JAMES L. DENNIS, *Circuit Judge*: †

The Indian Child Welfare Act (ICWA) of 1978 is a federal law that regulates the removal and out-of-home placement of American Indian children. The Act establishes minimum federal standards that must be met in any legal proceeding to place an Indian child in a foster or adoptive home, and it ensures that Indian tribes and families are allowed to participate in such Indian child welfare cases. *See* 25 U.S.C. § 1901 *et seq*. Congress enacted ICWA after finding "that an alarmingly high percentage of Indian families 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"; "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"; and "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children

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† JUDGES STEWART and GRAVES join this opinion in full. JUDGES WIENER, HIGGINSON, AND COSTA join all except Discussion Part I.A.2 (standing to bring equal protection claims other than the challenges to 25 U.S.C. §§ 1913-14).

CHIEF JUDGE OWEN joins Discussion Parts I.A.1 (standing to challenge §§ 1913-14), I.C (standing to bring anticommandeering claims), II.A.2.a.1 (anticommandeering challenge to §§ 1912(e)-(f) and 1915(a)-(b) as they pertain to state courts), and II.C (nondelegation). She further joins Discussion Part I.D (standing to bring nondelegation claim) except as to the final sentence. *See infra* OWEN, CHIEF JUDGE, OP.

JUDGE SOUTHWICK joins Discussion Parts I.A.1 (standing to challenge §§ 1913-14), II.A.1 (Congress's Article I authority), II.B (equal protection), and II.C (nondelegation). He further joinss in-part Discussion Parts II.A.2 (anticommandeering) and II.D (APA challenge to the Final Rule), disagreeing to the extent the analyses pertains to § 1912(d)-(f) and the regulations that implement those provisions.

JUDGE HAYNES has expressed her partial concurrence in her separate opinion. *See infra* HAYNES, CIRCUIT JUDGE, OP.

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." *Id.*

Plaintiffs, consisting of the States of Texas, Louisiana, and Indiana, and seven individuals, challenge the facial constitutionality of ICWA as well as the statutory and constitutional validity of the Department of Interior's 2016 administrative rule implementing ICWA (the "Final Rule"). Combined, Texas, Louisiana, Indiana, and Ohio (which filed an amicus brief in support of Plaintiffs) are home to only about 1% of the total number of federally recognized Indian tribes and less than 4% of the national American Indian and Alaska Native population. *See* NAT'L CONF. OF STATE LEGIS., FEDERAL AND STATE RECOGNIZED TRIBES (March 2020), https://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx; CENTERS FOR DISEASE CONTROL AND PREVENTION, *Tribal Population* https://www.cdc.gov/tribal/tribes-organizations-health/tribes/state-population.html (last viewed Mar. 29, 2021). On the other hand, twenty-six other states and the District of Columbia have filed amicus briefs asking us to uphold ICWA and the Final Rule. Those states are California, Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Washington, and Wisconsin, which are collectively home to 94% of federally recognized Indian tribes and 69% of the national American Indian and Alaska Native population.

We do not decide cases by a show of hands of states' votes, of course, but we cannot ignore the irony of the situation with which we are faced. Twenty-six states and the District of Columbia, which are home to a large majority of federally recognized tribes and the nation's overall indigenous population, do not view ICWA as any sort of burden on their child welfare

systems. They strongly contend that ICWA is constitutional and have no problem applying it in their state court systems; indeed, they view ICWA as the "gold standard" for child welfare practices and a "critical tool" in managing their relationships with the Indian tribes within their borders. Conversely, only four states with relatively few tribes and Indians regard ICWA as offensive to their sovereignty and seek to have the law struck down completely because it intrudes upon their otherwise unimpeded discretion to manage child custody proceedings involving Indian children. Further, these State Plaintiffs and their amicus wrongly assert repeatedly that ICWA regulates *all* of their child custody and adoption proceedings. This is simply not true. Congress drew ICWA narrowly to provide minimum protections only to qualified Indian children—safeguards that Congress found necessary and proper to stop the abusive practices that had removed nearly a generation of Indian children from their families and tribes and that threatened the very existence of the Indian nations. *See generally* MARGARET JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD (2014) [hereinafter JACOBS, A GENERATION REMOVED]. The vast majority of child custody proceedings in Texas, Louisiana, and Indiana do not involve Indian children; therefore, ICWA does not apply in the vast majority of such proceedings in those states or, for that matter, in any other state.

Defendants are the United States of America, several federal agencies and officials in their official capacities, and five intervening Indian tribes. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction, but the district court denied the motion, concluding, as relevant to this appeal, that Plaintiffs had Article III standing. The district court then granted summary judgment in favor of Plaintiffs, ruling that provisions of ICWA and the Final Rule violated equal protection, the anticommandeering doctrine, the nondelegation doctrine, and the Administrative Procedure Act (the "APA"). Defendants appealed.

Although we would affirm most aspects of the district court's ruling that Plaintiffs have standing, we would conclude that Plaintiffs' challenges to ICWA lack merit and uphold the statute in its entirety. We would therefore reverse the district court's grant of summary judgment to Plaintiffs and render judgment in favor of Defendants.

BACKGROUND

Before the establishment of the United States, the North American landmass was "owned and governed by hundreds of Indian tribes." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.01 (Nell Jessup Newton ed., 2012.) [hereinafter COHEN'S]. These tribes, sovereigns under international law, came under the jurisdiction of the United States "through a colonial process that was partly negotiated and partly imposed." *Id.* The Constitution recognizes the existence of Indian tribes and, in many respects, treats them as sovereigns in the same manner as the states and foreign nations. *See* U.S. CONST. art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *Holden v. Joy*, 84 U.S. 211, 242 (1872) (holding that the President's Article II, Section 2 power to make treaties with the Indian tribes is coextensive with the power to make treaties with foreign nations). But a long line of judicial opinions confirms that, under U.S. law, Indian tribes occupy a unique position: they are "domestic, dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). That is, tribes reside within the United States and are subject to federal power, but they retain sovereign authority over a range of matters relevant to their self-government. COHEN'S, *supra* § 1.01.

Three key principles underpin the field of federal Indian law. First, Indian tribes possess "inherent powers of a limited sovereignty that has never been extinguished." *Id.* Because of tribes' retained sovereignty, they have a government-to-government relationship with the United States. *Id.* Second, the federal government has expansive and exclusive powers in Indian affairs,

and, relatedly, an ongoing obligation to use those powers to promote the well-being of the tribes in what is commonly referred to as a trust relationship. *Id.* Third, as a corollary to the federal government's broad power in Indian affairs, the supremacy of federal law, and the need for the nation to speak with one voice in its government-to-government relations, state authority in this field is very limited. *Id.*

In addition to these precepts, we are mindful of the uniquely crucial importance of historical perspective in federal Indian law. *See, e.g.*, CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 24 (1969) ("[I]n disputes concerning American Indian tribes the courts have also considered and often decided cases principally on the basis of historical materials[.]"). As Justice Holmes said about a different issue: "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); *see also N.L.R.B. v. Noel Canning,* 573 U.S. 513, 524 (2014) ("[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions[.]" (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). Particularly significant to our analysis is the contemporary understanding of the Constitution's treatment of Indian Affairs at the time of its adoption. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 605-10 (2008) (canvassing Founding-era historical sources to synthesize the original understanding of the Constitution). We therefore survey the interrelated history of Indian affairs and the adoption of the Constitution.

I. A Brief History of the American Indians and the United States Constitution

In holding key provisions of ICWA unconstitutional, the district court disregarded two centuries of precedent and omitted any discussion of the history of the federal constitutional power to enter treaties or legislate with respect to the Indian tribes. Seeking to make up for the district court's errors and omissions, the Plaintiffs now cite to several historical texts. The

authorities they cite, however, mainly support a broad understanding of the federal government's exclusive power over Indian affairs, which includes the authority to prevent states from exercising their sovereignty in ways that interfere with federal policy toward the Indians. Careful study of their references and other scholarly resources reveals the lack of foundation for the district court's more limited conception of federal authority.

Following the American Revolution, the new United States government supplanted the British Crown as the self-appointed ruler of most of North America, thereby inviting expansive white settlement of the continent. *See* COHEN'S, *supra* § 1.02. Americans, then, were optimistic in 1783; their victory over the British had rendered the nation, as George Washington put it, "the sole Lord[] and Proprietor[] of a vast tract of continent." Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1009 (2014) [hereinafter Ablavsky, *Savage Constitution*] (quoting George Washington, THE LAST OFFICIAL ADDRESS, OF HIS EXCELLENCY GENERAL WASHINGTON, TO THE LEGISLATURES OF THE UNITED STATES 4 (1783)). But only four years later, that optimism "turned to despondence, as the Continental Congress, with an empty treasury and a barely extant military, confronted looming wars against powerful Indian confederacies on the northern and southern borderlands." *Id.* Unrest between the tribes, the states, squatters, and settlers was largely to blame for this dramatic shift in national mood—hallmarks of the failure of the central government's Indian policy under the Articles of Confederation. *Id.* at 1006.

The insolvent Continental Congress desperately desired both peace with the Indians and annexation of the western land they inhabited in order to repay the debt it had incurred during the Revolutionary War. *Id.* To accomplish these goals, the new nation followed the practice of the British, who had treated Indian tribes as "quasi-foreign nations" and used negotiation, treaties, and war-making as the primary tools for managing relations. Br. of Prof. Ablavsky at 5. In other words, the United States

structured its relations with tribes akin to its regulation of foreign affairs. *See id.* The Articles of Confederation accordingly provided that the national government was to have authority over "managing all affairs with the Indians." ARTICLES OF CONFEDERATION OF 1781, art. IX. As the Continental Congress's Committee on Southern Indians explained, this authority comprehended a number of interrelated powers: "making war and peace, purchasing certain tracts of [tribal] lands, fixing the boundaries between [Indians] and our people, and preventing the latter settling on lands left in possession of the former." 33 *Journals of the Continental Congress, 1774-1789*, 457 (Roscoe R. Hill ed., 1936). These interconnected powers were, in the Southern Indians Committee's view, "indivisible." *Id.* This is to say that, under the Articles of Confederation, the Continental Congress was intended to possess Indian affairs powers like those that any sovereign would hold in conducting affairs with other sovereigns. *See id.* (noting that "before the revolution" these powers "were possessed by the King"). In practice, however, it was not clear whether, under the Articles, the states also retained the sovereign power to deal with the Indian tribes in their own right. *See* THE FEDERALIST NO. 42 at 217 (James Madison) (describing the delineation of authority as "ambiguous").

Exercising its federal authority, the Continental Congress appointed commissioners to secure peace treaties with tribes throughout the nation. COHEN'S, *supra* at 1.02[3]. These treaties serve as some of the earliest documentary bases for the nation's continuing trust relationship with the tribes. For example, in return for peace and other guarantees, the United States promised the Cherokees that the tribe would be "received" into "the favour and protection of the United States of America." Treaty with the Cherokees, preamble, 1785, 7 Stat. 18. Similar language was included in a treaty with the Six Nations tribes at Fort Stanwix in New York. TREATY WITH THE SIX NATIONS, 1784, 7 Stat. 15 (Treaty at Fort Stanwix).

While the national government worked to secure treaties with the tribes, some states resisted—or outright defied—these efforts, viewing them as infringements on their sovereignty. COHEN'S, *supra* at 1.02[3]. New York, for instance, protested the asserted national "incursion" into its powers posed by the Treaty of Fort Stanwix. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1147 (1995). Other states went further. Georgia and North Carolina seized on ambiguous clauses in the Articles concerning the scope of federal power over Indian affairs, construing them in a manner that "le[ft] the federal powers . . . a mere nullity." 33 *Journals of the Continental Congress* at 457. Indeed, Georgia outright ignored federal treaties and attempted to form its own compacts with the Creek Indians, *see id.*, "reportedly resort[ing] to death threats to compel agreement" and expropriate tribal lands. Ablavsky, *The Savage Constitution*, *supra* at 1028; *see also* Report of the Secretary of War on the Southern Indians (July 18, 1787), in 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789: REVOLUTION AND CONFEDERATION 449, 450 (Alden T. Vaughan et al. eds., 1994) [hereinafter EARLY AMERICAN INDIAN DOCUMENTS].

In a memorandum drafted on the eve of the Constitutional Convention, James Madison described Georgia's "wars and Treaties . . . with the Indians," as emblematic of the "vices" inherent in the division of federal and state power under the Articles. JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES, in 9 THE PAPERS OF JAMES MADISON 345, 348 (Robert A. Rutland et al. eds., 1975). And in a letter sent to Congress in the midst of the Convention, Secretary at War Henry Knox worried that the United States could not "effectual[y] interfere[]" in the many skirmishes that pitted states and settlers against

Indians and, he predicted that a "general [I]ndian war may be expected."[1] H. Knox, Report of the Secretary at War on the Southern Indians (July 18, 1787), in 18 EARLY AMERICAN INDIAN DOCUMENTS 450. Thus, nationalists like Madison and Alexander Hamilton "agreed on the problem": the new nation was "too weak to exercise the authority it enjoyed on paper" under the Articles of Confederation, and a stronger federal government was needed. Ablavsky, *Savage Constitution*, *supra* at 999. "Indian affairs thus propelled the creation of a more powerful national state—one that, in Madison's words, would possess the "ability to effect what it is proper [it] should do.'" *Id.* (alterations in original) (quoting Letter from James Madison to George Nicholas (May 17, 1788), in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 24, 28 (John P. Kaminski et al. eds., 1995)). The supporters of a stronger national authority envisioned a central government that could "govern not merely in principle but 'in reality,'" as Secretary Knox wrote about Indian affairs. *Id.* (quoting Report of the Secretary at War on the Southern Indians (July 18, 1787), in 18 EARLY AMERICAN INDIAN DOCUMENTS 449, 450).

At the Constitutional Convention, Madison attributed the failings of Indian policy to state interference with the Confederation's authority, especially its treatymaking power. *Id.* at 1006. His solution to Indian affairs was to revise "federalism to ensure federal supremacy—partly through the Indian Commerce Clause, but more significantly through the Treaty,

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[1] Knox's position was labeled "Secretary at War" under the Articles. *See* 19 Journals of the Continental Congress, 1774-1789, at 126 (Worthington Chauncey Ford ed., 1912) (establishing under the Articles of Confederation the position of "Secretary at War"). He was appointed to the new position of "Secretary of War" in September 1789. *See* Harry M. Ward, The Department of War, 1781-1795, at 101-02 (1962); *see also* Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50 (establishing the Department of War and the office of Secretary of War, a position invested with "such duties as shall be enjoined on, or entrusted to him by the President of the United States . . . relative to Indian Affairs").

Compact, Supremacy, and Property Clauses." Ablavsky, *Savage Constitution*, *supra* at 1006-07. At its heart, Madison's solution to Indian affairs "envisioned a strengthened federal government that would protect and restrain Indians and states alike." *Id.* at 1007.

Hamilton and other Federalists took a different but complementary view; their "concern over external threats dovetailed with the views of many on the frontier, who blamed the Articles' failure on national military weakness against Native power."[2] *Id.* The approach of Hamilton and

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[2] Though the writings and speeches of Madison have traditionally been regarded as the authoritative encapsulation of the Federalist case for the Constitution, contemporary research has upset the assumption that Madison's views were representative of the Federalist camp generally. In particular, historians have harnessed *The Documentary History of the Ratification*, a rich source of primary material concerning the Constitutional Convention and the ratification debates that includes documents such as letters, petitions, and records of convention debates. *See* MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 18-21 (2003) at 29 [hereinafter Edling, A REVOLUTION IN FAVOR OF GOVERNMENT] (citing THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 24, 28 (John P. Kaminski et al. eds., 1995)). In addition to the obvious import of the proceedings during the Constitutional Convention at which the charter was framed, documentation from the subsequent ratification debates offers significant insight into how the Constitution should be interpreted. The Constitution rooted its legitimacy in the consent of those whom it would come to govern, declaring that the system it outlined was "ordained and established" by "We the people," U.S. CONST. PREAMBLE. To turn the promise of self-rule into a reality, ratification was conducted through a series of state conventions with delegates chosen by the voters of each state. Ratification thus was itself an act of popular sovereignty and representative democracy that required the public and its chosen delegates to be educated and deliberate on the meaning of the Constitution. *See id.* at 29-31. These ratification debates provided the "first widely shared" exposition of important constitutional provisions, and the discussions that took place therein were the starting point for constitutional interpretation during the early republic. *Id.* Thus, the contemporaneous writings that circulated among the public and within the state ratification conventions are as important as the records of the Constitutional Convention itself in determining the charter's original public meaning. *See id.*

Mining this trove, historians have concluded that the issues that motivated Madison were not emphasized by all Federalists. Many Federalists did not echo Madison's

likeminded Federalists to Indian affairs, then, was to create a muscular "fiscal-military state that would possess the means to dominate the borderlands at Indians' expense." *Id.* (citing Max M. Edling, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 47-49 (2003)). The Indians thus served as "both impetus and justification for the creation of a federal standing army" supportable through direct taxation. *Id.*

Ultimately, these arguments in favor of restraining states and centralizing authority over Indian affairs resulted in a significant enhancement of the federal government's power. *Id.* at 999. New constitutional provisions were added declaring the federal constitution, laws, and treaties the supreme law of the land; barring state treatymaking; and providing "exclusive federal power over western territories." *Id.* Added, too, was the Indian Commerce Clause, but the foregoing more general

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prototypical liberal "call for minority rights and limited government," but rather argued for the formation of a strong national state. *Id.* at 14-15. While Madison was concerned primarily with creating a constitutional structure that would protect liberty by restraining concentrations of power and safeguarding the rights of minorities, Hamilton and others sought to establish a robust "national government with the ability to act." *Id.*

This latter group of Federalists, having witnessed the failings of the weak and insolvent nation under the Articles of Confederation, were fierce advocates for the Constitution's grant of unlimited fiscal and military power to the central government, arguing that centralizing such authority was necessary to defend against foreign and domestic aggressors and competitors. *Id.* Chief among the adversaries they sought to protect against were the Indian tribes. Indians presented immediate dangers in the borderlands, and these Federalists feared the tribes would form confederations with each other, the British to the north, or the Spanish to the south, creating strong rival powers for control of the continent. *Id.* These Federalists also perceived a need to remove the tribes, by force or by treaties, as obstacles to the new nation's capitalization of the interior lands and their resources. *See* Ablavsky, *Savage Constitution* at 1037-38, 1063-67. Countering the tribes, they believed, would require a strong central government with unlimited taxing, borrowing, and military powers. In sum, the need for a strong national government with robust powers to manage relations with the Indians played a crucial role in the Federalist case for the Constitution, and recognizing this motivation is key to understanding the wide breadth of the Indian affairs power the Constitution confers on the federal government. *See id.* at 1058-67.

provisions ensuring supreme federal power over the states with respect to foreign affairs and the western territories were of much greater importance, as they collectively authorized the "fiscal-military state committed to western expansion" that the Federalists had envisioned. *Id.*

During the ratification of the Constitution, the constant potential for Indian alliances with other tribes or European nations also influenced the public understanding of the Constitution. *See id.* at 1058-67. Indeed, "many Federalists repeatedly invoked the specter of threats posed by the 'savages' to justify" states' ratifying a stronger federal government and a standing army. *Id.* at 1000, 1069. This unifying strategy worked well: Georgia, for example, ratified the new Constitution after only three days of debate so that it could secure federal aid in its ongoing war with the Creek Indians. *Id.*

Proponents of the new charter also expressly contended that its consolidation of power over Indian affairs in the national government would rectify the problems that had resulted from the split authority between the states and Congress under the Articles of Confederation. Writing in the Federalist Papers, Madison described the Indian Commerce Clause as "very properly unfettered" by the ambiguous limits Article XI of the Articles of Confederation had placed on state power. THE FEDERALIST NO. 42 at 217 (James Madison); *see also* Ablavsky, *The Savage Constitution*, *supra* at 1053-54. The Constitution's opponents recognized, too, the import of this redistribution of power in Indian affairs; Abraham Yates, a leading Anti-Federalist, warned that "adopting the new government[] will enervate" states' "legislative rights, and totally surrender into the hands of Congress the management and regulation of the Indian affairs." Abraham Yates, *Documentary History of the Ratification of the Constitution*, Vol. XX, p. 1158; *see also* Ablavsky, *The Savage Constitution*, *supra* at 1053-54. Yet the Constitution was ratified despite these concerns, indicating that early Americans viewed the benefits of centralizing power over Indian affairs to be worth the surrender of state authority.

The post-ratification history further confirms that the Constitution created a fiscal-military government possessing broad, exclusive federal powers over Indian affairs. The Washington Administration likened federal authority over Indian affairs to its foreign affairs power. For instance, Secretary Knox wrote to President George Washington that "[t]he independent nations and tribes of Indians ought to be considered as foreign nations, not as the subjects of any particular state." Letter from Henry Knox to George Washington (July 7, 1789), in 3 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134, 138 (Dorothy Twohig ed., 1989). Accordingly, as Knox explained in another letter, the federal government had supreme authority to regulate in this field: "[T]he United States have, under the constitution, the sole regulation of Indian affairs, in all matters whatsoever." Letter from Henry Knox to Israel Chapin (Apr. 28, 1792), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 231-32 (Walter Lowrie et al. eds., 1832).

State officials also acknowledged the federal government's plenary authority over Indian affairs under the new constitution. Soon after ratification, for example, South Carolina Governor Charles Pinckney wrote to President Washington requesting aid from "the general Government, to whom with great propriety the sole management of India[n] affairs is now committed." Letter from Charles Pinckney to George Washington (Dec. 14, 1789), in 4 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 401, 404 (Dorothy Twohig ed., 1993); *see also* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1043 (2015) [hereinafter Ablavsky, *Beyond the Indian Commerce Clause*] (citing similar acknowledgments of federal supremacy in Indian affairs by the legislatures of Georgia and Virginia).

Early congressional enactments demonstrate the Founding-era view that the federal government was supreme in regulating Indian affairs. Ablavsky, *Savage Constitution*, *supra* at 999. Particularly significant is the

First Congress's passage of the Indian Intercourse Act (also referred to as the "Non-Intercourse Act" or "Trade and Intercourse Act"). Act of July 22, 1790, 1 Cong. ch. 33, 1 Stat. 137. The statute limited trade with Indians to persons licensed by the federal government and criminalized offenses by U.S. citizens against Indians in Indian country, including within states' borders. Successor versions were enacted throughout the 18th and 19th centuries, further expanding the scope of the law by, for instance, "authorizing federal military force to arrest violators of the Act found within Indian country anywhere in the United States." *See* Br. of Prof. Ablavsky at 11.[3]

That the Constitution was intended to confer on the federal government unimpeded authority vis-à-vis Indian relations is evidenced further in how the government deployed its new fiscal-military power against the tribes in service of the nation's westward expansion.[4] The military's initial western expeditions in the early 1790s resulted in gross failure, as an Indian confederacy handed the American forces the U.S. Army's worst defeat by Indians in its entire history. Ablavsky, *Savage Constitution*, *supra* at 1077-78. The Indians' routing of American troops underscored their martial strength and the threat that they posed to the nation's ambitions to conquer the western lands. In response, the government ramped up spending on the Army over the next few years, swelling its size severalfold. In subsequent battles with the Indians, the newly strengthened Army "prevailed, seizing most of present-day Ohio." *Id.* at 1078. The government's bellicose stance toward the tribes persisted, and, over the next century, wars between the Indians and the United States "remained a near constant" as the government

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[3] *See also* Act of May 19, 1796, 4 Cong. ch. 30, § 3, 1 Stat. 469, 470; Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329.

[4] "The army had been brought into existence to deal with western expansion and to coerce the Indians." EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT, *supra* at 140. Indeed, in the Antebellum era alone, the U.S. Army fought at least ten wars against the Indians. Ablavsky, *Savage Constitution*, *supra* at 1080 & n.483.

continued to facilitate westward expansion.[5] *Id.* at 1078. In this way, the Constitution operated as the Federalists had predicted: the nation developed a strong military able to quell any threat posed by Indians and, consequently, to open up the west to Anglo settlement. *Id.* at 1077-78.

Finally, early Supreme Court decisions confirm that the Constitution was understood to place the reins of authority over Indian affairs squarely and solely in the hands of the federal government. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), Chief Justice John Marshall explained that the Constitution

> confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

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[5] The history of the dispossession of the Indians continued apace throughout the nineteenth and well into the twentieth centuries. In the early years of the nineteenth century, for example, the United States negotiated treaties that resulted in the nation acquiring millions of acres, "often paying pennines on the acre for lands worth many times more." COHEN'S, *supra* § 1.03. Later, during the "allotment" era of 1887 until 1934, Indians' land holdings plunged from 138 million acres to only 48 million acres of land due to the federal government's policy of splitting tribal members' undivided interests in reservation lands into individually-owned lots and then selling off "surplus" reservation land to non-Indians. *Id.* § 1.04. By the measure of some scholars of the Indian history, "the United States seized some 1.5 billion acres from North America's native peoples" in total since the nation's founding. Claudio Saunt, *The Invasion of America*, AEON (Jan. 7, 2015), https://aeon.co/essays/how-were-1-5-billion-acres-of-land-so-rapidly-stolen. Professor Saunt has authored several books documenting the lengthy history of injustices that befell the Indians as their lands were taken by non-Indians throughout the eighteenth and nineteenth centuries, often by the federal government or with its backing. *See, e.g.*, CLAUDIO SAUNT, WEST OF THE REVOLUTION: AN UNCOMMON HISTORY OF 1776 (2014); CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY (2020).

The Court's holistic reading of the Constitution exemplifies how the Founding Generation understood federal Indian authority: as a bundle of interrelated powers that functioned synergistically to give the federal government supreme authority over Indian affairs. *See id.* at 519 ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."); *see also* Ablavsky, *Beyond the Indian Commerce Clause*, *supra* at 1040; *cf. McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." (internal quotation marks omitted)).

In sum, the historical evidence powerfully demonstrates that the Framers intended the Constitution, through an array of provisions, to entrust to the federal government exclusive and supreme authority in Indian affairs, including the power to prevent states from interfering with federal policy toward the Indians. It also reveals that the Founding Generation, both at the federal and state levels, held this same understanding regarding the Constitution's consolidation of authority in Indian affairs. Wielding its interconnected, symbiotic powers in this area, the early federal government at times regulated to encourage national expansion at the expense of the Indians' sovereignty and thereby to entrench tribes' dependency on the federal government of the United States.

II. The Special Federal-Tribal Trust Relationship

As a result of the federal government's forcible annexation of the western lands and envelopment of the Indian nations, the United States developed a special obligation with respect to the Indian tribes, with the two sharing what modern courts generally describe as a unique "trust relationship." Matthew L.M. Fletcher, PRINCIPLES OF FEDERAL INDIAN LAW § 5.2 (1st ed. 2017) [hereinafter Fletcher, FEDERAL INDIAN LAW]. In essence, the trust relationship obligates the federal government to

preserve tribal self-governance, promote tribal welfare, and uphold its fiduciary duty in managing tribal assets. *See id.*

The contemporary understanding of the trust relationship has roots in the centuries-old "doctrine of the law of nations." *Worcester*, 31 U.S. at 520. That doctrine holds that "when a stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one, which does not surrender its right to self-government." Fletcher, FEDERAL INDIAN LAW, *supra* § 5.2; *see Worcester*, 31 U.S. at 552, 555 ("Th[e] relation [between the United States and the tribes] was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master . . . Protection does not imply the destruction of the protected."). Of course, the Indian Nations were originally self-governing sovereigns and independent from any outside rulers. *See McClanahan v. State Tax Comm'n of Az.*, 411 U.S. 164, 172 (1973). But vested with plenary authority over Indian affairs, the federal government from its founding asserted a degree of ultimate sovereignty over the tribes. *See* Ablavsky, *Beyond the Indian Commerce Clause*, *supra* at 1012. In particular, the United States insisted that it had the authority under the law of nations to control the tribes' external relations with other sovereigns. *See* Fletcher, FEDERAL INDIAN LAW, *supra* § 5.2. Under the same law of nations, then, the United States naturally assumed a duty of protection to the tribes. *See id.* And as the nation expanded westward, an increasing number of Indian nations, whether through treaty or military conquest, fell under the authority of the United States and therefore under its duty of protection. COHEN'S, *supra* § 1.03.

In addition to demonstrating the early federal government's view that it held exclusive plenary power over Indian affairs, the First Congress's enactment of the Indian Intercourse Act reveals that the young nation understood itself to owe a special duty of protection to the Indian tribes within its borders. Act of July 22, 1790, 1 Cong. ch. 33, 1 Stat. 137. The

legislation sought to prevent abuses against Indians by non-Indians and states. Specifically, it permitted only federal agents to purchase Indian lands and provided for criminal sanctions for offenses by non-Indians against Indians. *See* COHEN'S, *supra* § 1.03. Federal legislation protective of Indians was crucial because, as the Court later explained, the tribes "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

The government's acknowledgement and assumption of a special duty of protection is further reflected in countless treaties between the United States and the tribes. *See, e.g.*, *Worcester*, 31 U.S. at 519 (noting that the United States "assum[ed] the duty of protection" toward the Cherokee Nation under the Treaty of Holston, July 2, 1791, 7 Stat. 39, 40). Like the Indian Intercourse Act, these treaties committed the government to protecting the tribes from a sometimes-hostile non-Indian populace. *See, e.g.*, Treaty with the Northern Cheyenne and Northern Arapahoe, art. I, May 10, 1868, 15 Stat. 655, 655 ("If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained."); *see also* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1496-97 (1994). The Supreme Court itself has repeatedly recognized the duty of protection the treaties memorialized. *See, e.g.*, *Kagama*, 118 U.S. at 384 ("From the[tribes'] very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."); *Worcester*, 31 U.S. at 519.

Regrettably, the federal government's involvement in Indian affairs has also often been far from benign. During the late nineteenth to early twentieth centuries, Congress interfered in internal tribal affairs and property interests extensively. Fletcher, FEDERAL INDIAN LAW, *supra* § 5.2; *see also McGirt*, 140 S. Ct. at 2463 (discussing Congress's policy in the late 1800's of "pressur[ing] many tribes to abandon their communal lifestyles and parcel their land into smaller lots owned by individual tribe members," in order to assimilate Native Americans and give white settlers "more space of their own" (citing General Allotment Act of 1887, ch. 119, 24 Stat. 388-90)). The Court, however, held that such congressional enactments—even when they resulted in takings of tribal property—were immune from judicial review as long as Congress acted in "good faith." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903)). In taking a hands-off, deferential approach to Congress's management of Indian affairs, the Court analogized the federal-tribal relationship as akin to that of a guardian to its ward. *See, e.g.*, *id.* at 565 (stating that "Congress possess[es] paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests"); *Kagama*, 118 U.S. at 384 ("These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States[.]"). Though intended to suggest that the government played a salutary role in tribal affairs, the guardianship metaphor instead underscores a prevailing view of Indians—both wrongheaded and deeply repugnant—as primitive people, "untutored and improvident, and still requiring the protection and supervision of the general government." *Heckman v. United States*, 224 U.S. 413, 417 (1912); *see also, e.g.*, *Beecher v. Wetherby*, 95 U.S. (5 Otto) 517, 525 (1877) (describing the Indians as "an ignorant and dependent race" subject to the "control [of] a Christian people").

In 1934, Congress began a "slow retreat" from this problematic guardianship model when it enacted the Indian Reorganization Act. Fletcher, FEDERAL INDIAN LAW, *supra* § 5.2 (citing Act of June 18, 1934, 48 Stat. 984, codified as amended at 25 U.S.C. §§ 5101 *et seq.*). The Act, for

the first time in the history of the government's intervention in Indian affairs, required tribal consent to the statute's operative provisions. 25 U.S.C. § 5123(a)(1). This trend continued into the latter half of the twentieth century, and the guardianship metaphor has now given way completely, with Congress and the modern Court both explicitly acknowledging that the government's relationship with and obligations to the tribes is instead that of a trustee to a beneficiary. *See, e.g.*, 25 U.S.C. §§ 5601–02 (recognizing and reaffirming the federal trust responsibility); 25 U.S.C. § 3101 (finding that "the United States has a trust responsibility toward Indian forest lands"); *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (affirming the "undisputed existence of a general trust relationship between the United States and the Indian people"); *see also* Fletcher, FEDERAL INDIAN LAW, *supra* § 5.2. Rather than reflecting and justifying a paternalistic approach that subordinated tribal sovereignty—as the guardianship model did—the trust relationship commits the federal government to preserving tribal self-governance.[6] It also obligates and authorizes Congress to enact statutes that promote the general well-being of tribes by providing them with governmental services, including education, health care, housing, and public safety. Fletcher, FEDERAL INDIAN LAW, *supra* § 5.3; *see also Seminole*

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[6] This duty to maintain tribal self-governance is embodied in the congressional statement of policy in the Indian Self-Determination and Education Assistance Act of 1975:

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy that will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 5301.

