No. 18-11479

In the United States Court of Appeals for the Fifth Circuit

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,

Plaintiffs-Appellees,

v.

CHEROKEE NATION; ONEIDA NATION; QUINALT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants-Appellants.

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

APPELLEES' OPPOSITION TO MOTION TO STAY PENDING APPEAL

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CHEROKEE NATION; ONEIDA NATION; QUINALT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants-Appellants.

Pursuant to Local Rule 28.2.1, the undersigned counsel of record certifies that the following list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate potential disqualification or recusal.

1. Cherokee Nation (Intervenor-Defendant)
2. Oneida Nation (Intervenor-Defendant)
3. Quinault Indian Nation (Intervenor-Defendant)
4. Morongo Band of Mission Indians (Intervenor-Defendant)
5. Chad Everet and Jennifer Kay Brackeen (Plaintiffs)
6. Frank Nicholas and Heather Lynn Libretti (Plaintiffs)
7. Altagracia Socorro Hernandez (Plaintiff)
8. Jason and Danielle Clifford (Plaintiffs)

9. State of Texas (Plaintiff)

10. State of Louisiana (Plaintiff)

11. State of Indiana (Plaintiff)

12. United States of America (Defendant)

13. Bureau of Indian Affairs and its Director, Bryan Rice (Defendants)

14. John Tahsuda III, Bureau of Indian Affairs Principal (Defendant)

15. United States Department of the Interior and its Secretary, Ryan Zinke (Defendants)

16. United States Department of Health and Human Services and its Secretary, Alex Azar (Defendants)

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44. Sam Ennis, United States Department of the Interior, Solicitor's Office, of-counsel for Federal Defendants.

45. Hon. Reed O'Connor, United States District Judge, Northern District of Texas

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INTRODUCTION

The Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, is a highly unusual federal statute. Enacted six years before the Supreme Court held that child-custody determinations may not be made on the basis of racial considerations, *see Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984), ICWA established a "Federal policy that, where possible, an Indian child should remain in the Indian community." H.R. Rep. No. 95-1386, at 23. But no federal official carries out this "Federal policy." Instead, ICWA makes state agencies and courts the instruments of that federal policy by dictating every significant aspect of a state child-welfare or custody proceeding that involves a child of a Indian tribal member. *See* 25 U.S.C. § 1903(4) (defining "Indian child").

ICWA's lynchpin is the system of placement preferences that states must apply in foster-care and adoption proceedings involving Indian children. *See* 25 U.S.C. § 1915. ICWA provides that in any such adoption proceeding "under State law, a preference shall be given, in the absence of good cause to the contrary," to "(1) the child's extended family; (2) other members of the child's tribe; or (3) other Indian families," which is to say, any member of any of the 572 *other* federally recognized Indian tribes.

Id. § 1915(a); *see also id.* § 1915(b) (preferences in foster-care proceedings). ICWA then delegates to Indian tribes the power to reorder those placement preferences, for example, to prefer an "other Indian famil[y]" over a non-Indian member of the child's extended family. *Id.* § 1915(c). Finally, under regulations promulgated in 2016, "[t]he party urging that ICWA preferences not be followed bears the burden of proving by clear and convincing evidence the existence of 'good cause'" to deviate from such a placement. 81 Fed. Reg. 38,782, 38,838 (June 14, 2016) ("Final Rule"); *see also* 25 C.F.R. § 23.132(b). *But see* Guidelines for State Courts—the Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) ("1979 Guidelines") (finding no authority to issue binding regulations and observing that "'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding").

ICWA thusly requires States to segregate Indian children into a parallel child-welfare system in which States supplant the best-interests-of-the-child standard that is the touchstone of state child welfare law with ICWA's categorical preferences, which, in turn, are backstopped by a heightened standard of proof—all in the service of the nakedly race-

based "Federal policy" of routing "Indian children" to the "Indian community."

Appellees—individuals whose adoptions of Indian children were delayed or denied as a result of ICWA's placement preferences, and three States—challenged ICWA and the Final Rule. Following extensive briefing and a four-hour oral argument, the district court methodically applied controlling Supreme Court precedent and held that ICWA discriminates on the basis of race in violation of the Constitution's guarantee of equal protection, impermissibly delegates legislative power to Indian tribes, and commandeers state judges and child-welfare officers to accomplish federal objectives. The court also set aside the Final Rule. APP 519-65 ("Op.").

