STUART KYLE DUNCAN, *Circuit Judge*:[†]

We consider challenges to the Indian Child Welfare Act of 1978 ("ICWA"), 92 Stat. 3069, 25 U.S.C. §§ 1901–1963, and its implementing regulations, 81 Fed. Reg. 38,778 (June 14, 2016) ("The Final Rule").

ICWA is a federal law that regulates state foster-care and adoption proceedings involving Indian children. The law is challenged by three states, which claim it abridges their sovereignty, and by several couples seeking to adopt Indian children, who claim it unfairly blocks them from doing so. The case is one of first impression and raises many intricate issues. That should come as no surprise, given that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . . marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (Marshall, C.J.); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.01 (2019) [hereinafter "COHEN'S"] ("The field of Indian law and policy is

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[†] JUDGES SMITH, ELROD, WILLETT, ENGELHARDT, and OLDHAM join JUDGE DUNCAN's opinion in full. JUDGE JONES joins all except Parts III(A)(2) (equal protection as to "Indian child") and that portion of Part III(B)(2)(a) concerning preemption by the appointed counsel provision in 25 U.S.C. § 1912(d).

CHIEF JUDGE OWEN joins Part III(B) (anti-commandeering/preemption) and Part III(D)(3) ("good cause" standard in 25 C.F.R. § 23.132(b) violates APA). *See infra* OWEN, C.J., concurring in part and dissenting in part.

JUDGE SOUTHWICK joins Parts III(B)(1)(a)(i)–(ii) (anti-commandeering as to § 1912(d)–(f)); Part III(B)(2)(a) (preemption); Part III(B)(2)(b) (in part) (no preemption, only as to § 1912(d)–(f)); Part III(B)(2)(c) (in part) (preemption, except as to the discussion of § 1951(a)); and Part III(D)(1) (in part) (Final Rule violates APA to extent it implements § 1912(d)–(f)).

JUDGE HAYNES joins Part I (standing); Part III(A)(3) (equal protection as to "other Indian families"); Parts III(B)(1)(a)(i), III(B)(1)(a)(iv), III(B)(1)(a)(ii) (in part), III(B)(1)(b) (in part), and III(B)(2)(b) (in part) (anti-commandeering/preemption as to §§ 1912(d)–(e) and 1915(e)); Part III(D)(1) (in part) (Final Rule violates APA to extent it implements provisions found unconstitutional in those portions of Parts III(A) and (B) that JUDGE HAYNES joins); and Part III(D)(3) ("good cause" standard in 25 C.F.R. § 23.132(b) fails at *Chevron* step one). *See infra* HAYNES, J., concurring.

extraordinarily complex, rich, controversial, and diverse."). To guide the reader through our lengthy decision, we provide this summary.

First, we conclude ICWA exceeds Congress's power to the extent it governs state proceedings. Congress, to be sure, has "plenary" authority to legislate on Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)). But ICWA does something that, to our knowledge, no federal Indian law has ever tried: it governs states' own administrative and judicial proceedings. That is an unheard-of exercise of the Indian affairs power, and neither Supreme Court precedent nor founding-era practice justifies it. And ICWA is all the more jarring because of its subject matter: domestic relations. That subject "belongs to the laws of the states, and not to the laws of the United States," and is "one in regard to which neither the congress of the United States, nor any authority of the United States, has any special jurisdiction." *Ex parte Burrus*, 136 U.S. 586, 594 (1890). And yet ICWA co-opts the states to create, in essence, a federal adoption system for Indian children. The Constitution does not empower Congress to do that. To say otherwise would mock "our federal system, [in which] the National Government possesses only limited powers [and] the States and the people retain the remainder." *Bond v. United States*, 572 U.S. 844, 854 (2014).

Second, in the alternative, we conclude many parts of ICWA are unconstitutional or unlawful. ICWA's unequal standards for "Indian children" and "Indian families" violate the Fifth Amendment's equal protection guarantee by failing to rationally link children to tribes. Many provisions commandeer states by conscripting their agencies, officials, and courts into a federal regulatory program. Another provision delegates to Indian tribes the power to change enacted federal law setting child placement preferences. Declaratory relief is proper as to those provisions. Finally, a 2016 rule implementing ICWA violates the Administrative Procedure Act by

exceeding the agency's authority over state courts. To that extent, the rule must be declared unlawful.

Our decision does not affect all of ICWA. Some provisions do not govern state proceedings—such as those giving tribes exclusive jurisdiction over on-reservation children, those permitting states and tribes to adjust their jurisdictions, and those granting funds for tribal programs. These provisions are not challenged here and do not fall within our decision. With that qualification, we affirm the district court's judgment declaring parts of ICWA and the Final Rule unconstitutional and unlawful.

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Background

I. Indian Child Welfare Act

In 1978, Congress enacted ICWA out of concern that too many Indian children were being unjustifiably removed from their families and adopted by non-Indians. Specifically, Congress found that "an alarmingly high percentage of Indian families [were being] 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 [were being] placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). Congress also found that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, ha[d] often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." § 1901(5). ICWA therefore set "minimum Federal standards" for removing Indian children and placing them in foster and adoptive homes "which will reflect the unique values of Indian culture." § 1902. These standards sought "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." *Id.* As authority for the law, Congress invoked its "plenary power over Indian affairs," grounded in the Indian Commerce Clause and "other constitutional authority." § 1901(1); *see* U.S. Const. art. I, § 8, cl. 3 (vesting Congress with "Power . . . [t]o regulate Commerce . . . with the Indian Tribes").

ICWA applies to a "child custody proceeding" involving an "Indian child." § 1903(1), (4).[1] Such proceedings include foster care placements, terminations of parental rights, and preadoptive and adoptive placements. § 1903(1)(i)–(iv). If a proceeding involves an Indian child living on a tribe's reservation, the tribe has exclusive jurisdiction. § 1911(a). For off-reservation Indian children, state courts exercise concurrent jurisdiction with tribal courts, but must transfer a proceeding to tribal jurisdiction upon request of either parent or the child's tribe, absent good cause or a parent's objection. § 1911(b); *see also Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 162 (Tex. App.—Houston [14th Dist.], Aug. 24, 1995, pet. denied) (explaining "state courts may exercise jurisdiction concurrently with the tribal courts" in proceedings involving off-reservation children).

For proceedings remaining under state jurisdiction, ICWA imposes numerous requirements. For instance, a party seeking foster placement, or termination of parental rights, must notify the Indian child's parent and tribe of that party's "right to intervene." §§ 1911(c), 1912(a).[2] Indigent parents have the "right to court-appointed counsel." § 1912(b). Any party has "the right to examine all reports or other documents filed with the court[.]" § 1912(c). To prevail, the party seeking placement or termination must prove that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" and "have proved unsuccessful." § 1912(d). The party must also offer evidence, "including testimony of qualified expert witnesses," that the

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[1] An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." § 1903(4).

[2] The Secretary of the Interior must be notified if the parent or custodian cannot be found. § 1912(a).

parent's continued custody will likely cause the child "serious emotional or physical damage." § 1912(e)–(f). Proof must be by "clear and convincing evidence" for foster placement, § 1912(e), and "beyond a reasonable doubt" for termination, § 1912(f).

If parents voluntarily consent to a placement or to termination of rights, they can withdraw consent "at any time" before the process ends. § 1913(b)–(c). Following an adoption, the birth parents may withdraw consent based on fraud or duress for up to two years. § 1913(d). A child, parent, or tribe may also sue to invalidate the placement or termination for any violation of §§ 1911, 1912, or 1913. § 1914.

ICWA also dictates where Indian children may be placed. In adoptions governed by state law, an Indian child must be placed, absent "good cause," with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." § 1915(a). Similarly, in foster or pre-adoptive placements, an Indian child must be placed (again, absent good cause) with: (1) extended family; (2) a foster home "licensed, approved, or specified" by the tribe; (3) a licensed "Indian foster home"; or (4) an "institution for children" either tribe-approved or operated by a suitable Indian organization. § 1915(b)(i)–(iv). In any case, the child's tribe may "establish a different order of preference by resolution," which the "agency or court effecting the placement shall follow," provided "the placement is the least restrictive setting appropriate to the particular needs of the child." § 1915(c). The "State" must maintain a record of an Indian child's placement that "evidenc[es] the efforts to comply with the order of preference specified in [§ 1915]" and that "shall be made available at any time upon request of the Secretary or the Indian child's tribe." § 1915(e).

ICWA also requires state courts to maintain and transmit various records. For instance, upon request of an adopted Indian eighteen or older, a

court must provide "the tribal affiliation, if any, of the individual's biological parents and . . . such other information as may be necessary to protect any rights flowing from the individual's tribal relationship." § 1917. Additionally, a state court must provide the Secretary with a copy of a final adoption decree "together with such other information as may be necessary to show" various matters. § 1951(a).[3]

Finally, ICWA contains a severability clause providing that, "[i]f any provision . . . or the applicability thereof is held invalid, the remaining provisions . . . shall not be affected thereby." § 1963.[4]

II. Final Rule

In 1979, the Bureau of Indian Affairs ("BIA") promulgated guidelines (the "1979 Guidelines") to assist state courts in applying ICWA. *See* 44 Fed. Reg. 67,584 (Nov. 26, 1979); *see also* 25 U.S.C. § 1952 (authorizing Secretary of Interior to "promulgate such rules and regulations . . . necessary" to implement ICWA). The 1979 Guidelines were "not intended to have binding legislative effect." 44 Fed. Reg. at 67,584. BIA found nothing in ICWA or its legislative history to suggest that Congress intended the Department to exercise "supervisory authority" over courts deciding Indian child-custody matters. *Id.* Such authority would be "so at odds with concepts of both

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[3] Those matters are: (1) the child's name and tribal affiliation, (2) the names and addresses of biological parents, (3) the names and addresses of adoptive parents, and (4) "the identity of any agency having files or information relating to such adoptive placement." § 1951(a)(1)–(4); *see also* 25 C.F.R. §§ 23.140–141 (additional recordkeeping requirements applicable to both courts and agencies).

[4] ICWA contains other provisions unrelated to state child-custody proceedings, such as provisions permitting jurisdictional agreements between states and Indian tribes (§ 1919); provisions addressing the Secretary's approval of tribal re-assumption of jurisdiction (§ 1918); and provisions concerning grants and funding for tribal child and family programs (§§ 1931–1933). As explained *infra* III(E), our decision does not affect these provisions.

federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect." *Id.* Rather, "[p]rimary responsibility" for interpreting ICWA "rests with the courts that decide Indian child custody cases." *Id.* In particular, the Guidelines mentioned the "good cause" standard, which was "designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." *Id.*; *see* § 1915(a)–(b).

In 2016, BIA changed course and promulgated new regulations (the "Final Rule") that "set binding standards for Indian child-custody proceedings in State courts." 81 Fed. Reg. 38,778, 38,785 (June 14, 2016). BIA stated it "no longer agrees with statements it made in 1979 suggesting that it lacks the authority to issue binding regulations." *Id.* at 38,786. It now found binding standards "necessary," *see* § 1952, given "divergent interpretations of ICWA provisions by State courts and uneven implementation by State agencies." 81 Fed. Reg. at 38,787. In particular, the new regulations restrict what constitutes "good cause" to depart from ICWA's placement preferences. *See id.* at 38,843–47. The "good cause" standard, the new regulations assert, is not determined by the "best interests of the child" but is instead "a limited exception" to the preferences. *Id.* at 38,847. Accordingly, the new regulations limit "good cause" to five factors. *See* 25 C.F.R. § 23.132(c). Moreover, the party seeking departure "should" bear the burden of proving good cause "by clear and convincing evidence." *Id.* § 23.132(b). BIA acknowledged that the clear-and-convincing standard "is not articulated in section 1915," but asserted courts have "almost universally concluded" it is the right standard. 81 Fed. Reg. at 38,843. Finally, BIA explained the Final Rule only "advises" that the standard "'should' be followed," but "does not categorically require that outcome" and "declines to establish a uniform standard of proof on this issue." *Id.*

III. Parties

A. Plaintiffs

Plaintiffs are the states of Texas, Louisiana, and Indiana (collectively, the "State Plaintiffs"), and seven individual plaintiffs—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").[5]

1. *A.L.M., Y.R.J., and the Brackeens*

In 2015, A.L.M. was born in New Mexico to unmarried parents. His biological mother is a member of the Navajo Nation and his biological father is a member of the Cherokee Nation. Soon after birth, his mother brought A.L.M. to live in Texas with his paternal grandmother. The Child Protective Services Division ("CPS") of the Texas Department of Family and Protective Services ("DFPS") removed A.L.M. when he was 10 months old and placed him in foster care with the Brackeens. In 2017, his biological parents voluntarily terminated their rights to A.L.M. and, along with his guardian *ad litem*, supported the Brackeens' adoption petition. At the adoption hearing, representatives of the Navajo and Cherokee Nations agreed to designate Navajo as A.L.M.'s tribe because the Navajo had located an alternate placement with non-family tribal members in New Mexico. The Texas family court denied the Brackeens' petition, concluding they failed to prove by clear and convincing evidence good cause to depart from ICWA's placement preferences. The DFPS announced its intention to remove A.L.M. from their care and transfer him to the Navajo family. The Brackeens

[5] References to "Plaintiffs" include both State Plaintiffs and Individual Plaintiffs.

obtained an emergency stay and filed this lawsuit. The proposed Navajo placement then withdrew, and the Brackeens finalized A.L.M.'s adoption.

The Brackeens are now engaged in Texas state court proceedings to adopt A.L.M.'s half-sister, Y.R.J., who was born in June 2018 to A.L.M.'s biological mother. The Navajo Nation again opposes the Brackeens' petition to adopt Y.R.J. based on ICWA's placement preferences. The proceedings are ongoing. *See In re Y.J.*, No. 02-19-235-CV, 2019 WL 6904728, at *1 (Tex. App.—Fort Worth, Dec. 19, 2019, pet. filed) (remanding for further proceedings).

2. *Baby O., Hernandez, and the Librettis*

In 2016, Baby O. was born in Nevada to plaintiff Hernandez, a non-Indian. Her biological father, E.R.G., is descended from members of the Ysleta del sur Pueblo Tribe ("Pueblo") but was not an enrolled member when Baby O. was born. With E.R.G.'s support, Hernandez decided to have the Librettis adopt Baby O., who accompanied the Librettis home three days after her birth. The Pueblo Tribe intervened in the Nevada custody proceedings and identified numerous alternative Indian-family placements for Baby O. under ICWA. After the Librettis joined this lawsuit, however, the tribe withdrew its objections and the Librettis finalized Baby O.'s adoption in late 2018.

3. *Child P. and the Cliffords*

Born in 2011 in Minnesota, Child P. was placed in foster care in 2014 when her biological parents were arrested and charged with various drug-related offenses. For two years Child P. moved from placement to placement until Minnesota terminated her mother's rights and placed her with the Cliffords in 2016, who have since sought to adopt her. Child P.'s maternal grandmother, R.B., is a member of the White Earth Band of the Ojibwe Tribe (the "White Earth Band"). After Child P. initially entered foster care in

2014, the White Earth Band notified the court that she was ineligible for membership. After Child P. was placed with the Cliffords, however, the tribe changed its position, notified the court that Child P. was eligible for membership, and has since announced that Child P. is a member. As a result, Minnesota removed Child P. from the Cliffords and placed her with R.B. in 2018. The state trial court concluded that the Cliffords had not established "good cause" to deviate from ICWA's preferences by "clear and convincing evidence," a decision since affirmed on appeal. *See In re S.B.*, No. A19-225, 2019 WL 6698079, at *6 (Minn. Ct. App. Dec. 9, 2019). Child P.'s adoption, however, has not been finally approved; until it is, the Cliffords remain eligible to adopt her.

B. Defendants

Defendants are the United States of America and various federal agencies and officials, referred to collectively as the "Federal Defendants."[6] Shortly after this suit was filed, the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (collectively, the "Tribal Defendants") were allowed to intervene as defendants. On appeal, we granted the Navajo Nation's motion to intervene as a defendant.[7]

IV. District Court Proceedings

Plaintiffs sued in federal district court seeking injunctive relief and a declaration that ICWA and the Final Rule violate various provisions of the

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[6] Specifically, they are the United States Department of the Interior and its Secretary Deb Haaland, in her official capacity; the BIA and its Acting Assistant Secretary for Indian Affairs Darryl LaCounte, in his official capacity; and the United States Department of Health and Human Services and its Secretary Xavier Becerra, in his official capacity.

[7] References to "Defendants" include both Federal Defendants and Tribal Defendants.

Constitution and the APA. Defendants moved to dismiss for lack of standing. The district court denied the motion, finding that at least one Plaintiff had standing to bring each claim. Plaintiffs then moved for summary judgment on all their claims, which the district court granted in part and denied in part. *See Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018).

First, the district court ruled that ICWA discriminates on the basis of a racial classification that fails to satisfy strict scrutiny and therefore violates the Fifth Amendment's equal protection component. Second, the court ruled that ICWA's provision empowering Indian tribes to re-order placement preferences improperly delegates federal legislative power. Third, the court ruled that various provisions of ICWA "commandeer" state agencies, officials, and courts in violation of Article I and the Tenth Amendment and do not validly preempt conflicting state laws. Fourth, the court ruled that various provisions of the Final Rule violate the APA. Finally, the court ruled that ICWA as a whole exceeds Congress's power under the Indian Commerce Clause.[8] The court's final judgment therefore declared certain provisions of ICWA and the Final Rule unconstitutional.[9]

On appeal, a panel of our court reversed the district court on all grounds. *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019). JUDGE OWEN dissented in part. *Id.* at 441–46 (OWEN, J., dissenting in part). We granted *en banc* rehearing. *Brackeen v. Bernhardt*, 942 F.3d 287 (2019).

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[8] The court denied summary judgment on Plaintiffs' Fifth Amendment claim based on parents' fundamental rights to "make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57 (2000). The court reasoned those rights had never been extended to foster families, prospective adoptive parents, or "adoptive parents whose adoption is open to collateral attack." *Brackeen*, 338 F. Supp. 3d at 546. Plaintiffs have not appealed that ruling.

[9] Specifically, it declared unconstitutional 25 U.S.C. §§ 1901–23 and 1951–52, as well as 25 C.F.R. §§ 23.106–22, 23.124–32, and 23.140–41.

Standard of Review

"We review a grant of summary judgment *de novo*, applying the same standard as the district court." *All. for Good Gov't v. Coal. for Better Gov't*, 901 F.3d 498, 504 (5th Cir. 2018) (citation omitted). "We review *de novo* the constitutionality of federal statutes." *United States v. McGinnis*, 956 F.3d 747, 752 (5th Cir. 2020) (citation omitted). We must set aside final agency action under the APA if "such action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019) (quoting 5 U.S.C. § 706(2)(A)).

Discussion

We proceed as follows. First, we address whether Plaintiffs have Article III standing to assert their claims, and conclude they do (*infra* I). Next, we address whether ICWA exceeds Congress's constitutional power over Indian affairs (*infra* II). Agreeing with the district court in part, we conclude that ICWA exceeds Congress's power to the extent it governs state child-custody proceedings. Alternatively (*infra* III), we address the court's holdings that parts of ICWA and the Final Rule violate the Fifth Amendment equal protection guarantee (III(A)); the anti-commandeering and preemption doctrines (III(B)); the nondelegation doctrine (III(C)); and the APA (III(D)). Concluding that parts of ICWA and the Final Rule are unconstitutional or unlawful on those grounds, we then address the appropriate remedy (III(E)).

I. Article III Standing

We first address whether Plaintiffs have Article III standing. The district court ruled they did, concluding that the State Plaintiffs had standing to assert claims that ICWA exceeds Congress's power, commandeers states, and violates the nondelegation doctrine; that the Individual Plaintiffs had

standing to assert equal protection claims; and that all Plaintiffs had standing to challenge the Final Rule under the APA.

We review standing *de novo*. *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019). Article III standing requires plaintiffs to show an injury traceable to defendants' conduct that a judicial decision would likely redress. *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)); *see also Texas v. United States*, 945 F.3d 355, 374 (5th Cir. 2019) (standing requires "injury, causation, and redressability") (citation omitted). At least one plaintiff must have 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) (citation omitted). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

A.

The claims that ICWA exceeds Congress's power, commandeers states, and improperly delegates legislative power are, in essence, claims that ICWA encroaches on states' prerogatives to administer child-custody proceedings. State Plaintiffs have standing to bring these claims, which assert injuries unique to states, caused by the Federal Defendants' administration of ICWA, and redressable by a favorable decision.

We have found that states "may have standing based on (1) federal assertions of authority to regulate matters [states] believe they control, (2) federal preemption of state law, and (3) federal interference with the enforcement of state law." *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015) (citations omitted), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016)

(Mem.).[10] Those principles easily encompass State Plaintiffs' claims that ICWA hijacks their child-custody machinery and improperly supplants their child-custody standards, either directly or by delegation to tribes. They also explain why State Plaintiffs have standing to assert under the APA that the Final Rule improperly issued regulations purporting to bind state administration of child-custody proceedings. *See id.* at 151–54 (holding federal statute may afford states standing to vindicate injury to their "quasi-sovereign" interests) (citing *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007)); *Texas*, 945 F.3d at 384 (states have standing to challenge statute infringing sovereign interest in "applying their own laws and policies"); *see also* 5 U.S.C. § 702 (affording right of judicial review to persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action").[11]

B.

The equal protection claims assert ICWA and the Final Rule wrongly discriminate against Indian children and non-Indian families. The Individual Plaintiffs claim this unequal treatment permeates the law and regulations, beginning with the threshold definition of "Indian child." *See* 25 U.S.C.

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[10] *See also Tex. Office of Pub. Util. Council v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) ("States have a sovereign interest in 'the power to create and enforce a legal code.'") (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)).

[11] Defendants contest State Plaintiffs' standing to bring a nondelegation challenge to § 1915(c), which allows tribes to vary ICWA's placement preferences. Defendants say any injury is speculative because no evidence shows that a tribally-reordered preference has affected proceedings in the plaintiff states. *See Lujan*, 504 U.S. at 560 (injury must be "actual or imminent, not conjectural or hypothetical" (internal quotation marks omitted)). We disagree. As State Plaintiffs note, one Texas tribe, the Alabama-Coushatta, has filed its reordered preferences with the Texas DFPS. The claimed injury from § 1915(c) is thus sufficient to support standing. *See, e.g.*, *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.'") (cleaned up).

§ 1903(4). They claim the placement preferences for Indian children, § 1915(a)–(b), "impose a naked preference for 'Indian families' over families of any other race," and make non-Indians show "good cause" to depart from them, *id.* They claim the collateral attack provisions, §§ 1913(d) and 1914, make their adoptions of Indian children more vulnerable to being overturned. Finally, they claim the Final Rule implementing these provisions adds to their injuries.[12] The State Plaintiffs assert similar claims on behalf of "children in their care," alleging ICWA and the Final Rule "require [their] agencies and courts" to "carry out the racially discriminatory policy objectives of [ICWA]" and to expend "resources and money" in doing so. All Plaintiffs seek a declaration that §§ 1913(d), 1914, and 1915 are unconstitutional and an injunction prohibiting the Federal Defendants from implementing those sections "by regulations, guidelines, or otherwise." They also seek declaratory relief and an injunction prohibiting the Federal Defendants from enforcing funding mechanisms tied to states' compliance with ICWA. *See* 42 U.S.C. §§ 622(b)(9), 677(b)(3)(G).

We agree with the district court that the Individual Plaintiffs have standing to challenge ICWA and the Final Rule.[13] As persons seeking to adopt Indian children, the Individual Plaintiffs are "objects" of the contested provisions, and the "ordinary rule" is that they have standing to challenge them. *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264–266 (5th Cir. 2015) (quoting *Lujan*, 504 U.S. at 561). Their adoptions have been burdened, in various ways, by ICWA's unequal treatment of non-Indians.

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[12] *See, e.g.*, 25 C.F.R. §§ 23.129–32 (implementing preferences); *id.* § 23.132(b) (party seeking departure from preferences must prove "good cause" by "clear and convincing evidence"); *id.* §§ 23.136–37 (implementing collateral attack provisions).

[13] We therefore need not consider whether the State Plaintiffs have standing to bring equal protection claims on behalf of Indian children in their care.

For instance, the Brackeens' adoption of A.L.M. was hampered and delayed by the preferences,[14] burdens they are again suffering in trying to adopt A.L.M.'s half-sister, Y.R.J. *See Y.J.*, 2019 WL 6904728, at *5 (noting the Navajo seek "a judgment that Y.J. be placed in accordance with ICWA preferences"). Moreover, the Brackeens' adoption of A.L.M. (and Y.R.J. too, if successful) will be open to collateral attack under ICWA.[15] Similarly, the Cliffords' attempt to foster Child P. has been thwarted by the pre-adoptive preferences—they failed to show good cause to depart by "clear and convincing evidence"—and they will be hampered by the adoptive

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[14] Defendants argue that, because the Brackeens' adoption of A.L.M. was completed in January 2018, their claims regarding A.L.M. are moot. We disagree. The situation falls within the "capable of repetition, yet evading review" exception to mootness because (1) A.L.M.'s adoption was "in its duration too short to be fully litigated prior to [its being settled]"; and (2) given the Brackeens' announced intent to adopt other Indian children, "there was a reasonable expectation that [they] would be subjected to the same action again." *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 164 (5th Cir. 2009) (citation omitted). JUDGE WIENER's partial dissent argues neither prong applies. As to prong one, he contends the Brackeens "could have litigated their ICWA challenges in state court during A.L.M.'s July 2017 adoption proceedings, long before" the district court's October 2018 judgment. WIENER OP. at 5 n.18. We disagree. The Brackeens *were* contesting the preferences during the state proceedings, but those proceedings were settled in December 2017 due to the fortuity that the Navajo placement "was no longer available" and no others materialized. As to the second prong, JUDGE WIENER contends the Brackeens' "stated reluctance to adopt other Indian children was too vague." *Id.* We disagree. The Brackeens needed to show only a "reasonable expectation" they would again face ICWA's burdens. *Kucinich*, 563 F.3d at 164. They did so by alleging they "intend[ed]" to foster and adopt other Indian children, and then by supplementing the record to document their effort to adopt Y.R.J., beginning with their letter to the state agency in September 2018. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (second prong satisfied when plaintiff "credibly claimed that it planned" to engage in similar activity subject to prior regulation).

[15] Specifically, the Brackeens' adoption of A.L.M. remains open to attack under § 1914, and their prospective adoption of Y.R.J. would be open to attack under both §§ 1913(d) and 1914. Unlike § 1913(d), which allows a collateral attack based on fraud or duress only for two years after the adoption, § 1914 specifies no time frame for a collateral attack based on a claimed violation of any provision of §§ 1911–1913.

preferences in their planned adoption of Child P. If the Brackeens and the Cliffords were Indians, or if the children they sought to adopt were non-Indians, none of these obstacles would exist.