Nation v. United States, 316 U.S. 286 (1942) (imposing "the most exacting fiduciary standards" on the government in administering tribal assets). In fact, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."[7] COHEN'S, *supra* § 5.04.

In short, the present-day trust relationship between the United States and Indian nations is an outgrowth of a complex, centuries-old nation-to-nation political relationship between the two, and it expresses both the enduring obligations the federal government owes to the Indians and its power to discharge this duty.

III. Federal Regulation of Indian Children Before ICWA

Even before the dawn of the American nation, Congress had concerned itself with the rearing of Indian youths. As JUDGE COSTA relates, in 1775 the Continental Congress appropriated funds ostensibly to educate Indians at Dartmouth College but with the ulterior aim of using the Indian pupils as shields to ward off potential attacks by the British or their Indian allies. *See* COSTA, CIRCUIT JUDGE, OP. at 15. In the earliest years

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[7] *See, e.g.*, Indian Trust Asset Reform Act, 25 U.S.C. §§ 5601–5602 (recognizing and reaffirming the federal trust responsibility); National Indian Forest Resources Management Act, 25 U.S.C. § 3101 (finding that "the United States has a trust responsibility toward forest lands"); American Indian Agricultural Resources Management Act, 25 U.S.C. § 3701 (finding that "the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes"); American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4043 (Special Trustee for American Indians must prepare comprehensive strategic plan to "ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians"); Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101(2)–(4) ("[T]here exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people[.]"); 20 U.S.C. § 7401 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.").

of the Constitutional era, the federal government took a number of actions to regulate Indian children. For example, starting in 1794, the federal government entered into over one hundred treaties with Indian tribes that obligated the federal government to provide for Indian education. And stemming from a misguided paternalistic stance toward the tribes, President Washington directed American treaty commissioners dealing with Indian tribes to "endeavor to obtain a stipulation for certain missionaries . . . to reside in the nation" in order to "civilize" the population. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 912 (2017) (quoting Letter from George Washington, President of the United States, to Benjamin Lincoln, Cyrus Griffin, and David Humphreys, (August 29, 1789), reprinted in 4 AMERICAN STATE PAPERS 65, 66 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832)).

During the late eighteen century the federal government even expressly involved itself in the transfer of American Indian children from their families and tribal communities to non-native homes. Fletcher, FEDERAL INDIAN LAW, *supra* § 3.6. Under the Washington Administration, for instance, federal monies financed the rearing of Indian children in Quaker homes. Br. of Prof. Ablavsky at 20. Though springing from an intention to do good, like much of the government's past Indian policy, the Indian removal efforts wrought monumental and lasting damage on the lives of individual Indians and tribes. *See* Fletcher, FEDERAL INDIAN LAW, *supra* § 3.6.

The campaign to "Christianize" the supposedly heathen Native peoples greatly expanded in the late nineteenth century, with the removal of Indian children constituting the single most important aspect of the government's "civilization" policy. *See* Fletcher, FEDERAL INDIAN LAW, *supra* § 3.6. Government officials took Indian children from their homes and tribal lands, at times by force, and enrolled them at coercive, off-

reservation Indian boarding schools. *Id.* These federally run or financed schools sought to stamp out all vestiges of Indian culture. As the Commissioner of Indian Affairs wrote in 1896, the purportedly humanitarian course was "for the strong arm of the nation to reach out, take [Indian children] in their infancy and place them in its fostering schools, surrounding them with an atmosphere of civilization, . . . instead of allowing them to grow up as barbarians and savages." T.J. Morgan, *A Plea for the Papoose*, 18 Baptist Home Mission Monthly 402, 404 (1896). The headmaster of the notorious Carlisle School explained the policy even more bluntly in his infamous credo, stating that the schools were meant to take an Indian child and "Kill the Indian in him, to save the man." Fletcher, FEDERAL INDIAN LAW, *supra* § 3.6 (quoting Richard H. Pratt, THE ADVANTAGES OF MINGLING INDIANS WITH WHITES (1892), reprinted in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880–1900 260–61 (Francis Paul Prucha ed. 1973)).

Although the total number of children enrolled in the boarding schools is unknown, in 1895 alone 157 boarding schools housed more than 15,000 Indian children. Andrea C. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 57 (2006). Many were run directly by the Bureau of Indian Affairs ("BIA"). Others were operated by Christian groups that received federal funds. Schooling was left to Christian groups because Christianity, and particularly Protestantism, was seen, at the time, as essential to a "civilized" life. *See* Fletcher, FEDERAL INDIAN LAW, *supra* § 3.6. The government thus hoped to eradicate the American Indians' native religions by converting young Indians to Christianity.

The use of government-backed force was central to the creation of these boarding schools. "Indian parents who opposed the taking of their children to these schools faced criminal prosecution and possible incarceration." *Id.* Children were "literally kidnap[ped]" so they could be

shipped off to the Indian schools. For example, one federal agent described hunting down Hopi "Indian children who had escaped to caves or cellars, sometimes defended by their parents, who would have to be restrained by force to prevent the kidnapping of their children." *Id.*

Life at the schools themselves was pervaded by a strict regimen of military-style discipline meant to reform Indian children and assimilate them into Anglo society. *Id.* Children were forbidden to speak their native languages and were punished, including through beatings, if they lapsed into their native tongues. COHEN'S, *supra* § 1.04. And the goal of permanently severing Indian children's connections with tribal life did not stop at the end of the school year. Under an "outing system," Indian children were placed in non-Indian homes far from their reservations during the summer, ensuring that they never returned to their communities during their tenure at the boarding schools. Fletcher, FEDERAL INDIAN LAW, *supra* § 3.6.

In 1928, a devastating federally commissioned report produced by the Brookings Institution laid bare the problems in Indian boarding schools, concluding that they were "grossly inadequate." *See* Lewis Meriam, THE PROBLEM OF INDIAN ADMINISTRATION 11 (1928). The report detailed life at the schools, citing "deplorable health conditions," including fire risks, "serious malnutrition, and high-rates of communicable diseases." *Id.* at 192, 318-19. More generally, the report observed that the "official government attitude" toward Indian education had been premised "on the theory that it is necessary to remove the Indian child[ren] as far as possible from [their] environment" so as to prepare them for "life among the whites." *Id.* at 346, 618. This way of thinking, the report explained, was fundamentally flawed and at odds with the "modern point of view in education," which favored rearing the child "in the natural setting of home and family life." *Id.* at 346. The result of the government's boarding school policy had been to "largely disintegrate[] the [Indian] family." *Id.* at 15.

By the time of the report, Indian boarding schools had begun to decline as the BIA charged state public schools with assuming more responsibility for Indian education. COHEN'S, *supra* § 1.04. But the boarding schools did not vanish; as late as the 1970s, thousands of Indian children were still being educated at federal boarding schools. *See Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Select Comm. on Indian Affairs*, 95th Cong. 603 (1977).

In establishing Indian schools, "the intent of American policymakers and educators may not have been to harm Indian people," but the "end result was the near-destruction of tribal culture and religion across the United States." Fletcher, FEDERAL INDIAN LAW, *supra* § 3.6. The federal government itself has acknowledged its tragic role in decimating Indian tribes and families by separating them from their children. In 2000, the Assistant Secretary of the BIA offered a formal apology to the Indian tribes:

> [The BIA] set out to destroy all things Indian. This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the [BIA] committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually . . . Never again will we seize your children, nor teach them to be ashamed of who they are. Never again.

146 CONG. REC. E1453 (Sept. 12, 2000) (quoting apology of Assistant Secretary for Indian Affairs, Department of the Interior remarks on Sept. 8, 2000).

IV. State Abuses Leading to ICWA

Though federal Indian boarding schools eventually declined, massive numbers of Indian children continued to be permanently removed from their families, tribes, and cultures through the 1970s. Replacing off-reservation boarding schools, state courts and child welfare agencies became the primary

vehicle for severing Indian youth—the lifeblood of tribes—from their communities. *See* COHEN'S, *supra* § 11.02. Surveys of states with large Indian populations during the 1960s and 1970s showed that between twenty-five to thirty-five percent of all Indian children were removed from their families. *See Indian Child Welfare Program: Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 93rd CONG. REC. 3 (April 8–9, 1974) (statement of William Byler, Executive Director, Association of American Indian Affairs); H.R. Rep. No. 95-1386, at 9 (1978). "In 16 states surveyed in 1969, approximately 85% percent of all Indian children in foster care were living in non-Indian homes," while in Minnesota in the early 1970s "90 percent of the adopted Indian children [were] in non-Indian homes." H.R. Rep. No. 95-1386, at 9 (1978); *see also Indian Child Welfare Program: Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 93rd CONG. REC. 5 (April 8–9, 1974) (statement of William Byler, Executive Director, Association of American Indian Affairs); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); COHEN'S, *supra* § 11.01. And in jurisdictions with significant Indian populations, Indian children were uprooted by states' child welfare machinery at rates far exceeding those for non-Indians. *See Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Select Comm. on Indian Affairs*, 95th Cong. 539-40 (1977). For example, in North Dakota and South Dakota, Indian children were over twenty times as likely to be placed in foster care than non-Indians. *Id.* at 540. In Minnesota, Maine, and Utah, the relative foster care rate for Indian children was, respectively, nineteen, sixteen, and fifteen times greater than that for non-Indians. *Id.* at 540. And in Washington, the combined rate of foster care and adoptive placements for Indian children in 1973 was nearly fourteen times greater than that of non-Indians. *Id.* at 599.

This nationwide crisis aroused the attention and indignation of Congress in the mid-1970s. Over the course of four years, Congress held hearings on, deliberated on, and debated how to remedy the problem.

Fletcher, FEDERAL INDIAN LAW, *supra* § 8.8. Congress heard "testimony taken from Indian Country . . . that many state and county social service agencies and workers, with the approval and backing of many state courts and some federal B[IA] officials, had engaged in the systematic, automatic, and across-the-board removal of Indian children from Indian families and into non-Indian families and communities." *Id.*

State officials attempted to justify these large-scale removals by invoking Anglo norms that favored rearing children within a nuclear family structure. *See Holyfield*, 490 U.S. at 35-36 (quoting 25 U.S.C. § 1901). This approach often reflected the officials' profound ignorance of or hostility to tribes' traditional values and community-oriented approach to child raising. In Indian communities, for example, it is common for extended family to play key roles in raising Indian children. *See* JACOBS, A GENERATION REMOVED, *supra* at 24-25; *see also* Supreme Court Br. of Indian Law Professors in *Adoptive Couple v. Baby Girl*, No. 12–399, at 5. Non-Indian child welfare agents, however, interpreted this practice of extended family care as parental neglect and cited it as a reason for removing Indian children from their parents and putting them up for adoption. *See* Supreme Court Br. of Indian Law Professors in *Adoptive Couple v. Baby Girl*, No. 12–399. In total, this and similar uninformed and abusive practices resulted in the removal, as noted, of over a quarter of all Indian children from their homes in states with large Indian populations. *See* H.R. Rep. No. 95-1386, at 9 (1978). Thus, even though the widespread transfer of Indian children to non-Indians may not have been specifically intended as an assimilation project, it nonetheless had that effect.

The mass removal of Indian children had profoundly adverse effects on the children themselves, who suffered trauma from being separated from their families and "problems of adjusting to a social and cultural environment much different than their own." *Id.*; *see also Indian Child Welfare Act of 1977: Hearing Before the S. Select Committee on Indian Affs.*, 95th Cong. 114 (1977)

(statement of Carl E. Mindell, M.D., & Alan Gurwitt, M.D., American Academy of Child Psychiatry) (stating that "[t]here is much clinical evidence to suggest that these Native American children placed in off-reservation non-Indian homes are at risk in their later development" and that "they are subject to ethnic confusion and a pervasive sense of abandonment"). Indian parents suffered greatly, too, of course. The evil of mass removal, however, was systemic, threatening not only children and families but the tribes themselves. As Calvin Isaac, the Chief of the Mississippi Band of Choctaw Indians, explained to Congress, the aggregate effect of the removal of Indian children threatened the tribes' existence:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Holyfield, 490 U.S. at 34.[8]

V. Congress's Findings and Aims in Enacting ICWA

In view of the alarming abuses perpetrated through state Indian child custody proceedings, Congress enacted ICWA in 1978. Recognizing that a "special relationship" exists between the United States and Indian tribes, Congress made the following findings:

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[8] As the Supreme Court noted in *Holyfield*, 490 U.S. 34 n.3 , "[t]hese sentiments were shared by the ICWA's principal sponsor in the House, Rep. Morris Udall, *see* 124 CONG. REC. 38102 (1978) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy"), and its minority sponsor, Rep. Robert Lagomarsino, *id.* ("This bill is directed at conditions which . . . threaten . . . the future of American Indian tribes [.]" (cleaned up)).

> Congress has plenary power over Indian affairs. 25 U.S.C. § 1901(1) (citing U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.")).
>
> "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." *Id.* § 1901(3).
>
> "[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and . . . an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." *Id.* § 1901(4).
>
> "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." *Id.* § 1901(5).

Based on its findings, Congress declared that it was the policy of the United States

> 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.

Id. § 1902.

VI. ICWA's Provisions

ICWA's substantive and procedural safeguards apply in any child custody proceeding involving an "Indian child," defined as "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." *Id.* § 1903(4). In proceedings for the foster care placement or termination of parental rights, ICWA gives "the Indian custodian of the child and the Indian child's tribe . . . a right to intervene at any point in the proceeding." *Id.* § 1911(c). "In any involuntary proceeding . . . where the court knows or has reason to know that an Indian child is involved," ICWA requires that the parent, the Indian custodian, the child's tribe, or the Secretary of the United States Department of the Interior ("Secretary" or "Secretary of the Interior") be notified of pending proceedings and of their right to intervene. *Id.* § 1912(a). In voluntary proceedings for the termination of parental rights or adoptive placement of an Indian child, ICWA ensures that the parent can withdraw consent for any reason prior to entry of a final decree of adoption or termination, at which point the child must be returned to the parent. *Id.* § 1913(c). If consent was obtained through fraud or duress, a parent may petition to withdraw consent within two years after the final decree of adoption and, upon a showing of fraud or duress, the court must vacate the decree and return the child to the parent. *Id.* § 1913(d). An Indian child, a parent or Indian custodian from whose custody the child was removed, or the child's tribe may file a petition in any court of competent jurisdiction to invalidate an action in state court for foster care placement or termination of parental rights if the action violated any provision of §§ 1911 to 1913. *Id.* § 1914.

ICWA further sets forth placement preferences for foster care, preadoptive, and adoptive proceedings involving Indian children. Section 1915 requires:

> 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 extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

Id. § 1915(a). Similar requirements are set for foster care or preadoptive placements. *Id.* § 1915(b). If a tribe establishes by resolution a different order of preferences, the state court or agency effecting the placement "shall follow [the tribe's] order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* § 1915(c).

The state in which an Indian child's placement was made shall maintain records of the placement, which shall be made available at any time upon request by the Secretary or the child's tribe. *Id.* § 1915(e). An Indian adoptee who attains the age of majority may request that the court which entered the adoption order provide her with information "as may be necessary to protect any rights flowing from the . . . tribal relationship." *Id.* § 1917. And a state court entering a final decree in an adoptive placement "shall provide the Secretary with a copy of such decree or order" and information as necessary regarding "(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." *Id.* § 1951(a). ICWA's severability clause provides that "[i]f any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby." *Id.* § 1963.

VII. The Final Rule

ICWA provides that "the Secretary [of the Interior] shall promulgate such rules and regulations as may be necessary to carry out [its] provisions." 25 U.S.C. § 1952. In 1979, the BIA promulgated guidelines (the "1979 Guidelines") intended to assist state courts in implementing ICWA but that lacked "binding legislative effect." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979). The 1979 Guidelines left the "[p]rimary responsibility" of interpreting certain language in ICWA "with the [state] courts that decide Indian child custody cases." *Id.* However, in June 2016, the BIA promulgated the Final Rule to

"clarify the minimum Federal standards governing implementation of [ICWA]" and to ensure that it "is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." 25 C.F.R. § 23.101; Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,868 (June 14, 2016). The Final Rule explained that while the BIA "initially hoped that binding regulations would not be necessary to carry out [ICWA], a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law." 81 Fed. Reg. at 38,782 (internal citation and quotation marks omitted).

The Final Rule provides that state courts have the responsibility of determining whether a child is an "Indian child" subject to ICWA's requirements. 25 C.F.R. §§ 23.107; 81 Fed. Reg. at 38,778, 38,869-73. The Final Rule also sets forth notice and recordkeeping requirements for states, *see* 25 C.F.R. §§ 23.140-41; 81 Fed. Reg. at 38,778, 38,875-76, and requirements for states and individuals regarding voluntary proceedings and parental withdrawal of consent, *see* 25 C.F.R. §§ 23.124-28; 81 Fed. Reg. at 38,778, 38,873-74. The Final Rule also restates ICWA's placement preferences and clarifies when they apply and when states may depart from them. *See* 25 C.F.R. §§ 23.129-32; 81 Fed. Reg. at 38,778, 38,874-75.

VIII. The Instant Action

A. Parties

1. Plaintiffs

Plaintiffs in this action are the states of Texas, Louisiana, and Indiana,[9] (collectively, "State Plaintiffs"), and seven individual Plaintiffs—

[9] There are three federally recognized tribes in Texas: the Yselta del Sur Pueblo, the Kickapoo Tribe, and the Alabama-Coushatta Tribe. There are four federally recognized tribes in Louisiana: the Chitimacha Tribe, the Coushatta Tribe, the Tunica-

Chad and Jennifer Brackeen ("the Brackeens"), Nick and Heather Libretti ("the Librettis"), Altagracia Socorro Hernandez ("Hernandez"), and Jason and Danielle Clifford ("the Cliffords") (collectively, "Individual Plaintiffs") (together with State Plaintiffs, "Plaintiffs").

a. The Brackeens & A.L.M.

At the time their initial complaint was filed in the district court, the Brackeens sought to adopt A.L.M., who falls within ICWA's definition of an "Indian Child." His biological mother is an enrolled member of the Navajo Nation and his biological father is an enrolled member of the Cherokee Nation. When A.L.M. was ten months old, Texas's Child Protective Services ("CPS") removed him from his paternal grandmother's custody and placed him in foster care with the Brackeens. Both the Navajo Nation and the Cherokee Nation were notified pursuant to ICWA and the Final Rule. A.L.M. lived with the Brackeens for more than sixteen months before they sought to adopt him with the support of his biological parents and paternal grandmother. In May 2017, a Texas court, in voluntary proceedings, terminated the parental rights of A.L.M.'s biological parents, making him eligible for adoption under Texas law. Shortly thereafter, the Navajo Nation notified the state court that it had located a potential alternative placement for A.L.M. with non-relatives in New Mexico, though this placement ultimately failed to materialize. In July 2017, the Brackeens filed an original petition for adoption, and the Cherokee Nation and Navajo Nation were notified. The Navajo Nation and the Cherokee Nation reached an agreement whereby the Navajo Nation was designated as A.L.M.'s tribe for purposes of ICWA's application in the state proceedings. No one intervened in the Texas adoption proceeding or otherwise formally sought to adopt A.L.M. The Brackeens entered into a settlement with the Texas state agency and

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Biloxi Tribe, and the Jena Band of Choctaw Indians. There is one federally recognized tribe in Indiana: the Pokagon Band of Potawatomi Indians.

A.L.M.'s guardian ad litem specifying that, because no one else sought to adopt A.L.M., ICWA's placement preferences did not apply. In January 2018, the Brackeens successfully petitioned to adopt A.L.M. The Brackeens initially alleged in their complaint that they would like to continue to provide foster care for and possibly adopt additional children in need, but their experience adopting A.L.M. made them reluctant to provide foster care for other Indian children in the future. Since their complaint was filed, the Brackeens have sought to adopt A.L.M.'s sister, Y.R.J. in Texas state court. Y.R.J., like her brother, is an Indian Child for purposes of ICWA. The Navajo Nation contests the adoption. On February 2, 2019, the Texas court granted the Brackeens' motion to declare ICWA inapplicable as a violation of the Texas constitution, but "conscientiously refrain[ed]" from ruling on the Brackeens' claims under the United States Constitution pending our resolution of the instant appeal.

b. The Librettis & Baby O.

The Librettis live in Nevada and sought to adopt Baby O. when she was born in March 2016. Baby O.'s biological mother, Hernandez, wished to place Baby O. for adoption at her birth, though Hernandez has continued to be a part of Baby O.'s life and she and the Librettis visit each other regularly. Baby O.'s biological father, E.R.G., descends from members of the Ysleta del sur Pueblo Tribe (the "Pueblo Tribe"), located in El Paso, Texas, and was a registered member of that tribe at the time Baby O. was born. The Pueblo Tribe intervened in the Nevada custody proceedings seeking to remove Baby O. from the Librettis. Once the Librettis joined the challenge to the constitutionality of ICWA and the Final Rule, the Pueblo Tribe indicated that it was willing to settle. The Librettis agreed to a settlement with the Pueblo Tribe that would permit them to petition for adoption of Baby O. The Pueblo Tribe agreed not to contest the Librettis' adoption of Baby O., and on December 19, 2018, the Nevada state court issued a decree of adoption, declaring that the Librettis were Baby O.'s lawful parents. Like the

Brackeens, the Librettis alleged that they intend to provide foster care for and possibly adopt additional children in need but are reluctant to foster Indian children after this experience.

c. The Cliffords & Child P.

The Cliffords live in Minnesota and seek to adopt Child P., whose maternal grandmother is a registered member of the White Earth Band of Ojibwe Tribe (the "White Earth Band"). Child P. is a member of the White Earth Band for purposes of ICWA's application in the Minnesota state court proceedings. Pursuant to § 1915's placement preferences, county officials removed Child P. from the Cliffords' custody and, in January 2018, placed her in the care of her maternal grandmother, whose foster license had been revoked. Child P.'s guardian ad litem supports the Cliffords' efforts to adopt her and agrees that the adoption is in Child P.'s best interest. The Cliffords and Child P. remain separated, and the Cliffords face heightened legal barriers to adopting her. On January 17, 2019, the Minnesota court denied the Cliffords' motion for adoptive placement.

2. Defendants

Defendants are the United States of America; the United States Department of the Interior and its Secretary Deb Haaland, in her official capacity; the BIA and its Director Darryl La Counte, in his official capacity; and the Department of Health and Human Services and its Secretary Xavier Becerra, in his official capacity (collectively, the "Federal Defendants"). Shortly after this case was filed in the district court, the Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians (collectively, the "Tribal Defendants") moved to intervene, and the district court granted the motion. On appeal, we granted the Navajo

Nation's motion to intervene as a defendant[10] (together with Federal and Tribal Defendants, "Defendants").

B. Procedural History

Plaintiffs filed the instant action against the Federal Defendants in October 2017, alleging that the Final Rule and certain provisions of ICWA are unconstitutional and seeking injunctive and declaratory relief. Plaintiffs argued that ICWA and the Final Rule violate equal protection and substantive due process under the Fifth Amendment and the anticommandeering doctrine that arises from the Tenth Amendment. Plaintiffs additionally sought a declaration that provisions of ICWA and the Final Rule violate the nondelegation doctrine and the APA. Defendants moved to dismiss, alleging that Plaintiffs lacked standing. The district court denied the motion. All parties filed cross-motions for summary judgment. The district court granted Plaintiffs' motion for summary judgment in part, declaring that ICWA and the Final Rule violated equal protection, the Tenth Amendment, and the nondelegation doctrine, and that the challenged portions of the Final Rule were invalid under the APA.[11] Defendants appealed. A panel of this court affirmed in part the district court's rulings on standing but reversed and rendered judgment on the merits, with one judge concurring in part and dissenting in part. The court then granted en banc review. In total, fourteen amicus briefs have been filed in this case.

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[10] The Navajo Nation had previously moved to intervene twice in the district court. The first motion was for the limited purpose of seeking dismissal pursuant to Rule 19, which the district court denied. The Navajo Nation filed a second motion to intervene for purposes of appeal after the district court's summary judgment order. The district court deferred decision on the motion pending further action by this court, at which time the Navajo Nation filed the motion directly with this court.

[11] The district court denied Plaintiffs' substantive due process claim, which Plaintiffs do not appeal.

STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*. *See Texas v. United States*, 497 F.3d 491, 495 (5th Cir. 2007). Summary judgment is appropriate when the movant has demonstrated "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

DISCUSSION

I. Article III Standing

Defendants first contend that Plaintiffs lack standing to challenge ICWA and the Final Rule. The district court denied Defendants' motion to dismiss on this basis, concluding that Individual Plaintiffs have standing to bring an equal protection claim; State Plaintiffs have standing to challenge provisions of ICWA and the Final Rule on the ground that they violate the Tenth Amendment and the nondelegation doctrine; and all Plaintiffs have standing to bring an APA claim challenging the validity of the Final Rule.

Article III limits the power of federal courts to "Cases" and "Controversies." *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing U.S. CONST. art. III, § 2). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Id.* To meet the Article III standing requirement, plaintiffs must demonstrate (1) "an injury in fact" that is (2) "fairly traceable to the challenged action of the defendant," and that is (3) likely to be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks, citations, and alterations omitted). A plaintiff seeking equitable relief must demonstrate a likelihood of future injury in addition to past harm. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). This injury must be "concrete and particularized" and "actual or imminent, not conjectural or

hypothetical." *See Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted).

"[S]tanding is not dispensed in gross," and "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). Nevertheless, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," and we therefore need conclude only that one plaintiff in the present case satisfies standing with respect to each claim. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). "This court reviews questions of standing *de novo*." *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 343 (5th Cir. 2013).

A. Standing to Bring Equal Protection Claim

Plaintiffs challenged 25 U.S.C. §§ 1913(d), 1914, 1915(a), and 1915(b), and Final Rule § 23.129 to 23.132 on equal protection grounds, alleging that these provisions impose regulatory burdens on non-Indian families seeking to adopt Indian children that are not similarly imposed on Indian families who seek to adopt Indian children. The district court concluded that Individual Plaintiffs suffered and continue to suffer injuries when their efforts to adopt Indian children are burdened by ICWA and the Final Rule; that their injuries are fairly traceable to the actions of Defendants because ICWA and the Final Rule mandate state compliance; and that these injuries are redressable because if ICWA and the Final Rule were invalidated, then state courts would no longer be required to follow them. Defendants disagree, arguing that the Individual Plaintiffs cannot demonstrate an injury in fact or redressability and thus lack standing to bring an equal protection claim. We will consider Plaintiffs' standing to assert challenges to each of the provisions at issue in turn.

1. The Challenge to §§ 1913 and 1914

We first conclude that none of the Plaintiffs have standing to assert an equal protection challenge to §§ 1913 and 1914. The district court concluded that § 1913(d), which allows a parent to petition the court to vacate a final decree of adoption on the ground that consent was obtained through fraud or duress, left the Brackeens' adoption of A.L.M. vulnerable to collateral attack for two years following the final judgment. Defendants argue that § 1914,[12] and not § 1913(d), applies to the Brackeens' state court proceedings and that, in any event, any injury premised on potential future collateral attack under either provision is too speculative.

We need not decide which provision applies here, as none of the Individual Plaintiffs have suffered an injury under either provision.[13] Plaintiffs do not assert that the biological parents of any Indian child, any tribe, or any other party are currently seeking or intend in the future to invalidate the adoption of any of their adopted children under either provision. Plaintiffs' proffered injury under § 1913(d) or § 1914 is therefore too speculative to support standing. *See Lujan*, 504 U.S. at 560; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n. 5 (2013) ("[T]hreatened injury must be certainly impending to constitute injury in fact, and . . . allegations of possible future injury are not sufficient. . . . . Plaintiffs cannot rely on speculation about the unfettered choices made by

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[12] "Any Indian child who is the subject of any action 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." 25 U.S.C. § 1914.

[13] State Plaintiffs argue that they have standing to bring an equal protection challenge in *parens patriae* on behalf of citizens other than the Individual Plaintiffs. We disagree. *See South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("[A] State [does not] have standing as the parent of its citizens to invoke [the Fifth Amendment Due Process Clause] against the Federal Government, the ultimate parens patriae of every American citizen.").

independent actors not before the court." (internal quotation marks, citations, and alterations omitted)).

Plaintiffs and JUDGE DUNCAN cite *Time Warner Cable, Inc. v. Hudson* for the proposition that "unequal positioning" before the law is sufficient to constitute an injury. 667 F.3d 630 (5th Cir. 2012) (internal quotation marks and citation omitted); *see* DUNCAN, CIRCUIT JUDGE, OP. at 19-20 & n.30. But that case is inapposite.

In *Time Warner*, this court considered whether standing was satisfied when incumbent Texas cable operators that had franchise agreements to provide services to municipalities across the state brought an equal protection challenge to a Texas law that excluded them from a benefit afforded to other similarly situated cable operators. 667 F.3d at 633-34. The Texas legislature had concluded that the cost of negotiating separate municipal franchise agreements posed a barrier for new companies seeking to enter the cable services market. *Id.* The Texas legislature responded by passing a law that permitted new entrants to the market and "overbuilders"—companies that build their own cable systems in areas already served by a cable operator—to obtain statewide franchises immediately. *Id.* Incumbent cable providers, however, were ineligible for statewide franchises until after the expiration of their existing municipal licenses. *Id.* at 634.

This court concluded that the incumbent operators had alleged a sufficiently actual or imminent injury because the statute was presently preventing incumbent cable providers from competing for the statewide franchises on equal footing with other market participants. *Id.* at 636. The incumbent cable providers would have been denied statewide licenses under the law if they had applied for them prior to the expiration of their existing municipal licenses, and submitting an application for a state-issued franchise license was wholly within the incumbent providers' power. In this way, the incumbent providers' claim satisfied Article III requirements, as the law

erected an actual barrier to companies already providing cable services that otherwise would be immediately free to seek a statewide franchise. *Id.*; *see also Northeastern Florida Chapter of Assoc. Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (in challenging a governmental program setting aside a certain percentage of contracts for minority-owned businesses, plaintiff must "demonstrate that it is *able and ready* to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis" (emphasis added)).

By contrast, Plaintiffs' challenges here to §§ 1913(d) and 1914 rest on the purely theoretical actions of potential third parties who may (or may not) invoke these provisions. *Cf. Clapper*, 568 U.S. at 414 n. 5. This case is not like *Time Warner*, but rather *Barber v. Bryant,* in which a group of LGBT individuals and advocacy organizations brought an equal protection challenge to a Mississippi statute that permitted parties accused of LGBT discrimination to assert their sincerely held religious opposition as a defense. 860 F.3d 345, 351 (5th Cir. 2017). This court found that, like in the present case, the *Barber* plaintiffs lacked standing to bring their equal protection challenge because any hypothetical future injury they would suffer under the statute was entirely dependent on unknown third-parties choosing to undertake a course of conduct purportedly authorized by the statute—there, discrimination against the plaintiffs. *Id.* at 357. JUDGE DUNCAN selectively quotes from *Barber* to argue that the court based its decision only on the fact that the plaintiffs had not alleged that *they* intended to engage in the activities in relation to which the Mississippi statute provided a discrimination defense. DUNCAN, CIRCUIT JUDGE, OP. at 19 n.30. But the *Barber* court plainly stated that, "[a]t a minimum, the challengers would have to allege plans to engage in [the] conduct in Mississippi *for which they would be subject to a denial of service* and would be stripped of a preexisting remedy for that denial." *Barber*, 860 F.3d at 358 (emphasis added). In the absence of allegations that a third party would take advantage of the statute to act in a way that would harm the plaintiffs, the plaintiffs failed to assert the type of

imminent injury necessary to support standing on their equal protection claim.[14]

In much the same way, the Plaintiffs here allege only that a third party *could* come along and challenge their adoptions under the statute, but they make no allegations that any party has in fact done so or intends to do so in the future. In other words, these provisions have yet to place any Plaintiff on unequal footing. No harm under the statute has materialized and no certain injury is imminent, as is required for standing to challenge the provision. *Clapper*, 568 U.S. at 409. And, to the extent Plaintiffs argue that an injury arises from their attempts to avoid collateral attack under § 1914 by complying with §§ 1911 to 1913, costs incurred to avoid injury are "insufficient to create standing" where the injury is not certainly impending. *See id.* at 416-17. Accordingly, Plaintiffs lack standing to challenge §§ 1913(d) and 1914.