Six weeks after the district court entered judgment, four Indian Tribes—intervenors in the district court—now seek an immediate stay pending an appeal that they evidently have no interest in expediting. That unusual request should be denied. Failing to engage meaningfully with the Supreme Court and Fifth Circuit precedent underlying the district court's decision, the Tribes do not come close to making the requisite strong showing that they are likely to succeed on the merits. Nor do the

Tribes make the required showing that, without a stay, they will suffer irreparable injury. It is not enough for the Tribes to complain that Texas, in accordance with the lower court judgment, no longer is applying ICWA or the Final Rule. The Tribes must show harm to themselves flowing from that change—and that they cannot do.

Even if the Tribes had made the required showing of irreparable harm, a stay still would be inappropriate because of the harm a stay would cause to Appellees. Take the Cliffords: Next month they will be engaged in contested adoption proceedings in which they are attempting to regain custody of Child P. *See* APP 633 (Dec. of Mark Fiddler ¶¶ 2-3). If the district court's ruling setting aside the Final Rule is stayed, the Final Rule will apply in those proceedings. Having won a judgment setting aside the Final Rule, the Cliffords should not now be deprived of its benefits absent the clearest demonstration that the judgment was incorrect. Yet the Tribes' argument to revive the Final Rule is surpassingly weak—indeed, irreconcilable with this Court's recent decision in *Chamber of Commerce v. Department of Labor*, 885 F.3d 360 (5th Cir. 2018).

The Tribes' motion for a stay should be denied.

BACKGROUND

Though Congress may have enacted ICWA with good intentions, the means Congress chose to achieve its aims—categorical preferences implemented by state officials without any accountability to ICWA's federal authors—yield a scheme rich with opportunities for abuse, as the facts underlying Individual Plaintiffs' claims, set forth in the district court's opinion, *see* APP 528-33 (Op. 10-15), vividly illustrate. The Tribes' suggestion (Mot. 1, 24) that these cases reflect a "gold standard" in child welfare is risible.

The district court's final judgment declares Sections 1901-1921 and 1950-51 of ICWA and all relevant portions of the Final Rule unconstitutional, but it does not enjoin any of the Defendants from taking any action. APP 566.

ARGUMENT

"A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Texas v. United States*, 787 F.3d 733, 747 (5th Cir. 2015). This is because a "stay is an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). Courts accordingly must assess four factors:

"(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434. The first two factors—likelihood of success and irreparable injury—"are the most critical." *Id.* "It is not enough that the chance of success on the merits be better than negligible." *Id.* Likewise, "simply showing some possibility of irreparable injury fails to satisfy the second factor." *Id.* at 434-35. If an applicant satisfies the first two factors for issuance of a stay, then the Court may assess the harm to the opposing party and the public interest. *Id.* at 435.

I. The Tribes Have Failed To Show Likelihood Of Success On The Merits.

The Tribes fail to make any showing—much less the necessary "strong showing"—that they are likely to succeed in overturning all three of the district court's constitutional holdings as well as the district court's alternative holding that the Final Rule is contrary to ICWA and inadequately explained. *Nken*, 556 U.S. at 434.

In an attempt to sidestep the likelihood-of-success inquiry altogether, the Tribes contend that the "presumption of constitutionality" entitles them to a stay. Mot. 9 (quoting *Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers)). But as the district court rightly observed, although a court "'must indulge the presumption of constitutionality and carefully examine a statute before finding it unconstitutional,'" "the presumption of constitutionality does not continue *following* a final judgment." APP 761 ("Stay Op." at 4) (quoting *United States v. Anderton*, 901 F.3d 278, 283 (5th Cir. 2018)). In any event, ICWA plainly violates the U.S. Constitution, in multiple respects.

A. Equal Protection

The district court's holding that "ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race," APP 544 (Op. 26), is clearly correct and is likely to be upheld on appeal. Indeed, the Supreme Court flagged "equal protection concerns" with ICWA five years ago. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013).