Those unequal burdens are injuries-in-fact for equal protection purposes. An equal protection injury consists in "[d]iscriminatory treatment at the hands of the government." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012) (alteration in original).[16] If plaintiffs show such disparate treatment, then "no further showing of suffering based on that unequal positioning is required for purposes of standing." *Time Warner*, 667 F.3d at 636; *see also Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). The Individual Plaintiffs have made that showing here.[17] And their injuries

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[16] *See also Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) (explaining "the gravamen of an equal protection claim is differential governmental treatment"); *Contender Farms*, 779 F.3d at 266 ("An increased regulatory burden typically satisfies the injury in fact requirement.") (citation omitted).

[17] The Federal Defendants argue no Plaintiff has standing to challenge the collateral attack provisions because it is "speculative" whether any such attack will occur. We disagree. The injury arises from those provisions' unequal treatment of the adoptions, not from any collateral attack itself. That injury is concrete, "irrespective of whether the plaintiff[s] will sustain an actual or more palpable injury as a result of the unequal treatment." *Time Warner*, 667 F.3d at 636 (citation omitted). We disagree with JUDGE DENNIS that this injury is not imminent under *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017). DENNIS OP. at 41–42. There, plaintiffs brought equal protection claims against a Mississippi law that protected persons holding traditional beliefs about marriage, sexual relations, and sex from discriminatory state action in specified areas, such as licensing or celebrating marriages. *Barber*, 860 F.3d at 351. We held plaintiffs lacked a "certainly impending" injury because they had not alleged they "plan[ned] to engage" in any conduct covered by the statute. *Id.* at 357. Although one plaintiff did "stat[e] his intention to marry," he did not allege that he was seeking marriage-related services from someone who might refuse or "even that he intended to get married in Mississippi." *Id.* The Brackeens

are traceable, in part, to the Federal Defendants' implementing ICWA through the Final Rule and to their inducing state officials to apply ICWA through the leverage of child welfare funds. *See K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (traceability requires only that defendants "significantly contributed" to injury); *see also Inclusive Cmtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (causation "doesn't require a showing . . . that the defendant's actions are the very last step in the chain of causation" and "isn't precluded where the defendant's actions produce a determinative or coercive effect upon the action of someone else") (quoting *Bennett v. Spear*, 520 U.S. 154, 167, 169 (1997)) (internal quotation marks omitted).

Finally, our decision would redress the Individual Plaintiffs' injuries. Redressability means a decision's "practical consequences" would "significant[ly] increase . . . the likelihood" of relief. *Utah v. Evans*, 536 U.S. 452, 464 (2002). "The relief sought needn't completely cure the injury, however; it's enough if the desired relief would lessen it." *Inclusive Cmtys. Project*, 946 F.3d at 655 (citation omitted); *see also Dep't of Tex., Veterans of the Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 432 (5th Cir. 2014) (en banc) (a decision need only relieve "a [plaintiff's] discrete injury," not his "*every* injury") (citation omitted). Here, the requested relief would redress the Individual Plaintiffs' injuries in numerous ways. For instance, it would make overcoming ICWA's preferences easier, because the Individual Plaintiffs would no longer have to justify departure "by clear and convincing

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are in a different position. Unlike the *Barber* plaintiffs, the Brackeens *have* engaged in conduct covered by §§ 1913 and 1914—adopting Indian children—and their adoptions are *now* vulnerable to collateral attack, unlike adoptions of non-Indian children. That "[d]iscriminatory treatment at the hands of the government" is a present injury-in-fact, regardless of whether "an actual or more palpable injury" will later materialize in the form of a collateral attack. *Time Warner*, 667 F.3d at 636.

evidence." 25 C.F.R. § 23.132(b) (implementing § 1915(a)–(b)). It would also remove state child welfare officials' obligations to implement the preferences, efforts "critical to the success of the . . . preferences." 81 Fed. Reg. at 38,839; *see also infra* III(B)(1)(a)(iii) (discussing state officials' required assistance with finding preferred placements). Additionally, Federal Defendants would be barred from inducing state officials to implement ICWA, including the preferences, by withholding funding.[18] Finally, the requested relief would make the adoptions less vulnerable to being overturned: it would declare unenforceable the collateral attack provisions themselves (§§ 1913(d), 1914), the underlying grounds for invalidity (§§ 1911–1913), as well as the implementing regulations (25 C.F.R. §§ 23.136–137). So, while a favorable decision would not guarantee the success of the Individual Plaintiffs' adoptions, its "practical consequences" would "lessen" their "discrete injur[ies]" caused by ICWA's unequal treatment of Indian children and non-Indian families. *Evans*, 536 U.S. at 464; *Inclusive Cmtys. Project*, 946 F.3d at 655; *Dep't of Tex., Veterans of Foreign Wars of the U.S.*, 760 F.3d at 432.[19] That is enough to satisfy redressability.

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[18] *See* 42 U.S.C. § 622(b)(9) (to qualify for Title IV-B funds, a state's child welfare plan must describe "the specific measures taken by the State to comply with the Indian Child Welfare Act"); *id.* § 624(a) (authorizing HHS Secretary to pay child welfare funds to a state "that has a plan developed in accordance with section 622"); *see also* 45 C.F.R. §§ 1355.34(b)(2)(ii)(E), 1355.36 (HHS regulations authorizing withholding of Title IV-B and Title IV-E funds based on, *inter alia*, failure to comply with ICWA).

[19] Redressability does not turn on whether our decision would determine the outcome of the Brackeens' adoption of Y.R.J. So, we need not address JUDGE COSTA's view that redressability may never depend on the impact of a federal decision on a state court. *See* COSTA OP. at 3–11. We note that JUDGE COSTA concedes the Brackeens have standing to bring APA claims because "a declaratory judgment against the Interior Secretary would bind her when it comes to enforcing the department's challenged regulations." *Id.* at 9 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)). We agree. Consider, though, that one ground for the Brackeens' APA claims is that the Final Rule implements ICWA provisions that violate their equal protection rights. Thus, to decide

II. Challenge to Congress's Power to Enact ICWA

We first consider whether ICWA is unconstitutional because Congress lacks power to regulate state child-custody proceedings involving Indian children. The district court held ICWA exceeds Congress's power. The panel reversed, reasoning that "the Indian Commerce Clause grants Congress plenary power over Indian affairs." *Brackeen*, 937 F.3d at 434 (citing *Lara*, 541 U.S. at 200). On *en banc* rehearing, Defendants continue to defend ICWA as a valid exercise of Congress's "plenary and exclusive authority over Indian affairs," derived from the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the Treaty Clause, art. II, § 2, cl. 2, as well as "preconstitutional powers."

We agree with Defendants that Congress has ample power to legislate respecting Indians, and also that the Supreme Court has described that power in broad terms that go beyond trade. We cannot agree, however, that Congress's authority is broad enough to justify ICWA's intrusion on state child-custody proceedings. To the contrary, the Supreme Court has warned that an exercise of Congress's Indian power that "interfere[s] with the power or authority of any State" would mark a "radical change[] in tribal status." *Lara*, 541 U.S. at 205. ICWA presents precisely such an interference with state authority. We therefore hold that, to the extent ICWA governs child-custody proceedings under state jurisdiction, it exceeds Congress's power.[20]

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that APA claim, we would in any event have to address whether the relevant parts of ICWA violate equal protection. *See* 5 U.S.C. § 706(2)(B) (courts may "hold unlawful and set aside agency action . . . contrary to constitutional right"); *see also Tex. Office of Pub. Utility Counsel*, 183 F.3d at 410 ("The intent of Congress in 5 U.S.C. § 706(2)(B) was that courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making.") (citation omitted).

[20] We reject Defendants' argument that this issue is not before us because the district court did not rule on it. To the contrary, the district court ruled on the issue of

A.

In urging us to uphold ICWA, Defendants rely heavily on two propositions: that Congress's Indian affairs power goes beyond commerce with tribes and that the power is "plenary and exclusive." We therefore consider at the outset whether those propositions, of their own force, justify ICWA. They do not. Both propositions are true as far as they go, but relying on them to uphold ICWA would set virtually no limit on Congress's authority to override state sovereignty and control state government proceedings.

Defendants are correct that, under binding Supreme Court precedent, Congress's authority to legislate on Indian affairs extends beyond regulating commerce with Indian tribes. Despite their textual proximity, the Indian Commerce Clause has a "very different application[]" from the Interstate Commerce Clause. *Cotton Petroleum Corp.*, 490 U.S. at 192. "[T]he central function of the Indian Commerce Clause," the Court has explained, "is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974); COHEN'S at 207–08 & nn.2, 3, 9–11 (1982)). Longstanding patterns of federal legislation bear this out. For example, in addition to commercial fields like land[21] and mineral development,[22] Congress has enacted Indian-related

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congressional authority as a necessary part of Defendants' preemption claims. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018) (preemption requires considering, first, whether the law "represent[s] the exercise of a power conferred on Congress by the Constitution").

[21] *See, e.g.*, 25 U.S.C. § 177 (requiring federal approval of any "purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe of Indians"); *id.* § 81 (requiring Secretary of Interior approval for contracts leasing Indian lands); *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) (purpose of 25 U.S.C. § 177 is to "prevent unfair, improvident or improper disposition" of Indian lands).

[22] *See, e.g.*, 25 U.S.C. §§ 2101–2108 (development of tribal mineral resources).

legislation in non-commercial fields like criminal law,[23] education,[24] probate,[25] health care,[26] and housing assistance.[27] Consequently, we cannot agree with Plaintiffs that ICWA is unconstitutional because it does not regulate tribal "commerce." Whatever the validity of that argument as a matter of original constitutional meaning, *cf. Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659–65 (2013) (Thomas, J., concurring), it is foreclosed by Supreme Court cases interpreting the Indian Commerce Clause to extend beyond commercial interactions with tribes.

Defendants are also correct that the Supreme Court has often described Congress's Indian power as "plenary and exclusive." *See, e.g.*,

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[23] *See, e.g.*, 18 U.S.C. § 1153 (placing certain crimes by "[a]ny Indian" within Indian country under federal criminal jurisdiction); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (state lacked jurisdiction to prosecute Indian defendant under Major Crimes Act for crime committed on reservation); *Lara*, 541 U.S. at 199–200 (upholding statute conferring on tribes criminal jurisdiction over nonmember Indians); *United States v. Antelope*, 430 U.S. 641 (1977) (upholding Major Crimes Act); *United States v. Kagama*, 118 U.S. 375, 385 (1886) (same).

[24] *See, e.g.*, 25 U.S.C. § 2000 ("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 . . . ."). *See also* COHEN'S § 22.03[1][a] ("Beginning with the 1794 Treaty with the Oneida, over 150 treaties between tribes and the United States have included educational provisions. For almost as long a time, Congress has legislated to provide for Indian education generally.") (footnotes omitted).

[25] *See, e.g.*, 25 U.S.C. § 2205 (authorizing tribes to adopt probate codes for distribution of trust or restricted lands located on reservations or otherwise subject to tribal jurisdiction).

[26] *See, e.g.*, 25 U.S.C. § 1601(1) ("Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people."). *See also* COHEN'S § 22.04 (discussing federal healthcare for Indian tribes).

[27] *See, e.g.*, 25 U.S.C. §§ 4101–4243 (establishing housing grant program for tribes).

Lara, 541 U.S. at 200 (citing *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470–71 (1979) ("*Yakima Nation*"); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). The Court has used that broad phrase in various ways—sometimes to signal "the breadth of congressional power to legislate in the area of Indian affairs," sometimes to confirm "the supremacy of federal over state law in this area," and other times "as a shorthand for general federal authority to legislate on health, safety, and morals within Indian country, similar to the states' police powers." COHEN'S § 5.02[1] (citing *inter alia Lara*, 541 U.S. at 200; *Yakima Nation*, 439 U.S. at 470; *Cotton Petroleum Corp.*, 490 U.S. at 192).[28] More recently, the Court has formulated the principle this way: "As dependents, the [Indian] tribes are subject to plenary control by Congress." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citing *Lara*, 541 U.S. at 200).[29]

Merely describing Congress's authority as "plenary," however, does not settle ICWA's validity. "The power of Congress over Indian affairs," the Supreme Court has explained, "may be of a plenary nature; but it is not absolute." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality

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[28] *See also* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1014 (2015)) ("Ablavsky, *Indian Commerce*") ("Plenary power, as used by the Court, has two distinct meanings. Sometimes the Court uses the term interchangeably with 'exclusive,' to describe federal power over Indian affairs to the exclusion of states. But the Court also uses the term to describe the doctrine that the federal government has unchecked authority over Indian tribes, including their internal affairs.") (footnotes omitted).

[29] *Cf. McGirt*, 140 S. Ct. at 2462 ("This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties.") (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–68 (1903)).

op.)); *see also* COHEN'S § 5.04[1] ("Federal power to regulate Indian affairs is 'plenary and exclusive,' but not absolute.") (footnotes omitted). In this realm, as in any, Congress's power is limited by other constitutional guarantees. *See New York v. United States*, 505 U.S. 144, 156 (1992) ("Congress exercises its conferred powers subject to the limitations contained in the Constitution.").[30] Among the most critical is the Constitution's structural guarantee of state sovereignty. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 918–19 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' [which] . . . is reflected throughout the Constitution's text") (quoting THE FEDERALIST No. 39, at 245 (J. Madison)). No Supreme Court decision even hints that Congress's Indian affairs power trumps state sovereignty. To the contrary, the Court has held that Congress's power to regulate Indian commerce—despite being "under the exclusive control of the Federal Government"—cannot "dissipate" the "background principle of state sovereign immunity." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996). Similarly, the Court has recognized that states did not surrender "their immunity against Indian tribes when they adopted the Constitution." *Blatchford v. Native Vill. of*

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[30] *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 710, 718 (1987) (holding federal law regulating "descent and devise of Indian lands" violated the Takings Clause); *Weeks*, 430 U.S. at 83–84 ("plenary" congressional power "in matters of Indian affairs" subject to "equal protection component of the Fifth Amendment"); *Mancari*, 417 U.S. at 551–55 (same); *United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935) (power over Indian lands "subject to . . . pertinent constitutional restrictions," including Takings Clause). A different question is to what extent the Constitution applies to the tribes themselves. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). Thus, "[t]he Bill of Rights does not apply to Indian tribes." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008).

Noatak and Circle Vill., 501 U.S. 775, 781–82 (1991). Those decisions defy the radical notion that Congress may deploy its "plenary" Indian power without regard to state sovereignty or the Tenth Amendment. *See also infra* II(B) (discussing additional precedents).

To say otherwise, as Defendants do, would erase the distinction between federal and state power—namely, that "[t]he Constitution confers on Congress *not plenary legislative power* but only certain enumerated powers," with "all other legislative power . . . reserved for the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018) (emphasis added). Nor does it follow that, because the Constitution gives Congress power over Indian affairs, "the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York*, 505 U.S. at 156. That begs the question, then, whether the Indian power includes authority to *govern state child-custody proceedings*. That "question[] of great importance and delicacy," *id.* at 155 (cleaned up), has not been squarely resolved by the Supreme Court. But the Court has strongly suggested the answer: it has warned that an exercise of Congress's Indian affairs power that "interfere[s] with the power or authority of any State" would mark a "radical change[]" in tribal relations with the states. *Lara*, 541 U.S. at 205; *see also infra* II(B). And, as we explain below, no founding-era treaty, statute, or congressional practice supports ICWA's unprecedented reach. *See infra* II(C).

We therefore cannot agree with JUDGE DENNIS that ICWA's intrusion on state government proceedings fails even to implicate the Tenth Amendment. *See* DENNIS OP. at 67. According to JUDGE DENNIS, when Congress deploys its Indian power, the Tenth Amendment vanishes. A court need ask only whether Congress "may legislate on the particular subject matter at issue"—here, Indian children and families "in child custody proceedings." *Id.* Because Congress has "plenary power" over that subject,

raising the Tenth Amendment as a barrier would "impos[e] new restraints on [Congress's] authority." *Id.*

That is a remarkable view. Imagine its applying to hypothetical exercises of Congress's other "plenary" powers—say, its "plenary power to make rules for the admission of aliens," *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), or its "plenary power over the Territories," *District of Columbia v. Carter*, 409 U.S. 418, 430 (1973), or its "plenary power to legislate for the District of Columbia," *Palmore v. United States*, 411 U.S. 389, 393 (1973), or its "plenary power . . . to regulate foreign commerce," *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904). Suppose Congress enacted rules in those areas that purported to govern state proceedings, as ICWA does. Imagine a federal law mandating different comparative fault rules in state tort suits involving Swedish visa holders. Or unique proof standards for Guamanians in state probate proceedings. Or laxer parol evidence rules for D.C. residents embroiled in state contract litigation. Or stricter adverse possession rules for French merchants in state property disputes. Would those federal laws, directly controlling state administrative and civil proceedings, be *immune* from the Tenth Amendment because Congress's authority in those areas is "plenary"? Of course not. Neither is ICWA.[31]

In sum, the settled proposition that "tribes are subject to plenary control by Congress," *Bay Mills*, 572 U.S. at 788, does not answer the novel question whether Congress can control state child-custody proceedings involving Indian children. We now turn to that question.

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[31] We agree with JUDGE DENNIS that these hypotheticals are "far-fetched" and "ridiculous." DENNIS OP. at 104 n.47. That is the point of a *reductio ad absurdum.*

B.

To answer it, we consider whether any Supreme Court precedent—or, failing that, any longstanding founding-era congressional practice—justifies the use of Congress's Indian affairs power to govern state child-custody proceedings involving Indian children. *See, e.g.*, *Printz*, 521 U.S. at 905 (explaining "contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions") (citing *Myers v. United States,* 272 U.S. 52, 175 (1926)). As we explain below (*infra* II(B)(1)–(2), II(C)), we find neither precedent nor historical evidence justifying the modern use of Congress's power here. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) ("*NFIB*") ("Sometimes the most telling indication of a severe constitutional problem is the lack of historical precedent for Congress's action.") (cleaned up).

We pause to make a point about method. Our analysis does not ask—as JUDGE DENNIS supposes—whether any "Founding-era federal law . . . applie[d] within state child welfare proceedings." DENNIS OP. at 72. JUDGE COSTA also tags us with a similarly absurd view. *See* COSTA OP. at 16 (imagining we seek a founding-era practice "explicitly bless[ing] federal intervention *in state domestic relations proceedings*" pursuant to the Indian affairs power) (emphasis added). But that approach to discerning the original extent of federal power "border[s] on the frivolous." *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008). No one thinks, and we do not claim, that states were adjudicating adoptions in 1787. Instead, we examine whether *comparable* founding-era uses of the Indian power justify ICWA's modern intrusion into state custody proceedings.[32] *See, e.g.*, *infra* at 38 (asking

[32] *See, e.g.*, *Printz*, 521 U.S. at 905–09 (examining whether founding-era federal laws requiring state courts to perform various naturalization functions justified the Brady Act's requiring state police to perform gun background checks).

whether ICWA is justified by "comparable founding-era exercises of Congress's Indian affairs power"). Testing whether the old maps onto the new is standard constitutional analysis.[33] So, we do not ask the specific (and meaningless) question whether founding-era Indian power was used to govern "state domestic relations proceedings"; we do ask the more general (and meaningful) question whether that power was used to govern "state proceedings," "state governments," "state governmental functions," or "a state's own proceedings that involve Indians." *See infra* II(C). Thus, the supposed rebuttals to our analysis—that state court "adjudication of child placements" did not exist "until the middle of the nineteenth century," DENNIS OP. at 72 , and "would not exist for another eight decades" after the founding era, COSTA OP. at 16—incinerate a straw man.

That clarification made, we proceed to our analysis.

1.

No Supreme Court decision supports Congress's deploying its Indian affairs power to govern state government proceedings. Indeed, the Court's precedents point in the opposite direction: such use of the Indian power marks a "radical change[] in tribal status" because it "interfere[s] with the power [and] authority of [the] State[s]." *Lara*, 541 U.S. at 205.

The logical place to begin is *Fisher v. District Court of Sixteenth Judicial District of Montana*, 424 U.S. 382 (1976), because it involves the same subject as this case: tribal authority over adoptions. Pursuant to the Indian Reorganization Act, 25 U.S.C. § 5123 (formerly cited as 25 U.S.C. § 476),

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[33] *See, e.g.*, *Heller*, 554 U.S. at 582 ("Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.") (citing *Reno v. ACLU*, 521 U.S. 844, 849 (1997); *Kyllo v. United States*, 533 U.S. 27, 35–36 (2001)).

the Northern Cheyenne Tribe vested its tribal court with exclusive jurisdiction over adoptions among tribe members. *Fisher*, 424 at 387. The Supreme Court upheld the exclusion of state-court jurisdiction because it would "interfere with the powers of self-government conferred upon the [tribe]." *Id.* The Court emphasized, however, that the tribe's exclusive jurisdiction was limited to adoptions where the child, the birth parents, and the adoptive parents were "each and all members of the [tribe]" and "reside within the exterior boundaries of the [reservation]." *Id.* at 384 n.6. The Court therefore concluded the tribal ordinance implemented an "overriding federal policy" that ousted state-court jurisdiction "over litigation involving reservation Indians." *Id.* at 390.[34]

The law at issue in *Fisher* is the mirror opposite of ICWA. *Fisher* held Congress could keep states *out* of on-reservation adoptions among tribe members. By contrast, this case asks whether Congress can directly regulate state proceedings involving off-reservation adoptions by non-Indians. *See, e.g.*, 25 U.S.C. § 1915(a) (applying ICWA preferences to "any adoptive placement of an Indian child under State law").[35] *Fisher* involved Congress's valid attempt to promote a tribe's "right . . . to govern itself independently of state law." 424 U.S. at 386. But this case asks whether Congress can legislate standards governing a state's own child-custody proceedings. To be sure, *Fisher* does not squarely address whether Congress has power to do so.

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[34] The Court also rejected an equal protection challenge to the ordinance, which we discuss *infra* II(A)(2).

[35] We note that one aspect of ICWA is similar to the law upheld in *Fisher*. Section 1911(a) reserves to a tribe exclusive jurisdiction "over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe." Our decision does not affect that section because it does not regulate state proceedings.

But the decision provides no support for the proposition that Congress may use its Indian affairs power to regulate state proceedings.

Speaking directly to that question is *United States v. Lara*, 541 U.S. 193 (2004), a more recent examination of the Indian affairs power. *Lara* was a double jeopardy case in which the Indian defendant, Lara, was first prosecuted by a different tribe and then prosecuted for a similar crime by the United States. 541 U.S. at 196–97. Lara's tribal prosecution was authorized by 25 U.S.C. § 1301(2), which allows tribes to prosecute other tribes' members. *Id.* at 197–98.[36] He argued his tribal prosecution was an exercise of "delegated federal authority," such that his federal prosecution constituted double jeopardy. *Id.* The Supreme Court disagreed, concluding that § 1301(2) recognized tribes' "inherent power" to prosecute nonmember Indians and that the federal prosecution did not place Lara in double jeopardy. *Id.* at 198, 210. The Court discussed several "considerations" leading it to conclude the statute validly exercised Congress's Indian affairs power. *Id.* at 200–07.

First, as noted, the Court confirmed that Congress has "broad general powers to legislate in respect to Indian tribes," powers typically described as "plenary and exclusive." *Id.* at 200 (quoting *Yakima Nation*, 439 U.S. at 470-71). Second, the Court had consistently approved adjustments of "tribal sovereign authority" similar to the expansion of criminal jurisdiction here. *Id.* at 202–03. Third, the Court found § 1301(2) did not have an "unusual legislative objective," given Congress's history of "ma[king] adjustments to the autonomous status of other such dependent entities," such as the Philippines or Puerto Rico. *Id.* at 203. Fourth, the Court found no "explicit

[36] The Supreme Court had previously held tribes could not prosecute members of other tribes in *Duro v. Reina*, 495 U.S. 676, 688 (1990), but Congress responded with § 1301(2).

language in the Constitution suggesting a limitation" on Congress's action. *Id.* at 204. Fifth, the Court found the jurisdictional change "limited" because the tribe already had jurisdiction over its own members as well as "authority to control events that occur upon [its] own land." *Id.* The Court cautioned, however, that it was "not now faced with a question dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status. *In particular, this case involves no interference with the power or authority of any State*." *Id.* at 205 (emphasis added).[37]

ICWA's encroachment on state child-custody proceedings cannot survive scrutiny under these *Lara* factors. To begin with, unlike in *Lara*, Defendants point us to no Supreme Court cases approving an expansion of "tribal sovereign authority" remotely like the one contemplated by ICWA. *Id.* at 202–03. Nor—as discussed *infra*—have Defendants identified any founding-era congressional history of regulating state proceedings, thus marking ICWA as having an "unusual legislative objective." *Id.* at 203. Indeed, ICWA is also "unusual" in that it intrudes into the domestic relations realm "long . . . regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Whereas in *Lara* no "explicit [constitutional] language" barred expanding one tribe's criminal jurisdiction over other tribe members, 541 U.S. at 204, the Tenth Amendment plainly reserves to states "[t]he whole subject of the domestic relations of . . . parent and child . . . ." *Burrus*, 136 U.S. at 593–94. Unlike the "limited" jurisdictional expansion in *Lara*, ICWA forces tribes into off-reservation state proceedings involving non-Indians. 541 U.S. at 204. Finally, and most obviously, ICWA seeks the "radical change[] in tribal status"

[37] Additionally, the Court explained that its prior decisions implicitly recognized that Congress could relax limitations on tribes' criminal jurisdiction. *Lara*, 541 U.S. at 205–07 (citing, *inter alia*, *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *Duro*, 495 U.S. 676).

foreshadowed in *Lara*: ICWA's stated purpose is to "interfere[] with the power [and] authority of [the] State[s]." *Id.* at 205.[38]

Finally, *Seminole Tribe*, 517 U.S. 44, confirms that Congress cannot deploy its Indian affairs power to override state sovereignty. In that case, the Court rejected the proposition that the Indian Gaming Regulatory Act, enacted under the Indian Commerce Clause, could validly abrogate state sovereign immunity. *Id.* at 72–73. The Court squarely held that Congress's "exclusive" authority over Indian commerce does not "dissipate" a state's immunity from federal suit: "[T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government." *Id.* at 72. *Seminole Tribe*'s holding removes any basis for Defendants' core argument that, because Congress's Indian affairs authority is "plenary," Congress can *ipso facto* regulate state sovereign matters like adoption proceedings. To the contrary, "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area" like Indian

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[38] JUDGE DENNIS contends the *Lara* factors "are of no relevance" because, in ICWA, "Congress is not altering the scope of the tribes' retained sovereign power" but is instead "grant[ing] new rights, protections, and safeguards" to tribes and families. DENNIS OP. at 77. We disagree. Nowhere does *Lara* limit its analysis to federal laws that "alter[] . . . tribes' retained sovereign power," as JUDGE DENNIS claims. Rather, *Lara* deploys various "considerations" to assess whether the Constitution "authorizes" Congress's use of its Indian affairs power. *See Lara*, 541 U.S. at 200. Those considerations bear directly on ICWA's validity. To be sure, the statute in *Lara* passed muster because it merely "relax[ed]" prior statutory restrictions on "the tribes' exercise of inherent prosecutorial power." *Id.* at 200, 207. But *Lara* expressly reserved the question whether there are "potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status," and "[i]n particular" for statutes that "interfere[] with the power or authority of [a] State." *Id.* at 205. The question that *Lara* reserved is the one presented by ICWA—whether by "interfer[ing] with the power or authority of [a] State," *id.*, ICWA exceeds Congress's authority to legislate for Indian tribes.

affairs, *id.*, the exercise of that power remains subject to the Constitution's guarantees of state sovereignty.[39]

2.