2. The Remaining Equal Protection Claims

Turning to the Plaintiffs' remaining claims, we conclude that the Brackeens have standing to assert an equal protection claim as to 25 U.S.C. § 1915(a) and Final Rule §§ 23.129, 23.130, and 23.132, and that the Cliffords have standing to press this claim as to § 1915(b) and Final Rule § 23.131. Because at least one Plaintiff has standing to assert each of these remaining claims, the "case-or-controversy requirement" is satisfied, and we do not analyze whether any other Individual Plaintiff has standing to raise it. *See Rumsfeld*, 547 U.S. at 52 n.2.

First, the Brackeens have standing to challenge § 1915(a), ICWA's adoption placement preferences provision. As Plaintiffs argue, § 1915's

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[14] The *Barber* plaintiffs also raised an Establishment Clause challenge to the statute, a separate issue not presented here and about which we express no opinion. *See Barber*, 860 F.3d at 356 ("The Equal Protection and Establishment Clause cases call for different injury-in-fact analyses because the injuries protected against under the Clauses are different." (internal quotations and citations omitted)).

placement preferences impose on them the ongoing injury of increased regulatory burdens in their proceedings to adopt A.L.M.'s sister, Y.R.J., which the Navajo Nation currently opposes in Texas state court. "An increased regulatory burden typically satisfies the injury in fact requirement." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015). However, we must also consider whether causation and redressability are met here. *See Lujan*, 504 U.S. at 560-61. The Brackeens' alleged injury is fairly traceable to the actions of at least some of the Federal Defendants, who bear some responsibility for the regulatory burdens imposed by ICWA and the Final Rule. *See Contender Farms, L.L.P.*, 779 F.3d at 266 (noting that causation "flow[s] naturally from" a regulatory injury). Additionally, the Brackeens have demonstrated a likelihood that their injury will be redressed by a favorable ruling of this court. In the Brackeens' ongoing proceedings to adopt Y.R.J., the Texas trial court has indicated that it will refrain from ruling on the Brackeens' federal constitutional claims pending a ruling from this court.[15]

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[15] We also conclude that the Brackeens have maintained standing throughout the course of the litigation. The Brackeen's initial complaint, filed in October 2017, alleged that they intended to adopt A.L.M. In January 2018, the Brackeens completed their adoption of A.L.M. in state court. In March 2018, they filed a second amended complaint wherein they alleged that they "intend[ed] to provide foster care for, and possibly adopt, additional children in need." Several months later, in September 2018, the Brackeens undertook efforts to adopt Y.R.J, and they supplemented the district court record in October 2018 with exhibits evidencing these efforts. The injury alleged in the Brackeens' second amended complaint was sufficiently imminent to support standing, in part, because the regulatory burdens they claimed ICWA imposed on their first adoption constitute "evidence bearing on whether" they faced "a real and immediate threat of repeated injury." *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) (internal quotation marks omitted). That the Brackeens' asserted injury was not too conjectural to support standing is confirmed by their later attempted adoption of Y.R.J. *See Hargrave v. Vermont*, 340 F.3d 27, 33034 (2d Cir. 2003) (plaintiff's claims that she would be subject to a state law even though a state court had refused to enforce the law were not speculative in light of state Supreme Court's ruling following the filing of plaintiff's federal complaint that the law could go into effect). Further, in this case, promoting judicial economy counsels in favor of construing the Brackeens' supplemental filing as correcting any defect in the pleading,

Our esteemed colleague JUDGE COSTA disagrees that the likelihood that the Texas trial court will follow our interpretation of ICWA is sufficient to satisfy Article III's redressability requirements and asserts that we are rendering an advisory opinion on this issue. COSTA, CIRCUIT JUDGE, OP. at 2-4. But "Article III does not demand a demonstration that victory in court will without doubt cure the identified injury." *Teton Historic Aviation Found. v. DOD*, 785 F.3d 719, 727 (D.C. Cir. 2015). The plaintiff must show only that its injury is "likely to be redressed by a favorable decision." *Vill. of Arlington Heights, v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 (1977). By stating that it will defer to our ruling, the Texas court has removed any need "to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy." *Id.* at 261-62. Instead, the Texas court's statement has made it all but certain that a decision in the Brackeens' favor will redress their purported injuries. *See Evans v. Michigan*, 568 U.S. 313, 325-26 (2013) ("We presume here, as in other contexts, that courts exercise their duties in good faith."). Article III's redressability requirements are met with respect to the Brackeens' claim, meaning at least one Plaintiff has standing to bring an equal protection claim challenging § 1915(a) and Final Rule §§ 23.129 to 23.132. *See Lujan*, 504 U.S. at 560-61; *Rumsfeld*, 547 U.S. at 52 n.2.

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permitting both the court and the parties to "circumvent 'the needless formality and expense of instituting a new action when events occurring after the original filing indicate[] a right to relief.'" *Northstar Fin. Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1044 (9th Cir. 2015) (quoting WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1505)). Therefore, even if the Brackeens had lacked standing at some point during the district court litigation, their supplementation of the record with information related to their attempted adoption of Y.R.J. cured any defect. *See Mathews v. Diaz*, 426 U.S. 67, 75 (1976).

Similarly, the Cliffords have standing to challenge § 1915(b), ICWA's foster care and preadoptive placement preferences, and Final Rule § 23.131.[16] The Cliffords have clearly alleged an injury due to this provision; they fostered Child P., but, pursuant to § 1915(b)'s placement preferences, Child. P. was removed from their custody and placed with her maternal grandmother, a member of the White Earth Band. Like the Brackeens' alleged injury, the Cliffords' injury is fairly traceable to some of the Federal Defendants given their responsibility for the burdens imposed by § 1915(b). Finally, a declaration by the district court that § 1915(b) violates equal protection would redress the Cliffords' injury. Since Child P. has not yet been adopted, the Cliffords may still petition for custody. Though no state court—whether within this circuit or in the Cliffords' home state of Minnesota—is bound by a decree of this court, we conclude that it is "substantially likely that [a state court] would abide by an authoritative interpretation" of ICWA by this court, "even though [it] would not be directly bound by such a determination." *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). Thus, a favorable ruling "would at least make it easier for" the Cliffords to regain custody of Child P. *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 521 (5th Cir. 2014). In sum, Plaintiffs have standing to challenge § 1915(a) and (b) and Final Rule §§ 23.129 to 23.132.

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[16] The Cliffords also challenged § 1915(a). We need not address this challenge, however, as we have already concluded that the Brackeens—and thus all Plaintiffs—have standing to challenge this provision. *See Rumsfeld*, 547 U.S. at 52 n.2 ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."). In addition, the parties contest whether the Cliffords' claim is subject to issue preclusion. Because issue preclusion is an affirmative defense, it does not implicate our standing analysis. *See, e.g.*, *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1003 (8th Cir. 2007) ("Whether a party has standing to bring claims and whether a party's claims are barred by an equitable defense are two separate questions, to be addressed on their own terms." (quoting *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 346 (3d Cir. 2001))); WRIGHT & MILLER, 13A FED. PRAC. & PROC. JURIS. § 3531 (3d ed.) ("Affirmative defenses against the claims of others are not likely to raise 'standing' concerns.").

B. Standing to Bring Administrative Procedure Act Claim

Plaintiffs also bring APA challenges to the Final Rule promulgated by the BIA. They assert that the Final Rule violates the APA because ICWA does not authorize the Secretary of the Interior to promulgate binding rules and regulations and also contend that the Final Rule's construction of § 1915 is invalid. The district court ruled that State Plaintiffs had standing to bring APA claims, determining that the Final Rule injured State Plaintiffs by intruding upon their interests as quasi-sovereigns to control the domestic affairs within their states.[17] A state may be entitled to "special solicitude" in our standing analysis if the state is vested by statute with a procedural right to file suit to protect an interest and the state has suffered an injury to its "quasi-sovereign interests." *Massachusetts v. EPA,* 549 U.S. 497, 518-20 (2007) (holding that the Clean Air Act provided Massachusetts a procedural right to challenge the EPA's rulemaking and that Massachusetts suffered an injury in its capacity as a quasi-sovereign landowner due to rising sea levels associated with climate change). Applying *Massachusetts*, this court in *Texas v. United States* held that Texas had standing to challenge the Department of Homeland Security's ("DHS") implementation and expansion of the Deferred Action for Childhood Arrivals program under the APA. *See* 809 F.3d 134, 152 (5th Cir. 2015). This court reasoned that Texas was entitled to special solicitude on the grounds that the APA created a procedural right to challenge the DHS's actions, and DHS's actions affected states' sovereign interest in creating and enforcing a legal code. *See id.* at 152-53.

Likewise, here, the APA provides State Plaintiffs a procedural right to challenge the Final Rule. *See id.*; 5 U.S.C. § 702. Moreover, State Plaintiffs allege that the Final Rule affects their sovereign interest in controlling child

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[17] The district court also found an injury based on the Social Security Act's conditioning of funding on states' compliance with ICWA. However, because we find that Plaintiffs have standing on other grounds, we decline to decide whether they have demonstrated standing based on an alleged injury caused by the Social Security Act.

custody proceedings in state courts. *See Texas*, 809 F.3d at 153 (recognizing that, pursuant to a sovereign interest in creating and enforcing a legal code, states may have standing based on, *inter alia*, federal preemption of state law). Thus, State Plaintiffs are entitled to special solicitude in our standing inquiry. With this in mind, we find that the elements of standing are satisfied. If, as State Plaintiffs alleged, the Secretary promulgated a rule binding on states without the authority to do so, then State Plaintiffs have suffered a concrete injury to their sovereign interest in controlling child custody proceedings that was caused by the Final Rule. Additionally, though state courts and agencies are not bound by this court's precedent, a favorable ruling from this court would remedy the alleged injury to states by making their compliance with ICWA and the Final Rule optional rather than compulsory. *See Massachusetts*, 549 U.S. at 521 (finding redressability where the requested relief would prompt the agency to "reduce th[e] risk" of harm to the state).

C. Standing to Bring Tenth Amendment Claims

For similar reasons, the district court found, and we agree, that State Plaintiffs have standing to challenge provisions of ICWA and the Final Rule under the Tenth Amendment. The imposition of regulatory burdens on State Plaintiffs is sufficient to demonstrate an injury to their sovereign interest in creating and enforcing a legal code to govern child custody proceedings in state courts. *See Texas*, 809 F.3d at 153. Additionally, the causation and redressability requirements are satisfied here, as a favorable ruling would likely redress State Plaintiffs' asserted injuries by lifting the mandatory burdens ICWA and the Final Rule impose on states. *See Lujan*, 504 U.S. at 560-61.

D. Standing to Bring Nondelegation Claim

Plaintiffs also contend that § 1915(c), which allows a tribe to establish a different order of placement preferences than the defaults contained in § 1915(a) and (b), is an impermissible delegation of legislative power that binds State Plaintiffs. Defendants argue that State Plaintiffs cannot

demonstrate an injury, given the lack of evidence that a tribe's reordering of § 1915(a) and (b)'s placement preferences has affected any children in Texas, Indiana, or Louisiana or that such impact is "real and immediate." State Plaintiffs respond that tribes can change ICWA's placement preferences at any time and that at least one tribe, the Alabama-Coushatta Tribe of Texas, has already done so. We conclude that State Plaintiffs have demonstrated injury and causation with respect to this claim, as State Plaintiffs' injury from the Alabama-Coushatta Tribe's decision to depart from § 1915's default placement preferences is concrete and particularized and not speculative. *See Lujan*, 504 U.S. at 560. And given that the Alabama-Coushatta Tribe has already filed their reordered placement preferences with Texas's Department of Family and Protective Services, Texas faces a "substantial risk" that its claimed injury will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.' " (internal quotation marks omitted) (quoting *Clapper*, 568 U.S. at 409, 414 n.5)). Moreover, a favorable ruling from this court would redress State Plaintiffs' injury by making a state's compliance with a tribe's alternative order of preferences under § 1915(c) optional rather than mandatory. *See id.*

II. Facial Constitutional Challenges to ICWA

Having determined that State Plaintiffs have standing on the aforementioned claims, we proceed to the merits of these claims. We note at the outset that ICWA is entitled to a "presumption of constitutionality" and "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000) (citing *United States v. Harris*, 106 U.S. 629, 635 (1883)).

A. Preemption and Anticommandeering

The district court ruled, and Plaintiffs argue on appeal, that 25 U.S.C. §§ 1901-23[18] and 1951-52[19] exceed Congress's constitutional powers by violating the anticommandeering doctrine and accordingly do not preempt any conflicting state law. We review *de novo* the constitutionality of a federal statute. *See United States v. Perez-Macias*, 335 F.3d 421, 425 (5th Cir. 2003).

We start our discussion by explaining the principles underpinning two intertwined areas of constitutional law: preemption and anticommandeering. First, preemption. This concept is derived from the Supremacy Clause of the Constitution, which provides that "[t]his 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." U.S. CONST. art. VI, cl. 2; *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law."). Therefore, when "Congress enacts a law that imposes restrictions or confers rights on private actors" and a "state law confers rights or imposes restrictions that conflict with the federal law," under the Supremacy Clause, "the federal law takes precedence and the state law is preempted." *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018). "Even without an express provision for preemption . . . state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby*, 530 U.S. at 372.

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[18] Title 25 U.S.C. §§ 1901-03 sets forth Congress's findings, declaration of policy, and definitions. Sections 1911-23 govern child custody proceedings, including tribal court jurisdiction, notice requirements in involuntary and voluntary state proceedings, termination of parental rights, invalidation of state proceedings, placement preferences, and agreements between states and tribes.

[19] Section 1951 sets forth information-sharing requirements for state courts. Section 1952 authorizes the Secretary of the Interior to promulgate rules and regulations that are necessary for ICWA's implementation.

The anticommandeering doctrine, by contrast, is rooted in the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Congress's legislative powers are limited to those enumerated under the Constitution, and "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Murphy*, 138 S. Ct. at 1476. "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." *Id.* at 1477 (quoting *New York v. U.S.*, 505 U.S. 144, 178 (1992)).

In the present context, these two doctrines—preemption and anticommandeering—represent opposite sides of the same coin. *See New York*, 505 U.S. at 156 (explaining that in cases "involving the division of authority between federal and state governments," the dual inquiries as to whether a congressional enactment is authorized under Article I or violates the Tenth Amendment "are mirror images of each other"). This is because for a federal law to preempt conflicting state law, two conditions must be satisfied. First, the federal law "must represent the exercise of a power conferred on Congress by the Constitution." *Murphy*, 138 S. Ct. at 1479. Second, since the Constitution "confers upon Congress the power to regulate individuals, not States," *New York*, 505 U.S. at 166, the provision at issue must be a regulation of private actors. *Murphy*, 138 S. Ct. at 1479. As discussed in more detail *infra*, a law does not fail this second inquiry simply because it *also* regulates states that participate in an activity in which private parties engage. *Id.* at 1478. Rather, the key question is whether the law establishes rights enforceable by or against private parties. *See id.* at 1480 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 391 (1992)). When a federal law fails this second step by directly commanding the executive or legislative branch of a state government to act or refrain from acting without commanding private parties to do the same, it violates the

anticommandeering doctrine.[20] *See, e.g.*, *New York*, 505 U.S. at 188 (stating that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program"); *Printz v. United States*, 521 U.S. 898, 932 (1997). On the other hand, if Congress enacts a statute pursuant to an enumerated power and the statute does not violate the anticommandeering doctrine or another constitutional provision, then the federal law necessarily has preemptive force.[21]

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[20] Though Congress is prohibited from commandeering states' legislatures and executive officers, it can "encourage a State to regulate in a particular way, or . . . hold out incentives to the States as a method of influencing a State's policy choices." *New York*, 505 U.S. at 166. For example, Congress may condition the receipt of federal funds under its spending power. *See id.* at 167. Some of the Defendants contend that ICWA is authorized under Congress's Spending Clause powers because Congress conditioned federal funding in Title IV-B and E of the Social Security Act on states' compliance with ICWA. However, because we conclude that ICWA is constitutionally permissible even if its provisions are construed as mandatory, we need not reach the question of whether it is justified as an optional incentive program in which states voluntarily participate.

[21] Of course, like any other unconstitutional law, a federal statute that violates the anticommandeering doctrine exceeds Congress's legislative authority. *See New York*, 505 U.S. at 155-56. The Court has stated, however, that a statute is beyond Congress's Article I power for purposes of the premption analysis either when the statute does not "represent the exercise of a power conferred on Congress by the Constitution,"—that is, when it addresses a subject matter that is not included in the powers that the Constitution grants the federal government—or when the statute breaches the anticommandeering doctrine, regardless of the subject matter addressed by the legislation. *See Murphy*, 138 S. Ct. at 1479. These are two distinct inquires. Otherwise, Congress could never violate the anticommandeering doctrine when regulating in a field over which it holds plenary authority. But the Supreme Court has held that this is not how the Constitution works. *See Reno v. Condon*, 528 U.S. 141, 142 (2000) (stating that, "in *New York* [*v. United States*, 505 U.S. 144 (1992)] and *Printz* [*v. United States*, 521 U.S. 898 (1997)], the Court held that federal statutes were invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated" the anticommandeering doctrine); *cf., e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (explaining that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area," that authority is subject to other constitutional constraints); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("[T]he Constitution is filled with provisions that grant Congress . . . specific power[s] to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of

1. Article I Authority

We first address whether ICWA represents a valid exercise of Congress's Article I power. "Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated." *Harris*, 106 U.S. at 635.

The district court concluded that Congress overstepped its powers in enacting ICWA by breaching the anticommandeering doctrine, but it never addressed whether the Act fell within Congress's Article I power separate and apart from any supposed anticommandeering violation. On appeal, Plaintiffs squarely argue that Congress exceeded its authority—without respect to any anticommandeering violation—in enacting ICWA.[22] For the reasons that follow, we disagree.

The historical development of the federal Indian affairs power is essential to understanding its sources and scope. *See Heller*, 554 U.S. at 581. Earlier, we reviewed the Framers' dissatisfaction with the untenable division of authority over Indian affairs between the states and the national Government under the Articles of Confederation. We explained how this led

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the Constitution."). We therefore address separately whether ICWA is within the range of subject matter on which Article I authorizes Congress to legislate and whether the law violates the anticommandeering inquiry.

[22] "[A] court of appeals sits as a court of review, not of first view." *Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017). Notwithstanding this general rule, "there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (cleaned up). Given the extensive litigation and the substantial and exceptional briefing from both the parties and *amici*, we conclude that it would work an injustice at this juncture not to resolve the question of Congress's authority to enact ICWA. *See id.* Moreover, we ultimately conclude that the proper resolution of the question is beyond any doubt.

the Framers to endow the national government with exclusive, plenary power in regulating Indian affairs under the new Constitution. *See supra* Background Part I. This intent, we observed, is revealed through a holistic reading of the Constitution; the combination of the charter's Treaty, Property, Supremacy, Indian Commerce, and Necessary and Proper Clauses, among other provisions, operate to bestow upon the federal government supreme power to deal with the Indian tribes. *See* Ablavsky, *Beyond the Indian Commerce Clause*, *supra* at 1043-44. Understandably, then, the Supreme Court has consistently characterized the federal government's Indian affairs power in the broadest possible terms. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2000) (noting that the Indian Commerce and Treaty Clauses are sources of Congress's "plenary and exclusive" "powers to legislate in respect to Indian tribes"); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982) (discussing Congress's "broad power . . . to regulate tribal affairs under the Indian Commerce Clause"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (same); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) ("As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad . . . ."); *Mancari*, 417 U.S. at 551-52 (noting that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself").

Conversely, the Constitution totally displaced the states from having any role in these affairs and "divested [them] of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996); *see also* Ablavsky, *Beyond the Indian Commerce Clause*, *supra* at 1043-44 (noting that the federal government's Indian affairs powers collectively amounted to what present-day doctrine terms field preemption). Responding to the problem under the Articles of Confederation of states openly flouting the federal strategy with respect to the Indians, the Framers specifically intended that the Constitution would prevent the states from exercising their sovereignty in a way that interfered with federal Indian

policy. *See* William C. Canby, § 2.1 American Indian Law in a Nutshell, (7th Ed.) [hereinafter Canby, American Indian Law]. As in its dealings with foreign nations, it was important that the United States speak with one voice in making peace with or deploying military force against the Indians without being undercut by the various contrary policies individual states might adopt if left to their own devices.

The writings and actions of both the Washington Administration and the First Congress amply demonstrate this early conception of the national Government as having primacy over Indian affairs. President George Washington himself explained in a letter to the Governor of Pennsylvania that the federal Government, under the new Constitution, "possess[ed] the only authority of regulating an intercourse with [the Indians], and redressing their grievances." Letter from George Washington to Thomas Mifflin (Sept. 4, 1790), in 6 The Papers of George Washington: Presidential Series 188, 189 (Mark A. Mastromarino ed., 1996). And the First Congress reinforced this exceptionally broad understanding of federal authority through the adoption of the Indian Intercourse Act of 1790, Act of July 22, 1790, §§ 1-3, 1 Stat. 137-38. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, is contemporaneous and weighty evidence of its true meaning.' " (alteration omitted) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)). The legislation provided exclusively for federal management of essential aspects of Indian affairs: the regulation of trade with Indians, prohibition on purchases of Indian land except by federal agents, and the federalization of crimes committed by non-Indians against Indians. *See* Cohen's, *supra*, § 1.03[2]. And early Congresses repeatedly reaffirmed this expansive understanding of federal power by reenacting the statute in various forms throughout the late eighteenth and early nineteenth century. *See* Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2

Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329.

These acts further evince that, from its earliest days, Congress viewed itself as having an obligation to sustain the Indians and tribes as a separate people belonging to separate nations and to protect them from harm by the states and their inhabitants. *See Lummi Indian Tribe v. Whatcom Cnty.*, 5 F.3d 1355, 1358 (9th Cir. 1993) (internal citations omitted) ("Courts considering the [Indian Intercourse] Act's purpose have agreed that Congress intended to protect Indians from the 'greed of other races,' and from 'being victimized by artful scoundrels inclined to make a sharp bargain.'" (first quoting *United States v. Candelaria*, 271 U.S. 432, 442 (1926); then quoting *Tuscarora Nation of Indians v. Power Auth.*, 257 F.2d 885, 888 (2d Cir. 1958), *vacated as moot sub nom.*, *McMorran v. Tuscarora Nation of Indians*, 362 U.S. 608 (1960))); STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 96 (4th ed. 2012). This duty has deep historical roots. As related above, the federal Government engaged with the Indians in the decades following ratification as part of its westward expansion project, utilizing not only diplomatic tools like treaties, but also military might. *See supra* Background Part I. By virtue of its manifold and dominant powers over Indian affairs, the national Government gradually subjugated the western lands, eventually enveloping the Indian tribes and extinguishing many aspects of their external sovereignty, including their ability to deal with other countries as independent nations.

As a consequence of the Indians' partial surrender of sovereign power, the federal Government naturally took on an attendant duty to protect and provide for the well-being of the "domestic dependent [Indian] nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831) (stating that Indian tribes "look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants"); *see also Mancari*, 417 U.S. at 552 ("In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force,

leaving them . . . [a] dependent people, needing protection . . . ." (quoting *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)); *supra* Background Part II. That is, owing to the federal Government's expansive Indian affairs powers and the way in which it has wielded those powers to divest Indians of their ancestral lands, the Government bears a responsibility to protect the tribes from external threats. Similarly, the Government has an overarching duty to provide for the welfare of tribes. *See* CANBY, AMERICAN INDIAN LAW, *supra* § 3.1; COHEN'S, *supra*, § 5.04.[23] Numerous pieces of Indian federal legislation have been passed pursuant to this federal duty.[24] Indeed, we know of no court that has found Congress's power wanting when Congress has invoked its duty to the tribes and enacted legislation clearly aimed at keeping its enduring covenant. *See*, *e.g.*, *Mancari*, 417 U.S. 551-52 ("Of necessity the United States assumed the duty of furnishing . . . protection [to the Indians], and with it the authority to do all that was required to perform that obligation . . . ." (quoting *Seber*, 318 U.S. at 715));

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[23] As discussed, this obligation has been characterized as akin to a guardian-ward relationship, or, in more contemporary parlance, a trust relationship. *See supra* Background Part II; *compare Cherokee*, 30 U.S. at 13 (referring to the tribes as "domestic dependent nations" and explaining "[t]heir relation to the United States resembles that of a ward to his guardian"), *with Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 757 (2016) (noting the "general trust relationship between the United States and the Indian tribes") (internal quotation marks omitted).

[24] *See, e.g.*, Indian Health Care Improvement Act, 25 U.S.C. § 1602 (explaining that the legislation was passed "in fulfillment of [the Government's] special trust responsibilities and legal obligations to Indians"); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a(a) ("The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities."); Elementary and Secondary Education Act, 20 U.S.C. § 7401 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children."); American Indian Agricultural Resource Management Act, 25 U.S.C. § 1307 ("[T]he United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes.").

Kagama, 118 U.S. at 383-84 ("Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen."); *Perrin v. United States*, 232 U.S. 478, 486 (1914) ("It must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts."); *Worcester*, 31 U.S. at 556-57 (explaining that the Constitution vests Congress with broad Indian affairs powers and that Congress has "[f]rom the commencement of our government . . . passed acts to regulate trade and intercourse with the Indians; which treat the[tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate"); *Cherokee Nation*, 30 U.S. at 13.[25]

Chief among the external threats to the Indian tribes were the states and their inhabitants. *See Kagama,* 118 U.S. at 384 (The Indian tribes "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies."); CANBY, AMERICAN INDIAN LAW, *supra* § 3.1. And the Supreme Court has long recognized and repeatedly reaffirmed the federal Government's ongoing duty to protect tribes from the states and vice versa—as well as its power to do so. *See Kagama,* 118 U.S. at 384; *Cherokee Nation*, 30 U.S. at 13; *Worcester*, 31 U.S. at 556-57; *Mancari*, 417 U.S. 551-52.

[25] Though some of the cited cases are permeated with paternalistic overtones and objectionable descriptions of Indians, it is no less true today than it was centuries ago that the national Government owes an obligation to provide for the welfare of the Indians—and that it is armed with the power to do so. *See, e.g.*, *Mancari*, 417 U.S. 551-52.

In light of the foregoing, ICWA represents the convergence of key aspects of federal Indian law. First, as Congress expressly noted in its congressional findings, ICWA was enacted pursuant to the "plenary power over Indian affairs" that the Constitution places in the federal government.[26] 25 U.S.C. § 1901(1). This authority is exclusive to the federal government, and the Framers specifically intended to prevent the states from interfering with its exercise, either by taking their own disparate stances in dealing with tribal governments or by otherwise exercising their sovereignty in a manner contrary to federal Indian policy. *See Seminole Tribe of Fla.*, 517 U.S. at 62; Ablavsky, *Beyond the Indian Commerce Clause*, *supra* at 1043-44. Just as the Constitution was meant to preclude the states from undertaking their own wars or making their own treaties with the Indian tribes, *see* James Madison, Vices of the Political System of the United States, in 9 THE PAPERS OF JAMES MADISON 345, 348 (Robert A. Rutland et al. eds., 1975), so too does it empower the federal government to ensure states do not spoil relations with the Indian tribes through the unwarranted taking and placement of Indian children in non-Indian foster and adoptive homes.[27] As with the

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[26] We find it notable that, in enacting ICWA, Congress explicitly contemplated whether it was constitutionally authorized to do so. *See* H.R. REP. NO. 95-1386, at 13-15 (discussing the constitutionality of ICWA, including that ICWA falls within Congress's plenary power over Indian affairs); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality."). Though this judgment is not dispositive, we grant it due deference. *See Perrin*, 232 U.S. at 486 ("[I]n determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion[.]").

[27] JUDGE DUNCAN contends that the principle that the federal government may prevent states from interfering with federal policy toward the tribes does not apply here because ICWA does not totally exclude states from Indian child custody proceedings. He contends that ICWA instead "does the opposite of 'excluding'" by "leav[ing] many adoptions under state jurisdiction . . . while imposing 'Federal standards' on those state proceedings." DUNCAN, CIRCUIT JUDGE, OP. at 48 (citing §§ 1911(b) & 1902). But JUDGE DUNCAN's suggestion that ICWA "co-opts" the machinery of state courts in service to the federal government is highly misleading. DUNCAN, CIRCUIT JUDGE,

federal government's dealings with any other nation, the Constitution dictates that the government address relations with the Indian tribes on behalf of the nation as a whole without state interference, be it with respect to war making, peace treaties, or child custody practices.

Second, ICWA falls within the federal government's continuing trust relationship with the tribes, which includes a specific obligation to protect the tribes from the states. We earlier recounted the arbitrary and abusive child removal and assimilation practices that led Congress to conclude that it was necessary and proper for it to enact ICWA. *See supra* Background Part IV-V; *see also Antoine*, 420 U.S. at 203. Briefly stated, throughout the late nineteenth and well into the twentieth century, the federal government was intimately involved in programs ostensibly to "educate" Indian children at off-reservation schools that sought to imbue them with white Christian values and permanently shed them of and sever them from their tribal heritage. Although the federal Government eventually discontinued this assimilationist policy, Congress found that abusive Indian child custody practices continued at the state level, often leading to the "wholesale" and unwarranted removal of Indian children from their homes by state child welfare agencies and adjudicatory bodies, *see* H.R. REP. NO. 95-1386, at 9;

OP. at 49. Far from pressing the states into federal service, ICWA minimizes any intrusion on state sovereignty by *permitting* states to exercise some jurisdiction over Indian Child custody proceedings so long as the state courts respect the federal rights of Indian children, families, and tribes. Section "1911(a) establishes exclusive jurisdiction in the *tribal* courts for proceedings concerning an Indian child who resides or is domiciled within the reservation." *Holyfield*, 490 U.S. at 36 (internal quotation marks omitted) (emphasis added). And while Section 1911(b) allows states to exercise some concurrent jurisdiction over cases involving "children not domiciled on the reservation," it establishes that jurisdiction over such proceedings still "*presumptively*" lies with the tribal courts. *Id.* at 36 (internal quotation marks omitted) (emphasis added). This means that, except in limited circumstances, the case may remain in state court only with the consent of the Indian child's parents, custodian, and tribe. *See* § 1911(b). This is all to say, that the statute allows states to participate in an activity that is presumptively and could wholly be reserved to the tribes or the federal government is an indulgence of state interests, not an invasion thereof.

see also Indian Child Welfare Act of 1977: Hearing Before the S. Select Committee on Indian Affs., 95th Cong. 320 (1977) (statement of James Abourezk, Chairman, S. Select Comm. on Indian Affs.) (describing the massive removal as resulting in "cultural genocide"). Congress heard and received extensive evidence on this plundering of tribal communities' children, including testimony that the vast removal of Indian children from their homes and communities constituted an existential threat to tribes. *See* 124 Cong. Rec. 38,103 (1978) (statement of Minority sponsor Rep. Robert Lagomarsino) ("For Indians generally and tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as on-going, self-governing communities."); *see also* H.R. REP. NO. 95-1386, at 9-10 (declaring that the removal of Indian children was a "crisis of massive proportions," representing "perhaps the most tragic and destructive aspect of Indian life").

After reviewing this testimony and evidence concerning the massive removal of Indian children from their tribal communities by the states, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"; "that an alarmingly high percentage of Indian families 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." 25 U.S.C. § 1901(3)-(4). And Congress directly attributed this threat to the states "exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies," observing that they had "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* § 1901(5).