Relying on *Morton v. Mancari*, 417 U.S. 535 (1974), the Tribes argue that because ICWA's classifications of "Indian children" and "Indian famil[ies]" are linked to membership in a federally recognized Indian

tribe, the classifications are "political" rather than racial in nature. But the Supreme Court's much more recent decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), holds that a classification based on tribal membership should be viewed as an impermissible "proxy for race" when the classification relates to "critical state affairs" rather than "the internal affair[s] of a quasi sovereign." *Id.* at 520, 522. ICWA's classifications, which indisputably relate to "state affairs"—specifically child-custody and placement proceedings conducted before state courts and agencies—operate as proxies for race in precisely the way that *Rice* describes. Indeed, by reaching beyond tribal membership to sweep in children who merely are *eligible* for membership, ICWA reveals itself even more clearly to be based on racial considerations.

In *Mancari*, the Supreme Court upheld a hiring preference for enrolled tribal members for certain BIA positions at the Bureau of Indian Affairs ("BIA"). 417 U.S. at 554. Because BIA governs the "lives and activities" of tribal members "in a unique fashion," the Court reasoned that the hiring preference "further[ed] Indian self-government" and was therefore "political rather than racial in nature." *Id.* at 553-54 & n.24.

The Court cautioned, however, that it would be an "obviously more difficult question" if Congress extended that preference to other agencies or established "a blanket exemption for Indians from all civil service examinations." *Id.* at 554.

The Court confronted a version of that "obviously more difficult question" in *Rice*. *Rice* involved a challenge to Hawaii's scheme for electing the trustees of its Office of Hawaiian Affairs, which administers programs for the benefit of "Hawaiians," defined as descendants of native persons inhabiting the Hawaiian Islands. 528 U.S. at 499. Hawaii's constitution limited the right to vote for the trustees to these native "Hawaiians." *Id*. When this voting scheme was challenged as race-based, the state invoked *Mancari*, arguing that "native Hawaiians have a status like that of Indians in organized tribes." *Id*. at 518-20.

The Supreme Court struck down the statute, holding that, even if native Hawaiians qualified as an Indian tribe, "[i]t does not follow from *Mancari*" that a State could have a "voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens." *Id*. at 520. *Rice* characterized *Mancari* as a

"limited exception" to the general prohibition against race-based legislation—one that *Mancari* itself had been "careful to note" was "confined" to BIA, which is "'*sui generis*.'" *Id.* (quoting *Mancari*, 417 U.S. at 554). "To extend *Mancari*" to the context of a state election, 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.

As the district court recognized, "[t]he specific classification at issue in this case mirrors the impermissible racial classification in *Rice*, and is legally and factually distinguishable from the political classification in *Mancari*." APP 543 (Op. 25). A state child-custody proceeding is no less a "critical state affair" than a state election, and ICWA's placement preferences operate to "fence out" non-Indian families like the Individual Plaintiffs from those proceedings. And quite unlike the laws relating to Indians previously upheld by the Court (catalogued in *Rice*, 528 U.S. at 519-20), ICWA's placement preferences do not fulfill treaty obligations, regulate tribal land or property, or otherwise touch on tribal self-government. ICWA instead regulates the operations of state courts and state agencies and mandates that they maintain parallel child-welfare systems applicable to tribal Indians. *Rice* forbids that result.

The Tribes argue that *Rice* is inapposite because, in that case, "the law did not require *any* political relationship with a separate sovereign." Mot. 11. That is demonstrably incorrect. Hawaii's argument in *Rice* was that: (1) Native Hawaiians should be treated as an Indian tribe; and (2) *Mancari* permits a state election limited to tribal Indians. The Court's decision assumed the first proposition to be true, and rejected the second. *See Rice*, 528 U.S. at 519 ("Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort."). Notably, the Tribes present no argument whatsoever that ICWA's placement preferences can survive under the principles set forth in *Rice*.

The Tribes also argue that ICWA's classifications are not racial because some minuscule number of adopted tribal members are not racially Indian, and ICWA does not apply to racial Indians who are not tribal members. Mot. 10. But the Tribes cannot deny that eligibility for tribal membership is based on lineal descent, 25 C.F.R. § 83.11(e), and that ICWA therefore applies overwhelmingly to persons who have some meas-

ure of Indian blood quantum. Nor can they deny that *Rice* rejected precisely the type of overinclusive/underinclusive argument the Tribes advance. *See* 528 U.S. at 514 ("We reject this line of argument.").

