PRISCILLA R. OWEN, *Chief Judge*, concurring in part, dissenting in part.

I

A

I first consider whether the States have standing. For the reasons articulated in JUDGE DENNIS's and JUDGE COSTA's opinions,[1] the States do not have standing to assert in this suit that the Indian Child Welfare Act of 1978 (ICWA)[2] violates the Equal Protection Clause of the Fifth Amendment. As to all other claims, I conclude that the States do have standing.

The States have asserted various, often overlapping, claims in Counts I through IV and Count VII of the live complaint in the district court—the Second Amended Complaint. Briefly summarized, the States seek a determination that Congress did not have the authority to supplant state law in child-welfare and adoption cases with certain directives in ICWA, and that Congress cannot require state courts to follow ICWA. The States also contend that the Bureau of Indian Affairs (BIA) violated the Administrative Procedure Act (APA) and the federal Constitution when it promulgated the Final Rule (Count I). The States contend that the Indian Commerce Clause did not empower Congress to enact certain provisions of ICWA (Count II); that adoption, foster care, and pre-adoptive placement of "Indian children" are not permissible subjects of regulation under the Tenth Amendment (Count III); that ICWA and the Final Rule violate anti-commandeering principles under the Tenth Amendment (Count III); that ICWA and the Final Rule violate the Equal Protection Clause of the Fifth Amendment

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[1] *See* DENNIS, J., concurring and dissenting, part I(A)(1), p. 39 n.13; COSTA, J., concurring and dissenting, part I, p. 3 n.2.

[2] 25 U.S.C. §§ 1901-1923, 1951-1952.

(Count IV); and that ICWA and the Final Rule violate the non-delegation doctrine of Article I, Section 1 because they "delegate to Indian tribes the legislative and regulatory power to pass resolutions in each Indian child custody proceeding that alter the placement preferences state courts must follow" (Count VII).

The States complain about the costs of complying with ICWA and the Final Rule, including the hours and resources that child-welfare agencies expend, costs borne by the States to employ experts, and the time consumed in state-court proceedings resolving ICWA issues. The States further contend they "are directly and substantially injured by the delegation of power over placement preferences because it violates the Constitution's separation of powers through abdication of Congress's legislative responsibility and requires State Plaintiffs to honor the legislation and regulation passed by tribes in each child custody matter, which can vary widely from one child to the next and one tribe to another."

The States have adequately alleged that they are injured by ICWA and the Final Rule for standing purposes.[3] The determinative question is whether those injuries could be redressed if a federal court were to grant the relief the States seek in this case.

The States seek a declaration that parts of ICWA are unconstitutional and therefore that state rather than federal law governs. To the extent the States are seeking to supplant ICWA with state substantive and procedural law in child-welfare proceedings, such a declaration would not redress the

[3] *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." (citations, footnote, and internal quotation marks omitted)).

States' injuries because no state court would be bound by such a declaration.[4] Every state court would, of course, be free to decide the constitutionality of ICWA de novo because the rulings of the federal district court and of this court would not bind state courts and would not bind private litigants in state court proceedings. For this reason, the assertion in JUDGE DUNCAN's opinion that a decision of this court "would also remove state child welfare officials' obligations to implement [ICWA's] preferences"[5] is, with great respect, incorrect.

The States contended in the district court that because various provisions of ICWA are unconstitutional, the federal government cannot require the States to comply with those provisions and therefore could not withhold federal funding for child welfare as a consequence of non-compliance with ICWA. Specifically, the States requested the district court to hold that certain statutes authorizing the Secretary to withhold federal child welfare funds from states that do not comply with ICWA, including 42 U.S.C. §§ 622(b)(9) and 677(b)(3)(G), are unconstitutional. The States sought an injunction prohibiting the federal defendants from implementing or enforcing those statutes in their initial pleadings.

However, the States did not thereafter pursue any relief in the district court regarding the withholding of funds by the federal defendants. The States moved for summary judgment, but they did not seek summary judgment or request injunctive relief in their motion with regard to federal funding of child welfare. They did not cross-appeal in this court seeking such relief, nor could they since they did not pursue it in the district court. The

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[4] *See Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014) (per curiam) ("Redressability requires 'a likelihood that the requested relief will redress the alleged injury.'" (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998))).