Thus, ICWA also falls within Congress's "plenary powers to legislate on the problems of Indians" in order to fulfill its enduring trust obligations

to the tribes. *Antoine*, 420 U.S. at 203. Indeed, the congressional findings in the statute expressly invoke this "responsibility for the protection and preservation of Indian tribes and their resources" and state "that the United States has a direct interest, as trustee, in protecting Indian children." 25 U.S.C. § 1901(2)-(3). The law was intended to combat an evil threatening the very existence of tribal communities, and it would be difficult to conceive of federal legislation that is more clearly aimed at the Government's enduring trust obligations to the tribes. Moreover, it fulfills the government's duty to protect the tribes from the states by regulating relations between the two—a power that the Framers specifically intended that the Constitution bestow on the federal government.[28] *See* CANBY, AMERICAN INDIAN LAW § 2.1

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[28] The opposing opinion misapprehends the significance to our analysis of the federal government's history of removing Indian children from their families and tribes to place them at off-reservation boarding schools. *See* DUNCAN, CIRCUIT JUDGE, OP. at 50-51. In the view of the opposing opinion, that the boarding school policy began in the latter half of the nineteenth century, and not the Founding era, means that the federal government's assimilation policy is irrelevant in determining whether Congress was authorized to enact ICWA. This is squarely contrary to the Supreme Court's explicit direction that historical "practice [is] an important interpretive factor even when the nature or longevity of that practice is subject to dispute, *and even when that practice began after the founding era*." *Noel Canning,* 573 U.S. at 525 (emphasis added). But more importantly, JUDGE DUNCAN's observation about the start of the boarding school policy misses the point: Since the Nation's founding, the federal government has viewed itself as owing an affirmative duty to promote tribal welfare generally and to provide for Indian children specifically, as well as having the power to do so—obligations that arise under what is now described as a trust relationship between the tribes and the government. *See* Br. of Prof. Ablavsky at 20 (describing federal financing of placement of Indian children in Quaker homes during the Washington administration); *see also* Fletcher, FEDERAL INDIAN LAW § 5.2. This relationship, at one time, led the federal government to pursue misguided policies that harmed the tribes, including its efforts at assimilating Indian children through the use of boarding schools during the nineteenth and twentieth centuries. And decades after the height of the federal government's ill-founded promotion of Indian boarding schools, the states continued to perpetuate the destruction of tribal culture by removing massive numbers of Indian children from the custody of their parents. *See supra* Background Part IV-V. In the face of these abusive child welfare practices and pursuant to the government's trust duty to the tribes—which, again, is rooted in the Nation's Founding era—Congress enacted ICWA to protect the tribes. Stated differently,

("The central policy . . . was one of separating Indians and non-Indians and subjecting nearly all interaction between the two groups to federal control.").

Plaintiffs raise several arguments in favor of cabining Congress's authority to redress the evils attending state child welfare proceedings involving Indian children. We review their contentions and find them wanting.

First, seeking to surmount the mountain of case law sustaining Congress's plenary authority to regulate with respect to Indians, Plaintiffs point out that the Court remarked that this power is "not absolute" in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977). A cursory review of the cited authority reveals that it affords no support to Plaintiffs' position. The above-quoted statement was made with regard to the justiciability of a challenge to Congress's "exercise of control over tribal property." *Id.* at 83. In other words, the Court was addressing only whether it in fact had authority to adjudicate the dispute—not the extent of Congress's authority to regulate Indian tribes. In any event, the Court concluded that the controversy was justiciable and upheld the challenged enactment. *Id.* at 90. *Delaware Tribal Business Committee* in no way shackles Congress's authority to regulate Indian tribes.

Plaintiffs next contend that the meaning of commerce in the Indian and Interstate Commerce Clauses is equivalent. Plaintiffs thus seek to import Interstate Commerce Clause jurisprudence into the Indian Commerce Clause in order to limit Congress's power under the latter; they argue that

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Founding-era history confirms Congress's "plenary power[]" and responsibility "to legislate on the problems of Indians," *Antoine*, 420 U.S. at 203, and the history of Indian child removal demonstrates that the unwarranted breakup of Indian families was such a problem. Congress was effectuating its trust obligations to the tribes when it acted to halt the wrongful Indian child custody practices that had once been carried out by the federal government and were continuing to be practiced by states at the time of ICWA's enactment, and this is exactly what the Constitution empowers the federal government to do.

the latter clause does not authorize ICWA because children are not "persons . . . in commerce" and child custody cases do not substantially affect commerce with Indian tribes. We find Plaintiffs' construction of the Indian Commerce Clause unduly cramped, at odds with both the original understanding of the clause and the Supreme Court's more recent instructions. *See Printz*, 521 U.S. at 905 (looking to "historical understanding and practice" as well as "the jurisprudence of this Court" to determine whether a federal enactment was constitutional). More fundamentally, the history, text, and structure of the Constitution demonstrate that the federal Government, including Congress, has plenary authority over all Indian affairs and that this power is in no way limited to the regulation of economic activity. And, as stated, Congress does not derive its plenary power solely from the Indian Commerce Clause, but rather from the holistic interplay of the constitutional powers granted to Congress to deal with the Indian tribes as separate nations. *See* Ablavsky, *Beyond the Indian Commerce Clause*, *supra* at 1026.

The history refutes Plaintiffs' attempt to equate the Interstate and Indian Commerce Clauses. Indeed, since the framing of the Constitution, "Indian 'commerce' [has] mean[t] something different" than "interstate commerce." *Id.* The Framers debated and approved the Indian Commerce Clause separately from the Interstate Commerce Clause, and, during ratification, the clauses were viewed as so distinct in content that "no one during ratification interpreted the Indian Commerce Clause to shed light on the Interstate . . . Commerce Clause[], or vice versa." *Id.* at 1027*; see also* Matthew L.M. Fletcher, *ICWA and the Commerce Clause*, in THE INDIAN CHILD WELFARE ACT AT 30: FACING THE FUTURE 32 (Fletcher et al. eds., 2009) [hereinafter Fletcher, *ICWA and the Commerce Clause*]. Though both provisions use the term "commerce," the historical evidence from the time of the Constitution's framing indicates that interpreting "commerce" identically in the Interstate and Indian Commerce Clauses is a "trap" that "would tend to obliterate the original meaning and intent of the Indian

Commerce Clause." Fletcher, *ICWA and the Commerce Clause*, *supra*, at 31. Put simply, "[c]ommerce with Indian tribes must be interpreted on its own terms rather than in the shadow of . . . the Interstate Commerce Clause." Ablavsky, *Beyond the Indian Commerce Clause*, *supra*, at 1028, 1029 (noting that eighteenth century references to "commerce" with Indians included the exchange of religious ideas with tribes and sexual intercourse with Indians); *see also* Fletcher, *ICWA and the Commerce Clause*, *supra* at 8-9.

Legislation from the beginning of the Constitutional era further demonstrates that the Constitution confers synergistic and comprehensive powers on the federal Government to manage relations with Indian tribes, regardless of whether the regulated activity is economic in nature. As noted above, the Indian Intercourse Act of 1790 embraced many noneconomic subjects, including the regulation of criminal conduct by non-Indians against Indians. In enacting the law, the First Congress plainly conceived of its power to extend into regulation of noneconomic activity relating to Indian tribes. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 24-26 (2010) (discussing the Act and its successors and stating that "Congress clearly believed that it could reach both economic and noneconomic activity under the Indian Commerce Clause," given that the Act reaches noneconomic criminal conduct, such as murder); *see also* Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2004 n.25 (2006). Since then, Congress has repeatedly exercised its Indian affairs authority for matters far beyond mere economic exchange. *See, e.g.*, Indian Health Care Improvement Act, 25 U.S.C. §§ 1601 *et seq.*; Tribally Controlled Community College Assistance Act, 25 U.S.C. § 1801(7)(B).

Furthermore, "[t]he scope of federal power under the Indian commerce clause has developed under Supreme Court decisions differently than the powers over foreign and interstate commerce." COHEN'S, *supra*, § 4.01[1][a]. The Court has explicitly underscored the distinction between

the clauses, explaining that "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Seminole Tribe*, 517 U.S. at 62 (observing that, though "the States still exercise some authority over interstate trade[, they] have been divested of virtually all authority over Indian commerce and Indian tribes"). In short, it is "well established that the Interstate Commerce and Indian Commerce Clauses have very different applications"; unlike the former clause, which "is concerned with maintaining free trade among the States," "the 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) (emphasis added); *see also United States v. Lomayaoma*, 86 F.3d 142, 145 (9th Cir. 1996) (noting that the Indian Commerce clause "confers more extensive power on Congress than does the Interstate Commerce Clause"). And the Supreme Court has continually made clear that Congress's Indian affairs power is not limited to regulating economic activity. *See Lara*, 541 U.S. at 200 (affirming power of tribes to criminally prosecute nonmembers); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 410-11, 416-17 (1865) (upholding under the Indian Commerce Clause a federal statute that criminally sanctioned the sale of liquor to Indians, reasoning that the law "regulates the intercourse between the citizens of the United States and [Indian] tribes, which is another branch of commerce, and a very important one"); *Worcester*, 31 U.S. at 559 (explaining that the array of Indian affairs powers conferred on Congress by the Constitution "comprehend all that is required for the regulation of our intercourse with the Indians"). Any contention that ICWA is beyond Congress's authority to legislate with regard to Indian affairs is unfounded.

Alternatively, Plaintiffs argue that, even if the Constitution grants Congress plenary power with respect to Indian affairs, ICWA nonetheless exceeds Congress's legislative authority because it reaches Indian children who are not yet enrolled tribal members. We find no merit in this argument.

Pursuant to its Indian affairs power, Congress has long regulated persons without any tribal connection when their conduct affects Indians. *See, e.g.*, Indian Intercourse Act, § 1, 1 Stat. 137 (requiring any person who seeks "to carry on any trade or intercourse with the Indian tribes" to obtain a license from the federal government); *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975) (upholding federal criminal statute, passed pursuant to the Indian Commerce Clause and applied to non-Indians for conduct on private, non-Indian land within a reservation). Indeed, "Congress' plenary powers to legislate on the problems of Indians" often results in statutes that impact—and are directly aimed at—non-Indians. *Antoine*, 420 U.S. at 203; *see also Dick v. United States*, 208 U.S. 340, 357 (1908) ("As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal . . . ."). This type of regulation has been upheld repeatedly, even when it extends outside the bounds of the reservation or Indian country. *See, e.g.*, *United States v. Nice*, 241 U.S. 591, 597 (1916) ("The power of Congress to regulate or prohibit traffic in intoxicating liquor with tribal Indians within a state, *whether upon or off an Indian reservation*, is well settled. It has long been exercised, and has repeatedly been sustained by this court.") (emphasis added); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. (3 Otto) 188, 195 (1876) (sustaining Congress's power to require forfeiture of liquor sold outside of Indian country by a non-Indian to a tribal member); *Holliday*, 70 U.S. (3 Wall.) at 416-17 (upholding statute that criminally sanctioned sale of liquor by a non-Indian to an Indian outside of Indian country); COHEN'S, *supra*, § 5.01[3] (explaining that the Indian Commerce Clause comprehends "transactions outside of Indian country."). Simply put, Congress's Indian affairs power does not hinge on whether an entity affected by a regulation is a member of an Indian tribe, and there is no authority in the case law for the novel constraint on congressional power that Plaintiffs proffer.

JUDGE DUNCAN's objections to Congress's power to enact ICWA center on concerns that the statute impermissibly interferes with state sovereignty by legislating federal protections applicable to Indian children in state child welfare proceedings. He raises similar contentions when arguing that ICWA contravenes the anticommandeering principle, which we address below in our anticommandeering discussion. *See infra* Discussion Part II.A.2. But that issue is distinct from the question of whether Congress under Article I may legislate on the particular subject matter at issue: providing minimum protections for Indian children and families in child custody proceedings in order to prevent and rectify the massive removal of Indian children from their communities.[29] *See supra* note 21. To the extent the opposing opinion alleges a Tenth Amendment violation independent of any anticommandeering problem, centuries of Supreme Court precedent declaring Congress's duty to protect tribes from the states and Congress's corresponding "plenary power[] to legislate on the problems of Indians" compel us to reject JUDGE DUNCAN's arguments for imposing new restraints on this authority. *Antoine*, 420 U.S. at 203; *see also, e.g.*, *Mancari*, 417 U.S. 551-52; *Kagama*, 118 U.S. at 383-84. Indeed, preventing the states from exercising their sovereign power in a manner that interferes with federal policy toward the Indian tribes is precisely what the Constitution was intended to do. *See Worcester*, 31 U.S. at 559 ("[The Constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations,

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[29] The opposing opinion misreads us as somehow suggesting that the "Tenth Amendment vanishes" when Congress has plenary power to legislate in a certain field. SEE DUNCAN, CIRCUIT JUDGE, OP. at 28. To the contrary, we have explained that the question of Congress's Article I authority to legislate on a given subject matter is separate from the anticommandeering inquiry and other federalism concerns—as well as other constitutional constraints on Congress's legislative authority. *See supra* note 21. And our analysis therefore tracks this basic understanding about the distinct constitutional inquiries presented: first, we address whether ICWA is within the range of Congress's Indian affairs authority, and second, we consider whether ICWA contravenes the anticommandeering doctrine. *Compare* Discussion Part II.A.1 *with* Discussion Part.II.A.2.

and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded."). It was exactly this concern that led the Framers to confer on the federal government exclusive, plenary power over Indian affairs through myriad interrelated constitutional provisions. *See* Ablavsky, *Beyond the Indian Commerce Clause* at 1043-44.

JUDGE DUNCAN's argument suffers from another fundamental defect. His overarching premise is that ICWA violates the Tenth Amendment—and thus exceeds Congress's Article I authority—because it "encroaches" on an area of "traditional" state regulation, the field of domestic relations. DUNCAN, CIRCUIT JUDGE, OP. at 15, 40 n. 58,. Yet, as JUDGE HIGGINSON cogently explains, this assertion is squarely at odds with the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, where the Court emphatically rejected as unprincipled and unadministrable a conception of Tenth Amendment protections that turns on whether a regulated activity is one that is traditionally within a state's purview. HIGGINSON, CIRCUIT JUDGE, OP. at 1-2; *see Garcia,* 469 U.S. 528, 546-47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'")

First, "[t]here is no 'general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'" *Maryland v. Wirtz*, 392 U.S. 183, 195 (1968) (quoting *Case v. Bowles*, 327 U.S. 92, 101 (1946)). Rather, pursuant to the Supremacy Clause, "the Federal Government, when acting within a delegated power, may override countervailing state interests," whether those interests are

labeled traditional, fundamental, or otherwise. *Id.* In ratifying the Constitution, the states consented to the subordination of their interests—even those interests that are traditional state prerogatives—to those of the federal government when it acts pursuant to its constitutional powers. *See Garcia*, 469 U.S. at 549. "In the words of James Madison to the Members of the First Congress: 'Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.'" *Id.* (quoting 2 Annals of Cong. 1897 (1791)).

Moreover, on a more practical level, requiring courts to attempt to ascertain whether a given area of regulation is sufficiently within the historical province of states to qualify for protection would "result in line-drawing of the most-arbitrary sort." *Id.* at 545. "[T]he genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated." *Id.* And, as the *Garcia* Court observed, aside from longevity, there is a total lack "of objective criteria" by which to identify unenumerated "fundamental' elements of state sovereignty." *Id.* at 549.

The *Garcia* Court therefore held that the entirety of the constitutional protections for states' retained sovereignty in the federalist system are found in the limitations inherent in Congress's enumerated Article I powers[30] and

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[30] The modern anticommandeering doctrine was developed post-*Garcia*, and it is also rooted in the Tenth Amendment's reservation of state sovereignty. *See, e.g.*, *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 932. And the Court has of course long recognized that states retain sovereign immunity from most private suits, including in post-*Garcia* decisions. *See, e.g., Seminole Tribe*, 517 U.S. at 47. *Garcia*, nevertheless, remains good law, as evidenced by citations to it in the Court's leading anticommandeering cases, *see New*

"in the structure of the Federal government itself," which assigns the states a role in, among other things, selecting the executive and legislative branches of the federal government. *Id.* at 550-51. This structure reflects the Framers' desire "to protect the States from overreaching by Congress" through their participation in the democratic system and the political process, and not by judicial assessment of whether a federal practice intrudes on some inviolable area of state sovereignty that went unmentioned in the Constitution despite its supposed importance. *Id.* In short, *Garcia* made clear that any "attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism." *Id.* at 554.

As JUDGE HIGGINSON points out, this is precisely the type of disfavored line drawing in which JUDGE DUNCAN's opinion engages: it erroneously attempts to shield states from ICWA's minimum protections on the ground that the law touches on domestic relations, a sphere of regulation "traditionally" within the purview of states. HIGGINSON, CIRCUIT JUDGE, OP. at 1-2. The opposing opinion thus "risks resuscitating a misunderstanding of state sovereignty that entangles judges with the problematic policy task of deciding what issues are so inherent in the concept and history of state sovereignty that they fall beyond the reach of Congress." HIGGINSON, CIRCUIT JUDGE, OP. at 2.

Recognizing that *Garcia*'s reasoning dooms its argument, the opposing opinion attempts to distinguish that decision based on the fact that the statute at issue in *Garcia* was enacted pursuant to Congress's Interstate Commerce Clause authority, whereas ICWA stems from Congress's power over Indian affairs. *See* DUNCAN, CIRCUIT JUDGE, OP. at 40 n.58. However, the *Garcia* Court's reasoning for expressly rejecting a Tenth

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York, 505 U.S. at 155; *Printz*, 521 U.S. at 932, meaning the type of unenumerated spheres of state sovereignty JUDGE DUNCAN relies upon simply do not exist.

Amendment test that looks to whether a federal regulation encroaches on a 'traditional governmental function' applies with equal force regardless of the enumerated power pursuant to which Congress acts. Moreover, it would be nonsensical for the Tenth Amendment to impose more stringent federalism limitations on Congress when it regulates under its Indian affairs authority than under its Interstate Commerce power. It is well settled that states retain sovereign authority under the Tenth Amendment "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government," *id.* at 549, and "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Seminole Tribe*, 517 U.S. at 62. In other words, if any distinction exists between the limitations federalism places on Congress's Indian affairs power and its Interstate Commerce power, it would be that Congress has *more* freedom to regulate with respect to Indian affairs, not less. *See id.*; *Cotton Petroleum Corp.*, 490 U.S. at 192; *see also Lomayaoma*, 86 F.3d 145; Ablavsky, *Beyond the Indian Commerce Clause*, *supra* at 1043-44.

The opposing opinion further contends that *Garcia* is inapposite because that case "concerned whether 'incidental application' of general federal laws 'excessively interfered with the functioning of state governments.'" DUNCAN, CIRCUIT JUDGE, OP. at 40 n.58 (quoting *Printz*, 521 U.S. at 932). But the same is true with ICWA. Like the provision of the Fair Labor Standards Act at issue in *Garcia* that applied to both public and private employers, ICWA is a generally applicable law. Under the statute, as explained *infra* Discussion Part II.A.2.b, any burdens faced by states are "nothing more than the same . . . obligations" that "private [actors] have to meet." *Garcia*, 469 U.S. at 554. Because ICWA's mandates may be borne either by private actors or state actors, any burdens on states are "merely incidental applications" of the statute. *Printz*, 521 U.S. at 932. JUDGE DUNCAN thus fails to persuasively distinguish *Garcia*, confirming that the opposing opinion's argument for limiting Congress's Indian affairs

authority under the Tenth Amendment is "unsound in principle and unworkable in practice." *Garcia*, 469 U.S. at 546.

The opposing opinion also posits, in essence, that Congress's authority to enact ICWA turns on whether there is either a Supreme Court decision blessing a statute that operates just like ICWA or a Founding-era federal law that regulates Indian children and applies within state child welfare proceedings. *See* DUNCAN, CIRCUIT JUDGE, OP. at 29-56. Because neither exist, ICWA must fall, according to the opposing opinion. Such reasoning is misguided.

First, it is unsurprising that there is no Founding-era federal Indian statute conferring rights that apply in state proceedings. As JUDGE COSTA notes, it would have been anachronistic and bizarre for the early Congresses to have passed a law specifically pertaining to child custody proceedings because it was not until the middle of the nineteenth century that state adoption law shifted to allow for the adjudication of child placements in judicial proceedings. *See* COSTA, CIRCUIT JUDGE, OP. at 16-17; *see also* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1112-17 (2003). And there was no need during the Founding era for legislation that operated like ICWA as there was no massive removal of Indian children from their families at the hands of state administrative or judicial bodies. It was only during the 1970s that the scale of the ongoing, state-driven problem of Indian child removal was brought to Congress's attention. *See supra* Background Part IV. Over a four-year span, Congress considered voluminous evidence of the systematic removal of Indian children from their families and tribes through state proceedings. Fletcher, FEDERAL INDIAN LAW, *supra* § 8.8. Faced with the unique and alarming nature of this evil, Congress determined it was necessary to enact ICWA in order to protect Indian children, families, and tribes within those state proceedings. Thus, deciding ICWA's constitutionality by looking to whether the Founders enacted a federal law conferring rights to Indian families and tribes within

child custody proceedings is as nonsensical as deciding that federal regulation of the internet is unconstitutional because the early Congresses lacked the prescience to regulate a non-existent technology.

Second, the absence of a Supreme Court decision squarely addressing a federal Indian statute that creates rights applicable in state proceedings does not lend credence to the opposing opinion's position. As discussed *infra* Discussion Part II.A.2.a.i, the Supreme Court has repeatedly held that state courts are bound by the Supremacy Clause to apply validly preemptive federal law, and there is thus ample Supreme Court precedent supporting Congress's authority to enact laws applicable in state proceedings. *See, e.g., McCarty v. McCarty*, 453 U.S. 210, 235-36 (1981) (federal military benefits statute guaranteeing "retired pay" to a retired servicemember preempted state's community property law that otherwise would have provided upon divorce for dividing the retirement pay between the former spouses); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979) (federal Railroad Retirement Act's scheme for pension benefits, which excluded a spouse of a railroad employee from entitlement to such benefits upon divorce, preempted state law's definition of community property subject to division). That there may be no case affirming a federal statute that creates rights *related to Indians* that apply in state courts evidences only the history just discussed and the fact that few questioned Congress's ability to legislate in this manner given the wealth of Supreme Court precedents upholding the preemptive force of federal law. Indeed, ICWA itself has been a part of the United State Code for over forty years without a significant Tenth Amendment challenge to the law reaching the Supreme Court or the courts of our sister circuits, which would surely be puzzling if the statute were truly the radical, unprecedented federal overreach that the opposing opinion contends. Thus, the lack of a Supreme Court case directly addressing an Indian law like ICWA that creates rights applicable in state court proceedings speaks not to the absence of federal authority to enact such a statute, but

instead to historical circumstance and federal authority that is so well established as to be unquestionable.

To summarize, ICWA's constitutionality does not hinge on JUDGE DUNCAN's exceptionally pinched framing that would have the statute rise or fall based on the historical sanctioning of an exact analogue that Congress would have had no occasion to enact. Rather, the salient question is whether the history and text of the Constitution and congressional practice suggest that ICWA is within Congress's plenary Indian affairs authority. *See Noel Canning,* 573 U.S. at 533 ("The Founders knew they were writing a document designed to apply to ever-changing circumstances over centuries. After all, a Constitution is 'intended to endure for ages to come,' and must adapt itself to a future that can only be 'seen dimly,' if at all." (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 415 (1819))); *Heller*, 554 U.S. at 528. Given the extensive history of federal government efforts to provide for the welfare of Indian children and tribes, including legislation specifically designed to protect Indians from mistreatment by the states and their citizens, this question can only be answered in the affirmative.

Searching in vain for case law to support its unorthodox position, the opposing opinion improvidently relies on two inapposite Supreme Court decisions, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *United States v. Lara*, 541 U.S. 193 (2004). In *Seminole Tribe*, the Court considered an issue wholly absent from the present case: Congress's power to abrogate states' sovereign immunity. 517 U.S. at 47. That case concerned the Indian Gaming Regulatory Act, which was passed pursuant to the Indian Commerce Clause. *Id.* One provision in the law authorized tribes to sue states in federal court to compel them to negotiate in good faith to establish a tribal-state compact governing gaming activities. *Id.* The Court nullified that provision; it reasoned that, although the Constitution vests Congress with "complete law-making authority" with respect to Indian affairs, "the Eleventh

Amendment [generally] prevents congressional authorization of suits by private parties against unconsenting states." *Id.* at 72.

JUDGE DUNCAN emphasizes this uncontroversial statement, but it does not advance his argument. DUNCAN, CIRCUIT JUDGE, OP. at 35-36. In holding that Congress could not abrogate a state's sovereign immunity pursuant to its Indian affairs power, *Seminole Tribe* simply recognized that, even when Congress holds plenary authority over a field of legislation, that power is still subject to limitations imposed by other constitutional provisions. *See id.*; *Williams*, 393 U.S. at 29; *Condon*, 528 U.S. at 149. It is for this reason that, as explained *supra* note 21, we first address Congress's Article I authority to legislate over ICWA's subject matter and then separately consider whether ICWA is consistent with the anticommandeering doctrine and other constitutional guarantees.

To the extent JUDGE DUNCAN asserts that *Seminole Tribe* prohibits Congress from regulating in state "sovereign matters like adoption proceedings," DUNCAN, CIRCUIT JUDGE, OP. at 36, we disagree. *Seminole Tribe* addressed only limitations on Congress's power to override states' sovereign immunity from suit by private parties. *See id.* at 47. It has no bearing on the scope of Congress's Article I authority when, as here, private suits against a state are not at issue. Indeed, the Court carefully noted that its opinion in no way touched upon other aspects of the Tenth Amendment. *See id.* at 61 n.10 (expressly declining to opine on whether the statute contravened the anticommandeering doctrine because this argument "was not considered below . . . and is not fairly within the question presented"); *see also id.* at 183 n.65 (Souter, J., dissenting) (cautioning that the views expressed in his dissenting opinion on the issue of state sovereign immunity "should not be understood [as] tak[ing] a position on" the "scope of the Tenth Amendment" in other respects). Furthermore, the Supreme Court has expressly held that even in fields like domestic relations that are generally the exclusive territory of state regulation, Congress can enact

legislation that preempts contrary state law. *See, e.g.*, *McCarty*, 453 U.S. at 235-36. In sum, any reliance on *Seminole Tribe* as imposing a limit on Congress's ability to exercise its Indian affairs authority to create federal rights that apply within child custody proceedings is misplaced.[31]

The Supreme Court's decision and reasoning in *Lara*, 541 U.S. at 196, also does not apply to the present case. There, the Court considered the constitutionality of a statute enacted in response to an earlier Court ruling in *Duro v. Reina*, 495 U.S. 676 (1990). In *Duro*, the Court held that tribes had been dispossessed of their inherent authority to prosecute nonmember Indians by virtue of their status as dependent sovereigns subject to the authority of the United States. *Id.* at 679. Congress promptly passed a law seeking to avoid the Court's ruling in *Duro* by "recogniz[ing] and reaffirm[ing]" that tribes' inherent sovereignty includes the power to exercise criminal jurisdiction over nonmember Indians. *Lara,* 541 U.S. at 196; *see also United States v. Enas*, 255 F.3d 662, 669 (9th Cir. 2001) (citing 25 U.S.C. § 1301(2)). That statute was challenged in *Lara* as exceeding Congress's authority. *See* 541 U.S. at 200. The case thus presented the specific question of whether Congress could statutorily alter limits that had been placed on tribes' inherent sovereign powers as a result of their dependent status.

The Court answered this question in the affirmative, reasoning that Congress was in effect "relax[ing] restrictions that the political branches" had previously placed on the exercise of inherent tribal authority. *Id.* at 196. In recognizing Congress's power to remove such restrictions, the Court

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[31] We note that JUDGE DUNCAN mischaracterizes the Defendants as supposedly making the "core" argument that simply because Congress has plenary authority over Indian affairs it "can *ipso facto*" regulate sovereign state affairs. DUNCAN, CIRCUIT JUDGE, OP. at 33-34, 36 n.52. This contention is not raised in the Defendants' briefing nor was it advanced at oral argument. Defendants' actual argument is that, as an initial matter, Congress has authority to enact ICWA and second that ICWA does not violate the anticommandeering doctrine.

discussed several relevant considerations. For example, one consideration was that Congress, with the Court's approval, had a long-established practice of adjusting the limits on the sovereign authority of tribes and other "dependent entities" such as Hawai'i and Puerto Rico. *Id.* 203-04. This history of congressional action was germane to deciding whether Congress could continue to adjust the scope of tribal autonomy. However, the *Lara* Court's considerations are of no relevance where, as with ICWA, Congress is not altering the scope of tribes' retained sovereign power.

Instead, in enacting ICWA, Congress simply employed *its* power to set policy with respect to the Indian tribes by conferring minimum federal protections on Indian children, parents, and tribes in state child custody proceeding. Stated differently, the considerations in *Lara* are inapplicable because, unlike the statute at issue in *Lara*, ICWA affirmatively grants new rights, protections, and safeguards to individual Indians and tribes in state proceedings and does not restore or remove any inherent sovereign authority the tribes possessed prior to their becoming dependents of the United States. Take, for instance, § 1911(b), which permits tribes to intervene in an off-reservation child custody case and invoke ICWA's placement preferences. That this provision cannot be read to restore sovereign authority to a tribe is clear from the fact that it grants the very same right to an Indian child's parents or relatives; a power cannot be sovereign in nature if it can just as easily be exercised by individual tribal members as by tribes themselves. *Cf. Lara,* 541 U.S. at 200 (upholding *tribes'* inherent sovereign power to prosecute nonmember Indians). Similarly, § 1912(b) provides indigent Indian parents or custodians a right to appointed counsel in state child custody proceedings—a right not conferred on the sovereign tribes at all. These provisions grant rights to Indian tribes, parents, and relatives pursuant to *Congress's* power to regulate relations between states, the federal

government, and the tribes, and they simply do not implicate the Indian tribes' inherent sovereign power.[32]

In sum, *Lara's* unique analytical approach cannot be applied wholesale to assess an enactment like ICWA that does not restore tribal sovereignty but instead affirmatively regulates Indian affairs by establishing a range of federal protections that apply when an Indian child is involved in a state child custody proceeding. *Lara*'s reasoning is therefore far removed from the Article I issue presented in this case.

Based on the Framers' intent to confer on the federal Government exclusive responsibility for Indian affairs, the centuries-long history of the Government's exercise of this power, and the extensive body of binding Supreme Court decisions affirming and reaffirming this authority, we conclude that ICWA "represent[s] the exercise of [] power[s] conferred on Congress by the Constitution." *Murphy*, 138 S. Ct. at 1479. At a bare minimum, ICWA is "necessary and proper," U.S. CONST. art. I, sec. 8—that is, "plainly adapted," *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819)—to solving "the problems of Indians," *Antoine*, 420 U.S. at 203, and thus fulfilling the federal government's trust duty to the tribes as it is squarely targeted at rectifying "perhaps the most tragic and destructive aspect of Indian life." H.R. REP. NO. 95-1386, at 9-10.[33] A contrary holding would render Congress impotent to remedy and prevent repetition of the depredations visited upon Indian children, tribes, and families, an injustice to which the federal Government itself has contributed and apologized. *See*

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[32] JUDGE DUNCAN is correct that in *Lara* the Court noted that it was not confronted "with a question dealing with potential constitutional limitations on efforts to legislate far more radical changes in tribal status." *Lara*, 541 U.S. at 205; DUNCAN, CIRCUIT JUDGE, OP. at 33-34 n.33. But as explained above, ICWA does not effect any change whatsoever in tribal sovereignty. JUDGE DUNCAN is therefore incorrect that the instant challenge to ICWA presents the question *Lara* left undecided.

[33] Notably, Plaintiffs do not expressly contend that ICWA exceeds the auxiliary powers granted to Congress under the Necessary and Proper Clause.

146 CONG. REC. E1453 (Sept. 12, 2000) (quoting apology of Assistant Secretary for Indian Affairs, Department of the Interior remarks on Sept. 8, 2000). Such a result would be not only a sad irony, but a grievous judicial straitjacketing of a coordinate branch of government. We decline to vitiate Congress's authority in a field in which the Supreme Court has held that it wields plenary power. *See Lara*, 541 U.S. at 200 (2000); *Ramah Navajo Sch. Bd., Inc.*, 458 U.S. at 837; *White Mountain Apache Tribe*, 448 U.S. at 142. Instead, we follow the Court's sustained admonitions that Congress is empowered fully to make good on its trust obligations to Indian tribes. *See, e.g.*, *Mancari*, 417 U.S. 551-52; *Antoine*, 420 U.S. at 203; *Kagama*, 118 U.S. at 383-84.