Moreover, as the district court recognized, ICWA applies not only to tribal members but also to "those children simply *eligible* for membership who have a biological Indian parent." APP 543 (Op. 25). "This means one is an Indian child if the child is related to a tribal ancestor by blood." *Id.* (citing membership of laws of various Indian tribes that hinge on ancestry). Section 1915(a) thus requires differential treatment based on an "ancestral" classification with an "explicit tie to race." *Rice*, 528 U.S. at 516-17.

The Tribes portray ICWA's application to children eligible for membership in a tribe as an ministerial stopgap to account for the time it takes for parents to enroll their child in the Tribe. Mot. 12. But that claim is flatly belied by Individual Plaintiffs' experiences. For example, it was a whole year after the Brackeens took in A.L.M. as a foster child that the Navajo Nation invoked A.L.M.'s continuing eligibility for tribal membership to block the Brackeens' adoption of A.L.M., and they did so

despite the fact that A.L.M's biological parents both supported the adoption by the Brackeens. Similarly, the Ysleta sur Pueblo Tribe invoked Baby O.'s eligibility for membership in that tribe to delay the Librettis' adoption of Baby O., in spite of the wishes of Baby O.'s sole custodial biological parent, Plaintiff Altagracia Hernandez. And the White Earth Band, after initially stating that Child P. was not eligible for membership, reversed position more than a year later and asserted that Child P. *was* eligible and therefore was an "Indian child" for ICWA purposes. ICWA applied to A.L.M., Baby O., and Child P. not because of a pending application for enrollment in a tribe, but because each was born to a tribal member, which is to say, because of their ancestry. "Ancestral tracing of this sort … employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name" and is every bit as "odious to a free people whose institutions are founded upon the doctrine of equality." *Rice*, 528 U.S. at 517. The Tribes are unlikely to succeed in overturning the district court's well-reasoned equal protection ruling.

B. Non-Delegation Doctrine

Section 1915(c) of ICWA authorizes tribes to change the order of ICWA's placement preferences, permitting a tribe to install a preference

for members of a child's tribe, or indeed members of any Indian tribe, over the child's extended family. 25 U.S.C. § 1915(c). The district court correctly ruled that Section 1915(c) is an unconstitutional delegation of Congress's legislative authority.

The Tribes do not dispute that Section 1915(c) delegates legislative power, but argue instead that such delegations to Indian tribes are permissible. Mot. 14. Congress may delegate authority to tribes only to regulate enrolled members or tribal land. *See United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (limitations on delegation of "legislative power" are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter"). *Mazurie* cannot support ICWA's delegation of the authority to re-order preferences applicable to proceedings in *state courts* involving *non-members*, and the Tribes adduce no precedent supporting such a delegation of power to tribes. The Tribes are unlikely to succeed on appeal in establishing the improbable proposition that Congress may grant to Indian tribes the power to set rules that *States* must follow.

C. Anti-Commandeering Doctrine

The Constitution "confers upon Congress the power to regulate individuals, not States," and thus "withhold[s] from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475-76 (2018). This anti-commandeering principle "promotes political accountability" by ensuring that "the responsibility for the benefits and burdens of the regulation is apparent." *Id*. at 1477.

ICWA transparently violates the anti-commandeering principle by directing state agencies and state courts in virtually every aspect of state child-custody and welfare proceedings involving Indian children. There is no federal official who administers ICWA or carries out its mandates; ICWA instead unabashedly requires that its federal policy of ensuring that Indian children be placed with Indian families be carried out by state agencies and state courts. ICWA "shifts all responsibility to the States, yet 'unequivocally dictates' what they must do." APP 554 (Op. 36) (quoting *Murphy*, 138 S. Ct. at 1477). The district court correctly determined that, after the Supreme Court's decision in *Murphy*, this type of

federal regulation of States in the exercise of their own regulatory authority is impermissible. The Tribes are unlikely to succeed in overturning that judgment.