Defendants cite various Supreme Court decisions as support for ICWA, but none suffice.

Defendants cite *Lara* repeatedly, but only for the general proposition that Congress's Indian affairs power has been described as "plenary and exclusive." They do not, however, discuss *Lara* in any detail nor analyze ICWA's validity under the considerations *Lara* sets out. As already discussed, incanting the formula that Congress's power in this area is "plenary and exclusive" begs the question whether Congress may use that power to regulate state child-custody proceedings. The same can be said for other broad formulations of the Indian affairs power Defendants cite. For example, Tribal Defendants quote the seminal opinion in *Worcester v. Georgia* for the proposition that federal treaties and laws "contemplate . . . that *all*

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[39] JUDGE DENNIS claims *Seminole Tribe* "has no bearing" on this question because it "addressed only limitations on Congress's power to override states' sovereign immunity from suit by private parties." DENNIS OP. at 75. That is incorrect. States' immunity from private suits is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution," and which is confirmed "by the Tenth Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999); *see also Blatchford*, 501 U.S. at 781–82 (rejecting notion that state surrender of immunity against tribes was "inherent in the constitutional compact"). Thus, contrary to JUDGE DENNIS's view, *Seminole Tribe* is not cabined to the "states' sovereign immunity from suit by private parties," but bears directly on whether Congress's Indian power may *ipso facto* override state sovereignty as a general matter. JUDGE DENNIS also asserts that *Seminole Tribe* "carefully noted that its opinion in no way touched upon other aspects of the Tenth Amendment." DENNIS OP. at 75. That misreads the decision. The footnote JUDGE DENNIS cites only declined to decide whether the gaming law at issue violated the Tenth Amendment by "mandat[ing] state regulation of Indian gaming," a question "not considered below." *Seminole Tribe*, 517 U.S. at 61 n.10. Neither the cited footnote, nor anything else in the decision, creates the artificial distinction JUDGE DENNIS seeks to create here.

intercourse with [Indians] shall be carried on exclusively by the government of the union." 31 U.S. (6 Pet.) 515, 519 (1832) (emphasis added); *see also id.* at 561 (op. of Marshall, C.J.) (same). It is unclear what that proposition has to do with this case. *Worcester* itself has no bearing on it: the decision held that Georgia could not apply its criminal laws on Cherokee territory and in contravention of a federal treaty. *See id.* at 561 (explaining that "[t]he Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force").[40]

Federal Defendants cite *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* ("*Fishing Vessel*"), 443 U.S. 658 (1979), presumably because that decision required the state of Washington to accommodate the treaty rights of Indians with respect to off-reservation fishing sites. Indeed, at *en banc* argument, Federal Defendants identified *Fishing Vessel* as their best case.[41] Rec. of Oral Argument at 8:45–9:50. But the treaty-based limitation on state regulation allowed in *Fishing Vessel* is

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[40] In a similar vein is the Supreme Court's recent decision in *McGirt*, 140 S. Ct. 2452. The Court held that certain lands in Oklahoma remained "Indian country" for purposes of the Major Crimes Act, 18 U.S.C. § 1153(a), and thus that Oklahoma state courts lacked jurisdiction to try an Indian defendant for crimes he committed on those lands. *Id.* at 2459. *McGirt* reiterates the familiar propositions that Congress has "significant constitutional authority when it comes to tribal relations," *id.* at 2462—in that case, the authority to establish an Indian reservation—and that "State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country,'" *id.* at 2459 (citing *Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993)). The decision, however, offers no support for the proposition that Congress's Indian affairs power extends to controlling state proceedings. The Court remarked only that "States have no authority to reduce federal reservations lying within their borders," *id.* at 2462, a settled proposition harkening back to Chief Justice Marshall's admonition in *Worcester*.

[41] Even so, counsel effectively admitted *Fishing Vessel* does not go far enough to support ICWA. When pressed for prior authority allowing Congress's "plenary" power to interfere with state child-custody proceedings, counsel responded that "this"—*i.e.* the instant challenge to ICWA—"is the case that presents that [issue]." Rec. of Oral Argument at 10:30–10:55.

nothing like ICWA's intrusion into state child-custody proceedings. The 1850s-era treaties in *Fishing Vessel* guaranteed tribes the "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." 443 U.S. at 674. The Court read those treaties to guarantee tribes a portion of yearly fishing runs, which could not be invalidated by state law or regulation. *Id.* at 684–85.[42] Requiring state regulatory forbearance to federal treaties, however, is worlds away from Congress's dictating separate standards for state child-custody proceedings involving Indian children. Furthermore, unlike in *Fishing Vessel*, here Defendants cannot rely on over a century of federal treaties bearing on the precise subject matter at issue. *Cf. Lara*, 514 U.S. at 203–04 (finding Indian affairs power justified by Congress's history of similar actions); *see also id.* at 201 (treaties "can authorize Congress to deal with 'matters' with which otherwise '[it] could not deal'").[43]

Tribal Defendants cite several decisions for the proposition that Congress may legislate with respect to Indian activity that does not occur "on or near the reservation." This general principle is true, of course, but again it begs the question whether ICWA validly regulates state child-custody

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[42] *Fishing Vessel* is one in a long line of cases resolving conflicts between tribal treaty rights and non-tribal interests or state regulation. *See, e.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019); *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392 (1968); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *United States v. Winans*, 198 U.S. 371 (1905).

[43] Federal Defendants also cite *Antoine v. Washington*, 420 U.S. 194 (1975), which, similar to *Fishing Vessel*, recognized Congress may ratify agreements with Indian tribes that preclude states from applying contrary state law. In *Antoine*, a tribe ceded part of its land to the United States in exchange for preserving hunting and fishing rights. The Court held that the Supremacy Clause prevented the State of Washington from applying its hunting and fishing laws to Indians on the ceded lands. *See id.* at 203–04 (citing, *inter alia*, *Choate v. Trapp*, 224 U.S. 665 (1912); *Perrin v. United States*, 232 U.S. 478 (1914); *Dick v. United States*, 208 U.S. 340 (1908)). Neither *Antoine*, nor any decision it relied on, suggests Congress may impose Indian-specific standards on state proceedings.

proceedings. The cited cases themselves offer no guidance on that question. For example, *United States v. McGowan* held that Congress validly denominated as "Indian country" a tract of federal land occupied by an Indian colony, remarking that Congress may legislate for the "protection of the Indians wherever they may be." 302 U.S. 535, 539 (1938) (citation omitted). *Morton v. Ruiz* invalidated under the APA an agency policy excluding federal assistance for tribe members living near reservations, noting "[t]he overriding duty of our Federal Government to deal fairly with Indians wherever located." 415 U.S. 199, 236 (1974). *Perrin v. United States* upheld a federal ban on selling alcohol on lands ceded by the Yankton Sioux Tribe, based on Congress's power "to prohibit the introduction of intoxicating liquors into an Indian reservation, . . . and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a state." 232 U.S. 478, 482 (1914).[44] Finally, *United States v. Kagama* upheld Congress's power to enact a criminal code for crimes committed by Indians on Indian reservations, observing that only the federal government possessed that power and that "the theater of its exercise is within the geographical limits of the United States." 118 U.S. 375, 384–85 (1886). As this summary shows, these decisions say nothing about whether Congress may exercise its Indian affairs power to regulate a state sovereign function like child-custody proceedings. [45] And, to the extent

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[44] Nor does *Perrin*'s modern sequel, *United States v. Mazurie*, 419 U.S. 544 (1975), support Defendants' position. Like *Perrin*, *Mazurie* only concerns Congress's Indian commerce power to regulate alcohol sales to Indians and the "introduction of alcoholic beverages into Indian country." *Mazurie*, 419 U.S. at 554 (and collecting cases). *Mazurie* upheld Congress's use of that power to ban alcohol sales by a non-Indian who owned land within a reservation. *Id.* at 546–47, 555–56.

[45] JUDGE HIGGINSON claims our view would resurrect the "governmental function" analysis rejected by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546–47 (1985). HIGGINSON OP. at 1; *see also* DENNIS OP. at 68–74. We disagree. In deciding whether federal wage standards could apply to municipal employees,

these decisions touch on that question, they deny Congress's power to do so. *See*, *e.g.*, *Kagama*, 118 U.S. at 383 (observing the federal code "does not interfere with the process of the state courts within the reservation . . . [but] is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation").[46]

C.

Finding no Supreme Court precedent justifying ICWA's intrusion on state sovereignty, we next examine whether ICWA is nonetheless supported by any comparable founding-era exercises of Congress's Indian affairs power. "[E]arly congressional enactments 'provid[e] contemporaneous and weighty

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Garcia rejected the test in *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), which exempted from federal regulation "integral" or "traditional" state government functions. *Garcia*, 469 U.S. at 546–47. *Garcia* is inapposite for several reasons. First, *Garcia* addressed the Commerce Clause, not the Indian affairs power. As discussed, whether the latter encroaches on state authority is one key to its valid use by Congress. *See, e.g., Lara*, 541 U.S. at 205 (asking whether use of the Indian affairs power "involve[d] . . . interference with the power or authority of any State"). Second, our view does not depend, as *Usery* did, on "apprais[ing] . . . whether a particular governmental function is 'integral' or 'traditional.'" *Garcia*, 469 U.S. at 546–47. Instead, we ask whether the Indian affairs power has ever been used to regulate state government proceedings of any kind. Third, *Garcia* concerned whether "incidental application" of general federal laws "excessively interfered with the functioning of state governments." *Printz*, 521 U.S. at 932 (discussing, *inter alia*, *Usery* and *Garcia*). Here, by contrast, we address a law whose "whole *object* . . . [is] to direct the functioning of the state [administrative and judicial proceedings]" in child custody cases. *Id.*; *see also infra* III(B)(1)(b) (explaining ICWA does not "evenhandedly" regulate state and private activity).

[46] Defendants also suggest ICWA is authorized by "preconstitutional powers." But they fail to explain how that is so. As State Plaintiffs point out, the Supreme Court's reference to "preconstitutional powers" in *Lara* referred to the United States' early relationship with Indian tribes, which at that time resembled "military and foreign policy [more] than a subject of domestic or municipal law." 541 U.S. at 201. While such authority spoke to the issue in *Lara*—Congress's power to alter the scope of tribes' inherent sovereignty—it has no bearing on ICWA, a law having nothing to do with military or foreign policy and everything to do with state domestic law.

evidence of the Constitution's meaning.'" *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011) (alteration in original) (quoting *Printz*, 521 U.S. at 905). When assessing the constitutionality of a federal law, the Supreme Court looks to founding-era legislation for any light it may shed on the scope of Congress's authority. *See*, *e.g.*, *Printz*, 521 U.S. at 905–07 (canvassing "statutes enacted by the first Congresses" to determine whether Congress could compel state officers to implement federal law).[47] Evidence that the first Congresses used federal power over Indian tribes to regulate state proceedings would be "contemporaneous and weighty evidence" that the Constitution permits ICWA's encroachment on state child-custody proceedings. *Bowsher v. Synar*, 478 U.S. 478 U.S. 714, 723–24 (1986). "Conversely," if no such evidence exists, "we would have reason to believe that the power was thought not to exist." *Printz*, 521 U.S. at 905. *Amici* Indian law experts, as well as the Navajo Nation intervenors, have amassed considerable evidence illuminating early use of the Indian affairs power, which we have carefully considered. *See* Br. for Prof. Gregory Ablavsky as *Amicus Curiae* at 5–20 ("Ablavsky Br."); Br. for Indian Law Scholars as *Amici Curiae* at 3–8 ("Indian Law Scholars Br."); Br. for Intervenor Navajo Nation at 11–12 & nn. 5–6 ("Navajo Nation Br."). We cannot agree, however, that this evidence supports ICWA's modern-day intrusion into state child-custody proceedings.

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[47] *See also Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (relying on Congress's "Decision of 1789" to reject congressional role in officer removal); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (placing particular weight on "[a]n act 'passed by the First Congress assembled under the Constitution, many of whose members had taken part in framing that instrument'" (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888))); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (reasoning "[t]he power [to incorporate the Bank of the United States] was exercised by the first congress elected under the present constitution").

Ample founding-era evidence shows that Congress's Indian affairs power was intended to be both broad in subject matter and exclusive of state authority. The framing generation understood Congress's power to include, for example, "making war and peace, purchasing certain tracts of [Indians'] 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, 458 (Roscoe R. Hill ed., 1936).[48] Additionally, it was understood that Congress's power would displace the prior authority of states under the Articles of Confederation to deal directly with tribes. Defending this centralization, James Madison wrote that Congress's power to regulate commerce with Indian tribes was "very properly unfettered" from "obscure and contradictory" limitations in the Articles that extended national power only to Indians "not members" of States and made it subservient to state legislation. THE FEDERALIST No. 42, at 219 (James Madison) (George W. Carey & James McClellan eds., 2001).[49] Confirming this view was Anti-Federalist Abraham Yates, Jr., who concluded, to his chagrin, that the new Constitution would "totally surrender into the hands of Congress the management and regulation of the Indian affairs." Abraham Yates, Jr. (Sydney), *To the Citizens of the State of New-York* (June 13-14, 1788), *reprinted*

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[48] *See also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 533, at 381 (Rotunda & Nowak ed. 1987) ("STORY") (describing federal Indian power as the "right of exclusive regulation of trade and intercourse with [Indians], and the . . . authority to protect and guarantee their territorial possessions, immunities, and jurisdiction").

[49] *See also* ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 196 (Liberty Fund 1999) (1803) (discussing Articles' "obscure" and "contradictory" limitations on national power over Indians) (citing THE FEDERALIST No. 42); STORY § 533, at 380 (observing Articles attempted to "accomplish impossibilities [respecting power over Indians]; to reconcile a partial sovereignty in the Union, with complete sovereignty in the states").

in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1153, 1156–58 (John P. Kaminski et al. eds., 2004). This view was later echoed by the Washington administration: "[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), *reprinted in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 231–32 (Lowrie & Clarke eds., 1832).

Especially relevant is the first Congress's enactment of the Trade and Intercourse Act, *see* Act of July 22, 1790, 1 Cong. Ch. 33, 1 Stat. 137, which, with its statutory successors, was the primary federal statute governing Indian affairs until the 1830s. *See* Ablavsky, *Indian Commerce*, at 1023. The Act prohibited "any trade or intercourse with the Indian tribes" without a federal license; prohibited the sale of land by Indians or Indian tribes unless executed by federal treaty; and extended federal criminal jurisdiction to crimes committed by non-Indians against Indians. Congress later amended the Act to require federal approval to cross into Indian country and to authorize the United States military to arrest violators of the Act. *See* Act of May 19, 1796, 4 Cong. Ch. 30, § 3, 1 Stat. 469, 470; *id.* §§ 5, 16.

None of this evidence speaks to the question before us, which is whether Congress may use its Indian affairs power to regulate a state's own child-custody proceedings. As already observed, the fact that Congress's power goes beyond regulating tribal trade begs the question whether it allows Congress to regulate state governments. Also beside the point is the fact that Congress's power was intended to exclude state authority over tribes. This prevented states from, for instance, nullifying federal treaties securing Indian lands.[50] That evidence would be relevant if the issue were whether ICWA

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[50] *See*, *e.g.*, *Worcester*, 31 U.S. at 561 (explaining that "[t]he Cherokee nation . . . is a distinct community occupying its own territory . . . in which the laws of Georgia can have

could *exclude* state courts from adoptions involving tribe members. *See Fisher*, 424 U.S. at 390 (upholding exclusion of state jurisdiction for adoptions among tribe members). But ICWA presents the opposite scenario: it seeks to force federal and tribal standards *into* state proceedings. *Amici* point us to no founding-era evidence even suggesting Congress thought its Indian affairs power extended that far.[51] The most pertinent example of Indian legislation from the first Congress—the Trade and Intercourse Act—addresses various aspects of the federal government's relationship with Indians. It says nothing about regulating a state's *own* proceedings that involve Indians.

Amici and the Navajo Nation also cite evidence that early Congresses used their authority to protect Indian children. But their evidence again fails to speak to the issue before us. For example, *amici* point to evidence that the federal government was "reluctantly" involved in the "widespread trade in captured children, both Indian and white," such as by "paying federal monies as ransom for children." Ablavsky Br. at 19 (citing, *inter alia*, Christina Snyder, *Slavery in Indian Country: The Changing Face of Captivity in Early America* 173–74 (2010)). They also point to federal superintendence of Indian children by "placing [them] within Anglo-American communities" and founding a "federally-run boarding school system." Ablavsky Br. at 19, 20 (citing 25 U.S.C. §§ 271-304b; FREDERICK E. HOXIE, A FINAL

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no force"); *see also* Ablavsky, *Indian Commerce*, at 1045–50 (describing Georgia's ultimately unsuccessful efforts to assert its "territorial sovereignty" against Cherokee treaty).

[51] JUDGE DENNIS similarly relies on evidence of early state resistance to federal Indian treaties, such as New York's undermining the Fort Stanwix Treaty with the Six Nations and Georgia's own conflicting treaties with Creek Indians. *See* DENNIS OP. at 8 (citing COHEN'S § 1.02[3]; Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1147 (1995)). This evidence has the same flaws as *amici*'s, however. It supports Congress's traditional power to bar states from subverting federal Indian treaties. But it does not involve, and so says nothing about, Congress's power to impose Indian-specific standards on state proceedings.

PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920, 189–210 (1984)). And they cite various federal policies vis-à-vis Indian children, such as funding education, allotting lands to Indian orphans, and establishing trust funds. *See* Indian Law Scholars Br. at 3–8.[52] Finally, the Navajo Nation cites numerous federal treaties that make "repeated promises . . . for the welfare of tribal children." Navajo Nation Br. at 11–12 & nn.5–6.[53] We assume only for argument's sake that all this evidence concerns *founding-era* practices relevant to the original understanding of the Indian affairs power. *But see infra* II(D) (explaining the federal boarding-school system dates from the late nineteenth century). Even then, the evidence shows only that the federal government has long shouldered responsibility for protecting Indian children. None of it, however, speaks to whether Congress may regulate state government proceedings involving Indian children.[54]

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[52] *See*, *e.g.*, Treaty with the Oneida, etc., art. III, Nov. 11, 1794, 7 Stat. 47 (providing for education of tribe's children); Treaty with the Kaskaskia art. III, Aug. 13, 1803, 7 Stat. 78 (providing funding for a Catholic priest "to instruct as many of their children as possible in the rudiments of literature"); Treaty with the Choctaw art. XIV, Sept. 27, 1830, 7 Stat. 333 (providing lands to unmarried children and orphans); Treaty with the Shawnee art. VIII, May 10, 1854, 10 Stat. 1053 (establishing trust fund for orphans); Treaty with the Cherokee, art. XXV, July 19, 1866, 14 Stat. 799 (providing for education of Cherokee orphan children in an "asylum" controlled by Cherokee government).

[53] *See*, *e.g.*, Treaty with the Nez Percés art. V, June 11, 1855, 12 Stat. 957 (providing two schools supplied with books, furniture, stationery, and teachers for free to the tribe's children); Treaty with the Seminoles art. III, May 9, 1832, 7 Stat. 368 (promising "a blanket and a homespun frock" to each Seminole child); Treaty with the Delawares, Supp. Art., Sept. 24, 1829, 7 Stat. 327 (requiring "thirty-six sections of the best land" be sold for "the support of schools for the education of Delaware children"); Articles of Agreement with the Creeks, Nov. 15, 1827, 7 Stat. 307 (providing $5,000 for "education and support of Creek children at the school in Kentucky").

[54] JUDGE DENNIS relies heavily on this kind of evidence to support his argument that the "trust relationship" between the Federal Government and Indian tribes justifies ICWA. DENNIS OP. at 16–17, 20–21, 59; *see, e.g.*, COHEN's § 5.04[3][a] ("One of the

D.

Relying on much of the same historical evidence we have examined, JUDGE DENNIS mounts an elaborate originalist defense of ICWA. *See* DENNIS OP. at 5–25, 52–66. We agree with JUDGE DENNIS that ICWA's validity hinges on Congress's founding-era exercise of its Indian affairs power. *See id.* at 5 (citing *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 524 (2014); *Heller*, 554 U.S. at 605–10). But we sharply disagree with his analysis. As explained, no founding-era treaty, statute, or practice features anything like ICWA's foisting federal standards on state governments. *See supra* II(C). ICWA's goal of managing tribal-state relations may harken back to the late eighteenth century, but its methods were first born in the late 1970s. The leading Indian law treatise puts it accurately: "While reaffirming basic principles of tribal authority over tribal members, ICWA also inserts federal and tribal law into family matters long within the domain of the states." COHEN'S § 11.01[1]. By enacting rules for state officials and for state proceedings, ICWA outstrips the historical record and so cannot be supported by any original understanding of the Indian affairs power.

We offer these additional responses to JUDGE DENNIS.

First, JUDGE DENNIS invokes the *exclusivity* of Congress's Indian power to support ICWA. Because the power "is exclusive to the federal government," it "totally displaced the states from having any role in [Indian] affairs." DENNIS OP. at 58, 53; *see id.* at 53 (comparing Indian affairs power to "field preemption"); *see also* COSTA OP. at 13–14 (relying on "exclusive" and "undivided" nature of federal Indian power). JUDGE

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basic principles of Indian law is that the federal government has a trust or special relationship with Indian tribes."). As explained below, the trust relationship fails to support the notion that Congress may impose federal standards on state child-custody proceedings. *See infra* II(D).

DENNIS contends that ICWA deploys this exclusive authority against states. "Just as the Constitution was meant to preclude the states from undertaking their own wars or making their own treaties with the Indian tribes," he argues, "so too does it empower the federal government to ensure states do not spoil relations with the Indian tribes" by placing Indian children with non-Indian families. *Id.* at 58 (citation omitted). We disagree.

The exclusivity of Congress's Indian power does not help justify ICWA. Quite the contrary. ICWA does the opposite of "excluding" states from Indian adoptions: it leaves many adoptions under state jurisdiction, *see* 25 U.S.C. § 1911(b), while imposing "Federal standards" on those state proceedings. *Id.* § 1902. If ICWA were akin to the founding-era practice of reserving war-making and treaty powers to the United States, then ICWA would "totally displace[] the states from having any role" in Indian adoptions. DENNIS OP. at 53.[55] As discussed, that is what Congress did in *Fisher* when it excluded tribal adoptions from state jurisdiction. *See supra* II(B)(1) (discussing *Fisher*, 424 U.S. 382). ICWA is not that. It does not bar state jurisdiction but co-opts it, thereby imposing federal yardsticks on state

[55] The same follows from JUDGE DENNIS's examples of "[s]tate officials . . . [who] acknowledged the federal government's plenary authority over Indian affairs under the new constitution." DENNIS OP. at 13. Those examples involved war- and treaty-making authority that the state officials conceded was entrusted to the federal government under the new Constitution. For instance, in a December 1789 letter, South Carolina Governor Charles Pinckney implored President Washington to conclude a treaty with "hostile Indian tribes" leagued with the Spanish. *See* DENNIS OP. at 13 (quoting Letter from Charles Pinckney to George Washington (Dec. 14, 1789), 4 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 401, 404 (Dorothy Twohig ed., 1993)). The "similar acknowledgments" by the Georgia and Virginia legislatures, *id.* (citing Ablavsky, *Indian Commerce*, at 1043), also involved treaties and war: Georgia's request that the federal government negotiate a peace treaty with the Creek, and Virginia's inquiry about the propriety of supplying tribes with ammunition. *See* Ablavsky, *Indian Commerce*, at 1043.

officials and state proceedings. The exclusivity of federal Indian power argues for invalidating ICWA, not upholding it.[56]

Second, JUDGE DENNIS invokes the federal government's "trust relationship" with Indian tribes to support ICWA. DENNIS OP. at 59. This "unique" relationship creates federal obligations "to preserve tribal self-governance, promote tribal welfare, and . . . manag[e] tribal assets." *Id.* at 16–17 (citing MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW § 5.2 (1st ed. 2017) [hereinafter FLETCHER]); *see also* COHEN'S § 5.04[3][a]. In this relationship, JUDGE DENNIS finds "a specific obligation to protect the tribes from the states," which he claims ICWA furthers. DENNIS OP. at 59. Principally, he evokes the federal government's late-nineteenth-century policy of "Christianizing" Indian children in boarding schools, *id.* at 22–25, 59–60, arguing that ICWA remedies similarly "abusive Indian child custody practices continued at the state level." *Id.* at 59. ICWA thus fulfills the federal government's trust obligation by "protect[ing] the tribes from the states." *Id.* at 61. Again, we disagree.

Even assuming there is a federal duty to (as JUDGE DENNIS phrases it) "protect the tribes from the states," it would not authorize ICWA's imposition on state proceedings. No founding-era example shows the United States fulfilling its trust obligations that way. History tells a different story. The trust doctrine arose out of early treaties, statutes—principally, the

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[56] We do not imply that Congress may never delegate to states authority over Indian matters. *See, e.g., Bryant*, 136 S. Ct. at 1960 (observing that, "[i]n 1953, Congress . . . g[ave] six States [criminal] 'jurisdiction over specified areas of Indian country within the States and provid[ed] for the [voluntary] assumption of jurisdiction by other States'") (first three brackets added; internal quotation marks omitted)). But no one defends ICWA on that basis, presumably because ICWA does the opposite: it imposes federal and tribal standards on proceedings within state jurisdiction. *See* 25 U.S.C. §§ 1901(5), 1903(1), 1911(b).