[5] *See* DUNCAN, J., concurring and dissenting, part I(B), p. 21.

question then arises as to whether there is redressability at this point in the proceedings, since standing must be present at each stage of litigation.[6]

A determination in this case that certain provisions of ICWA, the Final Rule, or both were unconstitutional would be a binding determination (res judicata) as between those States and the federal government. This would mean that the States could categorically direct their child-welfare agencies to cease compliance with the provisions of ICWA if it were held unconstitutional. Such relief would address injuries asserted by the States and establishes the States' Article III standing to raise the constitutional challenges to ICWA, other than equal protection. The States would no longer be burdened with ICWA's requirements and would not incur the costs and expenses associated with compliance unless and until, in a state-court proceeding, individual plaintiffs asserted rights under ICWA and a final state-court judgment were to hold, contrary to a judgment of this court or the district court, that ICWA is constitutional and the State is bound by its requirements in that state-court proceeding. The potential for such a collision between state and federal courts as to ICWA's constitutionality does not mean that federal courts cannot redress the States' injuries in the present case. A federal-court judgment in the States' favor in this case could conceivably redress their injuries, though in the longer term, a state court's view of the constitutionality of ICWA might ultimately carry the day were a conflict between state-court holdings and federal-court holdings to arise.

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[6] *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990) ("[The] case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed . . . ." (first citing *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); and then citing *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974))).

A judgment in the present case holding that the States prevail against the federal defendants on their claims that ICWA is unconstitutional could also potentially be the basis for precluding the federal government from withdrawing funding for a State's failure to comply with unconstitutional statutory or regulatory provisions. Does that mean that the federal government is prohibited from using a "carrot/stick" approach to persuade a State to comply with ICWA or else withdraw funding? That issue was not raised or briefed in the district court or this court. It has not been decided. But the point is, it is not improbable that the relief that the States do continue to seek in the present case would, in future litigation between the States and the federal government, preclude the federal government from withholding child welfare funds under ICWA as a consequence of the States' failure to comply with ICWA. The constitutionality of ICWA would be off the table in any such future litigation between a State who is a party to this case and the federal government.

Not all the States' claims are grounded in the federal Constitution. The States challenge 24 C.F.R. § 23.132(b) on the basis that the clear-and-convincing-evidence standard is contrary to 25 U.S.C. § 1915, and on the basis that in promulgating the Final Rule, the Bureau of Indian Affairs (BIA) did not provide a reasoned explanation for reversing its prior, long-held interpretation of ICWA. The relief sought by the States in this regard would redress their complaint that the Final Rule imposes too high a standard on state agencies seeking to place a child other than in accordance with ICWA's preferences. The Final Rule's offending provisions would be abrogated and therefore would not be a factor or at issue in state-court adoption or placement proceedings. This would redress the injuries identified by the States.

Accordingly, I concur in parts I(C) and (D) of JUDGE DENNIS's opinion, with the exception of the last sentence in part I(D).

B

As to the standing of the individual plaintiffs, I concur in part I(A)(1) of JUDGE DENNIS's opinion, and parts I and II(A) and the final paragraph of part II(B) of JUDGE COSTA's opinion.

I add these observations. None of the individual plaintiffs have standing to press any of their claims, other than those with regard to the APA and the Final Rule, because nothing this court has to say about ICWA binds any state court in adoption or foster care placement cases when a private party asserts that ICWA's provisions are constitutional and must be applied or that they are unconstitutional and cannot be applied. Private parties in child-welfare and adoption proceedings would not be bound by a judgment issued by a federal district court or this court declaring rights as between the Brackeens, for instance, and the federal defendants, or as between the States and the federal government.