First, the Tribes do not dispute that ICWA "requires [state] executive agencies to carry out its provisions." APP 554 (Op. 36). This was impermissible long before *Murphy*, *see Printz v. United States*, 521 U.S. 898 (1997), and the Tribes' motion offers no argument as to how ICWA's various directives to state agencies possibly could be sustained.

The Tribes claim that the anti-commandeering principle nevertheless permits Congress to impose identical requirements on state courts. Mot. 14-15. That would be a surprising loophole in the anti-commandeering principle, and it is not the law. While the Supremacy Clause means that state courts of general jurisdiction cannot refuse to entertain a federal cause of action, *see Testa v. Katt*, 330 U.S. 386, 394 (1947), ICWA commands state courts to apply "federal standards that modify *state created* causes of action." APP 553 (Op. 35). ICWA thus rewrites state law and then requires state judges to carry it out. No authority supports the Tribes' position that Congress may command state courts to adjudicate a

state-law cause of action in accordance with Congress's instructions in this way.

Perhaps sensing the precariousness of its position, the Tribes now raise a new argument: that ICWA is a permissible "condition on federal funding." Mot. 15. Because the Tribes did not press this argument below, it is "waived and cannot be raised for the first time on appeal." *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007). In any event, the new argument is meritless. ICWA is not the type of law that "allow[s]" but does "not require" the States to implement a federal statute. *Murphy*, 138 S. Ct. at 1479. As the Tribes acknowledged below, ICWA is a "federal mandate[]" that "impose[s] obligations" on States whether or not they accept federal funding. APP 192-93.

D. The Final Rule

If ICWA is unconstitutional, it follows that the regulations implementing that statute are contrary to law. But even if the Tribes succeeded in all of their arguments with respect to ICWA's constitutionality,

the district court's decision to set aside the Final Rule would survive for two independent reasons.

First, the Final Rule contradicts BIA's 40-year-old understanding that Congress tasked "courts that decide Indian child custody cases" with "[p]rimary responsibility for interpreting" ICWA, and that BIA therefore lacked authority to issue binding regulations. 44 Fed. Reg. at 67,584; *see also* 81 Fed. Reg. at 38,785-86 (BIA "no longer agrees … that it lacks the authority to issue binding regulations"). BIA, however, failed to "explain its change in position over its authority to 'carry out the provisions' and apply the ICWA." APP 560 (Op. 42). BIA's new interpretation of its regulatory authority therefore warranted no deference, and appropriately was set aside. *See Chamber of Commerce of U.S. v. U.S. Dep't of Labor*, 885 F.3d 360, 380 (5th Cir. 2018) (courts do not defer when an agency takes "forty years to 'discover'" a sweeping grant of regulatory authority in ambiguous statutory text).[1]

[1] The memorandum of the Solicitor of Interior invoked by the Tribes, Mot. 17, relies principally on unadopted bills that would have required detailed rulemaking by Interior, and does not justify Interior's change in its interpretation of the statute Congress actually enacted. *See* Indian Child Welfare Act by Legislative Rule at 16-17 (June 8, 2016), http://www.doi.gov/sites/doi.gov/files/uploads/m-37037.pdf.

Second, even if BIA had authority to issue binding regulations, the district court correctly held that the agency's imposition of the "clear and convincing" standard for a good-cause finding was "contrary to law." Op. 45. Preponderance of the evidence is the default standard of proof in civil litigation, and statutory "silence" "is inconsistent with the view that Congress intended to require a special, heightened standard of proof." *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Here, "other portions of the ICWA specifically include[] heightened evidentiary burdens," but "section 1915 does not establish a heightened evidentiary standard in conjunction with the good cause requirement." APP 563 (Op. 45). This "confirms that Congress intended the default preponderance of the evidence standard to apply." *Id.*

II. Defendants Have Failed to Show They Will Suffer Irreparable Injury from the Absence of a Stay.

The district court issued its judgment declaring ICWA unconstitutional and setting aside the Final Rule more than six weeks ago. Given that, and the fact that the Tribes claim now to be involved in dozens of ICWA cases in Texas alone, one might have expected the Tribes to come forward with a concrete showing of how the district court's ruling is prej-

udicing their involvement in one or more of those cases. Tellingly, however, the Tribes make no such showing. Indeed, in explaining their long delay in filing a notice of appeal and motion for stay, the Tribes claim that they did not even become *aware* of anyone having "implemented the judgment" until November 15. Mot. 7. That is difficult to believe, but taking the Tribes' protestation of ignorance at face value, it underscores the fact that the Tribes will suffer no irreparable harm in the absence of a stay pending appeal. *See Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (the "failure to act sooner undercuts the sense of urgency … and suggests that there is, in fact, no irreparable injury").