Trade and Intercourse Act and its successors, *supra* II(C)—and the Supreme Court decisions in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation*, and *Worcester*. *See* COHEN'S § 5.04[3][a]; FLETCHER § 5.2; WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 16–17 (7th ed. 2020) [hereinafter CANBY].[57] Those sources do show the federal government sometimes acted to restrain states on behalf of tribes, but only in the sense of preventing states from unauthorized trading, encroaching on tribal land, or subverting treaties.[58] Never did the United

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[57] The key passages undergirding the trust doctrine are from Chief Justice Marshall's *Cherokee Nation* opinion:

> [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

30 U.S. (5 Pet.) at 17–18; *see also* COHEN'S § 5.04[3][a] (explaining Marshall's *Cherokee Nation* opinion "provided the basis for analogizing the government-to-government relationship between tribes and the federal government as a trust relationship").

[58] *See* COHEN'S § 5.04[3][a] (explaining Trade and Intercourse Acts "imposed a statutory restraint on alienation on all tribal land for the purpose of ensuring federal rather than state or individual control over acquisition of Indian land"); CANBY at 17 (under the same Acts, "[n]on-Indians were prohibited from acquiring Indian lands by purchase or treaty . . . , or from settling on those lands or entering them for hunting or grazing"); *see also Worcester*, 31 U.S. at 557 (the Acts "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority

States purport to "protect tribes" by enacting federal standards for state proceedings. *See also supra* II(C) (discussing absence of such evidence from founding-era sources). The same is true for early federal laws regarding crimes against Indians. *See, e.g.*, CANBY at 17 (noting "[d]epredations by non-Indians against Indians were made a federal crime"). These laws provided federal compensation for victims, *id.*, and later for prosecution under federal jurisdiction.[59] While such laws excluded state jurisdiction, they did not pretend to enact standards for state courts or officials. Indeed, in upholding a later federal law punishing on-reservation Indian crimes, the Supreme Court stressed that the law "does not interfere with the process of the state courts within the reservation, nor with the operation of state laws." *Kagama*, 118 U.S. at 383.[60]

That brings us to JUDGE DENNIS's main historical example—the era of federal "assimilation" of Indian children in boarding schools. DENNIS OP. at 22–25, 59. As we grasp his argument, JUDGE DENNIS contends that, because the federal government once engaged in this widespread removal and

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is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [*sic*] by the United States").

[59] *See, e.g.*, Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1497 n.122 (discussing so-called "bad men" clauses in, for example, the Treaty with the Northern Cheyenne and Northern Arapahoe art I, May 10, 1868, 15 Stat. 655).

[60] JUDGE DENNIS emphasizes *Kagama*'s statement that Indian tribes "owe no allegiance to the states, and receive from them no protection," and that "[b]ecause of the local ill feeling, the people of the states where they are found are often their deadliest enemies." DENNIS OP. at 67 (quoting *Kagama*, 118 U.S. at 384). That colorful dicta has no bearing on the issue before us. As discussed, *Kagama* decided only that the United States could punish as a federal crime the murder of an Indian by an Indian on a reservation, even though situated within a state. *See* 118 U.S. at 377–78; *see also id.* at 383 (noting the law was "confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation"); *see also supra* II(B)(2) (discussing *Kagama*).

re-education of Indian children, it must also have power to prevent states from engaging in similar "abusive Indian child custody practices." *Id.* at 59.[61] We reject this argument.

To begin with, JUDGE DENNIS's key evidence dates from the late nineteenth century, not the founding era. *See, e.g.*, COHEN'S § 1.04 ("In 1879, Indian education began to shift to federal boarding schools so that Indian students could be removed completely from family and tribal life."). [62] It therefore provides less insight into Congress's Indian power as conceived by the founding generation. *See Printz*, 521 U.S. at 905 (explaining that "*contemporaneous* legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions" (citing *Myers*, 272 U.S. at 175) (emphasis added));[63] *cf. Heller*, 554 U.S. at 614 (observing that "discussions [that] took place 75 years after the ratification of the Second Amendment . . . do not provide as much insight into its original meaning as earlier sources").

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[61] The Federal Defendants similarly defend ICWA on the grounds that "Congress plainly has authority to address the massive removal of children from tribal communities."

[62] *See also* COHEN'S § 1.04 (during this period "[t]he full brunt of reeducation was directed toward Indian children, who were shipped away from the reservation or brought together at reservation schools"); Ablavsky Br. at 20 (discussing the "federally-run boarding school system, which took Indian children, often without their parents' consent, as part of its efforts to civilize them") (citing 25 U.S.C. §§ 271–304b; FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, 189–210 (1984)).

[63] *See also Marsh*, 463 U.S. at 790 (observing that "[a]n 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" (citation omitted) (cleaned up)); *McCulloch*, 17 U.S. at 401 (relying on fact that the contested power "was exercised by the first congress elected under the present constitution").

But even if this evidence concerned founding-era practice, it would not prove what JUDGE DENNIS claims. As we have said again and again, none of the history shows the United States using its Indian power to legislate for state governments. The boarding-school era makes the same point from a different angle. It shows the federal government adopting a policy towards Indian children—one roundly condemned today—and then changing *its own policy* in a more enlightened direction. *See* COHEN'S § 1.05 (recounting "[a] marked change in attitude toward Indian policy [that] began in the mid-1920s . . . away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture"). It is a mystery how an era of misguided federal policy proves Congress can dictate rules for states. None of this is to say there have been no abuses in how states have handled Indian adoptions. It is only to say that, in seeking a remedy, Congress cannot turn state governments into federal adoption agencies. The Tenth Amendment and the Constitution's structure forbid it.

One final point. According to JUDGE COSTA's separate opinion, there is nothing "novel" about ICWA's "interfer[ing] with state domestic relations proceedings" because "the federal government has been a constant, often deleterious presence in the life of the Indian family from the beginning." COSTA OP. at 15. But relying on the same evidence as JUDGE DENNIS, including the boarding-school era, *see id.* at 12–17, JUDGE COSTA also fails to identify a single example of Congress's deploying its Indian power to regulate a state's administrative or judicial machinery.[64] Thus, his

[64] JUDGE COSTA does dial the volume up to eleven, however. "[T]he most tragic irony" of our opinion, he claims, is that after two centuries of federal power "often used to destroy tribal life," we would "reject[] that power when it is being used to sustain tribal life." *Id.* at 12. "It would be news to Native Americans," he continues, that the same federal power used to wage war against them, steal their lands, displace them, and "'civiliz[e]'" their children "does not [also] reach the Indian family." *Id.* Where to begin? First, nothing prevents the federal government from mending its ways and using its power

denial that ICWA is a "novel" use of that power is baffling. *Id.* at 15. That view would likely surprise the leading Indian law commentator, Felix Cohen, who wrote that "ICWA . . . inserts federal and tribal law into family matters long within the domain of the states." COHEN'S § 11.01[1]. It would also surprise then-Assistant Attorney General Patricia Wald, who testified to Congress about ICWA (and who would later serve as Chief Judge of the D.C. Circuit). Flagging the "serious constitutional question" raised by ICWA, Wald warned "that the federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude[] the wholesale invasion of state power contemplated by [ICWA]." H.R. REP. No. 95-1386, at 39–40 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7562–63. Of course, Wald's views—or Felix Cohen's, for that matter—do not settle ICWA's constitutionality. But at least those commentators recognized, unlike JUDGE COSTA, that ICWA's intrusion on state power was unprecedented.

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We sum up this part. Neither judicial nor congressional precedent supports ICWA's trespass on state child-custody proceedings. While offering evidence that Congress has deployed its Indian affairs power broadly, exclusive of state authority, and in aid of Indian children, neither Defendants nor their *amici* nor JUDGE DENNIS offer founding-era examples

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"to sustain tribal life." It has tried to do that for nearly a century. *See* COHEN'S § 1.05 (era of "Indian Reorganization," beginning in 1928, "shift[ed] . . . toward more tolerance and respect for traditional aspects of Indian culture"). The issue before us, however, is whether the federal government's benevolence may include conscripting state governments as adoption agencies. If the Indian affairs power is a blank check, as JUDGES DENNIS and COSTA appear to think, the answer is yes. Second, no one denies that federal power "reach[es] the Indian family." COSTA OP. at 12. The issue here is whether it also reaches the state administrative and judicial proceedings that ICWA purports to govern.

of Congress's using this power to intrude on state governmental functions as ICWA does. "Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes the most telling indication of a severe constitutional problem is the lack of historical precedent for Congress's action." *NFIB*, 567 U.S. at 549 (Roberts, C.J.) (cleaned up) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)). The founding generation launched the Constitution in an atmosphere of intense suspicion about federal encroachment on state sovereignty. *See Centinel Letter I* (Oct. 5, 1787) (warning power of the proposed government would "necessarily absorb the state legislatures and judicatories" and "melt[] [the United States] down into one empire"), *reprinted in* THE ESSENTIAL ANTIFEDERALIST 102 (W.B. Allen & Gordon Lloyd eds., 2002). If Congress had deployed its Indian affairs power to govern state governments, some evidence would remain. Finding none, we have "reason to believe that the power was thought not to exist." *Printz*, 521 U.S. at 905.

The Constitution gives Congress sweeping powers over Indians. But the power Congress claims in ICWA finds no support in any Supreme Court decision or founding-era practice. To permit Congress to regulate state child-custody proceedings, whenever they involve Indian children, is incompatible with "our federal system, [in which] the National Government possesses only limited powers [and] the States and the people retain the remainder." *Bond*, 572 U.S. at 854. To the extent ICWA governs child-custody proceedings under state jurisdiction, it exceeds Congress's power.

III. Challenges to Specific ICWA Provisions

Alternatively, we address Plaintiffs' claims that parts of ICWA violate the Fifth Amendment (III(A)); the commandeering doctrine (III(B)); the

nondelegation doctrine (III(C)); and the APA (III(D)). We then consider the appropriate remedy (III(E)).

A. Fifth Amendment Equal Protection

We first address whether ICWA violates the equal protection component of the Fifth Amendment. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215–27, 235 (1995); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). "Fifth Amendment equal protection claims against federal actors are analyzed under the same standards as Fourteenth Amendment equal protection claims against state actors." *Butts v. Martin*, 877 F.3d 571, 590 (5th Cir. 2017) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)). Laws that classify citizens by race or ancestry trigger "the 'most rigid scrutiny.'" *Fisher v. Univ. of Tex.*, 570 U.S. 297, 309–10 (2013) (citing, *inter alia*, *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *Bolling*, 347 U.S. at 499; quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)). Laws that do not classify in those ways, however, must still be "rationally related to a legitimate governmental purpose." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)).

Plaintiffs claim ICWA violates equal protection: (1) by treating "Indian children" differently from non-Indian children; and (2) by preferring "Indian families" over non-Indian families. Both classifications, they argue, are racial and fail strict scrutiny. Alternatively, Plaintiffs say neither classification rationally links children with their tribes. Relying heavily on *Mancari*, Defendants counter that ICWA adopts "political" classifications subject to rational basis review. They say ICWA turns on a child's actual or potential tribal affiliation, not race, and so rationally furthers "Congress's 'unique obligation toward the Indians.'" They also defend ICWA's preference for Indian over non-Indian families because "many tribes have deep historic and cultural connections with other tribes, and . . .

many Indian children may be eligible for membership in more than one tribe."

Siding with Plaintiffs, the district court concluded ICWA classifies by race and fails strict scrutiny. The court stressed that ICWA covers children "simply *eligible* for [tribal] membership who have a biological Indian parent."[65] *Brackeen*, 338 F. Supp. 3d at 533. Surveying membership criteria, the court reasoned that ICWA applies if a child is "related to a tribal ancestor by blood." *Id.* The court also found that ICWA fails strict scrutiny because it is not narrowly tailored to maintaining tribal ties. ICWA applies to "eligible" children who may "never be members of their ancestral tribe." *Id.* at 533, 536 ICWA also "priorit[izes] a child's placement with any Indian," regardless of tribe, thus "impermissibly . . . treat[ing] 'all Indian tribes as an undifferentiated mass.'" *Id.* at 535 (cleaned up) (quoting *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring)).

1. Even assuming ICWA classifies by tribe, not race, it still must rationally link children to tribes.

The parties dispute whether ICWA classifies by race or tribe. Under Supreme Court precedent, which we examine below, that is a close question. Whatever the answer, though, the cases teach that the classifications still must rationally further ICWA's goal of linking children with tribes. Because we resolve the equal protection challenges on that basis (*infra* III(A)(2)–(3)), we need not decide whether ICWA classifies by race. Here we provide necessary context for our analysis by surveying the Court's Indian-classification cases from *Mancari* (1974) to *Adoptive Couple* (2013).

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[65] *See* § 1903(4) (defining Indian child as an unmarried minor who is either a tribal member or "eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe").

The seminal case is *Mancari*, which upheld a federal preference for hiring "Indians" at the Bureau of Indian Affairs ("BIA"). 417 U.S. at 551–55. "Indian" meant a tribe member with "one-fourth or more degree Indian blood." *Id.* at 553 n.24. The Court found this a "political rather than racial" preference because it excluded many "racial[]" Indians and was granted to Indians only "as members of quasi-sovereign tribal entities." *Id.* at 553 n.24, 554. Separately, the Court required the preference to be "reasonable and rationally designed to further Indian self-government." *Id.* at 555.[66] Importantly, the preference "d[id] not cover any other Government agency or activity," and so did not raise "the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations." *Id.* at 554.[67]

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[66] As the Court explained, the preference: (1) was "an employment criterion reasonably designed to further the cause of Indian self-government," *Mancari*, 417 U.S. at 554; (2) insured "participation by the governed in the governing agency," *id.*; (3) was akin to requiring officials to reside in the jurisdictions they govern, *id.*; (4) applied only to the BIA, whose "legal status [w]as truly *sui generis*" because it "governed . . . [tribal entities] in a unique fashion," *id.*

[67] Given our discussion of *Mancari*, we are puzzled by JUDGE COSTA's insistence that we harbor "the notion that the Constitution prohibits the federal government from granting preferences to tribe members." COSTA OP. at 18. JUDGE COSTA quotes nothing from our opinion to prove that claim. To the contrary, we recognize that *Mancari* permits certain federal preferences for tribe members. *See* 417 U.S. at 538, 541 (upholding BIA hiring preference for Indians and noting "[t]he federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834") (citations omitted). But the issue here—one *Mancari* itself recognized—is the permissible extent of those preferences. *See id.* at 554 (observing that "the BIA is truly *sui generis*," that "the preference does not cover any other Government agency or activity," and consequently that "we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations"). JUDGE COSTA pivots from this baseless claim to accuse us of "activis[m]," COSTA OP. at 20, and to propose a debate—one far afield from the issues in this case—over whether "[o]riginalism usually goes AWOL when the issue is whether the government may grant preferences to historically disadvantaged groups," *id.* at 18. We decline the invitation.

From 1974 to 1979, the Court applied *Mancari* to turn back similar equal protection challenges. It upheld laws: (1) granting a tribe sole jurisdiction over on-reservation adoptions;[68] (2) barring states from taxing on-reservation sales;[69] (3) disbursing treaty funds based on tribe membership;[70] (4) creating a criminal code for Indian lands;[71] (5) authorizing states to exercise jurisdiction over in-state Indian lands;[72] and (6) securing fishing rights to certain tribes.[73] These cases emphasized two things about permissible Indian classifications. First, they turn on tribal status, not race. Second, they reasonably further tribal interests—for instance, in self-government, economic development, and protecting Indian lands.[74]

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[68] *Fisher*, 424 U.S. at 384 n.5, 387, 389–91.

[69] *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 475–80 (1976).

[70] *Weeks*, 430 U.S. at 79–85.

[71] *Antelope*, 430 U.S. at 646–47 & n.7.

[72] *Yakima Nation*, 439 U.S. at 471–76, 484.

[73] *Fishing Vessel*, 443 U.S. at 684–85f.

[74] *See*, *e.g.*, *Fisher*, 424 U.S. at 387–91 (noting the law classified not by race but by the tribe's "quasi-sovereign status," and "further[ed] . . . Indian self-government" by excluding state jurisdiction); *Moe*, 425 U.S. at 475–80 ("special [tax] treatment" turned on treaty and furthered "Congress' unique obligation toward the Indians" (quoting *Mancari*, 417 U.S. at 555) (cleaned up)); *Weeks*, 430 U.S. at 79–85 (distribution turned on whether recipients were descendants of Delawares who maintained tribal membership); *Antelope*, 430 U.S. at 646 & n.7 (criminal code applied based on whether defendants were "enrolled [tribe] members" and acted "within . . . Indian country" (citing *Mancari*, 417 U.S. at 553 n.24)); *Yakima Nation*, 439 U.S. at 471–76, 500–02 (state jurisdiction turned only on "tribal status and land tenure," and was "fairly calculated" to balance non-Indian rights with "tribal self-government"); *Fishing Vessel*, 443 U.S. at 673 & n.20 (fishing rights turned on tribal status, not race).

Moving ahead several years, two decisions have clarified how equal protection applies to Indian classifications. Those are *Rice* and *Adoptive Couple*.[75]

Rice asked whether the Hawaii Constitution could allow only "Hawaiians" to elect trustees of a state "Hawaiian Affairs" agency. 528 U.S. at 499. The Court held that the classification violated the Fifteenth Amendment. *Id.* The definition of "Hawaiian"—"any descendant of the aboriginal peoples" inhabiting the islands since 1778—was "a proxy for race" because it traced a person's genetic relationship to aboriginal "races." *Id.* at 514–16. Relevant here, *Rice* held the voting restriction was not justified by *Mancari*. *Id.* at 518–22.

Even assuming native Hawaiians were like Indian tribes, the Court refused to "extend the limited exception of *Mancari* to [this] new and larger dimension." *Id.* at 518, 520. *Mancari*'s hiring preference was "rationally

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[75] Plaintiffs argue that a more radical limit on *Mancari* arises from the Supreme Court's 1995 decision in *Adarand*. That decision addressed a federal program that paid highway contractors to hire subcontractors controlled by "socially and economically disadvantaged individuals." 515 U.S. at 204. The program presumed social disadvantage if individuals were "black, Hispanic, Asian Pacific, Subcontinent Asian, [or] *Native Americans*." *Id.* at 207 (citation omitted) (emphasis added). Without discussing *Mancari*, the Court treated these as "race-based presumptions," *id.* at 208, subject to strict scrutiny. Although *Adarand* did not specifically address the Native American category, more than one federal judge has cautioned that *Adarand* may undercut *Mancari*. *See id.* at 244–45 & n.3 (Stevens, J., dissenting) (warning the majority's reasoning "would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to" race discrimination (citing *Mancari*, 417 U.S. at 541, 551–52, 553–54 & n.24)); *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997) ("If Justice Stevens is right about the logical implications of *Adarand*, *Mancari*'s days are numbered."); *but see Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 330 F.3d 513, 520–23 (D.C. Cir. 2003) (rejecting argument that *Adarand* impacts scrutiny for appropriations preference "promoting the economic development of federally recognized Indian tribes"). Because we do not decide whether ICWA's classifications are race-based, however, we need not address whether *Adarand* undercuts *Mancari*.

designed to further Indian self-government" in a "*sui generis*" context. *Id.* at 520 (quoting *Mancari*, 417 U.S. at 554, 555). But the decision could not support limiting voting for state offices to "a class of tribal Indians." *Id.* This was because *Mancari* concerned only "the internal affair of a quasi sovereign" (a tribe), while the election in *Rice* concerned the entire "State of Hawaii." *Id.* "To extend *Mancari* to this context," the Court held, "would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id.* at 522. Thus, in deciding *Rice*, the Court clarified that *Mancari*'s "limited" hiring preference for Indians could not support preferring Indians in "critical state affairs" like an election. *Id.* at 520, 522.[76]

The second key decision is *Adoptive Couple*, which interpreted ICWA in a dispute between an Indian child's adoptive parents and her biological father. 570 U.S. at 643–46. The Court held that certain ICWA provisions—its termination standard (§ 1912(f)), active-efforts requirement (§ 1912(d)), and placement preferences (§ 1915(a))—do not apply where the child's biological father never had custody because he had abandoned the child. *Id.* at 648, 651–56.[77] Relevant here, the Court warned that certain applications of ICWA may deny a child equal protection.

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[76] *See, e.g.*, *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (explaining *Rice* stands for the proposition that "Congress may not authorize special treatment for a class of tribal Indians in a state election").

[77] The Court explained that the termination standard—requiring a showing that the parent's "continued custody" may seriously harm the child, § 1912(f)—would not apply where a parent never had custody. *Adoptive Couple*, 570 U.S. at 648. Similarly, the active-efforts requirement—requiring "active efforts" to "prevent the breakup of the Indian family," § 1912(d)—would not apply where the parent had abandoned the child (there being no Indian family to "break up"). *Id.* at 651–53. Finally, the placement preferences would not apply "if no alternative party that is eligible to be preferred . . . has come forward." *Id.* at 654.

Specifically, the Court warned against applying ICWA to "put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Id.* at 655. It observed that "a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother . . . and could then play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests." *Id.* at 656. If ICWA required that result, "many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA." *Id.* "Such an interpretation," the Court stated, "would raise equal protection concerns." *Id.*

In sum, in equal protection challenges the Supreme Court has permitted Indian classifications based on tribal status (not race), if they rationally further federal obligations to tribes. This is logical, given the Constitution itself includes the category of "Indian Tribes." *See* U.S. CONST. art. I, § 8, cl. 3 (vesting Congress with power to "regulate Commerce . . . with the Indian Tribes").[78] At the same time, the Court has warned that Indian classifications may raise equal protection concerns when deployed outside the tribal context. A classification may go beyond internal tribal matters and interfere with state affairs (as in *Rice*), or it may disadvantage a child with tenuous links to a tribe (as in *Adoptive Couple*).

ICWA's classifications exist in the twilight between tribe and race. As Defendants point out, ICWA links its "Indian child" definition to tribes: a child must be a tribe member or at least "eligible" for membership and the

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[78] *See also*, *e.g.*, *United States v. Zepeda*, 792 F.3d 1103, 1117 (9th Cir. 2015) (Kozinski, J., concurring in the judgment) ("The Supreme Court has stressed time and time again that federal regulation of Indian *tribes* does not equate to federal regulation of the Indian *race*." (citing *Fisher*, 424 U.S. at 390), *Antelope*, 430 U.S. at 646, and *Mancari*, 417 U.S. at 553 n.24)).

offspring of a member. *See* § 1903(4). As Plaintiffs respond, however, whether a child is "eligible" for membership often turns on a child's quantum of Indian blood. For instance, one child in this case, Y.L.M., is eligible for membership in the Navajo Tribe because she is one-half "Navajo Indian Blood." As Plaintiffs forcefully argue, the fact that ICWA may apply depending on the degree of "Indian blood" in a child's veins comes queasily close to a racial classification.[79]

For present purposes, we need not decide whether ICWA classifies by race or tribe. Regardless, the Supreme Court still requires the law's classifications be "reasonable and rationally designed" to further federal obligations toward tribes. *Rice*, 528 U.S. at 520 (quoting *Mancari*, 417 U.S. at 555). As explained below, ICWA's separate standards for Indian children—standards which govern state proceedings, apply to children with tenuous connections to a tribe, and allow birth parents' wishes to be overridden—fail to rationally further tribal interests. That is even more evident with respect to ICWA's preference for Indian over non-Indian families, which is divorced from Congress's goal of keeping children linked to their tribe. [80]

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[79] *See*, *e.g.*, *Zepeda*, 792 F.3d at 1117 (Kozinski, J., concurring in the judgment) (making applicability of Indian Major Crimes Act turn, even partially, on "proof of some quantum of Indian blood" creates an "overt racial classification"); *id.* at 1119–20 (Ikuta, J., concurring in the judgment) (use of "blood quantum test" in same law is foreclosed by *Rice*'s "opposition to 'ancestral tracing of this sort'"(cleaned up) (quoting *Rice*, 528 U.S. at 510)).

[80] JUDGE DENNIS takes issue with our tailoring analysis on two related grounds. First, he chides us for not "truly" arguing that ICWA fails rational basis review but instead only arguing that "ICWA uses *impermissible means*" to further Congress's tribal obligations. DENNIS OP. at 120. Second, he contends we "apply a far more searching standard of scrutiny" than rational basis. *Id.* at 120–21. The simple answer to both contentions is that we are faithfully following the tailoring analysis for Indian classifications laid out by *Mancari*, *Rice*, and *Adoptive Couple*. JUDGE DENNIS's analysis, by contrast,

2. The "Indian child" classification fails to rationally further ICWA's goal of linking children to tribes.

For three related reasons, ICWA's disparate standards for "Indian children" fail to rationally further federal obligations toward Indian tribes.

First, ICWA creates separate standards for Indian children that extend beyond internal tribal affairs and intrude into state proceedings. *Mancari* long ago cautioned that a "blanket exemption" for Indians in the civil service system would raise "obviously . . . difficult" equal protection problems. 417 U.S. at 554. *Rice* amplified this warning, holding an Indian classification could not "extend" beyond a tribe's "internal affair[s]" into an "affair of the State," like an election. 528 U.S. at 520–22. ICWA does just what *Mancari* foretold and *Rice* forbade: it creates disparate standards for Indian children in state proceedings. By exporting a blanket Indian exception into state proceedings, ICWA violates *Rice* and severs any connection to internal tribal concerns.

Compare this intrusion on state jurisdiction with the law upheld in *Fisher*. *Supra* II(B)(1). *Fisher* approved exclusive tribal jurisdiction for adoptions where the child, birth parents, and adoptive parents were "each and all members of the [tribe] and . . . reside[d] within the exterior boundaries of the [reservation]." 424 U.S. at 384 n.6. That limited measure was "justified" because it "further[ed] the congressional policy of Indian self-government." *Id.* at 391. By contrast, ICWA dictates different standards for Indian children within "the States['] . . . recognized jurisdiction." § 1901(5). By imposing "Indian child" standards on state proceedings,

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proceeds as if those precedents had no bearing on this question at all, which is incorrect. *See infra* III(A)(2)–(3).

ICWA severs the link to tribal self-government or any other tribal interest identified by the Supreme Court.