2. ICWA Does Not Violate the Anticommandeering Principle.

We turn to the second prong of the preemption analysis and consider whether ICWA runs afoul of the anticommandeering doctrine. Under the Articles of Confederation, the federal government largely lacked the power to govern the people directly and instead was restricted to giving commands to the states that it was often powerless to enforce. *New York*, 505 U.S. at 161-62 (citing *Lane Cnty. v. Oregon*, 74 U.S. (Wall.) 71, 76 (1868)). To rectify this impotency, the Framers inverted this relationship in the Constitution, empowering Congress to "exercise its legislative authority directly over individuals rather than over States." *Id.* at 164. Citing this history, Justice O'Connor inaugurated the modern anticommandeering doctrine, in *New York v. United States*, stating that it represents the Framers' structural decision to withhold from Congress the power to directly command state executives and state legislatures to do its bidding. *See id.*

The Constitution's Supremacy Clause, provides, however, that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Thus, a distinction exists between a law that unconstitutionally

"conscript[s] state governments as [the federal government's] agents," *New York*, 505 U.S.at 178, and a law that establishes federal rights or obligations that the states must honor despite any conflict with state law. We consider, then, whether ICWA falls into the former camp or the latter.

a. In Requiring State Courts to Apply Preemptive Federal Law, ICWA Does Not Violate the Anticommandeering Doctrine.

The district court determined that ICWA unconstitutionally commandeers the states by requiring state courts to apply its minimum protections in their child custody proceedings. However, when considering whether a federal law violates the anticommandeering doctrine, the Supreme Court has consistently drawn a distinction between a state's courts and its political branches.

Because the Supremacy Clause obligates state courts to apply federal law as the "supreme Law of the Land" and provides that "the Judges in every State shall be bound thereby," the anticommandeering principle that Justice O'Connor formulated in *New York* does not apply to properly enacted federal laws that state courts are bound to enforce. As Justice Scalia made clear in *Printz*, "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." *Printz*, 521 U.S. at 907. State courts were viewed as distinctive because, "unlike [state] legislatures and executives, they applied the law of other sovereigns all the time," including federal law as mandated by the Supremacy Clause. *Id.* Thus, it is well-established that Congress has the power to pass laws enforceable in state courts. *See Palmore v. United States*, 411 U.S. 389, 402 (1973); *Testa v. Katt*, 330 U.S. 386, 394 (1947); *see also Second Employers' Liability Cases, N.H. & H.R. Co.,* 223 U.S. 1, 57 (1912); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876). Although these "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to

enforce them, . . . 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. In other words, it is inherent in the Supremacy Clause's provision that federal law "shall be the supreme Law of the Land" that state courts must enforce federal law. U.S. CONST. art. VI, cl. 2.

In the district court's erroneous view, ICWA's standards do not bind states courts because ICWA itself does not supply a federal cause of action. Although the district court noted the settled principle that state courts must apply federal law to a federal cause of action, it did not recognize the equally settled obligation on state courts to honor federal rights when they are implicated in a case arising out of a state-law cause of action. Failing to appreciate this duty, the court below thought that ICWA cannot bind state courts because it "modif[ies]" the substantive standards applicable to child custody cases, which arise from state law. Thus, the district court believed that ICWA improperly commandeers state courts and therefore cannot preempt conflicting state law.

There is no support in the Supreme Court's precedents for this novel limit on federal preemption. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 736 (2009) ("[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a *federal right* or cause of action they believe is inconsistent with their local policies." (emphasis added)). The Supreme Court has long made clear that, even in areas of traditional state prerogative, such as domestic relations, a federal right may preempt state causes of action "to the extent of any conflict" between the two. *Hillman v. Maretta*, 569 U.S. 483, 490-91 (2013) (quoting *Crosby*, 530 U.S. at 372). In other words, when the standard application of substantive state family law "clearly conflict[s]" with "federal enactments" in an area in which Congress may validly exercise its Article I authority, state law "must give way." *Id.* (quoting *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981)) (federal statute requiring that life insurance benefits be paid

according to a specific "order of precedence" preempted state law directing that proceeds be paid to a different beneficiary).

More to the point, the Supreme Court has expressly held that federal law *can* "modify" the substance of state law claims. Take, for example, *McCarty v. McCarty*, 453 U.S. 210 (1981). There, a federal military benefits statute provided for a different division of retirement benefits upon divorce than a state's community property law. *Id.* at 235-36. The Court held that the federal law preempted state law, thereby altering the substantive law applicable to a state-law cause of action. *Id.*; *see also Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 131, 143 (2001) (holding that ERISA preempted state law regarding allocation of certain assets upon divorce during state probate proceeding); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979) (holding that federal law preempted state law's definition of community property subject to division with respect to federal pension benefits). And in *Jinks v. Richland County*, the Court affirmed that federal law cannot only "modify" the substance of a state law claim, but indeed can keep alive a state law cause of action that would otherwise be time-barred.[34] 538 U.S. 456, 459 (2003) (upholding the federal supplemental jurisdiction statute's provision tolling state law claims while they are pending in federal court, thus permitting such claims, if they are dismissed from federal court, to proceed in state court, though they otherwise may be barred by the running of a state's limitations period).

As amici point out, these laws are not unique: a host of federal statutes change the standards applicable to state causes of action, including in family

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[34] While it is unquestionable that federal law may alter the "'substance' of state-law rights of action," the Supreme Court has left unresolved the validity of "federal laws that regulate state-court 'procedure.'" *See Jinks*, 538 U.S. at 464. We need not weigh in on this unsettled question because ICWA's challenged provisions grant rights and protections to Indian tribes and families that are substantive in nature. *Cf. id.* at 464-65 (tolling of state law limitations period is substantive).

law proceedings. *See, e.g.*, Servicemembers Civil Relief Act, 50 U.S.C. § 3911, *et seq.*; Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A; Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B; Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, *et seq.*; Intercountry Adoption Act of 2000, 42 U.S.C. § 14954. And state courts have long applied these requirements without ever questioning Congress's authority to impose them.

For example, in *In re Larson*, a California appeals court held that the federal Soldiers' and Sailors' Civil Relief Act (SSCRA), which affords rights to servicemembers who are "prejudiced" in state court proceedings "by reason of [their] military service," overrode otherwise applicable state law. 183 P.2d 688, 690 (Cal. Dist. Ct. App. 1st 1947), *disapproved of on other grounds by In re Marriage of Schiffman*, 620 P.2d 579 (Cal. 1980) (citing Pub. L. No. 86-721, 54. Stat. 1180, now titled Servicemembers Civil Relief Act, 50 U.S.C. § 391). In that case, the state trial court had granted a mother's petition to have her child's last name changed to hers from that of her former spouse. *Id.* at 690-91. The father appealed, averring that, because he was in the armed forces and detained as a prisoner of war in Germany at the of time of the mother's petition, he was entitled to relief under the SSCRA. *Id.* at 690. Acknowledging that the mother had "proceeded in accordance with the applicable statutes of this state," the appeals court nonetheless recognized that the federal statute superseded state law and vacated the lower court's order to permit the father to challenge the petition. *Id.* at 690-91. At no point did the state court suggest that the SSCRA impinged on state sovereignty. *See also, e.g.*, *In re China Oil & Gas Pipeline Bureau*, 94 S.W.3d 50, 59 (Tex. App. 2002) (applying Foreign Sovereign Immunities Act burden of proof to determine whether foreign state had waived immunity from state law breach of contract, breach of fiduciary duty, and fraud claims); *State ex rel. Valles v. Brown*, 639 P.2d 1181, 1186 (N.M. 1981) (applying Parental Kidnapping Prevention Act to determine whether the state court could modify a child custody decree).

In light of the Supreme Court's express decisions upholding federal law's ability to alter substantive aspects of state claims and the robust history of federal statutes that do just that, there can be little doubt that the district court erred by determining that ICWA's provisions preempting state law were instead a violation of the anticommandeering doctrine. Thus, to the extent that the rights created by ICWA conflict with states' child custody laws, the Supremacy Clause requires state judges to honor ICWA's substantive provisions. *See New York*, 505 U.S. at 178-79 (explaining that state judges are required under the Supremacy Clause to enforce federal law).

i. Sections 1912(e)-(f), 1915(a)-(b)

Applying these principles to the case at bar, we conclude that "to the extent of any conflict" between the rights created by ICWA and state law, *Hillman v. Maretta*, 569 U.S. at 490, state courts are obliged to honor those rights by applying ICWA's substantive evidentiary standards for foster care placement and parental termination orders, 25 U.S.C. § 1912(e)-(f), as well as the federal law's child placement preferences, *id.* § 1915(a)-(b). Each of these provisions creates federal rights in favor of Indian children, families, and tribes that potentially alter the substantive standards applicable in child custody proceedings. We note that these provisions do in fact conflict with the otherwise applicable law of the State Plaintiffs. For example, in furthering its goal of protecting "the best interests of Indian children," *id.* § 1902, ICWA prohibits terminating the parental rights of an Indian child's biological parents absent a determination "beyond a reasonable doubt . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(f). The State Plaintiffs, on the other hand, generally use the far less stringent "best interests of the child" analysis and "clear and convincing" evidentiary

standard.[35] Consequently, as between these differing standards, state courts are compelled to employ ICWA's heightened protections in proceedings involving Indian children. Indeed, state courts have not hesitated do so.[36] *See, e.g.*, *In re W.D.H.*, 43 S.W.3d 30, 37 (Tex. App. 2001) ("We conclude that it is not possible to comply with both the two-prong test of the Family Code, which requires a determination of the best interest of the child under the 'Anglo' standard, and the ICWA, which views the best interest of the Indian child in the context of maintaining the child's relationship with the Indian Tribe, culture, and family."); *Yavapai–Apache Tribe v. Mejia,* 906 S.W.2d 152, 170 (Tex. App. 1995) (stating that ICWA "was specifically directed at preventing the infiltration of Anglo standards" in custody proceedings involving Indian children); *In re Adoption of M.T.S.*, 489 N.W.2d 285, 288 (Minn. Ct. App. 1992) (concluding that ICWA's preference for placing an Indian child with an Indian family member provides a "higher standard of protection" for an Indian guardian than the state's best interests standard, which would otherwise apply in determining a child's custodial

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[35] *See* IND. CODE §§ 31-35-2-4(b)(2) and 31-37-14-2 (2019) (setting forth a four-element test to terminate parental rights, including that termination is "in the best interests of the child," and requiring proof of each element by "clear and convincing" evidence); LA. CHILD. CODE art. 1015, 1035, 1037 (2019) (stating that in order to terminate parental rights a court must find by "clear and convincing evidence" that a parent has committed one of an enumerated list of offenses and that it is in the "best interests of the child" to terminate the rights); TEX. FAM. CODE § 161.001 (2019) (requiring a showing by "clear and convincing evidence" "that termination is in the best interest of the child" and that the parent committed one of an enumerated list of offenses).

[36] Some state courts have determined that certain of ICWA's provisions do not conflict with—and therefore do not preempt—state law but rather mandate additional protections that state courts must implement. *See, e.g.*, *K.E. v. State*, 912 P.2d 1002, 1004 (Utah Ct. App. 1996) (holding that ICWA does not preempt the state's "statutory grounds for termination of parental rights" but instead "requires a specific finding for termination proceedings" that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child "in addition to those [findings] required by state law and imposes a separate burden of proof for that finding." (citing 25 U.S.C. § 1912(f)).

placement (citing 25 U.S.C. §§ 1915(a), 1921)). This is "no more than an application of the Supremacy Clause." *New York*, 505 U.S. at 178.

In sum, § 1912(e) and (f)'s evidentiary standards and § 1915(a) and (b)'s placement's preferences simply supply substantive rules enforceable in state court and do not violate the Tenth Amendment.

ii. Sections 1915(e), 1917, and 1951(a)

We likewise find no constitutional infirmity in ICWA's provisions that require state courts to maintain and make available certain records pertaining to custody proceedings involving Indian children. *See* 25 U.S.C. §§ 1915(e), 1917, and 1951(a). Section 1915(e) requires state courts to retain a record "evidencing the efforts to comply" with ICWA's placement preferences and "ma[k]e available" this record, upon request, to the Secretary or an Indian child's tribe. *Id.* § 1915(e). Under § 1917, once an adopted Indian child attains majority, the state court that "entered the final decree" of adoption "shall," upon the Indian adoptee's application, "inform" her of her biological parents' tribal affiliation and provide other information that "may be necessary to protect any rights from the individual's tribal relationship." *Id.* § 1917. And § 1951(a) requires state courts to provide the federal government with a copy of the adoption decree in any proceeding involving an Indian child. *Id.* § 1951(a).

Though these recordkeeping provisions arguably do not supply rules of decision like those in §§ 1912(e)-(f) and 1915(a)-(b), the original understanding of the Supremacy Clause nonetheless compels state courts to effectuate their mandate. As explained in *Printz v. United States*, "the first Congresses required state courts to record applications for citizenship . . . [and] to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State." 521 U.S. at 905-06 (citing Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103; Act of June 18, 906 1798, ch. 54, § 2, 1 Stat. 567). From the dawn of the constitutional era, then, federal law placed specific recordkeeping and sharing requirements on state courts, and

these duties were viewed as congruent with the state courts' obligations under the Supremacy Clause. The history thus makes clear that this sort of requirement cannot be considered commandeering in violation of the Tenth Amendment. *See Marsh*, 463 U.S. at 790. Plaintiffs have provided no authority for deviating from this original understanding, and so we hew to it.

State Plaintiffs contend that, rather than applying to state courts, §§ 1915(e) and 1951(a) instead impose obligations on state agencies and thereby violate the anticommandeering doctrine. We address these provisions in turn and disagree with the States' conclusion as to each.

Though § 1915(e) applies to the "State," it does not specify whether that term refers to state courts or agencies. The regulation implementing § 1915(e), however, expressly permits states to designate either their courts or agencies as "the repository for th[e] information" required to be maintained by § 1915(e)." 25 C.F.R. § 23.141 ("The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency."). Substantively, the regulation requires only that "court records" be maintained. 81 Fed. Reg. at 38,849-50. This imposes no direct burden on states.

State Plaintiffs do not challenge the BIA's construction of § 1915(e).[37] Thus, their complaint that § 1915(e) and its implementing regulation impermissibly burdens their agencies rings hollow, given that Plaintiffs themselves have elected to designate their agencies, rather than courts, as the entities charged with complying with these provisions. States are not

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[37] Such a challenge would be unavailing in any event. Because the BIA's determination that state courts may maintain the records contemplated by § 1915(e) is at minimum a reasonable interpretation of an ambiguous statute that the BIA administers, *see Miss. Band Choctaw Indians v. Holyfield*, 490 U.S. at 40 n.13 ("Section 1915(e) . . . requires *the court* to maintain records 'evidencing the efforts to comply with the order of preference specified in this section.'" (emphasis added)), it is entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *infra* Discussion Part II.D.

"pressed into federal service" when they affirmatively choose to obligate their executive, rather than judicial, officers to implement an otherwise valid federal obligation. *See Printz*, 521 U.S. at 905. In other words, § 1915(e) and its implementing regulation are not "direct orders to the governments of the States" but rather let states exercise their discretion to require either their courts or child welfare agencies to maintain and make available the required records. *Murphy*, 138 S. Ct. at 1478. The constitutionality of these provisions does not rise or fall based on a state's preference.

For similar reasons, we disagree with JUDGE DUNCAN's contention that § 1951(a), which requires state courts to furnish adoption records to the federal government, invalidly commandeers state agencies. DUNCAN, CIRCUIT JUDGE, OP. at 104-06 . Notably, no party takes this position. This is likely because on its face the provision applies only to state courts. *See* 25 U.S.C. § 1951(a) (requiring "[a]ny State court entering a final decree or order in any Indian child adoptive placement" to provide certain records). And the records that must be furnished by a state court pursuant to this provision are not the type of records commonly held by state agencies; instead, the records are naturally produced as part of *state court* proceedings, and state courts are therefore in the best position to maintain and provide the records to the federal government.[38] *Id.* That the regulations implementing § 1951(a) purport to provide states the flexibility to instead designate an agency to fulfill the duties it imposes does not change that the law is by default aimed at state courts. *See* 25 C.F.R. § 23.140 (specifying that designating an agency relieves state courts of their obligations under § 1951(a)). And a state's wholly voluntary choice to utilize its political branches in place of its

[38] Section 1951(a) specifically requires that the following information be supplied to the Secretary: (1) the names and tribal affiliation of the Indian child; (2) the names and addresses of the child's biological parents; (3) the names and addresses of the adoptive parents; and (4) the identity of an agency that has information relating to the child's adoptive placement. 25 U.S.C. § 1951(a).

courts cannot, as we have explained, constitute commandeering of those political branches.

We therefore conclude that state courts are bound by the Supremacy Clause to apply §§ 1915(e), 1917, and 1951(a).[39]

b. The Challenged Provisions Do Not Commandeer Other State Actors.

We next consider whether ICWA commandeers state actors other than state courts. Our determination that the preemption and commandeering analyses are mirror images of one another leads us to the conclusion that if ICWA regulates private actors—and therefore preempts conflicting state law—it does not contravene the anticommandeering doctrine. A survey of the Supreme Court's precedents in this area makes clear that a law meets this requirement so long as it establishes rights that are legally enforceable by or against private parties. This test is necessarily satisfied when Congress enacts a general regulation applicable to any party who engages in an activity, regardless of whether that party is a State or private actor. The Supreme Court has thus stressed in its Tenth Amendment decisions that "the anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. It is unsurprising, then, that in

[39] We also disagree with JUDGE DUNCAN's asserted distinction between § 1917 and the other recordkeeping provisions. DUNCAN, CIRCUIT JUDGE, OP. at 97-98 &-98 n.138. JUDGE DUNCAN maintains that § 1917, which confers upon adult Indian adoptees the right to obtain from courts information pertaining to their tribal relationship, is a valid preemption provision because it is "best read" as regulating private actors, not states. But the same could be said for § 1915(e), which confers rights upon Indian tribes to obtain records. And both provisions require state courts to retain records so that an Indian individual or tribe may later obtain them. Thus, if § 1917 is best read as applying to private actors, so too is § 1915(e). We find it unnecessary to resolve this question, however, because like §§ 1915(e) and 1951(a), § 1917 places duties on state courts to maintain records—a special type of obligation that was understood from the nation's very beginning to validly bind state courts under the Supremacy Clause. *See Printz*, 521 U.S. at 905-06.

each case in which the Court has found an anticommandeering violation, the statute at issue directly and exclusively commanded a state's legislature or executive officers to undertake an action or refrain from acting without mandating that private actors do the same.

For example, in the first modern anticommandeering case, *New York v. United States*, the Supreme Court held that a federal law impermissibly commandeered state actors to implement federal legislation when it gave states "[a] choice between two unconstitutionally coercive" alternatives: to either dispose of radioactive waste within their boundaries according to Congress's instructions or "take title" to, and assume liabilities for, the waste. 505 U.S. at 175-76. The Court was clear: Congress cannot compel "*the States* to enact or enforce a federal regulatory program." *Id.* at 176 (emphasis added). Notably, the statute did not place any legally enforceable rights or restrictions on private parties, instead operating only upon the states.

Similarly, in *Printz v. United States*, the Court held that a provision of the Brady Handgun Violence Prevention Act requiring state chief law enforcement officers to conduct background checks on handgun purchasers "conscript[ed] the State's officers directly" and was therefore invalid. 521 U.S. at 935. The Court explained that the statute violated the anticommandeering principle because it was aimed solely at state executive officers, requiring them "to conduct investigation in their official capacity, by examining databases and records that only state officials have access to. In other words, the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible." *Id.* at 932 n.17 (*N.B.* that "the burden on police officers [imposed by the Brady Act] would be permissible [under the Tenth Amendment] *if a similar burden were also imposed on private parties* with access to the relevant data" (first alteration in original) (emphasis added) (internal quotation marks and citation omitted)). Accordingly, the Court rejected as irrelevant the Government's

argument that the Act imposed only a minimal burden on state executive officers, stating that it was not "evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments," but rather a law whose "whole *object* . . . [was] to direct the functioning of the state executive." *Id.* at 931-32. Again, the law did nothing to alter the rights or obligations of private parties, but served only to bind the States.

Recently, in *Murphy v. NCAA*, the Court concluded that a federal law that prohibited states from authorizing sports gambling ran afoul of the anticommandeering doctrine. 138 S. Ct. at 1478. The statute violated state sovereignty, the Court explained, by "unequivocally dictat[ing] what a state legislature may and may not do." *Id.* In reaching this conclusion, the Court reviewed its Tenth Amendment jurisprudence and clarified the distinction between statutes that impermissibly commandeer state actors and those that may incidentally burden the states but, nevertheless, do not offend the Tenth Amendment. The mediating principle, the Court announced, is that a regulation is valid so long as it "evenhandedly regulates an activity in which both States and private actors engage." *Id.* at 1478. This occurs when a statute confers either legal rights or restrictions on private parties that participate in the activity, and thus the law is "best read" as regulating private parties.

A review of two cases cited by *Murphy* in which the Court upheld statutes imposing incidental burdens or obligations on states is instructive as to what permissible, evenhanded regulation entails. First, in *Reno v. Condon*, the Court unanimously upheld the Driver's Privacy Protection Act (DPPA), a federal regulatory scheme that restricted the ability of states and private parties to disclose a driver's personal information without consent. 528 U.S. 141, 151 (2000). In determining that the anticommandeering doctrine did not apply, the Court distinguished the law from those invalidated in *New York* and *Printz*:

> [T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens; rather it regulates the States as the owners of [Department of Motor Vehicle] data bases. It does not require the [state] Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals . . . .

Id. The statute, moreover, "applied equally to state[s] and private" resellers of motor vehicle information. *Murphy*, 138 S. Ct. at 1479; *see Condon*, 528 U.S. at 151 (explaining that the statute was "generally applicable"). That compliance with the DPPA's provisions would "require time and effort on the part of state employees" posed no constitutional problem, then, because private actors engaged in the regulated enterprise were also subject to the statute's requirements. *Condon*, 528 U.S. at 150. In short, because the law created restrictions enforceable against private resellers, it satisfied the "best read" test as articulated in *Murphy*.

Second, in *Baker v. South Carolina*, the Court also rejected a Tenth Amendment challenge to a federal enactment. 485 U.S. 505, 513-15 (1988). At issue in that case was a statute that eliminated the federal income tax exemption for interest earned on certain bonds issued by state and local governments unless the bonds were registered. *Id.* at 507-08. The Court treated the provision "as if it directly regulated States by prohibiting outright the issuance of [unregistered] bearer bonds." *Id.* at 511. But critically, the provision applied not only to states but to any entity issuing the bonds, including "local governments, the Federal Government, [and] private corporations." *Id.* at 526-27. In upholding the provision, the Court reasoned that it merely "regulat[ed] a state activity" and did not "seek to control or influence the manner in which States regulate private parties." *Id.* at 514. "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Id.* at 514-15 (requiring "state officials . . . to devote substantial effort" to comply

with the statute is "an inevitable consequence" of Congress validly regulating the state's activity). Such a federal law thus does not commandeer state actors, but merely establishes standards applicable to any actor who chooses to engage in an activity that Congress may validly regulate through legislation. *See id.* It creates legally enforceable obligations—in *Baker*, a prohibition—that affect private parties.

As both a textual and practical matter, the provisions Plaintiffs challenge apply "evenhandedly" to "an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. Sections 1912(a) and (d), for example, impose notice and "active efforts" requirements, respectively, on the "party" seeking the foster care placement of, or termination of parental rights to, an Indian child.[40] Because plaintiffs bring a facial challenge, there is no need to look beyond the language of these provisions—which plainly is facially neutral, *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."); *see also United States v. Raines,* 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.").[41] The statute applies to

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[40] Section 1912(a) requires "*the party* seeking the foster care placement of, or termination of parental rights to, an Indian child" to "notify the parent or Indian custodian and the Indian child's tribe . . . of the pending proceedings and of their right to intervention." 25 U.S.C. § 1912(a) (emphasis added).

Section 1912(d) states that "[*a*]*ny party* seeking to effect a foster care placement of, or termination of parental rights to, an Indian child" to "satisfy the court that active efforts have been made to provide remedial services . . . to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Id.* § 1912(d) (emphasis added).

[41] Our court recently reaffirmed this principle. In *Freedom Path, Inc. v. Internal Revenue Service*, we examined a facial challenge to an IRS Revenue Ruling by an organization that had received a proposed denial from the IRS of its application for tax-exempt status. *See* 913 F.3d 503, 506 (5th Cir. 2019). We explained that "[t]o find the

any party seeking a foster care placement or the termination of parental rights, regardless of whether that party is a state agent or private individual. *Id.*

Furthermore, even were we to consider how these provisions are actually applied in child custody proceedings, it is clear that they do in fact apply to private parties. ICWA defines "foster care placement" to embrace "*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." 25 U.S.C. § 1903(1)(i) (emphasis added). As Defendants observe, actions to appoint guardians or conservators are often private actions that do not involve the state as a party. *See, e.g.*, *J.W. v. R.J.*, 951 P.2d 1206, 1212-13 (Alaska 1998) (determining that a custody dispute between a father and stepfather constituted a "foster care placement" under ICWA); *In re Guardianship of J.C.D.*, 686 N.W.2d 647, 649 (S.D. 2004); *In re Custody of C.C.M.*, 202 P.3d 971, 977 (Wash. C.t App. 2009) (holding that grandparents' petition for nonparental custody of their Indian grandchild "qualifies as an action for foster care placement under ICWA"). Similarly, private parties may bring proceedings to terminate parental rights. *See, e.g.*, TEX. FAM. CODE. ANN. § 102.003 (permitting, among others, a "parent," "the child through a court-appointed representative," or "a guardian" to bring such an action); 33 TEX. PRAC. HANDBOOK OF TEX.

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unconstitutionality [the organization] claims requires that we go beyond the language of the Revenue Ruling and analyze the way in which the IRS applies it beyond the text. *On a facial challenge, however, we do not look beyond the text* . . . [A] facial challenge to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual." *Id.* at 508 (internal quotation marks and citations omitted) (emphasis added) (quoting *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006)). And, even if we were to construe Plaintiffs' complaint as an as-applied challenge, the proper remedy would not be the wholesale invalidation of the statutory provisions that the district court's order effected and for which Plaintiffs and JUDGE DUNCAN argue. Rather, demonstrating that the statute may be applied unconstitutionally warrants only an injunction against the statute being applied in that unconstitutional manner. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010).

FAMILY LAW § 19:2 (2018); *see also Matter of Adoption of T.A.W.*, 383 P.3d 492, 496 (Wash. 2016) (holding that ICWA's "active efforts provision . . . appl[ies] to privately initiated terminations" and remanding for trial court to determine whether "active efforts ha[d] been" made to prevent the breakup of the Indian family); *D.J. v. P.C.*, 36 P.3d 663, 673 (Alaska 2001) ("[W]e hold that ICWA applies to termination proceedings when a party other than the state seeks the termination."); *S.S. v. Stephanie H.*, 388 P.3d 569, 573–74 (Ariz. Ct. App. 2017) ("[W]e conclude that ICWA applies to a private termination proceeding just as it applies to a proceeding commenced by a state-licensed private agency or public agency."); *In re N.B.*, 199 P.3d 16, 19 (Colo. App. 2007) ("ICWA's plain language is not limited to action by a social services department."). Thus, from both a textual and practical standpoint, it cannot seriously be disputed that these provisions apply to private parties. *See* 25 U.S.C. § 1903(1)(i); *J.W.*, 951 P.2d at 1212-13.

Similarly, § 1912(e) and (f)—which require qualified expert witness testimony before, respectively, either the foster care placement of, or termination of parental rights to, an Indian child—are also evenhanded regulations that do not effect an invalid commandeering.[42] Neither provision expressly refers to state agencies. And when read in conjunction with § 1912(d)'s language placing burdens on "[a]ny party" involved in foster care or parental termination proceedings relating to Indian children, § 1912(e) and (f) must also reasonably be understood to apply to "any party"

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[42] Section 1912(e) provides that no foster care placement may be ordered in involuntary proceedings in state court absent "a determination, supported by clear and convincing evidence, 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 damage to the child." 25 U.S.C. § 1912(e).

Section 1912(f) requires that no termination of parental rights may be ordered in involuntary proceedings in state court absent "evidence beyond a reasonable doubt, 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 damage to the child." *Id.* § 1912(f).

engaged in these proceedings. This understanding, moreover, comports with how state courts have read and applied these provisions. *See, e.g.*, *In re Mahaney*, 51 P.3d 776, 786 (Wash. 2002) (holding that § 1912(e)'s expert witness requirement applied to an action exclusively between private parties—an Indian mother and her children's paternal grandmother—regarding a foster care placement); *D.J.*, 36 P.3d at 673 (holding that § 1912(f) applied to an action between an Indian child's maternal grandmother and his biological father regarding the termination of the father's parental rights); *Matter of Baby Boy Doe*, 902 P.2d 477, 484 (Idaho 1995) (holding that prospective adoptive parents satisfied "their burden of proof" under § 1912(f) "with testimony of [a] qualified expert witness[]"). Thus, § 1912(e) and (f), like § 1912 (a) and (d), are generally applicable provisions. *See Murphy*, 138 S. Ct. at 1478; *see also Condon*, 528 U.S. at 151.

State Plaintiffs' contention that the aforementioned provisions commandeer state executive officers is reminiscent of the argument made by South Carolina—and rejected by the Court—in *Condon*. There, South Carolina claimed that the DPPA "thrusts upon the States all of the day-to-day responsibility for administering its complex provisions . . . and thereby makes state officials the unwilling implementors of federal policy." 528 U.S. at 149-50 (internal quotation marks omitted). But ICWA, like the DPPA, does not require states "to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151. Unlike the statutes in *New York*, *Printz*, and *Murphy*, § 1912 does not create obligations or restrictions enforceable solely against states. *See Murphy*, 138 S. Ct. at 1481 (determining that a provision of the gambling regulation at issue did not constitute a valid "preemption provision because there is *no way* in which [it] c[ould] be understood as a regulation of private actors") (emphasis added); *Printz*, 521 U.S. at 932 n.17 (explaining that extending "to private citizens" the federal statute's directives "posits the impossible"); *New York*, 505 U.S. at 160 ("[T]his is not a case in which Congress has subjected a State to the same

legislation applicable to private parties."). Instead, its provisions simply impose the same, generally applicable burden on any party engaged in a custody proceeding involving an Indian child. *Cf. Condon*, 528 U.S. at 151 (noting that the regulation of data bases applied to "private resellers" of motor vehicle information along with states); *Baker*, 485 U.S. at 526-27 (stating that the requirement that bearer bonds be registered in order to be eligible for a federal income tax exemption applied to "local governments, the Federal Government, [and] private corporations"). Thus, § 1912 (a), (d), (e), and (f) "evenhandedly regulate[] an activity in which both States and private actors engage," and the anticommandeering doctrine does not apply. *See Murphy*, 138 S. Ct. at 1478.