As they did below, the Tribes contend that, without a stay, they "will lose their statutory rights in state-court proceedings involving Indian children." Mot. 18. But the Tribes nowhere explain "*how* being deprived of the ICWA results in irreparable injury to the tribes." Stay Op. 5. For example, the Tribes suggest that they may no longer receive notice in child-custody cases, Mot. 19, but they never connect that to any harm that *the Tribes* will suffer as a result. *See Nken,* 556 U.S. at 426 (absent a stay, irreparable injury must befall the "applicant"). As the district

court correctly explained, it is not enough for the Tribes to cite the "deprivation of rights originally provided by an unconstitutional statute." APP 762 (Stay Op. 5).

The Tribes' real argument is that, in the absence of a stay, "Indian children" will suffer irreparable harm as child-custody cases are adjudicated without what the Tribes characterize as "ICWA's protections." Mot. 20. Of course, the Tribes do not (and cannot) claim that any harm will befall the only "Indian children" directly at issue in this case—A.L.M., Baby O., and Child P.; a stay will *injure* those children, not help them. *See*, *infra*, Part III.

Ultimately, the Tribes' irreparable harm argument hinges on their unsubstantiated and utterly outrageous suggestion that Texas, Louisiana, and Indiana may "return to the unconscionable practices that Congress found objectionable when it enacted ICWA 40 years ago." Mot. 19. In fact, Congress did not even mention Texas, Louisiana, or Indiana when discussing the problems that led to ICWA's enactment. *See* S. Rep. No. 95-597, at 46-50 (1977); H.R. Rep. No. 95-1386, at 9 (1978). And the Tribes, of course, offer no evidence whatsoever that Texas, Louisiana, or Indiana will, absent ICWA, subject Indian children to the sorts of harms

that Congress then identified. While Indian children certainly are overrepresented in the foster-care system in the United States, the Tribes' claim that "these statistics … would become worse if the judgment is not stayed" is pure *ipse dixit*. Mot. 21. State law, after all, still commands those States' child-welfare agencies to safeguard the best interests of the children under their jurisdiction.

The Tribes also assert that, absent a stay, "it is likely that termination and adoption decisions in these states that are inconsistent with ICWA could not be reversed should the Tribes prevail on appeal." Mot. 21. Of course, it is entirely speculative whether there will be a child-custody decision with which the Tribes disagree during the pendency of this appeal, and "some possibility of irreparable injury" is insufficient to "satisfy[] the second stay factor." *O'Donnell v. Goodhart*, 900 F.3d 220, 232 (5th Cir. 2018). In any event, if the Tribes prevail on appeal, Section 1914 of ICWA provides for an action to invalidate foster-care and parental-termination proceedings that violate relevant provisions of ICWA. 25 U.S.C. § 1914.[2]

[2] The Tribes' claim that its alleged injuries are "magnifie[d]" by the district court's supposed failure to conduct a severability analysis, Mot.

III. Issuance of the Stay Will Substantially Injure Plaintiffs.

Although the judgment will not impose any irreparable harm on the Tribes, a stay will inflict substantial and immediate harm on Plaintiffs. For example, the Brackeens' adoption of A.L.M., which is final under Texas law, will once again be exposed to the threat of a collateral attack under 25 U.S.C. § 1913(d). The Tribes contend that the possibility of such a collateral attack is speculative, but there is nothing speculative about ICWA's relegation of the Brackeens' family to a legally disadvantaged category, which itself is an injury, *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012), and one that the Fifth Circuit recognizes as irreparable, *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012).[3]

21, is specious. The district court severed the unconstitutional provisions of ICWA, leaving in place 25 U.S.C. §§ 1931-1934 and 1961-1963. APP 566.