In disagreeing with this analysis, Defendants and JUDGE DENNIS misread *Rice*. First, they claim *Rice* merely reaffirmed *Mancari* and nothing more. DENNIS OP. at 117. Not so: *Rice* specified that *Mancari*'s "limited" and "*sui generis*" Indian classification could not apply outside the tribal context to a state-wide election. 528 U.S. at 520–22. Thus, JUDGE DENNIS is wrong to argue that "the degree to which [ICWA] intrudes on state proceedings has no bearing on whether [ICWA] is rationally linked to protecting Indian tribes." DENNIS OP. at 120. To the contrary, *Rice* said this is a critical factor: an Indian classification cannot be transplanted from the "internal affair[s]" of tribes into external matters concerning all state citizens. 508 U.S. at 520; *see, e.g.*, *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (explaining that, after *Rice*, "Congress may not authorize special treatment for a class of tribal Indians in a state election"). Next, Defendants and JUDGE DENNIS say *Rice*, unlike this case, concerned the Fifteenth Amendment. DENNIS OP. at 121. That is true but misses the point. *Rice* said an Indian class could not be used "in critical state affairs." 528 U.S. at 522. Child-custody proceedings are no less critical to states than was the agency election in *Rice. See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The State . . . has a duty of the highest order to protect the interests of minor children, particularly those of tender years."). Finally, Defendants argue that, unlike in *Rice*, ICWA does not "*bar* any person . . . from participating in child-custody proceedings" (emphasis added). That is beside the point. *Rice* did not turn on whether people's rights were "barred" or only limited. Its point was that a tribal classification—which could limit participation in a tribe's "internal affair[s]"—cannot do so in "affair of the

[s]tate," like the state election in *Rice* or the state custody proceedings here. *Id.* at 520.[81]

Second, ICWA covers children only "eligible" for tribal membership. Enacting ICWA, Congress declared "there is no resource that is more vital to the continued existence and integrity of Indian tribes than *their* children." § 1901(3) (emphasis added). But ICWA applies not only to child tribe members, but also to a child only "*eligible* for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe." § 1903(4) (emphasis added). As Defendants tell us, "[m]embership in an Indian tribe is generally not conferred automatically upon birth," but requires "affirmative steps" by parents or guardians. *See* 81 Fed. Reg. at 38,783 (explaining "Tribal membership . . . is voluntary and typically requires an affirmative act by the enrollee or her parent"). This means ICWA applies to a child who is not, and may never become, a tribe member.

Federal Defendants respond that, because a child's "formal enrollment" in a tribe depends on parents or guardians, eligibility is a "proxy" for the child's "not-yet-formalized tribal affiliation." This is just a complicated way of saying that a child only *eligible* for membership may never become a member, and may have no other tangible connection to a tribe. The cases before us illustrate the point better than any abstract discussion could.

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[81] JUDGE DENNIS goes so far as to say that state child-custody proceedings involving Indian children are somehow no longer purely *state* affairs. Relying on Congress's finding that Indian children are tribes' "vital" "resource[s]," 25 U.S.C. § 1901(3), he claims: "[E]ven when ICWA reaches into state court adoption proceedings, those proceedings are simultaneously affairs of states, tribes, and Congress." DENNIS OP. at 122. No authority supports that remarkable claim. ICWA's own findings recognize that "the States" have "their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies," 25 U.S.C. § 1901(5), and its provisions maintain the distinction between state and tribal jurisdiction, *id.* § 1911(a), (b).

Take A.L.M., whom the Brackeens eventually adopted, with his birth parents' approval, over objections by the Navajo Nation. A.L.M.'s only tie to the Navajo is that his mother is a member (his father is Cherokee). But neither A.L.M. nor his birth parents have ever lived on the Navajo reservation during A.L.M.'s life, except for the "day he was born and the next day." The Navajo never tried to participate in A.L.M.'s adoption proceedings. And the only reason A.L.M. is considered Navajo (and not Cherokee) is that "representatives of the Cherokee and Navajo Nations . . . reached an agreement in the hallway outside the hearing room that A.L.M. would become a member of the Navajo Nation because only the Navajo had identified a potential foster placement." Or take Child P., whom the Cliffords are trying to adopt over objections by the White Earth Band of Ojibwe Indians. Child P. is linked to the White Earth Band through her maternal grandmother, R.B. Before Child P. was placed with the Cliffords, the tribe wrote the state court that Child P. was ineligible for membership. After placement, however, the tribe changed its position and declared Child P. eligible. This triggered ICWA's placement preferences: Child P. was taken from the Cliffords and placed with R.B., whose foster license had been previously revoked by the state.

As these cases illustrate, ICWA permits a child's inchoate tribal membership to override her placement in state proceedings.[82] ICWA thereby

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[82] JUDGE DENNIS waves away this (and the next) tailoring flaw in ICWA because he claims they only make the law "under- and over-inclusive." DENNIS OP. at 122–23. We disagree. First, JUDGE DENNIS again disregards what *Mancari*, *Rice*, and *Adoptive Couple* teach about tailoring: overbroad Indian classifications divorced from tribal interests create equal protection problems. *See Mancari*, 417 U.S. at 554; *Rice*, 528 U.S. at 520–22; *Adoptive Couple*, 570 U.S. at 655. Second, the "eligibility" criterion does not merely make ICWA "over-inclusive." Eligibility—one of only two ways to trigger ICWA—makes the law cover children (like the ones here) with no actual connection to a tribe. Third, as discussed below, allowing ICWA to *override* birth parents' wishes to place their children with non-Indians does not mean ICWA only has "imperfect means-ends fit[]." DENNIS

"put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple*, 570 U.S. at 655. This squarely raises the "equal protection concerns" forecast by the Supreme Court in *Adoptive Couple*.[83]

Third, ICWA overrides the wishes of biological parents who support their child's adoption outside the tribe. When enacting ICWA, Congress proclaimed that too many Indian families were being "broken up" when non-tribal agencies engaged in the "often unwarranted" "removal" of children and placed them with "non-Indian" families. § 1901(4). But ICWA applies even when an Indian child's parents do not oppose adoption outside the tribe. In other words, ICWA applies in circumstances entirely unlike those that gave rise to the law—situations where no Indian family is being "broken up" by state authorities and where parents themselves acquiesce in children's being placed in "non-Indian foster [or] adoptive homes." *Id.*

Again, the cases before us illustrate the point. Take Baby O., the child of Altagracia Hernandez (a non-Indian) and E.R.G. (descended from members of the Ysleta del sur Pueblo Tribe). Both parents supported Baby O.'s adoption by the non-Indian Librettis—indeed, Hernandez is a plaintiff in this case alongside the Librettis. Yet the Pueblo, asserting E.R.G. was a

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OP. at 123 (citation omitted). Instead, it makes nonsense of ICWA's key goal of preventing the *break-up* of Indian families. *See* 25 U.S.C. § 1901(4). Finally, JUDGE DENNIS discounts ICWA's first tailoring flaw—namely, its intrusion into state proceedings in defiance of *Mancari* and *Rice*. Taken together, these three flaws show ICWA fails to rationally further its goals.

[83] Few provisions in Title 25 define "Indian" to include persons "eligible" for tribal membership. *See, e.g.*, 25 U.S.C. § 2511(3) (defining "Indian" this way for purposes of tribal school grants). None of these provisions, however, has any impact on state proceedings as ICWA does. *Cf., e.g.*, § 2502(a)(1) (authorizing federal grants to tribes that operate certain schools). Consequently, none is affected by our holding that ICWA's inclusion of "eligible" members is one factor that severs its connection to tribal interests.

member, intervened and proposed numerous Indian-family placements under ICWA. Or again take A.L.M., whose Navajo mother and Cherokee father both testified they support A.L.M.'s adoption by the non-Indian Brackeens. Nonetheless, the Navajo sought to block the Brackeens' adoption of A.L.M. in favor of placing the child with unrelated tribe members, and is now doing the same with the Brackeens' attempt to adopt A.L.M.'s half-sister, Y.R.J. *See In re Y.J.*, 2019 WL 6904728, at *3–5.

As Plaintiffs point out, allowing ICWA to override birth parents' wishes in this way again raises the "equal protection concerns" foreshadowed by *Adoptive Couple*. In that case, the Court warned ICWA was open to equal protection challenge if it allowed a tribe member "to override the mother's decision and the child's best interests" and thus "put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." 570 U.S. at 655–56. What the Court foretold there is what has happened here to A.L.M, Y.R.J., and Baby O.: their parents' wishes were potentially or actually overridden by a non-custodial tribe member's invocation of ICWA. Applying ICWA in this way does nothing to further Congress's original aim of preventing Indian families' being "broken up" by the "unwarranted removal" of their children and placement with non-Indian families. § 1901(4).

In sum, we conclude that ICWA's "Indian child" classification violates the equal protection component of the Fifth Amendment.[84]

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[84] As the district court found, this conclusion directly impacts the placement preferences in § 1915(a) and (b), the collateral attack provisions in §§ 1913 and 1914, and the Final Rule provisions in 25 C.F.R. §§ 23.129–132.

3. The "Indian family" classification fails to rationally further ICWA's goal of linking children to tribes.

We next consider Plaintiffs' claim that ICWA impermissibly discriminates against non-Indian families. While Plaintiffs challenge ICWA's placement preferences as a whole on this basis, the logical focus of the claim is on the adoptive preference for "other Indian families" in § 1915(a), as well as the preference for a licensed "Indian foster home" in § 1915(b). *See* §§ 1915(a)(3), 1915(b)(iii). In these provisions, ICWA's preference for "Indian" over "non-Indian" families is most evident. Plaintiffs argue this privileging of Indian over non-Indian families is a racial classification that fails strict scrutiny. As with the Indian child classification, however, we assume *arguendo* that "Indian family" is a tribal, not a racial, category. We do so because we agree with Plaintiffs' alternative argument that the preference fails to rationally further Congress's goal of keeping Indian children linked to their own tribe. As Plaintiffs correctly point out, "placing a tribal child with a *different* Indian tribe does not even conceivably advance the continued existence and integrity of the child's tribe."

ICWA's overriding purpose was to safeguard the continued "existence and integrity of Indian tribes" by protecting "their children" from unwarranted removal. § 1901(3). Congress invoked the United States' interest "in protecting Indian children who are members or eligible for membership in an Indian tribe." *Id.* Congress also faulted states for "often fail[ing] to recognize the essential tribal relations of Indian people." § 1901(5). Many of ICWA's provisions seek to further this tribe-focused goal. For instance, a tribe has exclusive jurisdiction of adoptions involving an Indian child domiciled "within the reservation of *such tribe*." § 1911(a) (emphasis added). Right to intervene is given to "the Indian child's tribe." § 1911(c). And some of ICWA's placement preferences are tribe-based—obviously the preference for "other members of the Indian child's tribe"

(§ 1915(a)(2)), but also the preference for "a member of the child's extended family" (§ 1915(a)(1), 1915(b)(i)), who is presumably of the same tribe.

ICWA, however, also has provisions broadly preferring "Indian families" over non-Indian families. A non-Indian family seeking to adopt or foster an Indian child, absent "good cause to the contrary," will fail if "other Indian families" or "Indian foster home[s]" are available. §§ 1915(a)(3), 1915(b)(iii). Nothing requires these Indian families or homes to be of a child's tribe. *See* § 1903(3) (relevantly defining "Indian" as "any person who is a member of an Indian tribe"). In fact, they are virtually assured not to be: otherwise, they would qualify as "other members of the Indian child's tribe." § 1915(a)(2).

We agree with Plaintiffs that a naked preference for Indian over non-Indian families does nothing to further ICWA's stated aim of ensuring that Indian children are linked to their tribe. This conclusion follows *a fortiori* from our conclusion that ICWA's Indian child category is insufficiently linked to federal tribal interests. The Indian child category encompassed children who were not, and may never be, members of a tribe. Even more, ICWA's preference for "Indian families" lacks any connection to a child's tribe: as explained, the Indian families preferred over non-Indian families are, by definition, not members of the child's tribe. Thus, the preference has no rational link to maintaining a child's links with his tribe. Similarly, the Indian child category ran afoul of *Mancari*, *Fisher*, and *Rice* by creating a blanket exception for Indian children in state child-custody proceedings. The Indian family category does the same: by definition, Indian families have a statutorily-conferred advantage over non-Indian families with respect to state adoptions and foster placements. Even assuming the Indian family category is tribal and not racial, ICWA extends the category far beyond *Mancari* and *Fisher*, and infiltrates the kind of "critical state affairs" that *Rice* forbade. *See Rice*, 528 U.S. at 522.

In response, Federal Defendants argue that this "Indian family" preference is not merely a "preference for 'generic "Indianness."'" They assert it instead "reflects the reality that many tribes have deep historic and cultural connections with other tribes, and that many Indian children may be eligible for membership in more than one tribe." We are unpersuaded. Even accepting that some tribes are interrelated, ICWA's Indian family preference is not limited in that way. Rather, the preference privileges Indian families of *any* tribe, regardless of their connection to the child's tribe, over all non-Indian families. ICWA's classification therefore does not rationally further linking children to their tribes.

In sum, we conclude ICWA's preferring Indian over non-Indian families violates the equal protection component of the Fifth Amendment.

B. Commandeering and Preemption

The district court concluded numerous provisions of ICWA "commandeer" state agencies and courts in violation of Article I and the Tenth Amendment.[85] *See Brackeen*, 338 F. Supp. 3d at 538–41. The court also ruled that the preemption doctrine does not save these provisions because they "directly command states." *Id.* at 541. On appeal, Defendants argue ICWA does not commandeer states because it evenhandedly regulates an activity in which both states and private parties engage. They also claim the challenged provisions merely create federal rights enforceable in state courts under the Supremacy Clause.

The anti-commandeering doctrine recognizes the "fundamental structural" principal that "the Constitution . . . withhold[s] from Congress

[85] Specifically, the court found invalid §§ 1901–23 and 1951–52, which "include the congressional findings and declaration of policy, definitions, child custody proceedings, record keeping, information availability, and timetables."

the power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475; *see generally Printz*, 521 U.S. 898; *New York*, 505 U.S. 144; *FERC v. Mississippi*, 456 U.S. 742 (1982); *Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264 (1981). To be sure, Congress may encourage states to regulate as it wishes. For instance, Congress may "attach conditions on the receipt of federal funds" under the Spending Clause. *New York*, 505 U.S. at 167 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)). Or it may offer states the option of regulating "private activity . . . according to federal standards or having state law pre-empted by federal regulation." *Id.* (citing *Hodel*, 452 U.S. at 288). What Congress cannot do, however, is issue "a simple command to state governments to implement legislation enacted by Congress." *Id.* at 176. Nor may it "compel the States to enact or administer a federal regulatory program." *Id.* at 188. This anti-commandeering doctrine reflects a basic principle: "[t]he Constitution confers on Congress not plenary legislative power but only certain enumerated powers," and "conspicuously absent" from those is "the power to issue direct orders to the governments of the States." *Murphy*, 138 S. Ct. at 1476.

The Supreme Court has deployed this doctrine to declare unconstitutional federal legislation commanding state legislatures, officers, and agencies. For instance, Congress could not make state legislatures "take title" to radioactive waste, nor make state executive agencies "regulat[e] [waste] according to the instructions of Congress." *New York*, 550 U.S. at 175–76; *see also Murphy*, 138 S. Ct. at 1476 (the law in *New York* "issued orders to either the legislative or executive branch of state government"). Congress also could not compel state or local officers to conduct background checks under a federal firearms law. *Printz*, 521 U.S. at 903–04, 933. Such a requirement—even if it involved only "discrete, ministerial tasks," *id.* at 929—would amount to "the forced participation of the States' executive in the actual administration of a federal program." *Id.* at 918. Finally, Congress

could not prohibit states from "author[izing]" sports gambling because that would "unequivocally dictate[] what a state legislature may and may not do." *Murphy*, 138 S. Ct. at 1470, 1478.

Different dynamics come into play when asking—as the district court did here—whether federal law commandeers state *courts*. This is due to the Supremacy Clause, which binds "the Judges in every State" to follow validly enacted federal law. U.S. CONST. art. VI, cl. 2; *see Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (Supremacy Clause "provides 'a rule of decision' for determining whether federal or state law applies in a particular situation" (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015))). Thus, Congress may, "in a sense, direct state judges" by enacting federal law state courts must apply. *New York*, 505 U.S. at 178–79.[86] Similarly, state judges must apply federal law that validly preempts applicable state law. *Murphy*, 138 S. Ct. at 1479. So, if federal law is enforceable in state courts or preempts state law, no "commandeering" arises from the fact that state courts must apply the federal enactment—rather, this is what the Supremacy Clause demands. *New York*, 505 U.S. at 179; *see also Printz*, 521 U.S. at 907 (state courts "have been viewed distinctively in this regard" because "unlike legislatures and executives, they applied the law of other sovereigns all the time"). The Supremacy Clause, however, assumes the same limit on Congress's power that the anti-commandeering doctrine does—that Congress may regulate only individuals, not state governments.[87] In that

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[86] *See also id.* at 179 (explaining "this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause"); *Printz*, 521 U.S. at 907 (suggesting "the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions").

[87] *See New York*, 505 U.S. at 178 (federal laws enforceable in state courts "involve congressional regulation of individuals, not congressional requirements that States

regard, then, the operation of the Supremacy Clause overlaps with anti-commandeering.

Finally, we should not lose sight of why anti-commandeering is critical. First, the doctrine protects the division of power between federal and state governments, which "secures to citizens the liberties that derive from the diffusion of sovereign power" and "reduce[s] the risk of tyranny and abuse from either front." *New York*, 505 U.S. at 181–82 (citations omitted). Second, the doctrine "promotes political accountability" by letting voters know "who to credit or blame" for good or bad policies. *Murphy*, 138 S. Ct. at 1477.[88] Third, the doctrine "prevents Congress from shifting the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1477.[89]

With that background in mind, we proceed to our analysis. We first address Plaintiffs' anti-commandeering challenges (*infra* III(B)(1)). We next address whether the preemption doctrine saves any of the challenged provisions (*infra* III(B)(2)). As the Supreme Court has done in this area, we analyze the challenged provisions separately.[90] ICWA touches many aspects

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regulate"); *Murphy*, 138 S. Ct. at 1481 (explaining "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States").

[88] *See also New York*, 505 U.S. at 169 ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.").

[89] *See also Printz*, 521 U.S. at 930 ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes.").

[90] *See*, *e.g.*, *Murphy*, 138 S. Ct. at 1470 (analyzing only the component of the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702(1), that prohibits states from "authoriz[ing] by law" sports betting); *Printz*, 521 U.S. at 902–03 (analyzing only those Brady Act sections, 18 U.S.C. § 922(s)(2), 922(s)(6)(C), 922(s)(6)(B), applicable to a "chief law enforcement officer"); *New York*, 505 U.S. at 152–54, 174–77 (analyzing

of state child-custody proceedings. It would not be implausible to find constitutionally problematic provisions alongside permissible ones.[91]

1. Commandeering

As discussed, the anti-commandeering doctrine typically asks whether federal law conscripts state agencies or officials. This part therefore focuses on Plaintiffs' claims that ICWA compels action by state child welfare agencies. Where Plaintiffs instead challenge provisions compelling state courts, we consider those claims under preemption analysis, *infra*.

a. *ICWA's active-efforts, expert-witness, placement-preference, placement-record, and notice provisions commandeer state agencies.*

No Defendant denies that ICWA requires action by state child welfare agencies. This is unsurprising. What prompted ICWA, after all, were concerns about Indian families' treatment by "State[ ] . . . *administrative* and judicial bodies." § 1901(5) (emphasis added). ICWA obviously covers matters—child-custody proceedings—lying within the purview of state agencies.[92] ICWA's regulations, moreover, describe actions that must be taken by "State agencies," "governmental organizations," and "State

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separately the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act, 42 U.S.C. § 2021e(d)(2)(C)).

[91] *See*, *e.g.*, *Murphy*, 138 S. Ct. at 1481 (analyzing regulation of state legislatures in PASPA § 3702(1) separately from the "closely related provision" in § 3702(2) regulating "private conduct"); *New York*, 505 U.S. at 173–75 (two of the Act's "incentives" were valid under Spending Clause and preemption, whereas "take-title" provision commandeered states).

[92] *See*, *e.g.*, TEX. HUM. RES. CODE § 40.002(b)(1), (2) (providing Texas Department of Family and Protective Services "shall . . . provide protective services for children" as well as "family support and family preservation services"); TEX. FAM. CODE § 262.001(a) (authorizing "governmental entity with an interest in the child" to take actions to protect child).

actors."[93] For instance, ICWA's placement preferences "create[ ] an obligation on *State agencies* and courts to implement the policy outlined in the statute." 81 Fed. Reg. at 38,839 (emphasis added). Thus, the idea that ICWA compels state agencies seems incontestable. As the district court concluded, Texas "indisputably demonstrated that the ICWA requires [Texas's] executive agencies to carry out its provisions." *Brackeen*, 338 F. Supp. 3d at 540. It specifically found that the relevant agency, the DFPS,

> must, among other things[:] serve notice of suit on Indian tribes, verify a child's tribal status, make a diligent effort to find a suitable placement according to the ICWA preferences and show good cause if the preference are not followed, ensure a child is enrolled in his tribe before referring him for adoption, and keep a written record of the placement decision.

Id. at 540 & n.18. Defendants dispute none of this.[94]

Turning to the specific challenges before us, we conclude the following ICWA provisions commandeer state agencies.

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[93] *See*, *e.g.*, 81 Fed. Reg. at 38,779 (ICWA sought to remedy failures by "State agencies and courts"); *id.* at 38,780 (noting "[s]everal ICWA provisions do apply, either directly or indirectly, to State and private agencies"); *id.* at 38,790 ("active efforts" require "substantial and meaningful actions by agencies," meaning "agencies of government"); *id.* at 38,791 (agreeing "active efforts" "require States to affirmatively provide Indian families with substantive services"); *id.* at 38,792 (definition of "agency" includes "governmental organizations"); *id.* at 38,814 ("active efforts" requirement "ensure[s] that State actors . . . provide necessary services to parents of Indian children"). *See also*, *e.g.*, *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 n.18 (1989) (observing ICWA sought to address "the failure of State officials [and] agencies" to consider "the special problems and circumstances of Indian families") (internal quotation omitted).

[94] JUDGE DENNIS's opinion does not squarely address whether ICWA commands state agencies. We understand his view to be that the point is immaterial because ICWA "evenhandedly regulates an activity in which both States and private actors engage." DENNIS OP. at 89 (quoting *Murphy*, 138 S. Ct. at 1478). We disagree and respond below.

i. *Active efforts (§ 1912(d))*. We begin with the "active efforts" requirement in § 1912(d). Any "party" seeking to place an Indian child in foster care, or to terminate parental rights, must "satisfy the court that active efforts have been made to provide remedial services . . . designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Id.* State agencies are "parties" that seek placement or termination with respect to Indian children.[95] Consequently, ICWA's active-efforts requirement demands extensive action by state and local agencies as a condition to fulfilling their obligations to Indian children.[96] For example, in *Doty-Jabbaar v. Dallas County Child Protective Services*, a state appellate court concluded a county agency failed ICWA's active-efforts requirement before terminating a birth mother's rights. 19 S.W.3d 870, 875–76 (Tex. App.—Dallas 2000, pet. denied). Although the agency had given the mother a seven-point plan including "drug treatment, parenting classes, and psychological evaluations," the court found insufficient evidence that "these remedial services and rehabilitation programs had proven unsuccessful." *Id.* at 875.[97]

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[95] *See*, *e.g.*, *N.M. v. Tex. Dep't of Fam. & Prot. Servs.*, No. 03-19-00240-CV, 2019 WL 4678420, at *1 (Tex. App. —Austin Sept. 26, 2019, no pet.) (ICWA case involving Texas DFPS's efforts "to terminate the parent-child relationship of N.M. and the children's father"); TEX. FAM. CODE §§ 153.371(10), 101.0133 (as child's managing conservator, DFPS has "the right to designate the [child's] primary residence," including foster placement); *see also* 81 Fed. Reg. at 38,792 ("any party" in § 1912 includes "governmental organizations").

[96] *See* 25 C.F.R. § 23.2 (defining "active efforts" to mean "affirmative, active, thorough, and timely efforts" to "maintain or reunite an Indian child with his or her family"); *see also, e.g.*, *In re D.E.D.I.*, 568 S.W.3d 261, 262–63 (Tex. App.—Eastland 2019, no pet.) (trial court "specifically found" that DFPS "made active efforts to provide remedial services and rehabilitation programs" under ICWA).

[97] *Cf., e.g.*, *In re J.L.C.*, 582 S.W.3d 421, 433–34 (Tex. App.—Amarillo 2018, pet. ref'd) (finding ICWA active-efforts burden satisfied because "the [DFPS] had appropriately engaged [the parent] with services but the Department's efforts had failed")

ICWA's regulations confirm that active-efforts demands action by state agencies. Through the "'active efforts' provision . . . Congress intended to require States to affirmatively provide Indian families with substantive services." 81 Fed. Reg. at 38,791. The "active-efforts requirement," they emphasize, "is one critical tool to ensure that *State actors* . . . provide necessary services to parents of Indian children." *Id.* at 38,814 (emphasis added).[98] The Final Rule even specifies the efforts required by § 1912(d)—including eleven categories of remedial services—"[w]here an agency is involved in the child-custody proceeding." 25 C.F.R. § 23.2.[99]

We therefore conclude that the active-efforts requirement in § 1912(d) commandeers states in violation of Article I and the Tenth Amendment. *See also Brackeen*, 937 F.3d at 443 (OWEN, J., dissenting in part) (concluding § 1912(d) "means that a State cannot place an Indian child in foster care, regardless of the exigencies of the circumstances, unless it first provides the federally specified services and programs without success").

ii. *Expert witnesses (§ 1912(e), (f))*. We reach the same conclusion as to the "expert witness" requirements in § 1912(e) and (f). These provisions prohibit placement or termination absent "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

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[98] *See also id.* at 38,814 (active-efforts requirement sought to remedy failures by "agencies of government"); *id.* at 38,790 (the "active efforts requirement" is one of ICWA's "primary tools" to address failures by "agencies of government" and should therefore be "interpreted in a way that requires substantial and meaningful actions by agencies to reunite Indian children with their families").

[99] The term "agency" includes "governmental organizations." 81 Fed. Reg. at 38,792; *see also* 80 Fed. Reg. 10,146, 10,151 ("[a]gency" includes a "public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding").

damage to the child." § 1912(e) (foster placement); § 1912(f) (termination). ICWA thus "requires the testimony of qualified expert witnesses for foster-care placement and for adoptive placements." 81 Fed. Reg. at 38,829 (citing § 1912(e), (f)); *see also* 25 C.F.R. § 23.122(a) (specifying expert qualifications). As a result, state agencies must present the testimony of expert witnesses, with specific qualifications, when they seek to place an Indian child in foster care or terminate parental rights. *See also Brackeen*, 937 F.3d at 443–44 (OWEN, J., dissenting in part) (concluding § 1912(e) "places the burden on a State, not a court, to present expert witness testimony in order to effectuate foster care for Indian children").