JUDGE DUNCAN posits two reasons why the evenhandedness principle ought not apply to the challenged provisions. First, he asserts that ICWA compels states to regulate private individuals. DUNCAN, CIRCUIT JUDGE, OP. at 89-91. Not so. As discussed, ICWA is a comprehensive federal regulatory scheme that regulates private individuals by creating rights and restrictions in favor of Indian individuals and tribes in child custody proceedings involving Indian children. In so doing, ICWA places legal obligations on parties to these proceedings, whether individuals or state actors. *See Condon*, 528 U.S. at 150 (finding no anticommandeering problem in the fact that compliance with the DPPA would "require time and effort on the part of state employees"). Just as the DPPA "regulate[d] the States as the owners of data bases," *id.* at 151, ICWA regulates the states as participants in Indian child custody proceedings—placing the same requirements on states as it does on any private party. This fits the bill of an evenhanded regulation.[43]

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[43] JUDGE DUNCAN's assertion that ICWA imposes "critical duties" on state actors is irrelevant to determining whether the statute is consistent with the anticommandeering doctrine. DUNCAN, CIRCUIT JUDGE, OP. at 91. Nowhere in the

Second, JUDGE DUNCAN asserts that ICWA regulates states in their sovereign capacity. DUNCAN, CIRCUIT JUDGE, OP. at 91-92. Whereas Congress regulated states as participants in the market for bonds in *Baker* and the market for driver's information in *Condon*, JUDGE DUNCAN contends that ICWA does not regulate states as market participants but rather as sovereigns carrying out their duty to protect children. But in *Condon*, the statute at issue "regulate[d] the disclosure of personal information contained in the records of state motor vehicle departments." 528 U.S. at 143. The regulation of motor vehicles, of course, is a quintessential state function. As explained above, the provision was nevertheless upheld because it "regulate[d] the States as the owners of data bases;" that is, as participants in the market for drivers' personal information. *Id.* at 151. The situation is the same here. Though family law is as a general matter committed to the states, *but see, e.g.*, *McCarty*, 453 U.S. at 235-36, the activity at issue here—child custody proceedings—involves private parties as litigants.[44] ICWA,

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Court's commandeering cases has it made mention of, or found dispositive, whether the obligations imposed on states by a regulation were important to the statutory scheme's success. In *Condon*, for example, that the DPPA's restrictions applied to states was surely "crucial" to the law's efficacy. *See* 528 U.S. at 143-44 (noting that "Congress found that many States . . . sell driver's personal information" and that the statute "establishes a regulatory scheme" that expressly "restricts the States' ability to disclose a driver's personal information"); *id.* at 143 (citing 139 CONG. REC. 9468 (Nov. 16, 1993) (explaining that a purpose of "this legislation is to protect a wide range of individuals, [to] protect them from the State agencies [that,] often for a price, a profit to the State, [] release lists") (statement of Sen. Warner)); *see also Baker*, 485 U.S. at 510-11 (noting that the challenged provision "completes th[e] statutory scheme" setup by Congress). The evenhandedness inquiry does not turn on whether the statute imposes "critical" duties—or even "trivial" duties, for that matter—on states, but rather whether those duties apply equally to both states and private actors. *See Murphy*, 138 S. Ct. at 1478.

[44] Citing *Printz*, JUDGE DUNCAN also asserts that the "salient question" in determining whether the evenhandedness exception applies is "whether a federal law requires states officials to act 'in their official capacity' to implement a federal program." DUNCAN, CIRCUIT JUDGE, OP. at 93 (quoting *Printz*, 521 U.S. at 932 n.17). This test cannot be squared with the Court's cases. In *Condon*, for example, compliance with the DPPA required action by state officials acting in their official capacity. *See* 528 U.S. at 150

then, "regulates the States as" participants in these proceedings, and the reasoning of *Baker* and *Condon* applies equally here.

Because § 1912 (a), (d), (e), and (f) are "evenhanded," we conclude they are necessarily "best read" as pertaining to private actors within that phrase's meaning in *Murphy*. *Id.* at 1478, 1479. This follows from our earlier conclusion that a law is "best read" as regulating private actors—and therefore can be given preemptive effect—when it creates legal rights and obligations enforceable by or against private actors. Because an evenhanded regulation genuinely applies to private parties (as well as states), it necessarily establishes legal rights and obligations applicable to private parties (as well as states).

This is demonstrated by even a cursory review of § 1912 (a), (d), (e), and (f). The obligations the provisions impose are enforceable against any private party seeking a foster placement for, or the termination of parental rights to, an Indian child. And, viewed inversely, these obligations are an array of rights in favor of and enforceable by private parties. Section 1912(a) grants Indian parents and tribes the right to notice of pending child custody proceedings. *Id.* § 1912(a). Further, § 1912(d) grants to Indian children, tribes, and families the right to maintain their tribal and family unit "subject

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("We agree with South Carolina's assertion that the DPPA's provisions will require time and effort on the part of state employees . . . ."); *see also Baker*, 485 U.S. at 514-15 ("That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."). The salient question, rather, is whether the statute applies equally to both states and private actors. This is clear from the portion of *Printz* JUDGE DUNCAN purports to rely on. As the Court in *Printz* explained, the background check requirement at issue "*undoubtedly*" would have been consistent with the anticommandeering doctrine if its burdens could have been extended equally to both state actors and private actors. 521 U.S. at 932 n.17 (emphasis added). The problem, however, was that the burden the statute placed on state law enforcement officers by its very nature could not possibly be borne by private persons. *Id.* ("[T]he suggestion that extension of this statute to private persons would eliminate the constitutional problem posits the impossible.").

only to certain (federal) constraints." *Id.* § 1912(d); *Murphy*, 138 S. Ct. at 1480. Specifically, the provision confers upon private actors an enforceable right to demand in custody proceedings that "active efforts" be made to keep an Indian family intact before the foster care placement of, or termination of parental rights to, an Indian child. *See D.J.*, 36 P.3d at 674 (reversing the termination of parental rights to an Indian child because, *inter alia*, the trial court failed to make findings as to whether active efforts had been made to prevent the breakup of the Indian family). Sections 1912(e) and (f) similarly provide enforceable federal rights to Indian parents to maintain their families absent testimony from qualified expert witnesses regarding detriment to the child from the parents' continued custody. 25 U.S.C. § 1912(e), (f).

Plaintiffs' argument that ICWA is not evenhanded—and thus is not best read as applying to private parties—because state actors are more frequently bound by its provisions is also misplaced. As an initial matter, a "best read" inquiry that turns on the factual question of whom is most likely to engage in the regulated conduct would demand record evidence that is absent here, and there is no indication that the Supreme Court has ever performed such a fact-bound evaluation as part of its commandeering analyses. More importantly, an "evenhanded" law is "best read" as regulating private parties not because its burdens may happen to fall upon states more or less frequently than private actors as a factual matter, but instead, as we have explained, because such a law *necessarily* establishes rights or obligations that are legally enforceable by or against private parties.

The *Murphy* Court's discussion of *Morales v. Trans World Airlines, Inc.*, in which the Court considered whether the federal Airline Deregulation Act of 1978 (ADA) preempted States from passing their own laws prohibiting allegedly deceptive airline fare advertisements, confirms this conclusion. *Id.* at 1480 (citing *Morales*, 504 U.S.at 391). At issue in *Morales* was a provision of the ADA that removed earlier federal airline regulations. 504 U.S. at 378. "To ensure that the States would not undo federal deregulation with

regulation of their own," the ADA provided that "no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any [covered] air carrier." *Murphy*, 138 S. Ct. at 1480 (alteration in original) (quoting 49 U.S.C. § 1305; *Morales*, 504 U.S. at 378). The Court held that the provisions validly preempted state law. *Id.* at 391. As the Court in *Murphy* explained:

> [t]his language [in the ADA] might appear to operate directly on the States [and thus constitute an invalid attempt at preemption], but it is a mistake to be confused by the way in which a preemption provision is phrased . . . [I]f we look beyond the phrasing employed in the Airline Deregulation Act's preemption provision, it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities (*i.e.,* covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints.

Id. at 1480. The Court's analysis did not turn on the frequency with which state and private actors engaged in the regulated conduct; indeed, it is axiomatic that private actors could not regulate airlines. Rather, as the *Murphy* Court made clear, what was dispositive in determining that the statute was "best read" as regulating private actors—and thus preempted state law —was that it created legally enforceable private rights. *Id.* at 1480. Accordingly, Plaintiffs' argument is of no moment. Sections 1912 (a), (d), (e), and (f) are evenhanded regulations, and they therefore do not violate the anticommandeering doctrine and may validly preempt conflicting state law.

Although Plaintiffs limit their arguments on appeal primarily to the aforementioned portions of § 1912, the district court's ruling that ICWA violates the anticommandeering doctrine was far more sweeping, invalidating all portions of the statute that alter the substantive law applicable in cases arising out of state causes of action. As discussed, the district court's theory that ICWA commandeers state courts in this manner is based on a flawed

premise. *See supra* Discussion Part II.A.2.i. ICWA's provisions beyond those already discussed in § 1912 also validly preempt conflicting state law because they are part of a comprehensive statute, the "whole *object* of" which, *Printz*, 521 U.S. at 900, is to "confer[] on private entities"—namely Indian children, families, and tribes—"a federal right." *Murphy*, 138 S. Ct. at 1480; *see* 25 U.S.C. § 1902 (declaring Congress's policy in enacting ICWA of "protect[ing] the best interests of Indian children and promot[ing] the stability and security of Indian families and tribes"). An inquiry into ICWA's individual provisions, moreover, reveals that they operate to confer rights on private actors. For instance, § 1911, grants the Indian custodian of an Indian child and that child's tribe the right to intervene in child custody proceedings.[45] Section 1912(b) confers upon indigent Indian parents "the right to court-appointed counsel in any removal, placement, or termination proceeding." *Id.* § 1912(b). And § 1913(b) affords Indian parents the right to withdraw their consent to a foster care placement at any time. *Id.* § 1913(b).[46]

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[45] Several jurisdictions have recognized that § 1911(c) creates federal rights in favor of tribes and therefore have concluded that the provision preempts otherwise applicable state law permitting only licensed attorneys to represent parties. *See, e.g.*, *In re Elias L.*, 767 N.W.2d 98, 104 (Neb. 2009). These courts have explained that the tribal right to intervene is unfettered and that otherwise applicable state law would "not only burden the right of tribal intervention, it will essentially deny that right in many cases." *State ex rel. Juvenile Dep't of Lane Cnty. v. Shuey*, 850 P.2d 378, 381 (Or. Ct. App. 1993); *see also In re N.N.E.*, 752 N.W.2d 1, 12 (Iowa 2008); *J.P.H. v. Fla. Dep't of Children & Families*, 39 So. 3d 560 (Fla. Dist. Ct. App. 2010) (per curiam). In essence, these state courts have understood that they are bound to permit tribes to intervene without being represented by licensed counsel because to require otherwise would "frustrate[] the deliberate purpose of Congress" in enacting this measure. *Hillman*, 569 U.S. at 494 (internal quotation marks and citation omitted).

[46] ICWA's placement preference provisions, § 1915(a) & (b), likewise create federal rights for Indian children, tribes, and families that apply in Indian child custody proceedings. Because the placement preferences are valid premptive federal laws, state adjudicators are bound under the Supremacy Clause to apply these provisions. *See supra* Discussion Part II.A.2.a(i).

Given that the entire purpose and effect of the provisions the district court erroneously invalidated is to confer rights and protections upon private actors, *viz.*, Indian tribes, families, and children, we conclude that they are "best read" as regulating private parties. *Murphy*, 138 S. Ct. at 1479, 1480 ("In sum, regardless of the language used by Congress . . . , every form of preemption is based on a federal law that regulates the conduct of private actors, not the States."). That the Supremacy Clause prevents states from interfering with these federal rights does not transform ICWA into an unconstitutional command to state actors. *See Murphy,* 138 S. Ct. at 1480. Rather, such a restriction on states is inherent to preemption. *See id.* at 1479.

Indeed, JUDGE DUNCAN acknowledges that the placement preferences apply in state court and preempt contrary state law. He broadly suggests, however, that the placement preferences also separately "direct action by state agencies and officials." DUNCAN, CIRCUIT JUDGE, OP. at 83-84. But reading the placement-preference provisions to require state agencies to perform executive or legislative tasks is contrary to the statute's plain text. The provisions merely require the body adjudicating an Indian child custody proceeding to apply the preferences contained therein in deciding contested claims unless there is good cause not to. *See* 25 U.S.C. § 1915(a) ("In any adoptive placement of an Indian child . . ., a preference shall be given, in the absence of good cause to the contrary . . . .); *id.* § 1915(b) ("In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary . . . .").

As JUDGE DUNCAN concedes, this straight-forward interpretation does not present an anticommandeering problem. *See New York*, 505 U.S. at 178-79 ("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."); *cf. Murphy*, 138 S. Ct. at 1480-81 (observing that "every form of preemption is based on a federal law that regulates the conduct of private actors" and invalidating a federal statute that barred states from authorizing sports gambling because the statute did "not confer any federal rights on private actors" and instead could be understood only as "a direct command to the States"). JUDGE DUNCAN's interpretation of § 1915(a) & (b) as separately directing state administrative action—which he argues is unconstitutional—is thus not only plainly unreasonable given the text of the statute, but also contrary to settled canons of statutory construction. *See United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (stating that a statute must be interpreted to avoid constitutional doubt if reasonably possible).

It would thus be error on multiple levels to conclude that ICWA unconstitutionally commandeers state actors, and we decline to do so.[47]

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[47] The opposing opinion again makes much of the unremarkable fact, already discussed above, *see supra* note 21, that though Congress may hold plenary authority over a given field of legislation, any laws passed pursuant to that plenary power must still be consistent with the anticommandeering doctrine and other constitutional principles. *See* DUNCAN, CIRCUIT JUDGE, OP. at 27-29. In a misguided attempt to illustrate this point, the opposing opinion conjures up various hypothetical federal laws concerning subjects on which Congress exercises exclusive legislative authority that would alter the rules applicable to various state causes of actions in state proceedings. For example, the opposing opinion imagines a federal law "mandating different comparative fault rules in state court suits involving Swedish visa holders," and appears to postulate that, notwithstanding Congress's plenary power in regulating commerce with foreign nations, *see* U.S. CONST. art. I, § 8, cl. 3, such a law would be beyond Congress's legislative authority. DUNCAN, CIRCUIT JUDGE, OP. at 29.

First, these are far-fetched, counterfactual, law-school exam hypotheticals that are wholly detached from the kind of real and pressing human problems that ICWA addresses; rational legislators would neither see the need for such legislation nor enact such unfair and unworkable laws. As Justice Frankfurter observed, "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor do we need go beyond what is required for a reasoned disposition of the kind of controversy now before the Court." *Garcia*, 469 U.S. 528 (quoting *New York v. United States*, 326 U.S. 572, 583 (1946) (Frankfurter, J.)). Though a ridiculous law can be imagined, it is unnecessary to fence off an inviolable area of sovereignty reserved to the states in order to prevent it. And it bears emphasizing that we nowhere contend, as JUDGE DUNCAN pretends, that Tenth Amendment principles like the anticommandeering doctrine "vanish" in the face of Congress's plenary authority over Indian affairs. DUNCAN, CIRCUIT JUDGE, OP. at 69. This is a strawman, as evidenced by the fact that we specifically address Plaintiffs' anticommandeering contentions after concluding that ICWA is within the subject matter upon which Congress is authorized to legislate.

Moreover, it is unclear precisely what point JUDGE DUNCAN is attempting to make with his parade of supposed horribles. He appears to consider it obvious that his imagined laws would "of course" exceed Congress's power solely because they set standards applicable to state causes of action in state court proceedings. DUNCAN, CIRCUIT JUDGE, OP. at 35. But, as JUDGE DUNCAN himself fully acknowledges elsewhere in his opinion, it is well established that Congress *can* validly set substantive standards in state court proceedings when acting pursuant to its Article I powers, including by "altering" the substance of state causes of action. DUNCAN, CIRCUIT JUDGE, OP. at 102-03 ("The Supreme Court has ruled that federal standards may supersede state

To summarize, ICWA is a law of the United States made in pursuance of the Congress's constitutional authority. Further, ICWA does not violate the anticommandeering doctrine because it does not directly command state legislatures or executive officials to enact or administer a federal program. Rather, any burden it places on state actors is incidental and falls evenhandedly on private parties participating in the same regulated activity. Under the Supremacy Clause, then, ICWA is the supreme law of the land, and judges in every state shall be bound thereby. ICWA and the Final Rule therefore preempt conflicting state law, and the district court erred by concluding otherwise.

B. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. 14, § 1. This clause is implicitly incorporated into the Fifth Amendment's guarantee of due process. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). We apply the same analysis with respect to equal protection claims under the Fifth and Fourteenth Amendments. *See Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir.

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standards even in realms of traditional state authority such as family and community property law. . . . [W]henever a federal standard supersedes a state standard, the federal standard can be said to 'modify a state created cause of action.'"); *see also Jinks*, 538 U.S. at 464-65 (holding that federal laws that "change the 'substance' of state-law rights of action" do not violate state sovereignty). And, while JUDGE DUNCAN expresses some doubt as to Congress's authority to regulate the procedure by which state courts' handle state-created causes of action, he wholly concedes that ICWA creates substantive standards, not procedural ones. DUNCAN, CIRCUIT JUDGE, OP. at 102 ("ICWA enacts substantive child-custody standards applicable in state child custody proceedings . . . To the extent those substantive standards compel state courts . . . we conclude they are valid preemption provisions."). Thus, if JUDGE DUNCAN is arguing that his hypothetical laws would outstrip Congress's power because they would regulate state court procedure rather than substance, he has already conceded that ICWA is not like those laws. And if he is arguing that the laws would be unconstitutional merely because they apply to state causes of actions in state court proceedings, his position is squarely contradicted by on-point Supreme Court precedent and his own words in this very case.

1995). In evaluating an equal protection claim, strict scrutiny applies to laws that rely on classifications of persons based on race. *See id.* But where the classification is political, rational basis review applies. *See Mancari*, 417 U.S. at 555. This means that the law is strongly presumed to be constitutional, and we will invalidate it only when the classification bears no rational connection to any legitimate government purpose. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993).

The district court granted summary judgment to the Plaintiffs, concluding that § 1903(4)—setting forth ICWA's definition of "Indian child" for purposes of determining when ICWA applies in state Indian child custody proceedings—is a racial classification that cannot withstand strict scrutiny.[48] Because ICWA's provisions are based on classifications of Indians, such as "Indian child," "Indian family," and "Indian foster home," we must first examine whether these are political or race-based classifications and thus which level of scrutiny applies. "We review the constitutionality of federal statutes de novo." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 192 (5th Cir. 2012).

1. Level of Scrutiny

Congress has exercised plenary power "over the tribal relations of the Indians . . . from the beginning." *Lone Wolf*, 187 U.S. at 565. The Supreme Court's decisions "leave no doubt that federal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645 (1977). "Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for

[48] As described above, we conclude that Plaintiffs have standing to challenge 25 U.S.C. § 1915(a) to (b) and Final Rule §§ 23.129 to 23.132 on equal protection grounds. The district court's analysis of whether the ICWA classification was political or race-based focused on § 1903(4), presumably because § 1903(4) provides a threshold definition of "Indian child" that must be met for any provision of ICWA to apply in child custody proceedings in state court.

special treatment a constituency of tribal Indians living on or near reservations." *Mancari*, 417 U.S. at 552. "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.*

In the foundational case of *Morton v. Mancari*, the Supreme Court rejected an equal-protection challenge to a BIA employment preference for Indians over non-Indians that applied regardless of whether the Indian beneficiary lived or worked on or near a reservation. *Id.* at 539 n.4, 555. The Court began by noting that Congress has repeatedly enacted preferences for Indians like the one at issue and that these preferences have several overarching purposes: "to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." *Id.* at 541-42 (footnotes omitted). The Court then stated that central to the resolution of whether the preference constituted a political or racial classification was "the unique legal status of Indian tribes under federal law and . . . the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Id.* at 551.

In view of this "historical and legal context," the Court upheld the preference, determining that it served a "legitimate, nonracially based goal." *Id.* at 553-54. Specifically, the preference was "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 554. Significantly, the Court observed that because the preference was limited to members of federally recognized tribes, it thus was "not directed towards a 'racial' group consisting of 'Indians' . . . In this sense, the preference is political rather than

racial in nature." *Id.* at 553 n.24. This was true even though individuals were also required to possess "one-fourth or more degree Indian blood" to be eligible for the preference. *Id.* The ruling, moreover, was consistent with "numerous' Court decisions upholding legislation that singled out Indians for special treatment. *Id.* at 554-55. The Court concluded its opinion by broadly holding 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 district court erroneously construed *Mancari* narrowly and sought to distinguish it from ICWA for two primary reasons. First, the district court read *Mancari*'s blessing of special treatment for Indian to be limited to laws "directed at Indian self-government and affairs on or near Indian lands." The district court apparently concluded that ICWA did not meet either of these requirements, and reasoned that strict scrutiny therefore applied. Second, the district court observed that ICWA's definition of Indian child—which includes children under eighteen years of age who are *eligible* for membership in a federally recognized tribe and have a biological parent who is a member of a tribe, 25 U.S.C. § 1903(4)(b)—extends beyond members of federally recognized tribes, whereas the preference in *Mancari* was restricted to current tribal members and thus "operated to exclude many individuals who are racially to be classified as Indians." Citing tribal membership laws that include a requirement of lineal descent, *see, e.g.*, NAVAJO NATION CODE § 701, the district court concluded that, since ICWA covers Indian children who are eligible for membership in a tribe, "[t]his means one is an Indian child [within the meaning of ICWA] if the child is related to a tribal ancestor by blood." In the view of the district court, ICWA therefore "uses ancestry as a proxy for race," and the law is therefore subject to strict scrutiny.

We disagree with the district court's reasoning and conclude that *Mancari* stands for the broader proposition that as long as "legislation that

singles out Indians for . . . special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," the statute "will not be disturbed." *Mancari*, 417 U.S. at 554-55. In other words, if a statute is reasonably related to the special government-to-government political relationship between the United States and the Indian tribes, it does not violate equal protection principles. *Mancari*—and its progeny—confirm that classifications relating to Indians need not be specifically directed at Indian self-government to be considered political classifications for which rational basis scrutiny applies. *Id.* at 555 ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."); *see also, e.g.*, *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." (quoting *Mancari*, 417 U.S. at 551-52)).

In *United States v. Antelope*, for instance, the Court expressly recognized that, although some of its earlier decisions relating to Indians "involved preferences or disabilities directly promoting Indian interests in self-government," its precedent "point[s] more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications." 430 U.S. 641, 646-47 (1977) (first citing *Mancari*, 417 U.S. at 553 n.24; then citing *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam)) (holding that a federal statute subjecting individual Indians to federal criminal jurisdiction due to their status as tribal members did not violate equal protection); *see also, e.g.*, *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 673 n.20 (1979) (determining that a treaty granting Indians certain preferential fishing rights did not violate equal protection because the Court "has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's

'unique obligation toward the Indians' " (quoting *Mancari*, 417 U.S. at 555)); *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 479-80 (1976) (sustaining tribal members' immunity from state sales tax for cigarettes sold on the reservation and explaining 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." (quoting *Mancari*, 417 U.S. at 555)).

Moreover, even if preferences for Indians were limited to those directly furthering tribal self-government—a proposition that, as demonstrated, is unsupportable—it is clear that ICWA is aimed squarely at this legislative purpose. As discussed, prior to enacting ICWA, Congress considered testimony about the devastating impacts of removing Indian children from tribes and placing them for adoption and foster care in non-Indian homes. *See supra* Background Part IV. The Tribal Chief of the Mississippi Band of Choctaw Indians, we noted, testified that "the chances of Indian survival are significantly reduced" by removing Indian children from their homes and raising them in non-Indian households where they are "denied exposure to the ways of their People . . . [T]hese practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." *Hearing on S. 1214 before the S. Select. Comm. on Indian Affairs*, 95th Cong. 157 (1977).

This testimony undoubtedly informed Congress's finding that children are the most vital resource "to the continued existence and integrity of Indian tribes," which itself reflects Congress's intent to further tribal self-government. 25 U.S.C. § 1901(3). Moreover, the Supreme Court has recognized that in enacting ICWA, "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by

non-Indians. The numerous prerogatives accorded the tribes through ICWA's substantive provisions must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." *Holyfield*, 490 U.S. at 50 (internal citations omitted)); *see also id.* (noting evidence before Congress at the time ICWA was considered that the "[r]emoval of Indian children from their cultural setting seriously impacts . . . long-term tribal survival" (quoting S. REP. NO. 597, 95th Cong., 2d Sess. 52 (1977)). Thus, it is clear that Congress intended ICWA to further both tribal self-government and the survival of tribes. *See* 25 U.S.C. § 1901(3)*; see also* COHEN'S, *supra* § 11.01[2] ("ICWA's objective of promoting the stability and security of Indian tribes and families encompasses the interest of Indian nations in their survival as peoples and self-governing communities . . . .").

We also are unpersuaded by the district court's reasoning that differential treatment for Indians is only subject to rational basis review when it applies to Indians living on or near reservations. The Supreme Court has long recognized Congress's broad power to regulate Indians and Indian tribes on and off the reservation. *See, e.g., United States v. McGowan*, 302 U.S. 535, 539 (1938) ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." (quoting *United States v. Ramsey*, 271 U.S. 467, 471 (1926)); *Perrin*, 232 U.S. at 482 (acknowledging Congress's power to regulate Indians "whether upon or off a reservation and whether within or without the limits of a state"). And courts have repeatedly upheld government preferences for Indians, regardless as to whether the Indians receiving "special treatment" were located on or near a reservation. *See, e.g.*, *Am. Fed'n of Gov't Emps. v. United States*, 330 F.3d 513, 516, 521 (D.C. Cir. 2003) (rejecting an equal protection challenge to a federal defense spending measure that provided a contracting preference for firms with less than "51 percent Native American ownership" even though the preference was "not restricted to Indian activities on or near reservations or Indian land"). Indeed, the preference in

Mancari itself did not require that the Indians benefiting from the employment preference live on or near a reservation, and the non-Indian employees who challenged the preference averred that "none of them [were] employed on or near an Indian reservation." *Mancari*, 417 U.S. at 539 n.4.

The district court's additional rationale for finding an equal protection violation here—that unlike the statute in *Mancari*, ICWA's definition of Indian child extends to children who are only eligible for membership but not-yet enrolled in a tribe—is also flawed. Though the district court made much of the fact that a child's tribal eligibility generally turns on having a blood relationship with a tribal ancestor, this does not equate to a proxy for race, as the district court believed.

Originally, Indian tribes "were self-governing sovereign political communities." *Wheeler*, 435 U.S. at 322-23; *see also* Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012) [hereinafter Krakoff]. The Constitution, moreover, recognizes tribes' political status both explicitly and implicitly. *See, e.g.*, U.S. CONST. art. I, § 8 (empowering Congress "to regulate commerce with foreign Nations, among the several States, and with the Indian Tribes"). And as explained, the history of the post-ratification period demonstrates that the federal government treated tribes as quasi-sovereigns from the very start.[49] *See* Ablavsky, *Beyond the Indian Commerce Clause*, *supra* at 1061-67. Though the relationship between the government and the tribes has evolved since then, it has always been considered a relationship between political

[49] To be sure, this course of dealing was not between powers on equal footing; the Court, as noted, has described the tribes as "wards of the nation" and "dependent on the United States," which, in turn, owes a "duty of protection" to Indian tribes. *Kagama*, 118 U.S. at 383-84 (emphasis omitted); *see also Mancari*, 417 U.S. at 551 (characterizing the relationship between the tribes and federal government as that of "guardian-ward"). But this dependent, quasi-sovereign status does not change that tribes are fundamentally political bodies with whom the federal government must manage relations as with any other nation.

entities. *See Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 16 (1831) (Marshall, C.J.) (describing Indian tribes as "domestic dependent nations"); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1278 (9th Cir. 2004) ("Historically, the formal relationship between the United States and American Indian tribes has been political, rather than race-based."); COHEN'S, *supra* § 4.01[1][a]; *see generally* Krakoff, *supra*, at 1060-78.

Beginning in 1934 with passage of the Indian Reorganization Act, the federal government entered into a new chapter wherein it officially acknowledged Indian tribes' rights of self-governance by authorizing tribes to apply for federally-recognized status. *See* Indian Reorganization Act, 25 U.S.C. §§ 5101 *et seq.* Official federal recognition of Indian tribes is "a formal political act" that "institutionaliz[es] the government-to-government relationship between the tribe and the federal government." *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting COHEN'S, *supra* § 3.02[3] (2005 ed.)); *see also* Krakoff, *supra*, at 1075. Though inevitably tied in part to ancestry, tribal recognition and tribal sovereignty center on a group's status as a continuation of a historical political entity. *See* 25 C.F.R. § 83.11(c), (e) (criteria for a tribe to receive federal recognition include that the tribe has "maintained political influence or authority over its members as an autonomous entity from 1900 until the present" and that its members "descend from a historical Indian tribe"); Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 538 (2017) (explaining that the descent criterion for federal recognition is "a proxy for connection[] to a political entity, specifically a *tribe*, which existed historically"); Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37862, 37,867 (2015). In this way, federally recognized tribal status is an inherently political classification. *See Mancari*, 417 U.S. at 553 n.24.

In view of this history, we cannot say that simply because ICWA's definition of "Indian child" includes minors eligible for tribal membership

(who have a biological parent who is a tribal member), the classification is drawn along racial lines. Tribal eligibility does not inherently turn on race, but rather on the criteria set by the tribes, which are present-day political entities.[50] Just as the United States or any other sovereign may choose to whom it extends citizenship, so too may the Indian tribes.[51] That tribes may

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[50] As the Tribes explain, under some tribal membership laws, eligibility extends to children without Indian blood, such as the descendants of persons formerly enslaved by tribes who became members after they were freed or the descendants of persons of any ethnicity who have been adopted into a tribe. *See*, *e.g.*, Treaty with the Cherokees, 1866, U.S.—Cherokee Nation of Indians, art. 9, July 19, 1866, 14 Stat. 799 (providing that the Cherokee Nation "further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees"); *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 132, 140-41 (D.D.C. 2017) (holding that Cherokee Freedmen enjoy full citizenship rights as members of the Cherokee Nation because Congress has never abrogated or amended the relevant treaty terms). Accordingly, a child may fall under ICWA's membership eligibility standard because his or her biological parent became a member of a tribe, despite not being racially Indian. Additionally, many racially Indian children, such as those affiliated with non-federally recognized tribes, do not fall within ICWA's definition of "Indian child." When it comes to ICWA's definition of Indian child, race is thus both underinclusive—because it does not capture these descendants of freed enslaved persons or other adoptive members who are not "racially" Indians—and overinclusive—because it embraces "racially" Indian children who are not enrolled in or eligible for membership in a recognized tribe or who lack a biological parent who is a member of a recognized tribe.

[51] For illustrative purposes, we note that *jus sanguinis*, or citizenship based on descent, is a common feature of the citizenship laws of foreign nations. *See, e.g.*, Irish Nationality and Citizenship Act, 2001 (Act. No. 15/2001) (Ir.) (individuals with any direct ancestor who was an Irish citizen are eligible for Irish ancestry, provided that the applicant's parent was recorded in Ireland's foreign births register); Kodikas Ellenikes Ithageneias [KEI] [Code of Greek Citizenship] A:1,10 (Gr.) (establishing that children of Greek parents are Greek by birth, and providing that aliens of Greek ethnic origin are eligible to obtain citizenship by naturalization); The Law of the Republic of Armenia on the Citizenship of the Republic of Armenia (Nov. 6, 1995), as amended through Feb. 26, 2017, by RA Law No. 75-N (Arm.) (providing that a person may be granted Armenian citizenship without residing in Armenia or speaking Armenian if he or she is of Armenian ancestry); Law of Return, 5710-1950, SH No. 51 p. 159 (1950) (Isr.) (extending the right of citizenship to any "Jew" wishing to immigrate to Israel); Law of Return (Amendment No. 2), 5730-1970, SH No. 586 p. 34 (1970) (Isr.) (clarifying that "Jew" means any person born of a

use ancestry as part of their criteria for determining membership eligibility does not change that ICWA does not classify in this way; instead, ICWA's Indian child designation classifies on the basis of a child's connection to a political entity based on whatever criteria that political entity may prescribe.[52] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("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.").

Jewish mother or who converted to Judaism, and vesting the right of citizenship in any child, grandchild, or spouse of a Jew, as well as any spouse of a child of a Jew or any spouse of a grandchild of a Jew); Legge 5 febbraio 1992, no. 91, G.U. Feb. 15, 1992, n.38 (It.) (guaranteeing citizenship to any person whose father or mother are citizens, and providing that Italian citizenship may be granted to aliens whose father or mother or whose direct ancestors to the second degree were citizens by birth); Law of 2 April 2009 on Polish Citizenship, Dz. U. z. 2012 r. poz. 161 (Feb. 14, 2012) (Pol.) (stating that individuals within two degrees of Polish ancestry may be eligible for Polish citizenship). That one may be eligible for citizenship based on their ancestry does not, of course, alter the fact that citizenship and eligibility therefor—like actual and potential membership in a federally recognized tribe—are political matters concerning the rights and obligations that come from membership in a polity.

