children, which is permissible under the Tenth Amendment."[35] Unlike the congressional enactment at issue in *Murphy*, the ICWA does "confer . . . federal rights on private actors interested in"[36] foster care placement, the termination of parental rights to an Indian child, and adoption of Indian children. States cannot override or ignore those private actors' federal rights by failing to give notice to interested or affected parties or by failing to follow the placement preferences expressed in the ICWA. If a State desires to place an Indian child with an individual or individuals other than the child's birth parents, the State must respect the federal rights of those upon whom the ICWA confers an interest in the placement of the Indian child or Indian children more generally. But 25 U.S.C. § 1912(d) (to the extent it concerns foster care placement), § 1912(e), § 1915(e), and 25 C.F.R. § 23.141, require more than the accommodation of private actors' federal rights regarding the placement of Indian children. Those statutes and regulations commandeer state officers or agents by requiring them "to provide remedial services and rehabilitative

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[33] *Id.* at 510.
[34] *Printz*, 521 U.S. at 918.
[35] *Brackeen*, __ F.3d at __, 2019 WL 3759491, at *14 (quoting *Baker*, 485 U.S. at 515).
[36] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1467 (2018).

programs designed to prevent the breakup of the Indian family" and to demonstrate that such "efforts have proved unsuccessful";[37] to present "qualified expert witnesses" to demonstrate "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child";[38] and to create and maintain records of every placement of an Indian child as well as records "evidencing the efforts to comply with the order of preference specified in this section."[39]

That these statutes and regulations "serve[] very important purposes" and that they are "most efficiently administered" at the state level is of no moment in a commandeering analysis.[40] As JUSTICE O-CONNOR, writing for the Court in *New York v. United States*, so eloquently expressed, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[41]

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[37] 25 U.S.C. § 1912(d).
[38] *Id.* § 1912(e).
[39] *Id.* § 1915(e).
[40] *Printz v. United States*, 521 U.S. 898, 931-32 (1997).
[41] 505 U.S. 144, 187 (1992).