For instance, a Texas appellate court recently found that the DFPS failed to justify terminating parental rights under ICWA because "the Department failed to produce testimony of a 'qualified expert witness' as required under the Act." *S.P. v. Tex. Dep't of Fam. & Prot. Servs.*, No. 03-17-00698-CV, 2018 WL 1220895, at *3 (Tex. App.—Austin Mar. 9, 2018, no pet.). Although DFPS offered testimony by the child's caseworker that termination was in the child's best interest, the court concluded the caseworker did not have "the requisite expertise to satisfy the federal requirement." *Id.* at *4. For instance, the caseworker was not "recognized by the Muscogee tribe," nor did she have "substantial experience in the delivery of child and family services to Indians or knowledge of [the tribe's] prevailing social and cultural standards and childrearing practices." *Id.*[100] The court therefore concluded the state agency failed to meet the "qualified

[100] *See* 80 Fed. Reg. at 10,157 (ICWA guidelines providing, *inter alia*, that a qualified expert "should have specific knowledge of the Indian tribe's culture and customs").

expert witness" requirement in § 1912(f) and reversed the termination of parental rights. *Id.* at *4–5.[101]

We conclude that § 1912(e) and (f) require state agencies and officials to bear the cost and burden of adducing expert testimony to justify placement of Indian children in foster care, or to terminate parental rights. The expert-witness requirements in § 1912(e) and (f) therefore commandeer states.

iii. *Placement preferences (§ 1915(a)–(d))*. We also conclude that the placement preferences in § 1915(a)–(d) violate the anti-commandeering doctrine to the extent they direct action by state agencies and officials. These provisions require that, absent good cause, "preference shall be given" to specific adoptive and foster placements for an Indian child.[102] Insofar as these preferences constrain state courts, we examine below whether they are valid preemption provisions. Quite apart from state courts, however, the preferences appear to independently demand efforts by state agencies and officials.

ICWA's regulations support this reading. The placement preferences, they state, "create[ ] an obligation on *State agencies* and courts to implement the policy outlined in the statute" and "require that *State agencies* and courts make efforts to identify and assist extended family and Tribal members with preferred placements." 81 Fed. Reg. at 38,839

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[101] *See also*, *e.g.*, *In re K.S.*, 448 S.W.3d 521, 539, 544–45 (Tex. App.—Tyler 2014, pet. denied) (affirming state agency's termination of parental rights under ICWA based on testimony of a "Cherokee Nation representative" who "was qualified as an expert witness" under § 1912(f)).

[102] *See* § 1915(a) (requiring adoptive preference in favor of (1) extended family, (2) other tribe members; or (3) other Indian families); § 1915(b) (requiring different foster-care preferences); § 1915(c) (tribes may re-order preferences); § 1915(d) (preference decisions must accord with "prevailing social and cultural standards" of pertinent Indian community).

(emphases added). These "*State efforts to identify and assist preferred placements* are critical to the success of the statutory placement preferences." *Id.* at 38,839–40 (emphasis added) (collecting decisions). Further confirming this view, ICWA's guidelines, *see* 80 Fed. Reg. 10,146, specify duties that "[t]he *agency* seeking a preadoptive, adoptive or foster care placement of an Indian child *must always follow*." 80 Fed. Reg. at 10,157 (emphases added). For example, to justify deviating from the preferences, the agency must prove that "a diligent search has been conducted to seek out and identify placement options"—including detailed notices to the parents or custodian, "known, or reasonably identifiable" extended family, the child's tribe, and—for foster or preadoptive placements—ICWA-specified institutions. *Id.* And, as discussed, ICWA guidelines specify that the "agency" that must undertake these efforts includes a "public agency and their employees, agents or officials." *Id.* at 10,151.[103]

State decisions confirm that ICWA's placement preferences may result in demanding extensive actions by state child welfare agencies. For example, in *Native Village of Tununak v. State*, the Alaska Supreme Court addressed the duties of the Alaska Office of Child Services ("OCS") to implement the placement preferences. 334 P.3d 165, 177–78 (Alaska 2014). To safeguard ICWA's preferences, courts "must searchingly inquire about . . . OCS's efforts to comply with achieving[] suitable § 1915(a) placement preferences" and, in turn, OCS must "identify[] early in a [child welfare proceeding] all potential preferred adoptive placements." *Id.* at 178.[104]

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[103] Surprisingly, Tribal Defendants contend the preferences apply "exclusively to state courts" and "are not mandates requiring that state executive branch employees enforce federal law." ICWA's regulations show the opposite is true.

[104] *See also*, *e.g.*, *Alexandra K. v. Dep't of Child Safety*, No. 1 CA-JV 19-0081, 2019 WL 5258095, at *1 (Ariz. Ct. App. Oct. 17, 2019) (observing "[t]he [Arizona Department of Child Safety] case manager testified DCS had not located any ICWA-compliant placement

In sum, to the extent the placement preferences in § 1915(a)–(d) require implementation efforts by state agencies and officials, that violates the anti-commandeering doctrine.

iv. ***Placement record (§ 1915(e); 25 C.F.R. §23.141).*** We also conclude that the related placement-record requirements in § 1915(e) commandeer states (along with its implementing regulation in 25 C.F.R. § 23.141). This provision requires "the State" to "maintain[ ] . . . [a] record" of any Indian child placements under state law. § 1915(e). The record must "evidenc[e] the efforts to comply with the order of preference specified in [§ 1915]" and "shall be made available at any time upon the request of the Secretary or the Indian child's tribe." *Id.* In turn, the Final Rule specifies: (1) the record's minimum contents, 25 C.F.R. § 23.141(b); (2) that "[a] State agency or agencies may be designated to be the repositories for this information," *id.* § 23.141(c), and (3) that "[t]he State court or agency should notify the [Bureau of Indian Affairs] whether these records are maintained within the court system or by a State agency," *id.*

As then-JUDGE OWEN reasoned in her panel dissent, these requirements commandeer states because they are "direct orders to the States." 937 F.3d at 444, 446 (OWEN, J., dissenting in part). The statute and regulation each command "the State" to create, compile, and maintain the required record and furnish it upon request to the child's tribe or the

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and that the Navajo Nation had not suggested any"); *People in Interest of M.D.*, 920 N.W.2d 496, 503 (S.D. 2018) (noting "[South Dakota Department of Social Services] workers also testified during the dispositional hearing to their familiarity with ICWA placement preferences, [and] their efforts to find a suitable placement for all the children"); *id.* at 504 (concluding that "because DSS explored the availability of a suitable placement for child with a diligent search, but was unsuccessful, there was good cause for departure from the placement preferences") (quoting *David S. v. State, Dep't of Health & Social Servs.,* 270 P.3d 767, 782 (Alaska 2012)) (cleaned up).

Secretary. § 1915(e); 25 C.F.R. § 23.141(a). Furthermore, the regulations explain that § 1915(e) "work[s] in concert" with the placement preferences to "require that State agencies and courts make efforts to identify and assist extended family and Tribal members with preferred placements." 81 Fed. Reg. at 38,839.[105] Consequently, as JUDGE OWEN correctly concluded, the placement-record requirements offend "the very *principle* of separate state sovereignty" because their "whole *object* . . . [is] to direct the functioning of the state executive" in service of a federal regulatory program. 937 F.3d at 445 (OWEN, J., dissenting in part) (quoting *Printz*, 521 U.S. at 932).

Tribal Defendants attempt to justify these requirements as merely making states perform administrative actions, such as "provid[ing] the federal government with information." *See also Printz*, 521 U.S. at 918 (declining to address constitutionality of laws "requir[ing] only the provision of information to the Federal Government" by state officials).[106] But the challenged provisions demand more than "provid[ing] information." The required record must not only compile documents but also "evidenc[e]" the state's "efforts to comply" with ICWA's placement preferences. § 1915(e).[107] The whole point is to help implement the placement

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[105] *See also id.* (explaining Congress intended "reading Sections 1915(a) and 1915(e) together" to "demand[ ] documentable 'efforts to comply' with the ICWA placement preferences").

[106] JUDGE DENNIS also cites *Printz*, 521 U.S. at 905–06, for the proposition that early federal laws required state courts to record citizenship applications and transmit naturalization records. DENNIS OP. at 86. But *Printz* did not decide whether those laws set a constitutional precedent. *See* 521 U.S. at 918. And, even assuming the recordkeeping obligations in § 1915(e) may be fulfilled by state courts, those obligations go well beyond the early examples in *Printz*. *See also infra* III(B)(2)(c) (discussing similar obligations imposed on state courts by § 1951(a)).

[107] *See also* 25 C.F.R. § 23.141(a), (b) (to justify departing from preferences, record "must contain . . . detailed documentation of the efforts to comply with the placement preferences"); 81 Fed. Reg. at 38,839 ("Section 1915(e) requires that, for each placement,

preferences, which, as explained, demand action by state agencies. *See also* 81 Fed. Reg. at 38,839 (preferences "create[] an obligation on State agencies and courts"). More than an obligation to "provide information," then, § 1915(e) demands states document the "forced participation of the States' executive in the actual administration of a federal program." *Printz*, 521 U.S. at 918.[108]

v. *Notice (§ 1912(a))*. Finally, we find § 1912(a) unconstitutional because it commandeers state agencies. Under this section, any "party" seeking to place an Indian child in foster care, or to terminate parental rights, "shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." *Id.*[109] The regulations describe this as "one of ICWA's core procedural requirements in involuntary child-custody proceedings." 81 Fed. Reg. at 38,809. It applies to state agencies. *See id.* at

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the State must maintain records evidencing the efforts to comply with the order of preference specified in section 1915.").

[108] JUDGE DENNIS sees no commandeering because the regulation implementing § 1915(e) "permits states to designate either their courts or agencies . . . as the entities charged with complying with" the requirement. DENNIS OP. at 87; *see* 25 C.F.R. § 23.141(c) (allowing designation of "[a] State agency or agencies" as "repository for this information"); *id.* (requiring "State court or agency" to notify BIA whether records are kept "within the court system or by a State agency"). We disagree. Whatever option the state chooses, either its agencies or its courts are co-opted into administering a federal program. JUDGE DENNIS's premise seems to be that requiring state *courts* to implement § 1915(e) would not be commandeering. That is mistaken. As explained below, forcing state courts to administer a federal recordkeeping regime violates anti-commandeering just as much as forcing agencies to do it. *See infra* III(B)(2)(c) (addressing recordkeeping requirement in § 1951(a)).

[109] If the identity or location of the parent, custodian, or tribe cannot be determined, "such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice." *Id.* The proceeding may not commence until ten days after receipt of notice by the parent, custodian, tribe, or the Secretary. *Id.*

38,792 ("any party" in § 1912(a) includes "governmental organizations").[110] The provision thereby imposes detailed[111] obligations on state agencies, which the Final Rule concedes will consume significant time and money.[112]

As explained, the anti-commandeering doctrine forbids Congress from imposing administrative duties on state agencies and officials. *See*, *e.g.*, *New York*, 550 U.S. at 176, 188 (Congress cannot issue "a simple command to state governments to implement legislation enacted by Congress," nor "compel the States to enact or administer a federal regulatory program"). Because that is what § 1912(a) does, it is unconstitutional.

b. *ICWA does not "evenhandedly regulate" state and private activity.*

Defendants' principal response on anti-commandeering is to invoke the principle that the doctrine "does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. For instance, they point out that private parties, as well as state agencies, may seek to be appointed as a child's guardian or

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[110] *See also*, *e.g.*, *In re Morris*, 815 N.W.2d 62, 72–76, 83 (Mich. 2012) (discussing § 1912(a) notice requirement and conditionally reversing order based on failure of court to ensure that state Department of Human Services notified child's tribe); *In re Desiree F.*, 99 Cal. Rptr. 2d 668, 696 (Cal. Ct. App. 2000) (finding it was "the duty of the Fresno County Department of Social Services to notify the Tribe or the Secretary" and invalidating court orders due to "the failure of the respective county welfare agencies and juvenile courts to comply with the clear provisions of the ICWA").

[111] *See*, *e.g.*, 25 C.F.R. § 23.111(a)(1), (c) (court must ensure "party seeking placement" sends notice "by registered or certified mail with return receipt requested"); *id.* § 23.111(d)(1)–(6) (14 different statements that must appear in notice); *id.* § 23.111(e) (if parent, custodian, or tribe not ascertainable, requiring notice to BIA, including "as much information as is known regarding the child's direct lineal ancestors").

[112] 81 Fed. Reg. at 38,863 (estimating at 81,900 the "[t]otal annual burden hours" for "State court[s] and/or agenc[ies]" to provide notices); *id.* at 38,864 (estimating at $260,442 the "annual cost burden" of providing required notices).

conservator or to terminate parental rights. Similarly, JUDGE DENNIS observes that some of the challenged provisions (notice and active efforts) refer to "any party" seeking placement or termination, and thus apply "regardless of whether that party is a state agent or private individual." *See* § 1912(a), (d); DENNIS OP. at 94. In advancing this argument, both Tribal Defendants and JUDGE DENNIS rely heavily on *South Carolina v. Baker*, 485 U.S. 505 (1988), and *Reno v. Condon*, 528 U.S. 141 (2000). DENNIS OP. at 92–93. They are right to do so, because those decisions undergird the "evenhanded regulation" principle. *See Murphy*, 138 S. Ct. at 1478–79 (discussing *Baker* and *Condon*). But examining those decisions shows the principle does not apply to ICWA.

Baker involved a federal law denying a tax exemption to interest earned on state and local bonds issued in unregistered ("bearer") form. 485 U.S. at 510. The law treated private bonds similarly. *Id.* The Supreme Court rejected South Carolina's argument that the law commandeered states by coercing them to enact and administer a registered bond scheme. *Id.* at 513–14. At most, the law "effectively prohibit[ed]" states from issuing bearer bonds pursuant to a "'generally applicable'" law treating state and private bonds equally. *Id.* at 514 (citation omitted). The Court emphasized that the challenged law "d[id] not . . . seek to control or influence the manner in which States regulate private parties." *Id.* Relying on *Baker*, *Condon* rejected South Carolina's commandeering challenge to a federal law restricting state DMVs from disclosing drivers' personal information. 528 U.S. at 144. The law also restricted private disclosure and resale of such information. *Id.* at 146. Distinguishing its commandeering decisions in *New York* and *Printz*, the Court explained that, here, the challenged law "d[id] not require the States in their sovereign capacity to regulate their own citizens," did not require state legislatures to enact any laws, and "d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals."

Id. at 151. Additionally, the law regulated states only as "the owners of data bases," and as part of "the universe of entities that participate as suppliers to the market for motor vehicle information." *Id.*

For two main reasons, the "evenhanded regulation" principle from *Baker* and *Condon* has no application here. First, the laws challenged in those cases, unlike ICWA, did not compel states "to regulate their own citizens." *Condon*, 528 U.S. at 151; *see also Murphy*, 138 S. Ct. at 1479. ICWA emphatically does. As explained, ICWA requires state agencies to provide remedial services to Indian families (§ 1912(d); 25 C.F.R. § 23.2; 81 Fed. Reg. at 38,814); to adduce expert witness testimony (§ 1912(e), (f); 25 C.F.R. § 23.122(a); 81 Fed. Reg. at 38,829); to assist Indian families and tribes with preferred placements (§ 1915(a)–(d); 81 Fed. Reg. at 38,839–40); to compile records evidencing efforts to comply with placement preferences (§ 1915(e); 25 C.F.R. § 23.141); and to provide detailed notices to parents, custodians, and tribes (§ 1912(a); 25 C.F.R. § 23.111). This is especially evident as to the placement preferences: ICWA "creates an obligation on State agencies and courts to *implement*" the preferences by "mak[ing] efforts to identify and assist extended family and Tribal members." 81 Fed. Reg. at 38,839 (emphasis added). These efforts are "critical to the success of the statutory placement preferences." *Id.* at 38,839–40. The fact that ICWA imposes "critical" duties on state actors concerning private persons sets it worlds apart from the tax law in *Baker* (which, at most, effectively prohibited states from issuing bearer bonds) and the privacy law in *Condon* (which restricted agency disclosure of drivers' information). Instead, ICWA fits *Condon*'s description of laws that commandeer states by "requir[ing] state officials to assist in the enforcement of federal statutes regulating private individuals." *Condon*, 528 U.S. at 151.

Second, unlike the laws in *Baker* and *Condon*, ICWA regulates states "in their sovereign capacity." *Condon*, 528 U.S. at 151; *see also Murphy*, 138

S. Ct. at 1478. In *Baker* and *Condon*, Congress regulated states as participants in the bond market (*Baker*, 485 U.S. at 510) and the "market for motor vehicle information" (*Condon*, 528 U.S. at 151). Because private parties also participated in those markets, and were treated similarly, those decisions could speak of Congress "evenhandedly regulat[ing] an activity in which both States and private parties engage." *Murphy*, 138 S. Ct. at 1479. ICWA is a different animal. It regulates states, not as market participants, but as sovereigns fulfilling their "duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore*, 466 U.S. at 433. The contrast with regulating state participation in bond or data markets could hardly be greater. As State Plaintiffs correctly observe, "child welfare is not a market regulated by Congress in which public and private actors participate," but is instead "the sovereign obligation of the States." Once again, ICWA's regulations clinch the point: they assert that ICWA balances federal interests in Indian families and tribes "with the States' *sovereign interest in child-welfare matters*." 81 Fed. Reg. at 38,789 (emphasis added).

JUDGE DENNIS responds that, because certain ICWA provisions may apply to private parties as well as state agencies, this triggers the *Baker/Condon* "evenhanded regulation" principle. DENNIS OP. at 93–101. We disagree. First, this view overlooks that *Baker* and *Condon* do not apply to a federal law that regulates states as sovereigns[113] and compels them to

[113] JUDGE DENNIS suggests that *Condon* addressed a law regulating states as sovereigns, and not as market participants, because "regulation of motor vehicles . . . is a quintessential state function." DENNIS OP. at 98. We disagree. Congress enacted the privacy law in *Condon* because it "found that many States . . . sell [drivers'] personal information to individuals and businesses," 528 U.S. at 143, just as "private persons" do, *id.* at 146. The law thus "regulate[d] the States as the owners of data bases," not as sovereigns. *Id.* at 151.

regulate private parties.[114] *Baker*, 485 U.S. at 514; *Condon*, 528 U.S. at 151; *see also Murphy*, 138 S. Ct. at 1479. ICWA does both. Second, JUDGE DENNIS's view mistakes the "activity" ICWA regulates. *Cf. Murphy*, 138 S. Ct. at 1478 (considering "an activity in which both States and private actors engage"). ICWA directly regulates state "child custody proceeding[s]." § 1903(1). This is not regulation of an "activity" states engage in alongside private actors, like bond issuance or data sharing. Instead, this is regulation of state administrative and judicial "proceedings" in service of a federal regulatory goal. The anti-commandeering doctrine forbids that.[115] Third, under JUDGE DENNIS's view, Congress could conscript state officials into a federal program, provided it requires private actors to participate too. The anti-commandeering cases do not support that view. The salient question, rather, is whether a federal law requires state officials to act

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[114] We disagree with JUDGE DENNIS that the duties imposed on state employees by the federal law in *Condon* are anything like ICWA's commandeering of state agencies. *See* DENNIS OP. at 98. In *Condon*, state DMV employees had to spend "time and effort" to "learn and apply" the patchwork of federal restrictions on disclosing driver information. 528 U.S. at 144–45, 150. But the employees were "not require[d] . . . to assist in the enforcement of [the] federal statute[]." *Id.* at 151. ICWA, by contrast, requires state agencies to "implement" the heart of the law—placement preferences—by "identify[ing] and assist[ing]" potential placements. 81 Fed. Reg. at 38,839–40; *see also id.* at 38,839 (stating the preferences "create[ ] an obligation on State agencies and courts to *implement the policy outlined in the statute*") (emphasis added). JUDGE DENNIS also misunderstands our point that state agencies' role here is "critical." *See* DENNIS OP. at 97 n.43. The point is not that commandeering depends on whether the state actor's forced action is "critical" or "trivial." Rather, the point is that ICWA's regulations describe state agencies as playing a "critical" role in "implement[ing]" the law, *see* 81 Fed. Reg. at 38,839–40, a telltale sign that the agencies are being "compel[led] . . . to . . . administer a federal regulatory program," *New York*, 505 U.S. at 188.

[115] *See New York*, 505 U.S. at 178 (explaining "Congress . . . may not conscript state governments as its agents"); *Murphy*, 138 S. Ct. at 1479 (Congress cannot "regulate the States' sovereign authority to 'regulate their own citizens'") (quoting *Condon*, 528 U.S. at 151)).

"in their official capacity" to implement a federal program. *See Printz*, 521 U.S. at 932 n.17 (Brady Act did not "merely require [state officers] to report information in their private possession" but instead to do so "in their official capacity"). ICWA does so. That parts of ICWA may also compel private parties does not dilute the fact that ICWA "compel[s] the States to . . . administer a federal regulatory program." *New York*, 505 U.S. at 188.[116]

2. Preemption

We now consider whether the challenged ICWA provisions do not commandeer states but are, instead, valid preemption provisions. *See Murphy*, 138 S. Ct. at 1479 (considering whether PASPA § 3702(1) was "a valid preemption provision"). The district court ruled preemption could not save any of those provisions because they "directly command states" and not "'private actors.'" *Brackeen*, 338 F. Supp. 3d at 541 (quoting *Murphy*, 138 S. Ct. at 1481). On appeal, Defendants argue the challenged provisions confer federal rights on Indian children, families, and tribes that preempt conflicting state laws.

"Preemption doctrine reflects the basic concept, grounded in the Supremacy Clause, that federal law can trump contrary state law." *Butler v. Coast Elec. Power Ass'n*, 926 F.3d 190, 195 (5th Cir. 2019) (citing *Arizona v. United States*, 567 U.S. 387, 398–99 (2012)). This occurs when federal law

[116] As part of his argument that certain sections of ICWA are "evenhanded" (and therefore do not commandeer states), JUDGE DENNIS also finds that these sections are "necessarily 'best read' as pertaining to private actors." DENNIS OP. at 99. But this argument grafts onto commandeering a preemption principle—namely, that a federal law preempts only if it is "best read as one that regulates private actors." *Murphy*, 138 S. Ct. at 1479. JUDGE DENNIS cites no authority for the proposition that the two analyses may be blended into one. Moreover, the most recent Supreme Court decision addressing commandeering and preemption—*Murphy*—treats the two analyses separately. *See* 138 S. Ct. at 1478–79 (commandeering); *id.* at 1479–81 (preemption). We will therefore follow the Supreme Court and address the "best read" issue under preemption, not commandeering.

conflicts with state law, expressly preempts state law, or excludes state legislation by occupying an entire field. *See Murphy*, 138 S. Ct. at 1480 (identifying "three different types of preemption—'conflict,' 'express,' and 'field'") (citation omitted).[117] To have any kind of preemptive effect, however, a federal law must meet two conditions: it (1) "must represent the exercise of a power conferred on Congress by the Constitution," and (2) must be "best read" as a law that "regulates the conduct of private actors, not the States." *Murphy*, 138 S. Ct. at 1479, 1481.[118]

At the outset, we note that ICWA implicates "conflict" preemption only. ICWA lacks an express preemption clause and no one contends ICWA occupies the field of Indian child-custody proceedings.[119] We also note that various ICWA provisions potentially conflict with state laws.[120] For instance, ICWA grants an indigent parent the right to appointed counsel, § 1912(b), which may exceed some state guarantees. ICWA also grants a child's tribe the right to intervene, § 1911(c), a right not automatically granted by some state laws. Substantively, ICWA imposes an onerous standard for terminating parental rights—proof "beyond a reasonable doubt" that continued custody "is likely to result in serious emotional or physical damage

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[117] *See also generally City of El Cenizo, Tex. v. Texas*, 890 F.3d 164, 176–81 (5th Cir. 2018) (field and conflict preemption); *Franks Inv. Co., LLC v. Union Pac. R. Co.*, 593 F.3d 404, 407–08 (5th Cir. 2010) (express preemption).

[118] *See also Alden*, 527 U.S. at 731 (explaining "the Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design") (citing *Printz*, 521 U.S. at 924).

[119] *See, e.g.*, *In re A.B.*, 245 P.3d 711, 718–19 (Utah 2010) (ICWA does not implicate express or field preemption); *In re W.D.H.*, 43 S.W.3d 30, 35–36 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (ICWA implicates only conflict preemption).

[120] *See generally New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–34 (1983) (discussing special considerations governing preemption of state law by "federal and tribal interests") (and collecting decisions).

to the child." § 1912(f). States, by contrast, generally allow termination based on "clear and convincing evidence" that a parent has committed certain offenses and that termination is in "the best interest of the child." *See, e.g.*, TEX. FAM. CODE § 161.001(b)(1), (2).[121] ICWA's placement preferences may also conflict with state standards, under which placements depend on the child's best interests.[122] Such conflicts, while not inevitable,[123] should come as no surprise. Whereas states seek only to promote a child's best interests, ICWA also seeks to "promote the stability and security of Indian tribes and families." § 1902.

With that background in mind, we proceed to the preemption analysis. We assume for purposes of this part only that ICWA is a valid exercise of Congress's power. *See Murphy*, 138 S. Ct. at 1479. We therefore focus on whether the challenged provisions are "best read" as regulating private instead of state actors. *Id.*

a. *The provisions that regulate private actors are valid preemption provisions.*

Contrary to the district court's ruling, *see Brackeen*, 338 F. Supp. 3d at 541, we conclude that several provisions of ICWA are valid preemption provisions because they are best read as regulating private actors. For

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[121] *See also, e.g.*, *In re W.D.H.*, 43 S.W.3d at 37, 36 (explaining Texas law "is based on the 'Anglo' standard for determining the best interest of the child," which is "'notably different'" from ICWA's termination standard) (first quoting *Doty-Jabbaar*, 19 S.W.3d at 877); and then citing *Yavapai-Apache Tribe*, 906 S.W.2d at 168).

[122] *Compare* 81 Fed. Reg. at 38,840 (explaining "[ICWA] requires that States apply a preference for the listed placement categories" in § 1915), *with* TEX. FAM. CODE § 162.016(b) (court shall grant adoption if "the adoption is in the best interest of the child"); LA. CHILD. CODE arts. 1217(B), 1255(B) (the court's "basic consideration" in adoption decree "shall be the best interests of the child").