[52] Moreover, even if ICWA did classify on the basis of blood quantum as do some other laws respecting Indian affairs, it does not necessarily follow that strict scrutiny would apply. *See generally* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CAL. L. REV. 495, 532-46 (2020) (arguing that, based on the historical understanding of the Indian affairs power, Congress has complete authority to determine who is an Indian and it is never a suspect classification); *Mancari*, 417 U.S. at 552 (applying rational basis review to law that classified on the basis of blood quantum). Because ICWA simply looks to tribal eligibility and the tribal membership of a child's birth parents, we need not decide what level of scrutiny applies when Congress classifies on the basis of more remote Indian ancestry. We note, however, that some scholars have explained that "the appearance of 'Indian' within the [text of the] U.S. Constitution likely dooms [any] equal protection challenge to Indian classifications." Gregory Ablavsky, *Race, Citizenship, and Original Constitutional Meanings* 70 STAN. L. REV. 1025, 1074 (2018). Either the use of "'Indian' in the Constitutional is a political classification" and thus "the use of Indian in ICWA and similar statutes must also be read as a political classification," or the references to Indians in the Constitution must be understood as "bound up with historical conceptions of race" and "the Constitution itself" therefore acknowledges and "authorizes distinctions based on Native ancestry." *Id.*

The district court determined, and Plaintiffs now argue, that ICWA's definition of "Indian child" "mirrors the impermissible racial classification in *Rice* [*v. Cayetano*, 528 U.S. 495 (2000)], and is legally and factually distinguishable from the political classification in *Mancari*." We disagree.

In *Rice*, the Court held that a provision of the Hawaiian Constitution that permitted only "Hawaiian" people to vote in the statewide election for the trustees of the Office of Hawaiian Affairs (OHA) violated the Fifteenth Amendment. *Id.* at 515. "Hawaiian" was defined by statute as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawai[']i." *Id.* at 509. (citation and internal quotation marks omitted). The Court emphasized that the statute classified citizens "solely because of their ancestry," determining that the legislature's purpose in doing so was to use ancestry as a proxy for race. *Id.* at 514-17. In reaching its ruling, the *Rice* Court expressly reaffirmed *Mancari*'s central holding that, because classifications based on Indian tribal membership are "not directed towards a 'racial' group consisting of 'Indians,'" but instead apply "only to members of 'federally recognized' tribes," they are "political rather than racial in nature." *Rice*, 528 U.S. at 519-20 (quoting *Mancari*, 417 U.S. at 553 n.24).

The facts and legal issues in *Rice* are clearly distinguishable from the present case. As a threshold matter, *Rice* specifically involved voter eligibility in a state-wide election for a state agency, and the Court found only that the law at issue violated the Fifteenth Amendment. As should be obvious, the Fifteenth Amendment, which deals exclusively with voting rights, is not implicated in this case. But even assuming *Rice*'s holding would apply to an equal protection challenge, ICWA's definition of "Indian child" is a fundamentally different sort of classification than the challenged law in *Rice*.

The Court in *Rice* specifically noted that native Hawaiians did not enjoy the same status as members of federally recognized tribes, who are

constituents of quasi-sovereign political communities. *Id.* at 522. Instead, ancestry was the sole, directly controlling criteria for whether or not an individual could vote in the OHA election. But unlike the ancestral requirement in *Rice*, ICWA's eligibility standard simply recognizes that some Indian children have an imperfect or inchoate tribal membership. That is, the standard embraces Indian children who possess a potential but not-yet-formalized affiliation with a current political entity—a federally recognized tribe. *See Mancari*, 417 U.S. at 553 n.24.

An appreciation for how tribal membership works makes this manifest. As Congress understood in enacting ICWA, tribal membership "typically requires an affirmative act by the enrollee or her parent," 81 Fed. Reg. at 38,782, and a "minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe," H.R. REP. NO. 95-1386, at 17 (1978). Thus, Congress was not drawing a racial classification by including the eligibility requirement but instead recognizing the realities of tribal membership and classifying based on a child's status as a member or potential member of a quasi-sovereign political entity, regardless of his or her ethnicity. And because ICWA does not single out children "solely because of their ancestry or ethnic characteristics," *Rice*, 528 U.S. at 515, *Rice* is inapposite.

In short, we find *Rice* wholly inapplicable except insofar as it reaffirmed the holdings of *Mancari* and its progeny that laws that classify on the basis of Indian tribal membership are political classifications. It therefore does not alter our conclusion that ICWA's definition of "Indian child" is a political classification subject to rational basis review. *See Mancari*, 417 U.S. at 555.

Plaintiffs also separately contend that ICWA's lowest-tiered adoptive placement preference for "other Indian families" constitutes a racial

classification.[53] *See* 25 U.S.C. § 1915(a)(3). This preference, they argue, treats Indian tribes as "fungible" and does not account for the array of differences between tribes, which, in turn, evinces a desire to keep Indian children within a larger Indian "race." We disagree for reasons similar to our holding regarding ICWA's Indian child designation. Like the hiring preference in *Mancari*, this adoption placement preference—like all of ICWA's placement preferences—"applies only to members of federally recognized tribes." *Mancari*, 417 U.S. at 554 n.24 (internal quotation marks omitted); *see also* 25 U.S.C. § 1903(3) (defining "Indian" as encompassing only members of federally recognized tribes). Because on its face the provision is limited to "members of federally recognized tribes," "the preference is political rather than racial in nature." *Mancari*, 417 U.S. at 554 n.24 (internal quotation marks omitted). Accordingly, it, too, is subject only to rational basis review.[54]

2. Rational Basis Review

Having determined that ICWA's Indian child and family designations are political classifications, we need look no further than *Rice* to determine their constitutionality. Even in setting aside the Hawai'i election law at issue, the Court stated in no uncertain terms that statutes that fulfill "Congress' unique obligation toward the Indians" are constitutional. *Id.* at 520 (quoting *Mancari*, 417 U.S. at 555). "Of course," the *Rice* Court elaborated, "as we

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[53] 25 U.S.C. § 1915(a) provides:

> 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 extended family;
>
> (2) other members of the Indian child's tribe; or
>
> (3) other Indian families.

[54] For the same reasons, ICWA's foster care placement preferences based on tribal membership trigger only rational basis review. *See* 25 U.S.C. § 1915(b).

have established in a series of [post-*Mancari*] cases, Congress may fulfill its obligations and responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Id.* at 519 (citing *Wash. State Comm. Passenger Fishing Vessel Ass'n,* 443 U.S. at 673 n.20; *Antelope*, 430 U.S. at 645-47; *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84-85 (1977); *Moe*, 425 U.S. at 479-80; *Fisher*, 424 U.S. at 390-91).

This is precisely what ICWA does. We have already described at length the "circumstances and needs" that gave rise to ICWA. *Id.*; *see supra* Background Part IV-V. Suffice it to say that, in enacting the statute, Congress explicitly found that "an alarmingly high percentage of Indian families 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." 25 U.S.C. § 1901(4). It further concluded "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." *Id.* § 1901(5). It therefore enacted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." *Id.* U.S.C. § 1902. By systematically favoring the placement of Indian children with Indian tribes and families in child custody proceedings, Congress sought to ensure that children who are eligible for tribal membership are raised in environments that engender respect for the traditions and values of Indian tribes, thereby increasing the likelihood that the child will eventually join a tribe and contribute to "the continued existence and integrity of Indian tribes." *Id.* § 1901(3). It cannot be reasonably gainsaid that these measures have *some* rational connection to Congress's goal of fulfilling its broad and enduring trust obligations to the

Indian tribes.[55] *See Mancari*, 417 U.S. at 555. Indeed, JUDGE DUNCAN does not truly argue to the contrary. Instead, he raises what amount to two arguments that ICWA uses *impermissible means* to further Congress's obligations to the Indian tribes.

First, JUDGE DUNCAN argues that ICWA is irrational because it extends beyond internal tribal affairs and intrudes into state proceedings. DUNCAN, CIRCUIT JUDGE, OP. at 65. As we discuss at length when addressing Plaintiffs' federalism-based arguments, ICWA's creation of federal rights that state courts must honor is not a violation of state sovereignty. More fundamentally, however, the degree to which a law intrudes on state proceedings has no bearing on whether that law is rationally linked to protecting Indian tribes. One can imagine any number of overbearing measures that would advantage Indians at the expense of the states or other members of society that would nonetheless promote Indian welfare. A federal law could simply effectuate a direct transfer of wealth from state coffers to the Indian tribes, for example, which would almost certainly run afoul of various constitutional provisions. But there would be no debate that the law rationally furthered the well-being of tribes, which is sufficient to overcome *an equal protection challenge* when rational basis review applies. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate [government] interest.").

Though JUDGE DUNCAN couches this objection as an aspect of rational basis review, he appears to apply a far more searching standard of

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[55] In addition to the reasons stated above, that ICWA furthers Congress's legislative aim of discharging its duties to tribes is strongly suggested by the fact that 486 federally recognized tribes—over 80% of all such tribes in this nation—have joined as amici in support of upholding ICWA's constitutionality.

scrutiny.[56] For example, he relies on the *Rice* Court's statement that, because the OHA elections in that case affected the state as a whole, extending "*Mancari* to th[at] context would [] permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs." DUNCAN, CIRCUIT JUDGE, OP. at 61-62 (quoting 528 U.S. at 522). As we have stated, though, *Rice* centered on the Fifteenth Amendment, and even if the law were instead examined under the Fourteenth Amendment, it would be subject to strict scrutiny because it classified on the basis of race and discriminated with respect to a fundamental constitutional right. *See Nordlinger*, 505 U.S. at 10. ICWA does neither. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) (limiting "fundamental rights" for purposes of equal protection analysis to those rights protected by

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[56] JUDGE DUNCAN contends that he is "faithfully following the tailoring analysis for Indian classifications laid out by *Mancari*, *Rice*, and *Adoptive Couple*." DUNCAN, CIRCUIT JUDGE, OP. at 64 n.93. But the Supreme Court has expressly stated that "classifications based on tribal status" are not "suspect," *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. at 501, and, again, the Court has repeatedly reaffirmed that laws that neither infringe on a fundamental right nor involve a suspect classification warrant only rational basis review, which does not include the type of "tailoring analysis" JUDGE DUNCAN employs. *See, e.g.*, *Beach Commc'ns, Inc.*, 508 U.S., at 313 ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). If JUDGE DUNCAN reads the cases he cites to *sub silentio* overrule Supreme Court precedent to establish that Indian classifications are inherently suspect or otherwise subject to a stricter tailoring requirement than any other non-suspect classification, his conclusion runs counter to virtually every federal appeals court to have explicitly considered the issue. *See, e.g.*, *Am. Fed'n of Gov't Employees, AFL-CIO v. United States*, 330 F.3d 513, 520 (D.C. Cir. 2003) ("[O]rdinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis."(citation omitted)); *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 732 (9th Cir. 2003) ("The [*Mancari*] Court held that legislative classifications furthering that same purpose were political and, thus, did not warrant strict scrutiny instead of ordinary, rational-basis scrutiny[.]"). In other words, it is firmly established that *ordinary* rational basis scrutiny applies in an equal protection challenge to an Indian classification, and under standard rational basis review, factors like the degree of intrusion on state sovereignty are simply not relevant to whether one can imagine a legitimate government interest furthered by the classification.

the constitution). Thus, whether ICWA incidentally disadvantages some groups in state court proceedings is of no moment. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (stating that "a law will be sustained" on rational basis review "if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous" (citing *New Orleans v. Dukes*, 427 U.S. 297 (1976))).

Moreover, even if such a factor were relevant to ICWA's validity, we would disagree that the law's purpose or effect is analogous to the Hawai'i law at issue in *Rice*. Unlike the OHA election qualifications, ICWA regulates relations between states, the federal government, and the Indian tribes. The law is an example of congressional control over federal-tribal affairs—an interest completely absent in *Rice*. *See Rice*, 528 U.S. at 518 (noting that to sustain Hawai'i's restriction under *Mancari*, it would have to "accept some beginning premises not yet established in [its] case law," such as that Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes"); *see also Kahawaiolaa*, 386 F.3d at 1279 (rejecting an equal protection challenge brought by Native Hawaiians, who were excluded from the U.S. Department of the Interior's formal tribal acknowledgement process, and concluding that the recognition of Indian tribes was political). Thus, there is no concern that ICWA excludes a class of citizens from participation in their own self-government; even when ICWA reaches into state court adoption proceedings, those proceedings are simultaneously affairs of states, tribes, and Congress. *See* 25 U.S.C. § 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."). The *Rice* Court's caution against fencing off a class of citizens from participation in state affairs thus does not apply to ICWA for multiple reasons.

What remains of JUDGE DUNCAN's contentions amount to objections that ICWA's Indian child and family designations are under- and

over-inclusive. ICWA applies to Indian children who are only eligible for tribal membership and may never join a tribe, he points out, as well as when an Indian child's biological parents do not oppose placement of an Indian child with a non-Indian family. Based on this, JUDGE DUNCAN argues that the law could be applied in scenarios where it does not further Congress's goals of ensuring the continued survival of Indian tribes and preventing the unwilling breakup of Indian families. DUNCAN, CIRCUIT JUDGE, OP. at 67-71. Similarly, because ICWA in some instances favors placement of an Indian child with an Indian family of a different tribe over placement with a non-Indian family, JUDGE DUNCAN contends that the statute treats the tribes as fungible and does not always promote Congress's goal of linking Indian children with their particular tribes. DUNCAN, CIRCUIT JUDGE, OP. at 71-73. But the Supreme Court has clearly stated that these are not grounds for invalidating a law on rational basis review.

"Rational-basis review tolerates overinclusive classifications, underinclusive ones, and other imperfect means-ends fits." *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1010 (7th Cir. 2019) (collecting Supreme Court cases). "[L]egislation 'does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect.'" *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 592 n.39 (1979) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)). On rational-basis review, a statutory classification "comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative *every conceivable basis which might support it*." *Beach Commc'ns, Inc.*, 508 U.S. at 314-15 (emphasis added) (cleaned up). All of this is to say that it is immaterial whether one can imagine scenarios in which ICWA's classifications do not further ICWA's goals; that

the classifications could further legitimate goals in some instances is wholly sufficient to sustain the law's constitutionality.[57]

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[57] JUDGE DUNCAN contends that his arguments are somehow different from contentions that ICWA is overinclusive because "[e]ligibility—one of only two ways to trigger ICWA—makes the law cover children (like the ones here) with no actual connection to a tribe" and "allowing ICWA to override birth parents' wishes to place their children with non-Indians . . . makes nonsense of ICWA's key goal of preventing the *break-up* of Indian families." DUNCAN, CIRCUIT JUDGE, OP. at 68-69 n.95. But a law that employs a classification that applies to some individuals or in some situations in which it does not further the legislature's objectives is the precise definition of an overinclusive law, and the Supreme Court has repeatedly reaffirmed that such a statute survives rational basis review. *See, e.g.*, *Burlington N. R. Co. v. Ford*, 504 U.S. 648, 653–54 (1992) (upholding against equal protection challenge state's differing venue rules for domestically incorporated corporations because legislature could have rationally concluded that many corporations are headquartered in their state of incorporation and venue rule would promote convenient litigation, despite many corporations not having their principal place of business in their state of incorporation); *Vance v. Bradley*, 440 U.S. 93, 106 (1979) (upholding Foreign Service's mandatory 60-year retirement age because Congress could rationally believe that it promoted the maintenance of "a vigorous and competent" Service, notwithstanding many people over 60 being more "vigorous and competent" than many people under 60); *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (upholding state's cap on welfare awarded to families with dependent children because it was rational to believe it would encourage families to seek employment, despite the fact that many such families contain "no person who is employable"). Thus, even if JUDGE DUNCAN is correct that some Indian children as classified by ICWA never ultimately join an Indian tribe and that some Indian birth parents do not object to the placement of their children with non-Indian families, this does not mean that ICWA does not pass constitutional muster. It is enough that Congress could have rationally believed that some Indian children *would* join a tribe and some Indian birth parents *would* object to a non-Indian family placement.

Perhaps seeking to overcome this clear infirmity in its reasoning, the opposing opinion makes much of the Supreme Court's statement in *Adoptive Couple v. Baby Girl* that it would "raise equal protection concerns" to apply ICWA in a manner that "put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." DUNCAN, CIRCUIT JUDGE, OP. at 62, 70 (quoting 570 U.S. at 655). He contends that ICWA violates equal protection principles because it allegedly disadvantages Indian children by making it more difficult for non-Indians to adopt them. But the Court was merely cautioning in dictum that ICWA may be vulnerable to an as-applied challenge in the rare situation in which applying its classification to a specific set of facts is wholly irrational. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (holding that applying city ordinance to particular plaintiffs violated equal

Further, ICWA is irrational in the scenarios that JUDGE DUNCAN proposes only if we artificially cabin the interests that ICWA may serve. But "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* And "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* In other words, JUDGE DUNCAN errs by limiting his analysis to ICWA's goals as he narrowly defines them; any conceivable legitimate goal may be grounds to sustain ICWA's constitutionality so long as one can rationally articulate a way in which the law's Indian child and family classifications would theoretically further it.

In this light, it is clear that ICWA's classifications are not irrational even in the situations JUDGE DUNCAN suggests. It is rational to think that ensuring that an Indian child is raised in a household that respects Indian values and traditions makes it more likely that the child will eventually join an Indian tribe—thus "promot[ing] the stability and security of Indian tribes," 25 U.S.C. § 1902—even when the child's parents would rather the child be placed with a non-Indian family. And we reject the notion that ICWA's preference for Indian families treats tribes as fungible. As Defendants point out, many contemporary tribes descended from larger historical bands and continue to share close relationships and linguistic,

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protection because classification was irrational in that specific instance). This is a different matter than Plaintiffs' facial challenge to the statute, which requires that the "challenger . . . establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The fact that [ICWA] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid[.]" *Id.* Lastly, we reject JUDGE DUNCAN's supposition that the Indian children whom Plaintiffs seek to adopt would be put at "great disadvantage" by being placed in the care of an Indian relative or family pursuant to ICWA's preferences. DUNCAN, CIRCUIT JUDGE, OP. at 68-70. That is a value-laden policy determination that courts are ill-equipped to make, especially without the type of detailed fact-finding as to specific home placements that is largely absent from the record before us.

cultural, and religious traditions, so placing a child with another Indian family could conceivably further the interest in maintaining the child's ties with his or her tribe or culture. *See*, *e.g.*, Greg O'Brien, *Chickasaws: The Unconquerable People*, Mississippi History Now (September 23, 2020, 9:20 AM), https://mshistorynow.mdah.state.ms.us/articles/8/chickasaws-the-unconquerable-people (noting that, "[c]ulturally, the Chickasaws were (and are) similar to the Choctaws; both groups spoke a nearly identical language, their societies were organized matrilineally (meaning that ancestry was traced only through the mother's line), political power was decentralized so that each of their seven or so villages had their own chiefs and other leaders, and they viewed the sun as the ultimate expression of spiritual power for its ability to create and sustain life"). By providing a preference for placing Indian children with a family that is part of a formally recognized Indian political community that is interconnected to the child's own tribe, ICWA enables that child to avail herself of the numerous benefits—both tangible and intangible—that come from being raised within this context. And even if this were not the case, Congress could rationally conclude that placing an Indian child with a different tribe would fortify the ranks of that other tribe, contributing to the continued existence of the Indian tribes as a whole. *See* 25 U.S.C. §§ 1901(3), 1902; *Holyfield*, 490 U.S. at 49.

In sum, § 1903(4)'s definition of an "Indian child" and § 1915(a)(3)'s Indian family preference can be rationally linked to the trust relationship between the tribes and the federal government, as well as to furthering tribal sovereignty and self-government. They therefore do not violate constitutional equal protection principles, and the district court erred by concluding otherwise.[58] *See Mancari*, 417 U.S. at 555.

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[58] We similarly conclude that ICWA's foster care preferences survive rational basis review and thus do not violate equal protection.

C. Nondelegation Doctrine

We next review Plaintiffs' challenge to 25 U.S.C. § 1915(c) under the nondelegation doctrine. Article I of the Constitution vests "[a]ll legislative Powers" in Congress. U.S. CONST. art. 1, § 1, cl. 1. "In a delegation challenge, the constitutional question is whether the statute has" impermissibly "delegated legislative power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Section 1915(c) allows Indian tribes to establish through tribal resolution a different order of preferred placement than that set forth in § 1915(a) and (b).[59] Section 23.130 of the Final Rule provides that a tribe's established placement preferences apply over those initially specified in ICWA.[60] The district court determined that these provisions violated the nondelegation doctrine, reasoning that § 1915(c) grants Indian tribes the power to change legislative preferences with binding effect on the states and that Indian tribes are not part of the federal government of the United States and therefore cannot exercise federal legislative or executive regulatory power over non-Indians on non-tribal lands.

As an initial matter, Defendants argue that the district court's analysis of the constitutionality of these provisions ignores the inherent sovereign authority of tribes. They contend that § 1915(c) merely recognizes and incorporates a tribe's exercise of its inherent sovereignty over Indian children and therefore is not a delegation of authority from Congress. Ultimately, however, we need not decide whether the Indian tribes' inherent sovereign

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[59] The provision states: "In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section." 25 U.S.C. § 1915(c).

[60] "If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply." 25 C.F.R. § 23.130.

authority extends to establishing rights that can be conferred on its potential members in state court proceedings because Congress can extend tribal jurisdiction by delegating *its* power through an "express authorization [in a] federal statute." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997); *see also United States v. Enas*, 255 F.3d 662, 666-67 (9th Cir. 2001) (en banc) (explaining the "dichotomy between inherent and delegated power" and that "[w]hen Congress bestows additional power upon a tribe—augments its sovereignty, one might say—this additional grant of power is referred to as 'delegation'"); *cf. Mazurie*, 419 U.S. at 557 ("We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority to 'regulate Commerce . . . with the Indian tribes.'") (alterations in original).

As we have stated, Congress possesses the authority to enact ICWA pursuant to its constitutional legislative power. *See supra* Discussion Part II.A. And the limitations on Congress's ability to delegate its legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Mazurie*, 419 U.S. at 556-57.

Such a rule may arguably be justified by the fact that the Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine. In *United States v. Sharpnack*, 355 U.S. 286, 293-94 (1958), for instance, the Supreme Court upheld a federal statute that prospectively incorporated states' criminal law and made it applicable in federal enclaves within each state, though the states, of course, lacked the power to legislate in these enclaves. Rather than an impermissible delegation of Congress's legislative power, the Court reasoned that the law was a "deliberate continuing adoption by Congress" of state law as binding federal law. *Id.*; *see also Gibbons*

v. Ogden, 22 U.S. (9 Wheat.) 1, 80 (1824) ("Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject."); *United States v. Palmer*, 465 F.2d 697, 699-700 (6th Cir. 1972) (holding that the incorporation of state law into 18 U.S.C. § 1955, which prohibits operating an illegal gambling business and defines such an illicit business as one that violates state or local law, does not violate the nondelegation doctrine). This same reasoning applies to laws enacted by Indian tribes, for "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Mazurie*, 419 U.S. at 557; *see also S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983) (determining that the Secretary of the Interior did not improperly subdelegate administrative authority by requiring tribal consent as a condition precedent to granting a right-of-way across tribal lands to a railroad because the Secretary simply "incorporate[d] into the decision-making process the wishes of a body with independent authority over the affected lands").

Section 1915(c) provides that a tribe may pass, by its own legislative authority, a resolution reordering the placement preferences set forth by Congress in § 1915(a) or (b). Pursuant to this section, a tribe may assess, for example, whether the most appropriate placement for an Indian child is with members of the child's extended family, the child's tribe, or other Indian families. It is beyond debate that it would be within Indian tribes' authority to set these same standards in *tribal* child custody proceedings. *See, e.g.*, *Fisher*, 424 U.S. 390 (upholding exclusive tribal jurisdiction over adoption proceedings among tribal members located in Indian country); *Montana*, 450 U.S. at 564 (noting tribes' "inherent power to determine tribal membership [and] regulate domestic relations among members"). And just as the law at issue in *Sharpnack* incorporated the laws of a state on a matter with respect to which the state was authorized to legislate and applied it in an area in which the state was not authorized to legislate, so § 1915(c) incorporates the law of Indian tribes on a matter within the tribes' jurisdiction and makes it

applicable in an area that might otherwise be beyond the tribes' power to regulate. Thus, § 1915(c) can be characterized as a valid "deliberate continuing adoption by Congress" of tribal law as binding federal law. *Sharpnack*, 355 U.S. at 293-94; 25 U.S.C. § 1915(c); 81 Fed. Reg. at 38,784 (statement by the BIA noting that "through numerous statutory provisions, ICWA helps ensure that State courts incorporate Indian social and cultural standards into decision-making that affects Indian children").

But § 1915(c)'s validity is not dependent solely on this framing. Courts have frequently upheld delegations of congressional authority to Indian tribes without reference to federal incorporation of their law. In *United States v. Mazurie*, for example, the Supreme Court considered a federal law that allowed the tribal council of the Wind River Tribes, with the approval of the Secretary of the Interior, to adopt ordinances to control the introduction of alcoholic beverages by non-Indians on privately owned land within the boundaries of the reservation. *See* 419 U.S. at 547, 557. As the Court later explained, Congress indicated its intent to delegate authority to tribes in the statute's requirement that liquor transactions conform " 'with an ordinance duly adopted' by the governing tribe." *Rice v. Rehner*, 463 U.S. 713, 730-31 (1983) (quoting 18 U.S.C. § 1161) (examining the same statute challenged in *Mazurie*). The Court ruled that such a delegation of congressional power did not violate the nondelegation doctrine. *Mazurie,* 419 U.S. at 546, 557. Tribes possess "a certain degree of independent authority over matters" relating to their "internal and social relations," the Court reasoned, including the "distribution and use of intoxicants" within the reservation's bounds. *Id.* And this independent tribal authority provided Congress with a sufficient basis for vesting in tribes Congress's own power to regulate Indian affairs. *Id.*

Similarly, in *Bugenig v. Hoopa Valley Tribe*, the Ninth Circuit, sitting en banc, determined that Congress had expressly delegated authority to the Hoopa Valley Tribe to regulate conduct by nonmembers. *See* 266 F.3d 1201,

1223 (9th Cir. 2001) (en banc). In that case, the Hoopa Tribe had ratified a constitution in 1972 stating that the Tribe's jurisdiction "extend[s] to all lands within the confines of the" reservation and that the Tribe could regulate "the use and disposition of property upon the reservation," including by non-members. *Id.* at 1212. Later, Congress passed a statute stating that "existing gove[r]ning documents of the Hoopa Valley Tribe and the governing body established and elected thereunder . . . are hereby ratified and confirmed." *Id.* at 1207-08 (quoting 25 U.S.C. § 1300i-7). The Tribe then passed a resolution prohibiting harvesting timber within a certain zone on the reservation. *Id.* at 1208. Shortly after the resolution's adoption, a non-member purchased property in this zone and began clearing its timber. *Id.* The Tribe attempted to enjoin her timber removal, arguing that Congress had vested in it the authority to regulate within the reservation, regardless of ownership. *Id.* at 1209. The Ninth Circuit agreed. Reading together the tribal constitution and the congressional enactment that "ratified and confirmed" the Tribe's governing documents, the court found that Congress had "delegated authority to regulate all the lands within the" reservation, including those owned by non-Indians. *Id.* at 1216. The court also determined that the delegation was valid because "Congress can delegate to Indian tribes those powers that are within the sphere of the Indian Commerce Clause." *Id.* at 1223 n.12.

Like the statutes in *Mazurie* and *Bugenig*, § 1915(c) contains an express delegation to tribes. *See* 25 U.S.C. § 1915(c) (permitting "the Indian child's tribe" to alter the order of placement preferences). And because the authority to alter placement preferences with respect to specific tribes is within Congress's power, Congress can validly delegate this authority to Indian tribes. *See Buenig*, 266 F.3d at 1223 n.12. Thus, Congress has validly "augment[ed]" tribal power by delegating additional authority via § 1915(c). *Enas*, 255 F.3d at 667.

JUDGE DUNCAN presents two arguments as to why § 1915(c) violates nondelegation principles. First, he contends that the provision delegates Congress's core legislative power and thereby violates the bicameralism and presentment requirements that Congress must adhere to when enacting law. DUNCAN, CIRCUIT JUDGE, OP. at 110-11. Second, he argues that, even if § 1915(c) is construed as a delegation of regulatory authority, it violates nondelegation principles because it entrusts the authority to a party outside the federal government. DUNCAN, CIRCUIT JUDGE, OP. at 112. Neither contention is ultimately persuasive. . At the threshold, we note that JUDGE DUNCAN takes up the contention that § 1915(c) specifically violates bicameralism and presentment wholly *sua sponte*; no party or amicus raised it in the district court, before the panel, or in en banc briefing.[61] This is likely because the nondelegation doctrine already provides that Congress may not delegate to other actors the core legislative power that would be subject to the bicameralism and presentment requirements, *see Loving v. United States*, 517 U.S. 748, 758 (1996), and thus the nondelegation inquiry, already accounts for bicameralism and presentment. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 240 (2000) ("The nondelegation doctrine protects [important] interests by forcing specific policies through the process of bicameralism and presentment[.]"); *see also Jackson v.*

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[61] The district court also did not raise or pass on this issue. We ordinarily do not consider issues in this posture. *See Burell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 140 (5th Cir. 2016) ("To preserve an argument, it must be raised to such a degree that the district court has an opportunity to rule on it." (cleaned up)); *Firefighters' Ret. Sys. v. EisnerAmper, L.L.P.*, 898 F.3d 553, 561 (5th Cir. 2018) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." (internal quotation marks omitted)). Moreover, "[i]n our adversarial system of adjudication, we follow the principle of party presentation . . . '[I]n the first instance and on appeal . . ., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (third set of alterations in original) (quoting *Greenlaw v. United States*, 554 U.S. 237 (2008)).

Stinnett, 102 F.3d 132, 135 n.3 (5th Cir. 1996) (rejecting a reading of a statute that would "approach[] a violation of the Presentment Clause *and* the nondelegation doctrine" (emphasis added)). In a nondelegation challenge, the nondelegation question both subsumes and precedes the presentment and bicameralism questions, rending those latter inquiries superfluous.

Bicameralism and presentment are only *separately* implicated—to the exclusion of nondelegation—when Congress devises a scheme by which it (or its legislative agent) purports to enact law through a process other than that prescribed by Article I, Section 7 of the Constitution. "Absent retained congressional veto power or other such retained authority . . . which is 'legislative in its character and effect,' the presentment clauses are not [separately] implicated and the only question is one involving the delegation doctrine." *United States v. Scampini*, 911 F.2d 350, 352 (9th Cir. 1990) (quoting *INS v. Chadha*, 462 U.S. 919, 952 (1983)) (internal citation omitted); *see also Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 276 (1991) ("*Congress* cannot exercise its legislative power to enact laws without following the bicameral and presentment procedures specified in Article I." (emphasis added)). An arrangement in which specifically Congress or its agents attempt to enact legislation through an unconstitutional process is the only situation that can give rise to a procedural violation of bicameralism or presentment without also implicating nondelegation; it is still Congress that is purporting to enact law but doing so without complying with constitutionally mandated procedures. In light of this framing, it makes sense that the Supreme Court has consistently performed only a nondelegation analysis when examining challenges to the vesting of power in parties other than Congress or its agents. *See, e.g.*, *Mazurie*, 419 U.S. at 556-58; *Loving*, 517 U.S. at 758; *Am. Trucking Ass'ns*, 531 U.S. at 472-76; *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989). Neither Congress nor its agents are involved in the tribal resolution contemplated by § 1915(c). The cases JUDGE DUNCAN relies upon addressing the procedures Congress must use when enacting legislation are

therefore of little relevance to the present case. *E.g.*, *Chadha*, 462 U.S. at 959, *Clinton v. City of New York*, 524 U.S. 417, 447–48 (1998); *Metro. Washington Airports Auth.* 501 U.S. at 276.