[3] The Tribes now argue, for the first time, that section 1913(d) does not expose the Brackeens' adoption of A.L.M. to attack. Mot. 23. But the Navajo Nation has claimed the ability to mount just such an attack. *See* Reply of Navajo Nation in Supp. of Mot. to Intervene, Dkt. 89, at 3-4. Precedent appears to support their ability to do so. *See*, *e.g.*, *Morrow v. Winslow*, 94 F.3d 1386, 1395 n.6 (10th Cir. 1996) ("withdrawal of consent to termination of parental rights up to two years after an adoption decree" may be made under "§ 1913(d)").

The other Individual Plaintiffs will also be injured by a stay. The Tribes assert that "the ruling … has no effect on the Libretti[s'] ability to adopt Baby O.," Mot. 24, but the Final Rule, if reinstated, would apply to the Librettis' petition to adopt Baby O., which is set for a hearing in December. APP 633 (Dec. of Mark Fiddler at ¶ 2). Also in December, the Cliffords will participate in contested adoption proceedings involving Child P. *Id.* ¶ 3. If this Court should grant a stay, the Final Rule will likewise apply in those proceedings. 25 C.F.R. § 23.132(b). The fact that Nevada and Minnesota are not parties to this litigation does not diminish the effectiveness of the Court's vacatur of the Final Rule, which necessarily applies nationwide. *See* 5 U.S.C. § 706(2); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989).

The State Plaintiffs also would be harmed by a stay as their courts and child-welfare agencies once again are commandeered by the federal government. The Tribes attempt to trivialize this injury with the observation that State Plaintiffs previously had complied with ICWA's mandates, but, in the First Amendment context, the Supreme Court held that an injury of constitutional dimension "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S.

347, 373 (1976). Injuries to our federalist structure of government are no less irreparable.

Of even greater importance, a stay poses the risk of substantial harm to Indian children in State Plaintiffs' care. Though the Tribes pretend to "ask this Court to preserve the status quo," Mot. 2, since October 4, the "status quo" has been that ICWA cannot be applied in Texas, Louisiana, and Indiana, and the Final Rule has been set aside nationwide. That, of course, is not the condition the Tribes wish to preserve. And because the state child-welfare and custody proceedings involving Indian children cannot be paused indefinitely while the Tribes appeal, what the Tribes want is for this Court to order that ICWA and the Final Rule snap back to govern those proceedings. But if Appellees prevail on the merits, State Plaintiffs then likely would be faced with numerous requests to unwind placements and adoptions unlawfully conducted under ICWA and the Final Rule, with potentially devastating consequences for the Indian children involved. Here, because Appellees are likely to prevail on the merits, a stay is likely to cause substantial harm to the State Plaintiffs and the Indian children in their care.

IV. The Public Interest Weighs Against Granting A Stay.

The Court's final judgment protects the public from an unconstitutional act of Congress and an unlawful agency rule, and "it is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd sub nom*. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Tribes contend that "enforcement of federal laws advances the public interest," Mot. 25, but *this law* has been held unconstitutional, and the Tribes have failed to show that the district court's determination will be reversed on appeal. Enforcing unconstitutional laws is not in the public interest.

V. The Tribes' Motion Fails Under Their Alternative Standard.

The Tribes contend that they have satisfied the standard for a stay set forth in *Campaign for Southern Equality v. Bryant*, 773 F.3d 55 (5th Cir. 2014). Mot. 26. But even if the Tribes had presented a "substantial case on the merits" on "a serious legal question"—and they have not—the Tribes would not be entitled to a stay under this standard because, as explained above, the equities do not "weigh heavily" in their favor. *Bryant*, 773 F.3d at 57; *see also* APP 760 (Stay Op. 3 & n.5).

CONCLUSION

The Tribes' motion for stay pending appeal should be denied.

Dated: November 27, 2018 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this response contains 5,198 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in New Century Schoolbook 14-point font using Microsoft Word 2016.

DATED: November 27, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on November 27, 2018, I filed the foregoing document using the Court's ECF system. Service on all counsel of record for all parties was accomplished electronically using the Court's CM/ECF system.

DATED: November 27, 2018

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