[123] *See, e.g.*, *In re A.B.*, 245 P.3d at 720–21 (tribe's right to seek invalidation under § 1914 does not conflict with state notice-of-appeal requirements).

example, ICWA gives a child's Indian custodian and tribe the "right to intervene at any point" in a state court foster care or termination proceeding. § 1911(c). An indigent parent or Indian custodian has "the right to court-appointed counsel" in certain proceedings. § 1912(b).[124] Any party has "the right to examine all reports or other documents" filed in proceedings. § 1912(c). ICWA also confers various parental rights in voluntary termination proceedings, such as the right to have the terms of consent "fully explained in detail" and in comprehensible language (§ 1913(a)); the right to withdraw consent to a placement at any time or to a termination or adoption prior to final decree (§ 1913(b), (c)); and the right to withdraw consent based on "fraud or duress" up to two years after an adoption decree (§ 1913(d)). An Indian child, parent, custodian, or tribe may seek invalidation of a placement or termination action based on a violation of sections 1911, 1912, and 1913. § 1914. Additionally, a "biological parent" or prior Indian custodian may petition for return of custody when an adoption is set aside or the adoptive parents consent. § 1916(a). Finally, upon reaching age 18, an adopted Indian may obtain from the court information about his birth parents' "tribal affiliation," along with other information "necessary to protect any rights flowing from [his] tribal membership." § 1917.

The district court held none of the challenged provisions—including these—could validly preempt state law because they "directly command states." *Brackeen*, 338 F. Supp. 3d at 541. We disagree as to the provisions discussed above, which are best read to address private actors, not states. We therefore conclude those provisions (§§ 1911(c); 1912(b); 1913, 1914, 1916(a),

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[124] JUDGE JONES does not agree that § 1912(b) is a valid preemption provision and so does not join this part to the extent it concludes otherwise.

and 1917[125]) are valid preemption provisions.[126] *See Haywood v. Drown*, 556 U.S. 729, 736 (2009) (explaining states "lack authority to nullify a federal right or cause of action").

b. *The provisions that command state agency action are not valid preemption provisions.*

Conversely, we conclude that the provisions of ICWA discussed in the commandeering part are not valid preemption provisions. They are best read as regulating states, not private actors. *Murphy*, 138 S. Ct. at 1479.

In our commandeering discussion, *supra* III(B)(1), we considered ICWA's provisions requiring active efforts (§ 1912(d)), expert witnesses (§ 1912(e), (f)), placement preferences (§ 1915(a)–(d)), placement records (§ 1915(e)), and notice (§ 1912(a)). We found these provisions impose duties on state agencies to provide remedial services to Indian families (§ 1912(d); 25 C.F.R. § 23.2; 81 Fed. Reg. at 38,814); to adduce expert witness testimony

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[125] State Plaintiffs suggest that, by requiring an adult adoptee be informed of his birth parents' tribal affiliation, § 1917 improperly imposes on courts a "non-judicial obligation[]." We disagree. The right granted by § 1917 resembles rights recognized in various state laws providing courts may unseal adoption records upon request of adoptees. *See generally* Shannon Clark Kief, Annotation, *Restricting Access to Judicial Records of Concluded Adoption Proceedings*, 103 A.L.R. 5th 255 (2002) (collecting and analyzing cases). JUDGE DENNIS argues that, if § 1917 creates a preemptive right (as we conclude), then so does the placement-record provision in § 1915(e). DENNIS OP. at 89 n.39. We disagree. Unlike § 1917, § 1915(e) imposes a detailed recordkeeping regime on states designed to implement the placement preferences. *See supra* III(B)(1)(a)(iv).

[126] *See, e.g.*, *In re J.L.T.*, 544 S.W.3d 874, 879 (Tex. App.—El Paso 2017, no pet.) (§ 1911(c) preempts state rule requiring tribe to file written pleading to intervene); *Dep't of Human Servs. v. J.G.*, 317 P.3d 936, 944 (Or. Ct. App. 2014) (§ 1914 preempts Oregon "preservation rule"); *In re K.B.*, 682 N.W.2d 81, 2004 WL 573793, at *3 (Iowa Ct. App. 2004) (table) (concluding "when a tribe has a statutory right of intervention under ICWA, state-law doctrines of estoppel may not be applied to deprive it of that right"); *State ex rel. Juvenile Dept. of Lane Cnty. v. Shuey*, 850 P.2d 378, 379–81 (Or. Ct. App. 1993) (tribe's right of intervention in § 1911(c) preempts state laws requiring tribe be represented by attorney).

(§ 1912(e), (f); 25 C.F.R. § 23.122(a); 81 Fed. Reg. at 38,829); to assist Indian families and tribes with preferred placements (§ 1915(a)–(d); 81 Fed. Reg. at 38,839–40); to compile records evidencing efforts to comply with placement preferences (§ 1915(e); 25 C.F.R. § 23.141); and to furnish notice to parents, custodians, and tribes (§ 1912(a)). We therefore concluded these provisions transgress the commandeering rule.

That also means they are not valid preemption provisions. "[E]very form of preemption is based on a federal law that regulates the conduct of private actors, not the States." *Murphy*, 138 S. Ct. at 1481. These provisions regulate, not private persons, but the conduct of state agencies and officials. They therefore cannot validly preempt conflicting state law. *See*, *e.g.*, *Printz*, 521 U.S. at 935 (explaining a federal "command [to] the States' officers . . . to administer or enforce a federal regulatory program" is "fundamentally incompatible with our constitutional system of dual sovereignty").

Federal Defendants respond that these provisions merely grant Indian children and parents "federally conferred rights," which "may constrain state child-protection agencies" but do not "directly regulate[ ] States." We disagree. As we have explained at length, these provisions do not merely "constrain" state agencies but, instead, require state agencies to undertake extensive actions. *See supra* III(A)(1). Thus, it is immaterial whether they can somehow be characterized, through verbal legerdemain, as securing "federally conferred rights."[127] The salient point is that "[t]here is no way in which th[ese] provision[s] can be understood as *a regulation of private actors*."

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[127] For instance, Federal Defendants awkwardly re-cast § 1912(d) as securing to Indian children "the right not to be placed in foster care . . . without proof that 'active efforts have been made to provide remedial services and rehabilitative programs.'" This overlooks the key point that the provision "require[s] States to affirmatively provide Indian families with substantive services." 81 Fed. Reg. at 38,791.

Murphy, 138 S. Ct. at 1481 (emphasis added). They instead regulate state agencies, which means they commandeer states and cannot have valid preemptive effect. *See*, *e.g.*, *New York*, 505 U.S. at 178 ("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.").

c. *The placement preferences, placement standards, and termination standards are valid preemption provisions for state courts. The recordkeeping requirement is not.*

The district court ruled that certain ICWA provisions were not valid preemption provisions because they require state courts to "incorporat[e] federal standards that modify *state created* causes of action." *Brackeen*, 338 F.Supp.3d at 539, 542. The court focused on ICWA's requirement that courts apply the § 1915 placement preferences, which it characterized as "a direct command from Congress to the states." *Id.* at 540. More broadly, the court concluded that whenever ICWA commands courts to apply "federal standards" in state causes of action, it commandeers states and does not validly preempt state law. *Id.* at 541. On appeal, Defendants argue that the district court's rationale failed to account for the "well established power of Congress to pass laws enforceable in state courts," which those courts must apply under the Supremacy Clause. *See, e.g.*, *New York*, 505 U.S. at 178.

To resolve this question, we first review some background principles. The Supremacy Clause binds state courts of competent jurisdiction, save in narrow circumstances, to adjudicate federal causes of action. *See, e.g.*, *Haywood*, 556 U.S. at 734–36; *Howlett v. Rose*, 496 U.S. 356, 367–75 (1990); *Testa v. Katt*, 330 U.S. 386, 394–95 (1947).[128] This obligation sometimes

[128] This rule does not apply "only in two narrowly defined circumstances: first when Congress expressly ousts state courts of jurisdiction; and second, when a state court

includes applying federal procedural rules connected with the federal action. *See, e.g.*, *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (state court required to apply FELA jury-trial right despite state rule requiring court to make certain findings); *Cent. Vt. Ry. Co. v. White*, 238 U.S. 507, 512 (1915) (state court required to apply FELA burden of proof despite contrary state rule). Additionally, a state procedural rule may be preempted if it interferes with a federal cause of action. *See, e.g.*, *Felder v. Casey*, 487 U.S. 131, 147-150 (1988) (state notice-of-injury prerequisite preempted in § 1983 actions); *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 298–99 (1949) (state pleading rule barred because it interfered with federal rights). By contrast, however, no authority supports the proposition that Congress may prescribe procedural rules for state-law claims in state courts. *See, e.g.*, *Felder*, 487 U.S. at 138 (recognizing the "unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts"); *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636, 651 (7th Cir. 2014) (Sykes, J., concurring) ("[I]t's doubtful that Congress has the power to prescribe procedural rules for state-law claims in state courts.") (citing, *inter alia*, Anthony Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L. J. 947 (2001)).

The question we address here fits neatly into none of these categories. ICWA creates no federal cause of action state courts must enforce. Nor does ICWA enact federal procedural rules that state courts must prefer over their own procedures. Nor does ICWA impose procedural rules for state-law claims in state courts.[129] That, as noted, would likely be a bridge too far.

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refuses jurisdiction because of a neutral state rule regarding the administration of the courts." *Haywood*, 556 U.S. at 735 (internal quotation marks and citations omitted).

[129] *Jinks v. Richland County*, 538 U.S. 456 (2003), does not support the proposition that Congress may impose procedural rules on state claims in state courts. *Jinks* upheld Congress's authority to toll state limitations periods for state-law claims while removed to

Instead, ICWA enacts substantive child-custody standards applicable in state child-custody proceedings. For instance, ICWA requires courts to place Indian children with certain persons (§ 1915), and also requires courts to make specific findings under a heightened standard of proof before an Indian child may be placed in a foster home or his parents' rights terminated (§ 1912(e) and (f)).

To the extent those substantive standards compel state *courts* (as opposed to state *agencies*), we conclude they are valid preemption provisions. As already discussed, the Supremacy Clause requires state courts to apply validly enacted federal law. *See Printz*, 521 U.S. at 907; *New York*, 505 U.S. at 178–79. The Supreme Court has ruled that federal standards may supersede state standards even in realms of traditional state authority such as family and community property law. *See, e.g.*, *Boggs v. Boggs*, 520 U.S. 833 (1997); *McCarty v. McCarty*, 453 U.S. 210 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *see also Egelhoff v. Egelhoff ex rel. Briener*, 532 U.S. 141, 151–52 (2001) (observing "we have not hesitated to find state family law pre-empted when it conflicts with ERISA") (citing *Boggs*, 520 U.S. at 833). For instance, *Egelhoff* held ERISA preempted a state probate rule and so dictated, contrary to state law, the beneficiaries of pension and insurance proceeds. 532 U.S. at 147–50. Similarly, *McCarty* held a federal military benefits law preempted state community property rules, thus altering the property division upon divorce. 453 U.S. at 223–35. And, more recently, *Hillman v. Maretta* held that a federal law setting the "order of precedence" for paying

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federal court under supplemental jurisdiction. *Id.* at 459, 462–63; *see* 28 U.S.C. § 1367(d). The Court rejected the argument that this rule violated state sovereignty by regulating state-court "procedure," because "tolling of limitations periods falls on the 'substantive' side of the line." 538 U.S. at 464–65. The Court disclaimed any holding that "Congress has unlimited power to regulate practice and procedure in state courts." *Id.* at 465.

federal life-insurance benefits preempted a state cause of action that directed the benefits to another person. 569 U.S. 483, 491–94 (2013).

This preemption rule embraces some of the ICWA provisions challenged here. Specifically, ICWA's substantive standards requiring state courts to observe placement preferences (§ 1915) and make placement or termination findings (§ 1912(e) and (f)) are valid preemption provisions. The district court's view that these standards "modify state created causes of action," *Brackeen*, 338 F.Supp.3d at 539, is a matter of terminology not legal analysis: whenever a federal standard supersedes a state standard, the federal standard can be said to "modify a state created cause of action." In *McCarty*, for instance, the federal benefits law could be said to "modify" a state cause of action for dividing marital property. *McCarty*, 453 U.S. at 223–35. The same for *Hillman*, where the preempted state law "interfere[d]" with the federal scheme "by creating a [state] cause of action" directing proceeds to beneficiaries other than those specified by federal law. 569 U.S. at 494.

In any event, instead of casting preemption in terms of whether federal law "modifies" a state cause of action, the Supreme Court has put the analysis more straightforwardly: "[S]tate law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *see also*, *e.g.*, *Arizona*, 567 U.S. at 399 ("[S]tate laws are preempted when they conflict with federal law."). If ICWA's placement preferences apply in a state proceeding, preemption means a state court must prefer them to conflicting state standards.[130] But "this sort of federal 'direction' of state judges is mandated by the text of the

[130] Elsewhere in this opinion, we conclude the § 1915 placement preferences violate the equal protection component of the Fifth Amendment. *See supra* III(A)(2), (3). Our discussion in this Part of the preemptive effect of those preferences is separate from and independent of our holding that the preferences violate the Fifth Amendment.

Supremacy Clause," and so is not commandeering. *New York*, 505 U.S. at 178–79.[131]

We reach a different conclusion, however, as to § 1951(a), which requires state courts to provide the Secretary with a copy of an Indian child's final adoption decree, "together with . . . other information." The district court held this provision unconstitutional, casting it as part of ICWA's command to states to "administer" a federal regulatory program. *Brackeen*, 338 F.Supp.3d at 541-42. On appeal, Defendants argue the provision is merely an "information-sharing" requirement the Supreme Court all but approved in *Printz*. We disagree. *Printz* left open whether requiring "the provision of information to the Federal Government" amounts to commandeering. *See* 521 U.S. at 918 (noting "we . . . do not address" that issue because it is "not before us"). As State Plaintiffs point out, however, § 1951(a) makes state courts do more than share information. The provision spearheads a "recordkeeping" regime that demands state courts (1) transmit to the Secretary a variety of information, *see* 25 C.F.R. § 23.140;[132] (2) maintain a specified "record" of every Indian child placement, *see id.* § 23.141(a), (b);[133] and (3) "make the record available within 14 days of a

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[131] State Plaintiffs worry that this principle would permit Congress "to prescribe sentences for state-law drug offenses, or to require imposition of strict liability in auto-accident cases." We think not. We cannot fathom where Congress would get the power to do those things. Here, we have assumed—for this part only—that Congress has the power to enact ICWA. *But see supra* II (separately concluding Congress lacks power to enact ICWA to extent it governs state proceedings).

[132] The information pertains to the child's tribal affiliation, the names and addresses of the child's birth and adoptive parents, and "the identity of any agency having files or information relating to such adoptive placement." § 1951(a)(1)–(4); *see also* 25 C.F.R. § 23.140(a)(1)–(6) (detailing additional requirements).

[133] "The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and

request" by the tribe or Secretary, *id.* § 23.141(a). States have the option of designating either their courts or agencies as the "repository" for this information. *Id.* § 23.141(c). The regulations estimate complying with this regime will consume large amounts of state court and agency resources every year. *See* 81 Fed. Reg. at 38,863.

Unlike the other provisions discussed in this part, § 1951(a) is not a substantive child-custody standard state courts must apply under the Supremacy Clause. Rather, the provision imposes an extensive recordkeeping obligation directly on state courts and agencies. This is not a valid preemption provision because it regulates the conduct of states, not private actors. *Cf. Murphy*, 138 S. Ct. at 1481 (explaining "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States"). By conscripting state courts and agencies into administering this system, § 1951(a) violates the principle that "Congress cannot compel the States to enact or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. We therefore hold that § 1951(a) violates the commandeering doctrine and is not a valid preemption provision.

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Summing up part III, we find the following provisions unconstitutional to the extent they command state agencies (*supra* III(B)(1)(a), (B)(2)(c)):

- The active-efforts requirement in § 1912(d)
- The expert-witness requirement in § 1912(e) and (f)

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the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences." *Id.* § 23.141(b).

- The placement preferences in § 1915(a) and (b)
- The placement-record requirement in § 1915(e)
- The notice requirement in § 1912(a)
- The recordkeeping requirement in § 1951(a).

We also conclude that none of these are valid preemption provisions (*supra* III(B)(2)(b)).

On the other hand, we find the following are valid preemption provisions (*supra* III(B)(2)(a), (c)):

- The right to intervene in § 1911(c)
- The right to appointed counsel in § 1912(b)
- The right to examine reports and documents in § 1912(c)
- The right to withdraw consent in § 1913(b) and (c)
- The right to collaterally attack a decree in § 1913(d)
- The right to petition to invalidate a decree in § 1914
- The right to petition for return of custody in § 1916(a)
- The right to obtain tribal affiliation information in § 1917
- Courts' obligation to apply the placement preferences in § 1915
- Courts' obligation to apply the placement and termination standards in § 1912(e) and (f).

C. Nondelegation

We now consider whether ICWA § 1915(c) unconstitutionally delegates legislative power to Indian tribes. As discussed, ICWA establishes preferences for placements of Indian children. *See* § 1915(a), (b). Section 1915(c) empowers tribes to reorder those preferences:

> 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.

§ 1915(c). ICWA's regulations confirm that a tribe's rewritten preferences trump the order established by Congress.[134]

The district court ruled § 1915(c) and its implementing regulations violate the nondelegation doctrine for two reasons. First, the court held that § 1915(c) invalidly attempts to delegate Congress's "inherent legislative power to create law." *Brackeen*, 338 F. Supp. 3d at 536. Second, even if § 1915(c) delegates only regulatory power, that power cannot be delegated outside the federal government to an Indian tribe. The panel reversed, reasoning that the provision merely exercised Congress's longstanding authority to "incorporate the laws of another sovereign into federal law" and that tribes have "inherent authority" to regulate their members and domestic relations. *Brackeen*, 937 F.3d at 436–37. We agree with the district court that § 1915(c) impermissibly delegates legislative power to Indian tribes.

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"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v.*

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[134] *See* 25 C.F.R. § 23.130(b) ("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."); *id.* § 23.131(c) ("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, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.").

United States, 488 U.S. 361, 371 (1989). Typically, a nondelegation claim challenges Congress's "transferring its legislative power to another branch of Government." *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality op.); *see also, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (a delegation challenge asks "whether the statute has delegated legislative power to [an] agency"). Such challenges are usually unsuccessful because the Supreme Court requires Congress to provide only an "intelligible principle" guiding execution of the delegated authority. *See Touby v. United States*, 500 U.S. 160, 165 (1991); *see also, e.g.*, *United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009) (the "modern [nondelegation] test is whether Congress has provided an 'intelligible principle' to guide the agency's regulations," which "can be broad") (citations omitted). But § 1915(c), as the district court correctly recognized, presents an atypical nondelegation issue for two main reasons: the statute delegates lawmaking—not merely regulatory—authority, and it does so to an entity outside the federal government.

"The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996) (citing U.S. CONST., art. I, § 1; *Field v. Clark*, 143 U.S. 649, 692 (1892)). That forbidden conveyance is what § 1915(c) purports to do. It does not delegate to tribes authority merely to regulate under Congress's general guidelines. *Cf., e.g.*, *Touby*, 500 U.S. at 165 (nondelegation not implicated "merely because [Congress] legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors") (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). Rather, it empowers tribes to change the substantive preferences Congress enacted in § 1915(a) and (b) and to bind courts, agencies, and private persons to follow them. As the district court correctly reasoned, "[t]he power to change specifically

enacted Congressional priorities and impose them on third parties can only be described as legislative." *Brackeen*, 338 F. Supp. 3d at 537; *see also INS v. Chadha*, 462 U.S. 919, 952 (1983) (explaining "action that had the purpose and effect of altering the legal rights, duties and relations of persons" is "essentially legislative in purpose and effect"). This "delegation of power to make the law," Chief Justice Marshall explained long ago, "cannot be done." *Loving*, 517 U.S. at 759 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825) (Marshall,C.J.)); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested.").

If Congress wants to enact a new order of preferences, it must follow the constitutional demands of presentment and bicameralism. *See* U.S. CONST. art. I, § 1; *id.* § 7, cl. 2, 3; *see also, e.g.*, *Chadha*, 462 U.S. at 951 ("[T]he Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions."). But § 1915(c) orchestrates their evasion. Just as Congress cannot authorize laws to be amended by a single chamber, *see Chadha*, 462 U.S. at 959, or by the President, *see Clinton v. City of New York*, 524 U.S. 417, 447–48 (1998), it may not empower laws to be rewritten by an outside entity. For instance, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991), Congress established a Board of Review, composed of nine members of Congress, that exercised veto power over a regional airport authority. The Court held the Board's authority was an unconstitutional delegation of federal power: Congress may "act with conclusive effect" only "through enactment by both Houses and presentment to the President." *Id.* at 275 n.19 (quoting *Bowsher*, 478 U.S. at 759 (Stevens, J., concurring in the judgment)). If Congress could delegate such authority to another entity, "it would be able to evade the carefully

crafted restraints spelled out in the Constitution." *Id.* at 275 n.20 (quoting *Bowsher*, 478 U.S. at 755 (Stevens, J., concurring in the judgment)).[135]

These principles bar the delegated authority exercised by a tribe under § 1915(c). In § 1915(a) and (b), Congress set forth a statutory order of preferences for placing Indian children, but § 1915(c) gives tribes the authority by "resolution" to overrule this order. The tribe can thereby "amend[] the standards" Congress enacted, *Chadha*, 462 U.S. at 954, sapping them of "legal force or effect," *Clinton*, 524 U.S. at 438. As a result, a state court or agency must no longer follow the priorities voted on by Congress and signed by the President in adjudicating an Indian child's placement. Instead they "shall follow" the tribe's priorities. § 1915(c). Whether Congress "intended such a result" is "of no moment." *Clinton*, 524 U.S. at 445-46. Congress cannot validly enact something called "Public Law [95-608] as modified by [an Indian child's tribe]." *Id.* at 448. The Constitution bars Congress from authorizing action that "alter[s] the legal rights, duties, and relations of persons . . . outside the Legislative Branch." *Metro. Wash. Airports*, 501 U.S. at 276 (quoting *Chadha*, 462 U.S. at 951).[136]

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[135] JUDGE DENNIS suggests that, by discussing the Constitution's presentment and bicameralism requirements, we have *sua sponte* raised an issue not addressed by the district court or the parties. DENNIS OP. at 132. Not so. Nondelegation, presentment, and bicameralism are interrelated doctrines, as JUDGE DENNIS himself recognizes. *See id.* (stating that the nondelegation inquiry "already accounts for bicameralism and presentment") (citing, *inter alia*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 240 (2000)).

[136] JUDGE DENNIS tries to compare § 1915(c) to federal laws that "set a default standard that applies unless another party chooses to act." DENNIS OP. at 134. The cited laws, however, empower agencies or other government actors only to grant waivers from otherwise applicable requirements, not to re-write enacted statutes. *See id.* at 134–35 (citing, *inter alia*, 16 U.S.C. § 1536(h)(1), allowing a committee to "grant an exemption" from certain requirements of the Endangered Species Act). Indeed, one of the cases JUDGE DENNIS cites upheld a similar waiver provision against a nondelegation challenge in part because "the Secretary ha[d] no authority to *alter the text of any statute*, repeal any law, or

Finally, even assuming § 1915(c) delegates only regulatory—as opposed to legislative—authority, it is still unconstitutional because it delegates that authority outside the federal government. "By any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'" *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)); *see also, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 351–53 (2002) (explaining that delegating executive power to non-federal actors violates Article II Appointments and Take-Care Clauses). An Indian tribe is "not part of the Government at all," which "would necessarily mean that it cannot exercise . . . governmental power." *Ass'n of Am. R.R.*, 575 U.S. at 1253 (Thomas, J., concurring). To be sure, Indian tribes are often described as "possessing attributes of sovereignty," *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (citing *Worcester*, 31 U.S. at 557), but this sovereignty has "'a unique and limited character' . . . center[ed] on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978) and citing *Mazurie*, 419 U.S. at 557). As relevant here, Indians have no sovereignty over non-Indians and no sovereignty over state proceedings. *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 330 ("[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'") (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S.

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cancel any statutory provision, in whole or in part." *Def. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124 (D.D.C. 2007) (addressing Secretary of Homeland Security's authority to waive federal environmental law under the REAL ID Act of 2005) (emphasis added). Unlike the waiver provisions JUDGE DENNIS cites, § 1915(c) empowers tribes to "alter the text" of the placement preferences Congress enacted in § 1915(a) and (b).

645, 659 (2001)); *see also infra* (discussing this proposition in greater detail).[137]

In sum, § 1915(c) violates the nondelegation doctrine, either because it delegates Congress's lawmaking function or because it delegates authority to entities outside the federal government altogether.

2.

Defendants' arguments to the contrary are unavailing.

Defendants first argue that § 1915(c) is not a delegation at all but only another example of Congress's adopting the laws of another sovereign. For example, they rely on *United States v. Sharpnack*, 355 U.S. 286 (1958), which upheld the Assimilative Crimes Act ("ACA") against a nondelegation challenge. Applying to federal enclaves, the ACA criminalizes actions that "would be punishable . . . within the jurisdiction of the State, Territory, Possession, or District in which such place is situated." *Id.* at 287–88; *see* 18 U.S.C. § 13(a). "Rather than being a delegation by Congress of its legislative authority to the States," *Sharpnack* held this practice is "a deliberate

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[137] JUDGE DENNIS counters that § 1915(c) is like "long approved" federal laws "that permit another sovereign to supply key aspects of the law"—for instance, when 42 U.S.C. § 1983 incorporates a state limitations period. DENNIS OP. at 136. We disagree. Section 1915(c) permits tribes, not merely to "supply key aspects of the law," but to *change* the order of preferences Congress enacted. Supplementing § 1983 actions with state limitations periods is a different animal. Congress "endorse[d] the borrowing of state-law limitations provisions" in § 1988, but only "where doing so is consistent with federal law." *Owens v. Okure*, 488 U.S. 235, 239 (1989). It is one thing for a state statute to supplement an otherwise-silent federal provision; it is quite another for a state (or a tribe) to alter the provisions of enacted federal law. In a similar vein, JUDGE DENNIS also cites federal laws supposedly delegating to "separate sovereign[s]" authority to change "the federal standard in matters related to the sovereign's jurisdiction." DENNIS OP. at 134–35 (emphasis omitted) (citing, *e.g.*, 20 U.S.C. § 1415(b)(6)(B), allowing state law to set time limitation for bringing an IDEA administrative claim). This again misses the point. None of these laws allows a different sovereign to alter the *text* of enacted federal law.

continuing adoption by Congress for federal enclaves" of crimes that "have been already put in effect by the respective States." 355 U.S. at 294.