Evaluated under the proper rubric, § 1915(c) does not represent an invalid delegation. As to JUDGE DUNCAN's first contention, he appears to argue that § 1915(c) implicates the core legislative power because Congress, in setting a default rule that tribes may alter under congressionally-defined circumstances, has effectively permitted the tribes to "change specifically enacted Congressional priorities." DUNCAN, CIRCUIT JUDGE, OP. at 109. We note the counterintuitive nature of the opposing opinion's proposed holding that Congress delegates too much discretion when it provides some guidance and exercises some control over an issue by setting a default standard rather than leaving the implementation of a statute entirely to the delegee's discretion. Moreover, countless other federal statutes set a default standard that applies unless another party chooses to act, and these laws often grant the delegee far more power to negate the normal functioning of federal law than does § 1915(c). *See, e.g.,* 16 U.S.C. § 1536 (permitting an Endangered Species Committee made up of high-ranking executive branch officials to suspend the otherwise applicable requirements of the Endangered Species Act for particular projects); 7 U.S.C. § 136p (allowing the Environmental Protection Agency (EPA) to exempt state and federal agencies from the Federal Insecticide, Fungicide and Rodenticide Act); 43 U.S.C. § 1652 (permitting the Secretary of the Interior and other federal officials to "waive any procedural requirements of law or regulation which they deem desirable to waive in order to" construct the Trans-Alaska Pipeline); 42 U.S.C. § 1315 (permitting states, with approval from the Department of Health and Human Services, to customize their Medicaid programs in ways that would otherwise violate the Social Security Act). Indeed, many federal statutes specifically delegate to another, *separate sovereign* the authority to alter the federal standard in matters related to the sovereign's jurisdiction. *See, e.g.*, 20 U.S.C. § 1415(b)(6)(B) (providing that

the statute of limitation for bringing an administrative claim under the Individuals with Disabilities Education Act is two-years "or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows"); 11 U.S.C. § 522 (permitting state law to alter the default property exemptible from a bankruptcy estate); 12 U.S.C. § 2279aa-12(b)(2) (permitting states to enact law overriding exemption from state registration and qualification laws for securities guaranteed by the Federal Agricultural Mortgage Corporation); 42 U.S.C. § 14503(a), (e) (exempting nonprofit and governmental entities from liability for the acts of volunteers but allowing state law to override exemption in several specific ways).[62] Courts have repeatedly affirmed Congress's authority to allow another party to override the federal default for specific applications of a law without violating nondelegation principles. *See, e.g.*, *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 578 (D.C. Cir. 2019), *cert. denied sub nom. Valero Energy Corp. v. EPA*, 140 S. Ct. 2792 (2020) (mem.) (upholding against nondelegation challenge law permitting the EPA to alter otherwise statutorily mandated renewable fuel quotas); *Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124 (D.D.C. 2007) (noting that permitting executive officials to waive environmental laws for limited purposes does not violate nondelegation where it did not "alter the text of

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[62] JUDGE DUNCAN attempts to distinguish between laws that permit another party to waive statutory requirements and those that permit a party to "re-write enacted statutes." DUNCAN, CIRCUIT JUDGE, OP. at 111. n.149. But the opposing opinion offers no reasoned analysis as to why a waiver, which effectively deletes text from a statute for specific applications of the law or adds text establishing specific exceptions to a statutory regime, is less of a "rewrit[ing of] enacted statutes" than the reordering of the placement preferences for limited applications of ICWA that the statute authorizes Indian tribes to bring about. This failing is particularly apparent in JUDGE DUNCAN's handling of the cited federal laws that permit another sovereign to override a statutory default, just as ICWA does here. DUNCAN, CIRCUIT JUDGE, OP. at 113 n.150. Simply repeating the phrase "alter the text" is no substitute for meaningfully distinguishing these laws, and the opposing opinion does nothing to explain how § 1915(c) authorizes "alter[ing] the text" of a statute any more than the myriad other federal laws cited here that permit a party other than Congress to change a statute's functioning for certain limited applications.

any statute, repeal any law, or cancel any statutory provision" because the statute itself "retains the same legal force and effect as it had when it was passed by both houses of Congress and [was] presented to the President"); *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1140 (S.D. Cal. 2018), *aff'd*, 915 F.3d 1213 (9th Cir. 2019), *cert. denied sub nom. Animal Legal Def. Fund v. Dep't of Homeland Sec.*, 139 S. Ct. 594 (2018) (same).

JUDGE DUNCAN's second contention—that Congress may not delegate authority of any sort to a party outside the federal government—is also easily disposed of. Whether framed as a prospective incorporation of another sovereign's law or a delegation of regulatory authority, the Supreme Court has long approved of federal statutes that permit another sovereign to supply key aspects of the law, including an explicit delegation of authority to the Indian tribes. *See Mazurie*, 419 U.S. at 556-57; *Gibbons*, 22 U.S. (9 Wheat.) at 80, *Wilkerson v. Rahrer*, 140 U.S. 545, 562 (1891) ("[W]hile the legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend."). *But see Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 164 (1920) (holding that Congress may not delegate to the states its exclusive authority over admiralty and maritime law because the Constitution specifically entrusts that power to Congress to maintain nationwide uniformity). Indeed, the Supreme Court itself routinely looks to the law of other sovereigns to fill in important aspects of federal statutes. In the context of a § 1983 claim, for instance, analogous state personal injury torts supply, *inter alia*, the statute of limitations in which the federal claim may be brought. *See Wallace v. Kato*, 549 U.S. 384, 387 (2007) ("Section 1983 provides a federal cause of action, but in several respects relevant here federal law looks to the law of the State in which the cause of action arose."). The inescapable message of these long-standing statutes and Supreme Court precedents is clear: Congress does not invalidly delegate regulatory power simply because it prospectively incorporates into federal law the decision-making of another sovereign on a matter within that

sovereign's jurisdiction.[63] *Cf. Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406, 1417 (6th Cir. 1994) ("[T]he separation of powers principle and, *a fortiori*, the nondelegation doctrine, simply are not implicated by Congress' 'delegation' of power to the States.").

It is thus unsurprising that JUDGE DUNCAN offers no binding precedent to support a rule that regulatory power cannot be delegated outside the federal government, relying entirely on concurrences and secondary sources for his novel approach. *See* DUNCAN, CIRCUIT JUDGE, OP. at 112. And, because he offers no explanation or limiting principle to differentiate the present case from those cited above, one is struck by the sheer breadth of the opposing proposed opinion's holding, which would likely render myriad federal laws invalid and conflict with binding Supreme Court precedents. *See, e.g.*, *Mazurie*, 419 U.S. at 556-57.

In sum, § 1915(c) validly integrates tribal sovereigns' decision-making into federal law, regardless of whether it is characterized as a prospective incorporation of tribal law or an express delegation by Congress under its Indian affairs authority. Accordingly, § 1915(c) does not violate the nondelegation doctrine.[64]

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[63] Even if the Indian tribes were not sovereigns in their own right, it does not necessarily follow that incorporating their decision-making into federal law would violate the nondelegation doctrine, as the Supreme Court has historically upheld even delegations of authority to private entities against such challenges. *See Currin v. Wallace*, 306 U.S. 1, 1 (1939); *United States. v. Rock Royal Co-op.,* 307 U.S. 533, 577–78 (1939).

[64] Because we would not hold that any provision of ICWA is unconstitutional, a severability analysis is unnecessary. However, even if we were to conclude that certain portions of ICWA violate the Constitution, we would hold that ICWA's severability clause, 25 U.S.C. § 1963, is fully enforceable, meaning that only those specific provisions of the law that are unconstitutional are invalid and the remainder of the statute remains in full effect. *See Seila Law LLC v. Consumer Fin. Protect. Bureau*, 140 S. Ct. 2183, 2209 (2020) ("When Congress has expressly provided a severability clause, our task is simplified. We will presume that Congress did not intend the validity of the statute in question to depend

D. The Final Rule

The district court held that, to the extent §§ 23.106 to 23.122, 23.124 to 23.132, and 23.140 to 23.141 of the Final Rule were binding on State Plaintiffs, they violated the APA for three reasons: the provisions (1) purported to implement an unconstitutional statute; (2) exceeded the scope of the Interior Department's statutory authority to implement ICWA; and (3) reflected an impermissible construction of § 1915. Reviewing the district court's legal conclusions *de novo*, we conclude that the Final Rule does not contravene the APA. *Fath v. Texas Dep't of Transp.*, 924 F.3d 132, 136 (5th Cir. 2018).

1. The Constitutionality of ICWA

Because we conclude, for reasons discussed earlier in this opinion, that the challenged provisions of ICWA are constitutional, we also determine that the district court erred by concluding that the Final Rule was invalid because it implemented an unconstitutional statute. Thus, the statutory basis for the Final Rule is constitutionally valid.

2. The Scope of the BIA's Authority

Congress authorized the Secretary of the Interior to promulgate "rules and regulations as may be necessary to carry out the provisions" of ICWA. 25 U.S.C. § 1952. Pursuant to this provision, the BIA, acting under authority delegated by the Interior Department, issued guidelines in 1979 for state courts in Indian child custody proceedings that were "not intended to have binding legislative effect." 44 Fed. Reg. at 67,584. The BIA explained that, generally, "when the Department writes rules needed to carry out responsibilities Congress has explicitly imposed on the Department, those rules are binding." *Id.* However, when "the Department writes rules or

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on the validity of the constitutionally offensive provision unless there is strong evidence that Congress intended otherwise." (internal quotation and ellipses omitted)).

guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding." *Id.* With respect to ICWA, the 1979 BIA did not interpret the language and legislative history of 25 U.S.C. § 1952 to indicate that Congress intended the BIA to supervise state judiciaries, and it noted that enacting federal regulations that were primarily applicable in state court proceedings would raise federalism concerns. *Id.* The agency concluded that such binding regulations were "not necessary" in any event because the BIA then believed that state courts were "fully capable" of honoring the rights created by ICWA. *Id.*

In 2016, however, the BIA changed course and issued the Final Rule, which, in an effort to bring about greater uniformity in Indian child custody cases, sets binding standards governing the rights of Indian children, families, and tribes in such proceedings. *See* 25 C.F.R. §§ 23 *et seq.*; 81 Fed. Reg. at 38,779, 38,785. The BIA explained that its earlier, nonbinding guidelines were "insufficient to fully implement Congress's goal of nationwide protections for Indian children, parents, and Tribes." 81 Fed. Reg. at 38,782. Without the Final Rule, the BIA stated, state-by-state determinations about how to implement ICWA would continue to result in widely differing standards of protection "with potentially devastating consequences" for the Indian populations that ICWA was intended to benefit. *See id.*

Echoing the district court's reasoning, Plaintiffs argue that the BIA did not provide a sufficient explanation for its change in position regarding its authority to issue binding regulations. It is not clear, however, whether they also contend that, regardless of the adequacy of the explanation for the new position, the BIA simply lacks authority under § 1952 to promulgate binding regulations. In any event, we assume Plaintiffs properly present both challenges. As to the latter argument that the BIA lacks authority under ICWA to issue binding regulations, we employ the familiar framework set forth in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,

842-43 (1984). Under *Chevron*, we review "an agency's construction of the statute which it administers," by asking "two questions." *Id.* at 842. First, we must examine whether the statute is ambiguous. *Id.* "If 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." *Id.* at 842-43. But "if 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. We must uphold an agency's reasonable interpretation of an ambiguous statute. *Id.* at 844.

Under *Chevron* step one, the question is whether Congress unambiguously intended to grant the Department authority to promulgate rules and regulations that implement private rights that state courts must honor. In stating that "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter," the text of § 1952 confers broad authority on the Department to promulgate rules and regulations it deems necessary to carry out ICWA. This language clearly grants the BIA the authority to promulgate standards that are binding upon all parties; this is inherent in the statute's use of the term "rules," for a rule is not a rule if it can be disregarded at will. Still, the Final Rule does place a duty on state courts to respect the rights it implements, which we will grant is somewhat unusual in the world of administrative law. *See* 81 Fed. Reg. 38,778. Because it may be arguable that "Congress has not directly addressed the precise question at issue"—that is, whether the BIA is authorized to promulgate rules and regulations that effectively bind state courts—we will assume *arguendo* that § 1952 is ambiguous on the subject. *See Chevron*, 467 U.S. at 843.

The BIA's interpretation of § 1952 is valid under the second *Chevron* step because it is a reasonable construction of the statute. *See* 467 U.S. at 843-44. As Defendants point out, § 1952's language is substantively identical

to other statutes conferring broad delegations of rulemaking authority. Indeed, the Supreme Court has held that "[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act' . . . the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (quoting 42 U.S.C. § 1408) (cleaned up); *see also City of Arlington v. F.C.C.*, 569 U.S. 290, 306 (2013) (noting a lack of "case[s] 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"); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999) (determining that the Federal Communications Commission had authority to issue regulations based on statutory language permitting the agency to "prescribe such rules and regulations as may be necessary in the public interest to carry out" the statute). Here, § 1952's text is nearly identical to the statutory language at issue in *Mourning*, and the Final Rule's binding standards for Indian child custody proceedings are obviously related to ICWA's purpose of establishing minimum federal standards in child custody proceedings involving Indian children. *See* 25 U.S.C. § 1902. Thus, the BIA was reasonable in interpreting § 1952 to confer on it the authority to promulgate the Final Rule.

Neither Plaintiffs nor JUDGE DUNCAN argues that setting binding standards for child custody proceedings is unrelated to ICWA's purpose, for clearly it is not. Instead, Plaintiffs and JUDGE DUNCAN primarily contend that the BIA reversed its position without providing an adequate explanation.[65]

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[65] Like with Plaintiffs, it is not clear whether JUDGE DUNCAN separately argues that, regardless of the adequacy of the explanation given for the change, it is unreasonable

We must note the conceptual difference between the *Chevron* inquiry, which asks whether an agency's substantive interpretation of a statute is a reasonable one, and the procedural question of whether an agency provided an adequate explanation for its decision to switch from one statutory interpretation to another. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 n.4 (2005) (noting that any inconsistency in an agency's explanation for changing course "bears on whether the [agency] has given a reasoned explanation for its current position, not on whether its interpretation is consistent with the statute"). To be sure, there are situations where the procedures by which an agency adopts a new statutory interpretation—including whether the agency provided a reasoned explanation for changing its position—may be relevant to whether a court should defer to an agency's interpretation of a statute. More specifically, when it is necessary for a court to interpret a statute committed to an agency's implementation, *Chevron* deference may be withheld if the agency failed to adequately explain why it shifted to its current interpretation. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). But the *Chevron* framework is inapposite where a plaintiff directly challenges an agency rulemaking as violating *the APA*—as opposed to the statute that is being interpreted—because the agency arbitrarily departed from a prior statutory interpretation. When a plaintiff merely argues that an agency

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in the first instance for the BIA to interpret § 1952 to authorize the Final Rule because Congress could not have intended to allow the agency to set standards applicable in state courts. But any such argument would simply be inconsistent with the Supreme Court's holdings in *Mourning* and related cases regarding the breadth of authority delegated by broadly worded rules-enabling statutes. Under these precedents, so long as a rule is reasonably related to the statute's purpose, it is not unreasonable to interpret the BIA's delegated authority to encompass it. *See Mourning*, 411 U.S. at 369. Moreover, Congress clearly considered it to be within *its* power to set standards applicable in child custody proceedings, as there is no dispute that many provisions of ICWA do precisely that. There is thus no reason to presume that Congress would implicitly exclude such authority from its broad authorization to the BIA to promulgate rules it deems necessary to ICWA's implementation.

violated the APA by not providing sufficient reasons for its change of position, it is unnecessary for a court to actually decide whether the new statutory interpretation is correct to resolve the question; indeed, an agency can violate the APA by switching to a statutory interpretation that is wholly *reasonable* under *Chevron* if it does so without providing an adequate explanation for the change. *See Brand X*, 545 U.S. at 1001 (stating that an agency "is free within the limits of reasoned interpretation to change course *if it adequately justifies the change*" (emphasis added)); 5 U.S.C. § 706(2)(A), (C) (calling for courts to *separately* evaluate whether an agency action is arbitrary and capricious and whether an agency action is in excess of statutory authority). And because there is no need to interpret the statute when the challenge is only to the adequacy of an agency's explanation for its changed position, there is no need to determine whether to defer to the agency's new interpretation under *Chevron*. JUDGE DUNCAN therefore errs by characterizing the question of whether the BIA provided an adequate explanation for its changed position as a component of *Chevron* step two.

Moreover, we disagree that the BIA failed to provide an adequate explanation for its change of course. "The mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion. But if these pitfalls are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) (internal citations and quotation marks omitted). The agency must provide a "reasoned explanation" for its new policy, but "it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "[I]t 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, which the conscious change of course adequately indicates." *Id.*

In the preamble to the Final Rule, the BIA directly addressed its reasons for departing from its earlier interpretation that it had no authority to promulgate binding regulations applicable in child custody proceedings. The agency explained that, contrary to its previous position that nothing in the text of the statute indicated a congressional intent to authorize such binding regulations, Supreme Court precedent established that the text of § 1952 conferred "a broad and general grant of rulemaking authority" and "presumptively authorize[s the] agenc[y] to issue rules and regulations addressing matters covered by the statute." 81 Fed. Reg. at 38,785 (collecting Supreme Court cases). The BIA also justified its determination that ICWA granted it the authority to promulgate binding regulations based on having "carefully considered public comments on the issue" and, in light of this commentary, having reconsidered and rejected its statements in 1979 that it lacked such authority. *See id.* at 38,785-86. And the BIA directly responded to the federalism concerns raised in 1979 and by present-day commentators. It explained that such concerns were misplaced because the Constitution conferred upon Congress plenary power over Indian affairs and that, when "a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *Id.* at 38,789 (internal quotation marks omitted) (quoting *New York*, 505 U.S. at 156). Because Congress's plenary power authorized it to enact ICWA and because Congress had validly delegated authority to the BIA in § 1952 to implement ICWA, the agency determined that the Final Rule did not unconstitutionally encroach on state authority. *See id.*

Further, the BIA discussed why it now considered binding regulations necessary to implement ICWA: In 1979, the BIA "had neither the benefit of the *Holyfield* Court's carefully reasoned decision nor the opportunity to observe how a lack of uniformity in the interpretation of ICWA by State

courts could undermine the statute's underlying purposes." 81 Fed. Reg. at 38,787. In *Miss. Band of Choctaw Indians v. Holyfield*, the Supreme Court considered the meaning of the term "domicile" in 25 U.S.C. § 1911, which ICWA left undefined and the BIA left open to state interpretation under its 1979 Guidelines. 490 U.S. at 43, 51. "Section 1911 lays out a dual jurisdictional scheme" in which tribal courts have exclusive jurisdiction over custody proceedings concerning an Indian child "who resides or is domiciled within the reservation of" her tribe, whereas state courts have concurrent jurisdiction with tribal courts "in the case of children not domiciled on the reservation." *Id.* at 36. The Court held that "it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law," given that "Congress was concerned with the rights of Indian families vis-à-vis state authorities" and considered "States and their courts as partly responsible for the problem it intended to correct" through ICWA. *Id.* at 45. Because Congress intended for ICWA to address a nationwide problem, the Court determined that the lack of nationwide uniformity resulting from varied state-law definitions of this term frustrated Congress's intent. *Id.*

The Court's reasoning in *Holyfield* applies with equal force here. Congress's concern with safeguarding the rights of Indian families and communities was not limited to § 1911 but rather extended to all provisions of ICWA. Thus, as the BIA explained, the provisions of ICWA that the statute left open to state interpretation in 1979, including many that Plaintiffs now challenge, were subject to the same lack of uniformity the Supreme Court identified as contrary to Congress's intent in *Holyfield*. 81 Fed. Reg. at 38,779, 38,782 (explaining that the result of "conflicting State-level" interpretations of ICWA "is that many of the problems Congress intended to address by enacting ICWA persist today"). In view of *Holyfield* and "37 years of real-world ICWA application," *id.* at 38,786, the BIA concluded that issuing binding rules for child custody proceedings was "necessary to carry

out the provisions" of ICWA, an authority that was included in Congress's broad grant of rulemaking authority under § 1952. The BIA thus supplied a "reasoned explanation" for reversing its earlier position on its need and authority to issue binding regulations, *Fox Television Stations*, 556 U.S. at 515.

JUDGE DUNCAN's belief that ICWA is inconsistent with principles of federalism suffuses his critique of the BIA's explanation for its change of interpretation. Because the BIA's prior interpretation was constitutionally permissible and its new interpretation is not, he appears to argue, Congress could not have intended the new interpretation, and whatever explanation the BIA provided for the change was therefore inadequate. *See* DUNCAN, CIRCUIT JUDGE, OP. at 120-22. For the reasons discussed above with respect to ICWA's statutory provisions, we disagree that the BIA's new interpretation of its § 1952 authority violates the Constitution. But more importantly, in judging the adequacy of the BIA's explanation, it does not necessarily matter whether the BIA's new interpretation is actually constitutional, nor even whether Congress in fact intended § 1952 to confer authority to promulgate rules that would be binding in state court proceedings. These questions are relevant only to whether the BIA's new interpretation of § 1952 is a substantively reasonable interpretation and a constitutional application of the statute, which, again, are separate questions from the procedural matter of whether the agency gave a sufficient explanation for its decision to change course.

When specifically examining whether an agency met the procedural requirement that it provide an adequate explanation, all that is necessary is a "minimal level of analysis" from which the agency's reasoning may be discerned, *Encino Motorcars*, 136 S. Ct. at 2125—regardless of whether the court finds the reasoning fully persuasive. In other words, the agency decision must simply be non-arbitrary. When an agency "display[s] awareness that it is changing position" and provides coherent reasons for doing so, the test is satisfied. *Id.* at 2126. Here, it is enough that the BIA

"*believe*[*d*]" its prior interpretation of § 1952 to be an incorrect reflection of Congressional intent and set forth its reasons for thinking so. *Fox Television Stations*, 556 U.S. at 515. The same is true for the BIA's reasoned determination that its issuance of binding regulations does not pose federalism problems. It does not matter to this inquiry whether a court thinks the agency's interpretation or legal analysis is incorrect, nor that a court disagrees with the agency's decision as a policy matter. *See id.*; *cf.* DUNCAN, CIRCUIT JUDGE, OP. at 123 (arguing that conflicting state court decisions were not numerous and long-standing enough to justify issuing regulations to enforce uniformity).

Contrary to Plaintiffs' contentions, the BIA explained why it changed its interpretation of § 1952 and why it believed the Final Rule was needed based on its years of study and public outreach. *See* 81 Fed. Reg. 38,778-79, 38,784-85. In promulgating the rule, the BIA relied on Supreme Court precedent, its own expertise in Indian affairs, its specific experience in administering ICWA and other Indian child-welfare programs, state interpretations and best practices,[66] public hearings, and tribal consultations. *See id.* Thus, the BIA's change of course was not "arbitrary, capricious, [or] an abuse of discretion" because it was not sudden and unexplained. *See Smiley*, 517 U.S. at 742; 5 U.S.C. § 706(a)(2). The district court's contrary conclusion was error.

3. The BIA's Construction of § 1915

Title 25 U.S.C. § 1915 sets forth preferences for the placement of Indian children unless good cause can be shown to depart from them. 25 U.S.C. § 1915(a)-(b). The 1979 Guidelines advised that the term "good cause" in § 1915 "was designed to provide state courts with flexibility in

[66] Since ICWA's enactment in 1978, several states have incorporated the statute's requirements into their own laws or have enacted detailed procedures for their state agencies to collaborate with tribes in child custody proceedings.

determining the disposition of a placement proceeding involving an Indian child." 44 Fed. Reg. at 67,584. However, § 23.132(b) of the 2016 Final Rule, now specifies that "[t]he party seeking departure from [§ 1915's] placement preferences should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." 25 C.F.R. § 23.132(b). The district court determined that Congress unambiguously intended the ordinary preponderance-of-the-evidence standard to apply and that the BIA's imposition of a higher standard was therefore not entitled to *Chevron* deference.

Defendants contend that the Final Rule's clarification of the meaning of "good cause" and imposition of a clear-and-convincing-evidence standard are entitled to *Chevron* deference. Plaintiffs respond that the Final Rule's fixed definition of "good cause" is contrary to ICWA's intent to provide state courts with flexibility.

We conclude that the BIA's interpretation of § 1915 is entitled to *Chevron* deference. For purposes of *Chevron* step one, the statute is silent with respect to which evidentiary standard applies. *See* 25 U.S.C. § 1915; *Chevron*, 467 U.S. at 842. The district court relied on the canon of *expressio unius est exclusio alterius* ("the expression of one is the exclusion of others") in deciding that Congress unambiguously intended that a preponderance-of-the-evidence standard was necessary to show good cause under § 1915. The court reasoned that, because Congress specified a heightened evidentiary standard in other provisions of ICWA but did not do so with respect to § 1915, Congress did not intend for the heightened clear-and-convincing-evidence standard to apply. This was error.

"When interpreting statutes that govern agency action, . . . 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." *Catawba Cty. v. E.P.A.*, 571 F.3d 20, 36 (D.C. Cir. 2009) (internal quotation marks

omitted) (quoting *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990)); *accord In Defense of Animals v. United States Dep't of the Interior*, 751 F.3d 1054, 1066 n.20 (9th Cir. 2014) (same); *see also Texas Office Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 443 (5th Cir. 1999) (noting that the *expressio unius* canon is of "limited usefulness . . . in the administrative context"). "[T]hat Congress spoke in one place but remained silent in another, as it did here, rarely if ever suffices for the direct answer that *Chevron* step one requires." *Catawba Cty. v. E.P.A.*, 571 F.3d at 36 (internal quotation marks and citation omitted); *see also Adriondack Med. Ctr. v. Sebelius*, 740 F.3d 692 (D.C. Cir. 2014) ("The *expressio unius* canon is a 'feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.' " (quoting *Cheney R.R. Co.*, 902 F.2d at 68-69)); *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) ("Under *Chevron,* we normally withhold deference from an agency's interpretation of a statute only when Congress has directly spoken to the precise question at issue, and the *expressio* canon is simply too thin a reed to support the conclusion that Congress has clearly resolved this issue." (internal quotation marks and citations omitted)).

JUDGE DUNCAN argues that there is no indication that Congress intended to require a heightened standard of proof for § 1915. DUNCAN, CIRCUIT JUDGE, OP. at 125-26. But this misses the point. The question is not whether Congress intended to require a heightened standard, but rather whether it intended to *prohibit* one. The statute is silent as to the matter, and when "the statute is silent . . . with respect to the specific issue," we assume that Congress delegated the matter to agency discretion and proceed to *Chevron* step two.[67] *Chevron*, 467 U.S. at 842.

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[67] This is why Plaintiffs' and Judged Duncan's references to *Grogan v. Garner*, 498 U.S. 279, 286 (1991), are inapposite. *Grogan* addressed the standard of proof that applied to exceptions from dischargability of debt in the Bankruptcy Code, *see id.,* a set of laws that

Under *Chevron* step two, the BIA's determination as to the applicable evidentiary standard is reasonable. *See Chevron*, 467 U.S. at 844. As stated, the broad grant of rule-making authority in § 1952 permits the BIA to enact rules that are not foreclosed by statute "so long as [they are] reasonably related to the purposes of the enabling legislation." *Mourning*, 411 U.S. at 36. The BIA's suggestion that the clear-and-convincing standard should apply was derived from the best practices of state courts. 81 Fed. Reg. at 38,843. The preamble to the Final Rule explains that, since ICWA's passage, "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.* (citing, *inter alia*, *In re MKT*, 368 P.3d 771, 786 (Okla. 2016); *Gila River Indian Cmty. v. Dep't. of Child Safety*, 363 P.3d 148, 152-53 (Ariz. Ct. App. 2015); *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1340 (Cal. Ct. App. 2014)). Because the BIA's interpretation of § 1915 as not prohibiting a heightened standard of proof is not inconsistent with the statutory provision, and because § 23.132(b) was based on the persuasive reasoning in state court decisions and is designed to further congressional intent, we conclude it is reasonable and entitled to *Chevron* deference.

In considering *Chevron* step two, JUDGE DUNCAN again blends the question of whether the BIA fulfilled the APA's procedural requirement that it provide an adequate explanation for changing the way it interprets a statute it administers—a claim the Plaintiffs have not raised with respect to § 23.132(b)—with the substantive question of whether it is reasonable to

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courts are tasked with interpreting in the first instance. Congress had not delegated to an agency the authority to issue rules interpreting the Bankruptcy Code, and the *Grogan* court was therefore tasked with determining the best interpretation of the statutory provision, not simply whether a particular agency interpretation was reasonable. Thus, the *Grogan* Court's ruling that, under those circumstances, statutory silence suggested that the preponderance-of-the-evidence standard applied does not indicate that statutory silence prohibits an agency from applying a heightened evidentiary standard to the issue.

interpret the BIA's rulemaking authority to authorize the provision. DUNCAN, CIRCUIT JUDGE, OP. at 128. Though we disagree that the BIA failed to provide a reasoned explanation for its changed position, this is neither here nor there. Our precedents at most establish that, in a direct challenge to an agency rulemaking as beyond statutory authority, the agency's departure from longstanding practice justifies a more searching review at *Chevron* step two to determine whether the new position is reasonable. *See Chamber of Com. of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360, 380 (5th Cir. 2018) (stating that we greet sudden claims that a long-standing statute grants sweeping new powers with "a measure of skepticism" (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))). This is a different question from whether the agency provided an adequate explanation for shifting away from a longstanding interpretation.[68] And even if the BIA's explanation for changing course were insufficient, our caselaw does not indicate that such a deficiency inherently renders the agency's new interpretation an unreasonable construction of the statute. Plaintiffs have alleged only that § 23.132(b) is prohibited by § 1915. Thus, the sole issue is whether the regulation is permissible under ICWA. *See Chevron*, 467 U.S. at 842-43. The adequacy of the explanation for the BIA's new position is separate from, and immaterial to, this question.

JUDGE DUNCAN offers no argument as to why it is unreasonable to interpret § 1915 to permit the BIA to require the clear-and-convincing evidence standard beyond his reference to the *expressio unius* canon, which we have already found insufficient to foreclose the BIA's application of that standard. And because the BIA was reasonable in interpreting § 1915 not to

[68] To be sure, how long an agency adhered to a prior statutory interpretation may be a relevant consideration when a plaintiff does allege a procedural APA violation because an agency's explanation for a change of course must account for reliance interests engendered by its prior policy. *See Fox Television Stations, Inc.*, 556 U.S. at 515 (citing *Smiley*, 517 U.S. at 742). But Plaintiffs have not raised such a challenge to § 23.132(b).

prohibit a heightened standard of proof, we conclude that § 23.132(b) did not exceed the BIA's statutory authority. *See* 5 U.S.C. § 706(a)(2).

* * *

For these reasons, we conclude as follows: First, Plaintiffs have standing to press their claims except as to §§ 1913(d) and 1914. Next, the en banc court holds that Congress was authorized to enact ICWA. We conclude that this authority derives from Congress's enduring obligations to Indian tribes and its plenary authority to discharge this duty. And, although the en banc majority decides otherwise as to some provisions and the en banc court is equally divided as to others, we would hold that none of ICWA's provisions violate the Tenth Amendment's anticommandeering doctrine. Thus, we would hold that ICWA validly preempts any conflicting state law, and we dissent from the en banc majority's decision to the extent it differs from this conclusion.

In addition, for the en banc court, we hold that ICWA's "Indian Child" designation and the portions of the Final Rule that implement it do not offend equal protection principles because they are based on a political classification and are rationally related to the fulfillment of Congress's unique obligation toward Indians, and we REVERSE the district court's determination to the contrary. And, though the en banc court is equally divided on the matter, we would likewise determine that ICWA's adoptive placement preference for "other Indian families," and its foster care placement preference for a licensed "Indian foster home," and the regulations implementing these preferences are consistent with equal protection.

We also hold for the en banc court that § 1915(c) does not contravene the nondelegation doctrine because the provision is either a valid prospective incorporation by Congress of another sovereign's law or a delegation of regulatory authority. We therefore REVERSE this aspect of the district court's ruling.

Further, we hold for the en banc court that the BIA acted within its statutory authority in issuing binding regulations, and we hold for the en banc court that the agency did not violate the APA when it changed its position on the scope of its authority because the agency provided a reasonable explanation for its new stance. And we hold for the en banc court that the portions of the Final Rule that implement all parts of ICWA other than §§ 1912(d)-(f) and 1915(e) do not violate the APA. We thus REVERSE the district court's contrary conclusions.

Although a majority of the en banc court disagrees, we would also conclude that the portions of the Final Rule implementing §§ 1912(d)-(f) and 1915(e) are valid because these statutory provisions are constitutional, and we would hold that the provision of the Final Rule implementing § 1915's "good cause" standard is reasonable. We thus dissent from the en banc majority's decision that these portions of the Final Rule are invalid.

Because we conclude that that the challenged provisions of ICWA are constitutional in all respects and that the Final Rule validly implements the statute, we would reverse the district court in full and render judgment in favor of Defendants on all claims. We dissent from those portions of the en banc majority's decision that fail to do so.