The assertion in JUDGE DUNCAN's opinion that the individual plaintiffs' claims are redressable because the "Federal Defendants would be barred from inducing state officials to implement ICWA, including the preferences, by withholding funding,"[7] is, with great respect, erroneous. None of the individual plaintiffs have standing to argue that the federal government is precluded from withholding child welfare funds from a State. They do not argue that they have a right or interest that would permit them to insert themselves into disputes as to funding between the federal government and the States under ICWA. The individual plaintiffs cite no statute or constitutional provision that would confer such a right. Any relief granted to the States regarding child-welfare funding under ICWA would redress the individual plaintiffs' claims, if at all, only incidentally and

[7] DUNCAN, J., concurring and dissenting, part I(B), p. 21.

tangentially. In any event, as discussed above, the States did not pursue in the district court their request for a declaration that the federal defendants are barred from withholding child-welfare funding under ICWA. Such relief was not granted by the district court, and the States do not seek such relief in this court. No judgment of this court could now grant the relief that JUDGE DUNCAN's opinion says would redress the individual plaintiffs' claims regarding ICWA's preferences.

The individual plaintiffs do have standing to challenge the Final Rule. However, even were the Final Rule abrogated in its entirety, ICWA's statutory preferences and other requirements would remain intact. The individual plaintiffs do not have standing to challenge ICWA's provisions directly or in the abstract in the present case. A judgment of this court would not resolve any actual case or controversy as between the individual plaintiffs and the federal defendants, other than challenges to the Final Rule, for the reasons considered above and in JUDGE DENNIS's and JUDGE COSTA's opinions.

II

I agree with the conclusion in JUDGE DENNIS's opinion,[8] as a general proposition, that Congress had the authority under the Indian Commerce Clause[9] to enact ICWA. However, I do not join JUDGE DENNIS's analysis fully. I join part II(A) of JUDGE COSTA's opinion as to this issue.

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[8] DENNIS, J., concurring and dissenting, part II(A)(1).

[9] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

III

A

Because I conclude that neither the States nor the individual plaintiffs have standing to bring direct equal protection challenges to ICWA's statutory provisions, I would not and do not reach the merits of any of those claims. To the extent that equal protection claims have been asserted by the individual plaintiffs in challenging the Final Rule, I join the final paragraph in part II(B) of JUDGE COSTA's opinion. The individual plaintiffs have standing to assert equal protection challenges to ICWA in this context. I agree with the conclusion in JUDGE DENNIS's opinion that ICWA's preferences are political not racial. Those preferences withstand rational-basis scrutiny. I therefore conclude that the Final Rule did not violate the Equal Protection Clause in implementing ICWA's statutory preferences, including the preference for "Indian Families."

B

Regarding the commandeering and preemption claims, I join part II(A)(2)(a)(i) of JUDGE DENNIS's opinion and part III(B) of JUDGE DUNCAN's opinion.

To clarify, with regard to part III(B)(1)(a)(iii) of JUDGE DUNCAN's opinion, I agree that 25 U.S.C. §§ 1915(a)-(b), and implementing regulations, in large measure violate the anti-commandeering doctrine. However, the placement preferences set forth in that statute and its implementing regulations, standing alone, do not commandeer, as JUDGE DUNCAN's opinion explains.[10] Those federal laws preempt contrary state-law preferences. The commandeering occurs because state agencies are directed

[10] DUNCAN, J., concurring and dissenting, part III(B)(1)(a)(iii), p. 83.

to undertake action to identify and assist individuals who might be entitled to preference over others seeking to adopt or to provide foster care. To the extent the state courts and state agencies become aware of individuals who seek to have ICWA's preferences applied, ICWA's preferences should be followed.

C

Only the State plaintiffs asserted claims that Congress impermissibly delegated legislative power to Indian tribes in ICWA. With regard to the non-delegation issues, I join part II(C) of JUDGE DENNIS's opinion.

D

Regarding the APA claims, I join part III(D)(3) of JUDGE DUNCAN's opinion. I do not join part III(D)(2) of that opinion because the discussion as to whether regulations bind state courts is abstract. It is unclear from the discussion which regulations purport to bind state courts separate and apart from statutory provisions which do bind state courts to the extent the statutory provisions are constitutional.

E

I would grant declaratory relief consistent with the conclusions in this opinion.