Defendants contend ICWA § 1915(c) merely follows the pattern of the ACA by incorporating another sovereign's law. We disagree. The ACA's strategy is to "borrow[] state law to fill gaps in the federal criminal law on enclaves." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1891 (2019) (cleaned up). Section 1915(c) of ICWA does not "fill gaps" in federal law; it empowers tribes to *change* federal law. *Cf.*, *e.g.*, *Lewis*, 523 U.S. at 160 (explaining the ACA fills gaps only "where Congress has not defined the missing offenses") (cleaned up). Moreover, the Supreme Court has clarified that the ACA cannot adopt state laws that "effectively rewrite an offense definition that Congress carefully considered." *Id.* at 164 (citing *Williams v. United States*, 327 U.S. 711, 718 (1946)). As a result, the ACA's "continuing adoption" of state law does not evade the Constitution's lawmaking requirements. ICWA does: § 1915(c) contemplates that tribal "resolution[s]" will supersede law already enacted in §§ 1915(a) and (b).[138]

Defendants next rely on *United States v. Mazurie*. That decision addressed whether, pursuant to a federal statute, a tribe could regulate alcohol sales on non-Indian fee lands within the boundaries of its reservation. 419 U.S. at 546–48. The Supreme Court held the tribe could do so on two grounds. First, limitations on delegating legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id.* at 556 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–22 (1936)). Second,

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[138] The same may be said for the Federal Tort Claims Act ("FTCA"), on which Defendants also rely. The FTCA makes the United States liable in tort "in accordance with the [state] law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). Like the ACA, the FTCA completes the federal framework by adopting state law.

"tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," which empowers them to "regulate[] their internal and social relations." *Mazurie*, 419 U.S. at 557 (citing *Worcester*, 31 U.S. at 557; *Kagama*, 118 U.S. at 381–82; *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 173 (1973)). *Mazurie* does not apply to § 1915(c) for three reasons.

First, Indian tribes lack "independent authority" over off-reservation matters. The Supreme Court—citing *Mazurie*—has held that tribes' "unique and limited" sovereignty "centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank*, 554 U.S. at 330 (citing *Mazurie*, 419 U.S. at 557). Section 1915(c), however, empowers tribes to alter placement preferences with respect to off-reservation activities. Second, tribes have only sharply limited authority over nonmembers. *See*, *e.g.*, *Montana v. United States*, 450 U.S. 544, 565 (1981) (holding a tribe's "inherent sovereign powers . . . do not extend to the activities of nonmembers of the tribe"). Section 1915(c), however, empowers tribes to affect the rights of non-Indian foster and adoptive parents. Third, and most importantly, *Mazurie* does not even hint that tribes have authority to bind *state courts and agencies*. To the contrary, the statute in *Mazurie* explicitly provided that tribal ordinances could be promulgated only "so long as state law was not violated." 419 U.S. at 547 (citing 18 U.S.C. § 1161). Thus, *Mazurie* could not support the proposition that Congress can delegate to a tribe authority to bind state courts or agencies. Defendants cite no other authority for that unheard-of proposition.[139]

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[139] JUDGE DENNIS suggests that, regardless of a tribe's inherent sovereignty, Congress can extend a tribe's jurisdiction over state proceedings through "express authorization" in a federal statute or treaty. DENNIS OP. at 128 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997)). No authority supports that proposition. The case JUDGE DENNIS cites addresses, like *Mazurie*, only whether Congress may authorize

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For these reasons, we hold that § 1915(c) and its implementing regulations unconstitutionally delegate federal legislative power.

D. Administrative Procedure Act

We now consider whether the Final Rule violates the APA. The district court held it did for three reasons. First, the court set aside the parts of the Final Rule that implement the statutory provisions the court found unconstitutional. *Brackeen*, 338 F.Supp.3d at 541-41. Second, in the alternative the court found the BIA exceeded its authority by issuing regulations binding on state courts. *Id.* at 542-44. *See* 81 Fed. Reg. at 38,785–86. Third, the court separately found invalid 25 C.F.R. § 23.132(b), which requires that "good cause" to depart from the placement preferences be proved by clear and convincing evidence. *Id.* at 544-46. The panel reversed. *Brackeen*, 937 F.3d at 437–41. It found ICWA constitutional, *id.* at 437, and the BIA's interpretive views entitled to *Chevron* deference, *id.* at 438–41.

We review the agency's interpretation of ICWA under the two-step framework from *Chevron*, *USA*, *Inc. v. Natural Resources Defense Council*, *Inc.*, 467 U.S. 837 (1984); *see generally, e.g.*, *Sw. Elec. Power Co.*, 920 F.3d at 1014 (discussing *Chevron*). At step one, we ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. We answer that question by "exhaust[ing] all the 'traditional tools' of construction," including "text, structure, history, and purpose." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9;

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tribes to exercise authority over nonmembers *within their reservations*. *See Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1223 (9th Cir. 2001) (en banc) (upholding federal statute that "ratified" tribe's governing documents giving it power to regulate reservation property, including nonmembers' property).

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)). If that holistic reading of the statute settles the matter, *Chevron* ends: we "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. On the other hand, if the statute is "truly ambiguous" on the question, *Kisor*, 139 S. Ct. at 2414, we proceed to step two, "asking whether the agency's construction of the statute is 'permissible.'" *Sw. Elec. Power Co.*, 920 F.3d at 1014 (quoting *Chevron*, 467 U.S. at 843). A permissible construction is one that "reasonabl[y] accommodat[es] . . . conflicting policies that were committed to the agency's care by the statute." *Chevron*, 467 U.S. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)).

1.

Having found parts of ICWA unconstitutional (*supra* III(A)–(C)), we agree with the district court that the Final Rule is invalid to the extent it implements those unconstitutional statutory provisions. *See Brackeen*, 338 F.Supp.3d at 541–42; *see also* 5 U.S.C. § 706(2)(A) (authorizing courts to set aside "unlawful" agency action); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (explaining "unlawful" agency action "includes unconstitutional action"); *Texas v. United States*, 497 F.3d 491, 500–01 (5th Cir. 2007) (observing "[t]he authority of administrative agencies is constrained by the language of the statutes they administer") (citing *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007)). In the alternative, we address below the more specific grounds on which the district court concluded the Final Rule was unlawful.

2.

The district court found the Final Rule invalid because it purports to bind state courts' implementation of ICWA. Its ruling appears to rely on both *Chevron* step one and two. *See Brackeen*, 338 F.Supp.3d at 542–44. Defending

the ruling on appeal, Individual Plaintiffs focus on step two, arguing the BIA's "novel interpretation" of its authority in the Final Rule—which reverses BIA's position in the 1979 guidelines—does not merit *Chevron* deference. *See Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 380–81 (5th Cir. 2018) (treating this "novel interpretation" argument under *Chevron* step two). We resolve this question under step two. Therefore, we assume ICWA is "silent or ambiguous" on whether the BIA has authority to bind state courts. *Chevron*, 467 U.S. at 843. We ask only whether the BIA's 2016 stance is a "permissible construction of the statute." *Id.*

In 1979, mere months after enactment, the BIA emphatically concluded that ICWA did not authorize the agency to bind state courts' implementation of the statute. 44 Fed. Reg. at 67,584. It would be "an extraordinary step," the BIA wrote, "[f]or Congress to assign to an administrative agency such supervisory control over courts." *Id.* The agency recognized that § 1952 authorized it to issue rules "necessary to carry out [ICWA]." *Id.* But § 1952, the BIA explained, allowed it to make binding rules only for those parts of ICWA delegating interpretive responsibility to the Secretary of the Interior. *Id.*[140] "Nothing" in the section's text or history, however, suggested Congress wanted the agency to "exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters." *Id.* The agency declined to attribute to Congress "a measure so at odds with concepts of both federalism and separation of powers . . . in the absence of an express declaration of

[140] As an example, the agency cited § 1918, under which "the Secretary is directed to determine whether a plan for reassumption of jurisdiction is 'feasible' as that term is used in the statute." 44 Fed. Reg. at 67,584. The agency noted it had already promulgated regulations covering this section as well as "other areas where primary responsibility for implementing portions of the Act rest with this Department." *Id.* (citing 44 Fed. Reg. 45,092 (July 31, 1979)).

Congressional intent to that effect." *Id.* After operating with this understanding for 37 years, however, the agency reversed course in 2016, determining that § 1952 authorizes it to "set binding standards for Indian child-custody proceedings in State courts." 81 Fed. Reg. at 38,785.

When an agency abruptly departs from a longstanding position, its "'current interpretation . . . is entitled to considerably less deference.'" *Chamber of Commerce*, 885 F.3d at 381 (quoting *Watt v. Alaska*, 451 U.S. 259, 272–73 (1981)). Here, the agency "claims to discover in a long-extant statute an unheralded power" of binding state courts' implementation of ICWA, and so we "greet its announcement with a measure of skepticism." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*"). Indeed, BIA's "turnaround" from its previous stance "alone gives us reason to withhold approval or at least deference for the Rule." *Chamber of Commerce*, 885 F.3d at 381 (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976)). This principle is especially prescient where, as here, the agency's new position is "not a contemporaneous interpretation of [ICWA]" and "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." *Id.* (quoting *Gilbert*, 429 U.S. at 142); *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965) (giving "particular[] . . . respect" to the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion") (cleaned up). To be sure, an agency's changing its mind does not alone defeat *Chevron* deference. *See*, *e.g.*, *Gonzalez-Veliz v. Barr*, 938 F.3d 219, 234 (5th Cir. 2019) ("An agency is not permanently bound to the first reasoned decision that it makes."). But the agency must "show that there are good reasons for the new policy" by providing a "reasoned explanation" for departing from its previous position. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126

(2016) (quoting *Fox Television Stations*, 556 U.S. at 515–16).[141] The BIA has failed to do so here.

The 1979 BIA explained that empowering a federal agency to control state courts would be an "extraordinary" subversion of federalism and separation of powers. 44 Fed. Reg. at 67,584. BIA's 2016 response to this point can charitably be described as anemic. The agency now says it "reconsidered" its 1979 view because "Congress enacted ICWA to curtail State authority in some respects," including state court authority. 81 Fed. Reg. at 38,788–89. But that fails to address the serious question central to the agency's 1979 position—namely, whether Congress intended the *BIA* to control state courts. The agency also now points out that Congress can "pass laws enforceable in state courts." *Id.* at 38,789 (citing, *inter alia*, *Testa*, 330 U.S. at 394). But that settled principle long pre-dates the 1979 guidelines and, again, says nothing about whether a *federal agency* can control state courts. Moreover, as discussed, the Final Rule also purports to control state *agencies*, *supra* III(B)(1), which raises anti-commandeering problems the BIA ignores. The BIA also invokes Congress's "plenary power over Indian affairs," 81 Fed. Reg. at 38,789, but we have explained that mouthing that shibboleth is

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[141] JUDGE DENNIS criticizes us for including the agency's reversal "as a component of *Chevron* step two." DENNIS OP. at 143. As our discussion shows, however, both our court and the Supreme Court have considered under *Chevron* step two an agency's reversal-of-position, as well as its belated discovery of novel authority in statutes it has long administered. *See Encino Motorcars*, 136 S. Ct. at 2125–26; *UARG*, 573 U.S. at 324; *Chamber of Commerce*, 885 F.3d at 380–81, 387; *see also, e.g., Environmental Integrity Project v. EPA*, 969 F.3d 529, 544 (5th Cir. 2020) (explaining "we take the agency's change of position into account" in deciding whether to apply *Skidmore* deference). JUDGE DENNIS himself concedes that, when assessing an agency's reading of a statute, "*Chevron* deference may be withheld if the agency failed to adequately explain why it shifted to its current interpretation." DENNIS OP. at 142 (citing *Encino Motorcars*, 136 S. Ct. at 2125). That is the question we confront here—whether the BIA failed to justify its discovery in § 1952 of authority whose existence it had denied for the prior forty years.

not enough to override state sovereignty. *Supra* II(A). Finally, purportedly addressing the "Federalism concerns it noted in 1979," the BIA now cites the Supreme Court's *Brand X* decision. 81 Fed. Reg. at 38,789 (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)). But *Brand X* has nothing to do with federalism; rather, it addresses when a federal court's interpretation of a statute may deny *Chevron* deference to a federal agency's later interpretation. *See id.* at 982 (holding federal court trumps if "its construction follows from the [statute's] unambiguous terms").

The 1979 BIA also concluded that neither § 1952's language or history showed Congress gave the agency supervisory power over state courts. 44 Fed. Reg. at 67,584. The agency reasoned that, by authorizing rules "necessary to carry out" ICWA, § 1952 only empowered the BIA to issue regulations "to carry out the responsibilities Congress had assigned to [the Department] under [ICWA]." *Id.* BIA's 2016 response fails to engage this reasoning. It merely says that § 1952 is a "broad and general grant of rulemaking authority" and that courts have held that similar provisions "presumptively authorize agencies to issue rules and regulations addressing matters covered by the statute." 81 Fed. Reg. at 38,786. That ducks the point entirely. No one doubts the language in § 1952 authorizes agency rulemaking. *See*, *e.g.*, *Mourning v. Family Pub. Serv.*, 411 U.S. 356, 369 (1973). The 1979 BIA asked a different question: whether § 1952 authorizes regulations that bind state courts in state proceedings. *See* 44 Fed. Reg. at 67,584 ("Nothing in the language or legislative history of § 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power."). No case cited by the 2016 BIA confronts that question.[142] Only

[142] *See* 81 Fed. Reg. at 38,785 (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999); *Am. Hosp. Ass'n v. Nat'l Labor Relations Bd.*, 499 U.S. 606, 609–10 (1991);

one—*AT&T Corp. v. Iowa Utilities Board*—even comes close, but it holds only that a federal agency can control a state commission's participation in a federal telecommunications regime. *See* 525 U.S. 366, 378 n.6 (1999) (asking whether "the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations"). Here we have the opposite question: whether a federal agency can control state courts and agencies acting under state jurisdiction. The 1979 BIA concluded ICWA did not intend that "extraordinary step," 44 Fed. Reg. at 67,584, and the 2016 BIA offers no reason whatsoever for thinking otherwise.

Finally, the BIA defends its new approach as needed to harmonize "sometimes conflicting" state court interpretations of ICWA over past decades. 81 Fed. Reg. at 38,782. Merely because state courts have sometimes disagreed about ICWA, however, says nothing about whether Congress empowered the BIA to control how state courts interpret it. *Cf.* 44 Fed. Reg. at 67,584 (stating 1979 BIA's view that state courts "are fully capable of carrying out the[ir] responsibilities [under ICWA] without being under the direct supervision of this Department"). Regardless, the BIA's 2016 examples hardly show the "necessity" for such authority. Its prime example is that some courts created an "existing Indian family" exception to ICWA.[143] But, as the agency admits, the exception was repudiated by the court that created it, is now recognized by "[o]nly a handful" of courts, and

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Mourning, 411 U.S. at 369*; City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013); *Qwest Comm'ns Int'l Inc. v. FCC*, 229 F.3d 1172, 1179 (D.C. Cir. 2000)). Of these cases, JUDGE DENNIS focuses on *Mourning* because the agency-empowering language there was "nearly identical" to § 1952. DENNIS OP. at 141 & n.65. That is irrelevant, however, because *Mourning* did not address a federal agency's power over state courts or agencies; instead, it addressed the scope of the Federal Reserve Board's power to prevent merchants from evading certain Truth in Lending Act disclosure requirements. 411 U.S. at 361–62.

[143] *See* 81 Fed. Reg. 38782 (citing, *e.g.*, *Thompson v. Fairfax Cty. Dep't of Family Servs.*, 747 S.E.2d 838, 847–48 (Va. Ct. App. 2013)).

has been rejected by a "swelling chorus" of others. 81 Fed. Reg. at 38,801–02.

Also unpersuasive is the BIA's reliance on *Holyfield*. *Id.* at 38,786. *Holyfield* held that Congress did not intend state law to define the term "domicile" in ICWA § 1911, which gives tribes sole jurisdiction over on-reservation children. 490 U.S. at 44–47. The BIA claims that, in 1979, it lacked "the benefit of the *Holyfield* Court's carefully reasoned decision" showing how ICWA could be undermined by "a lack of uniformity" among state courts. 81 Fed. Reg. at 38,787. That does not hold water. *Holyfield* pitted *one* state court's errant interpretation of ICWA against correct interpretations by "several other state courts"—hardly an interpretive crisis. 490 U.S. at 41 & n.14. Moreover, the case involved ICWA's "key jurisdictional provision" dividing tribal from state authority, *id.* at 45, not any provision governing how state courts apply ICWA. *Cf.* 44 Fed. Reg. at 67,584 (1979 BIA disclaiming authority over provisions concerning "the responsibilities of state or tribal courts under the Act"). And *Holyfield* was on the books for 27 years before BIA claimed the decision inspired its 2016 policy change. 81 Fed. Reg. at 38,787. We treat that late-breaking revelation "with a measure of skepticism." *UARG*, 573 U.S. at 324.

We therefore conclude the 2016 Rule fails to provide a "reasoned explanation"[144] for reversing the agency's nearly forty-year-old

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[144] JUDGE DENNIS disagrees, arguing the BIA needed to provide only a "minimal level of analysis" for its new position. DENNIS OP. at 146 (quoting *Encino Motorcars*, 136 S. Ct. at 2125). But that is not the standard. When agencies "change their existing policies," they must "provide a reasoned explanation for the change." *Encino Motorcars*, 136 S. Ct. at 2125; *see also id.* (explaining "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy") (quoting *Fox Television Stations*, 556 U.S. at 515–16). As explained, the 2016 BIA has not provided a "reasoned explanation" for its about-face. It has provided a series of *non sequiturs*.

interpretation of § 1952 and discovering novel authority to bind state courts. *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television Stations*, 556 U.S. at 515–16). "An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference." *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

3.

The district court separately invalidated 25 C.F.R. § 23.132(b), part of the Final Rule that interprets the "good cause" standard in § 1915. That provision mandates specific placements for Indian children "in the absence of good cause to the contrary." *See* § 1915(a), (b). In turn, the Final Rule states: "The party seeking departure from the 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) (emphasis added); *see also* 81 Fed. Reg. at 38,844. The district court invalidated this part of the rule under *Chevron* step one, concluding it imposes a heightened burden of proof on § 1915 without statutory warrant. *Brackeen*, 338 F.Supp.3d at 545-46. We agree.

The step one inquiry is whether the statute unambiguously forecloses the agency's interpretation—here, specifying a heightened burden for proving "good cause" under § 1915. That section says nothing about a burden of proof, as the BIA admits. *See* 81 Fed. Reg. at 38,843 (noting the clear-and-convincing standard "is not articulated in section 1915"). The presumption, then, is that the section incorporates, not a heightened standard of proof, but the normal preponderance standard. *See, e.g.*, *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (statutory "silence" is "inconsistent with the view that Congress intended to require a special, heightened standard of proof"). But we need not rely solely on that presumption: at step one, we look beyond the "particular statutory provision in isolation" and read the

statute "as a symmetrical and coherent regulatory scheme." *Sw. Elec. Power Co.*, 920 F.3d at 1023 (cleaned up). Doing so, we find that Congress imposed a "clear and convincing evidence" standard in a nearby provision: § 1912(e) forbids foster placement unless "clear and convincing evidence" shows likely harm from the parent's continued custody. The next subsection, § 1912(f), demands an even higher showing—"beyond a reasonable doubt"—before terminating the parent's rights. Congress thus deliberately included heightened standards for proving certain matters in § 1912(e) and (f), but *not* for proving "good cause" in § 1915.[145] We thus conclude Congress elected not to impose a heightened standard in § 1915, foreclosing the agency's interpretation at *Chevron* step one. *See Chamber of Commerce*, 885 F.3d at 369 (when statute "unambiguously forecloses" agency interpretation, "that is the end of the matter") (quoting *Chevron*, 467 U.S. at 842–43) (cleaned up).

JUDGE DENNIS suggests this "negative-implication" canon of statutory construction does not apply when assessing the permissible scope of agency action. DENNIS OP. at 148–49. *See generally Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (discussing negative-implication or *expressio unius est exclusio alterius* canon) (citing SCALIA & GARNER, READING LAW 107 (2012)). We disagree. Courts are to use "all the 'traditional tools' of construction" at *Chevron* step one. *Kisor*, 139 S. Ct. at 2415 (quoting *Chevron*, 467 U.S. at 843 n.9). And both the Supreme Court and our court have deployed the negative-implication canon in the step one analysis.[146] The

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[145] *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("'[W]here Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

[146] *See, e.g., Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002); *Brown v. Gardner*, 513 U.S. 115, 120 (1994); *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 732

Chevron cases JUDGE DENNIS cites—which in any event are all out-of-circuit—merely show that the canon sometimes does not resolve step one. For instance, by including an agency mandate in one section but not another, Congress "may simply not have been focusing on the point in the second context" and so left "the choice . . . up to the agency." *Clinchfield Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990); *see also*, *e.g.*, *Catawba County v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009). There is no evidence of that here, however. To the contrary, Congress explicitly mandated heightened standards-of-proof in sections addressing foster and adoptive placements (§ 1912(e) and (f)), but *not* in a nearby section (§ 1915) addressing departures from placement preferences. Far from suggesting Congress left the standard-of-proof up to the agency, this pattern "signals the intentional omission" of a heightened standard from § 1915, a decision the agency cannot second-guess. *Chamber of Commerce*, 885 F.3d at 373 (citing *Russello*, 464 U.S. at 23).

Sitting this debate out, the Federal Defendants' sole response is that the Final Rule *suggests* but does not *require* the clear-and-convincing-evidence standard. They argue that § 23.132(b) says only that courts "should" impose that standard, and also point out that the regulations state the rule "does not categorically require [it]" and "declines to establish a uniform standard of proof." 81 Fed. Reg. 38,843. We are unsure what to make of this strange argument. The Final Rule's whole purpose was to impose "uniformity" on state courts, *id.* at 38,779, and the term "should" often "create[s] mandatory standards." *Should*, GARNER'S DICTIONARY OF LEGAL USAGE (3d ed. 2011). Moreover, the state courts hearing Plaintiffs' cases have not read the

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(5th Cir. 2018); *Chamber of Commerce*, 885 F.3d at 373; *Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 929 (5th Cir. 2012); *Miss. Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1363–64 & n.29 (5th Cir. 1993).

rule as a mere suggestion. Thus, whatever credence we might give to the Federal Defendants' view, we would still find the rule invalid at step one because it seeks to create (and has in fact created) a heightened standard-of-proof in contravention of § 1915.

Alternatively, we would find this part of the rule invalid at *Chevron* step two. As discussed above, we view with "skepticism" an agency's departure from longstanding practices, especially those adopted contemporaneously with the statute's enactment. *Chamber of Commerce*, 885 F.3d at 381 (quoting *UARG*, 573 U.S. at 324); *supra* III(D)(1). The BIA's 2016 treatment of the § 1915 "good cause" determination is strikingly at odds with its 1979 position. In 1979, the BIA wrote that ICWA's "use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." 44 Fed. Reg. at 67,484. This supported BIA's position that "[p]rimary responsibility for interpreting" ICWA's language "rests with the courts that decide Indian child custody cases." *Id.* In 2016, BIA did a 180-degree reversal—seeking to impose a one-size-fits-all standard on what it previously stated was a "flexible" inquiry—without giving the "reasoned explanation" needed to justify discarding a longstanding agency view. *Gonzalez-Veliz*, 938 F.3d at 234 (quoting *Encino Motorcars*, 136 S. Ct. at 2126). The agency's sole justification was that state courts have "almost universally" adopted this standard. 81 Fed. Reg. at 38,843. But that undermines the agency's position. A near-consensus by state courts in applying the statute—one they have "primary responsibility" for administering, 44 Fed. Reg. at 67,487—hardly justifies the BIA's newfound view that it must impose uniformity on those same courts.

E. Remedy

We now address the question of remedy. Plaintiffs' second amended complaint, the one operative here, sought a declaration that specific sections of ICWA are unconstitutional and an injunction prohibiting the Federal Defendants from implementing or administering those sections. It also sought vacatur of the Final Rule. The district court, however, granted only declaratory relief as to specific provisions of ICWA and the Final Rule, and Plaintiffs have not cross-appealed seeking to modify the district court's judgment. *See, e.g., Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 876 F.3d 119, 127 (5th Cir. 2017) (explaining that "even a prevailing party must file a cross-appeal to seek a modification of a judgment") (citing *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 604 (5th Cir. 2004)). Having found discrete parts of ICWA and the Final Rule unconstitutional and unlawful, we would therefore affirm the district court's judgment to that extent. Specifically: (1) we would declare that the noted sections of ICWA are unconstitutional;[147] and (2) we would declare that the noted provisions of the Final Rule are unlawful under § 706 of the APA.[148]

Finally, a word about severability. The modern Supreme Court applies a "severability doctrine" to determine whether invalid parts of a statute may be excised from the rest. *See, e.g., Free Enter. Fund*, 561 U.S. at 508 ("'Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any

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[147] Those are: **(1)** 25 U.S.C. §§ 1915(a), 1915(b), 1913(d), 1914 (equal protection); **(2)** 25 U.S.C. §§ 1912(a), 1912(d), 1912(e), 1912(f), 1915(a), 1915(b), 1915(e), 1951(a) (anti-commandeering); and **(3)** 25 U.S.C. § 1915(c) (nondelegation).

[148] Those are: **(1)** all parts of the Final Rule that implement the ICWA provisions declared unconstitutional; **(2)** all parts of the Final Rule that purport to bind state courts; and **(3)** the requirement in 25 C.F.R. § 23.132(b) that good cause to depart from the placement preferences be proved "by clear and convincing evidence."

'problematic portions while leaving the remainder intact.'") (quoting *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328–29 (2006)). For at least two reasons, however, we need not perform that analysis here.

First, Plaintiffs do not challenge all of ICWA but only particular provisions. We can therefore grant Plaintiffs appropriate relief without delving into severability.[149] In that way, this case differs from cases where deciding severability was necessary to fashion appropriate relief. *Cf., e.g., Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2349 (2020) (plaintiffs invoked "ordinary severability principles" to argue for complete relief on their First Amendment claim); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2208 (2020) (observing "[t]here is a live controversy between the parties on th[e] question [of severability], and resolving it is a necessary step in determining petitioner's entitlement to its requested relief"). Second, the parties' briefing contains little substantive analysis on this point. We decline to perform a severability analysis of a complex statute like ICWA when the parties have not deeply engaged with the issue.[150]

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[149] *See, e.g.*, 28 U.S.C. § 2201(a) (authorizing courts to "declare the rights and other legal relations of any interested party" in "a case of actual controversy within its jurisdiction"); 5 U.S.C. § 706(2) (authorizing courts to "hold unlawful and set aside agency action, findings, and conclusions" under various circumstances).

[150] Even were we so inclined, we note that ICWA contains a severability clause. *See* 25 U.S.C. § 1963. In that event, "[a]t least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause" because the clause "leaves no doubt about what the enacting Congress wanted if one provision of the law were later declared unconstitutional." *American Ass'n*, 140 S. Ct. at 2349.