COMMANDEERING THE INDIAN CHILD WELFARE ACT: NATIVE AMERICAN RIGHTS EXCEPTION TO TENTH AMENDMENT CHALLENGES

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INTRODUCTION

The U.S. Court of Appeals for the Fifth Circuit has challenged the constitutionality of legislation that has remained at the core of tribal sovereignty since its enactment.[1] The Indian Child Welfare Act of 1978

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1 Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019); Brackeen v. Bernhardt, 942 F.3d 287 (5th Cir. 2019) (granting plaintiffs petition to rehear the case en banc).

(ICWA)[2] was passed as a reparative response to the forced removal of Native American[3] children nationwide from their families and tribes and placement into the adoption and foster care systems. The current constitutional challenges focus on ICWA's 2016 revisions under the Department of the Interior, Bureau of Indian Affairs (BIA) "Indian Child Welfare Act Proceedings Final Rule" (Final Rule).[4] The revisions created binding procedures and regulations on state courts and state agencies handling child custody proceedings involving an Indian child.[5] The plaintiffs in *Brackeen v. Bernhardt*, which challenged provisions of ICWA, were the first to ever receive a successful ruling against the Act's constitutionality at the district court level.[6] The Fifth Circuit initially upheld the constitutionality of this long-standing law, despite a dissenting judge alleging conflicts between provisions of the Final Rule and the Tenth Amendment.[7] The legal battle to protect tribal sovereignty continues after the Fifth Circuit decided the case en banc.[8]

The Tenth Amendment's anti-commandeering doctrine protects states' rights by prohibiting the federal government from "commandeering" state officials.[9] Parties challenging ICWA argue that the Final Rule violates the Tenth Amendment by impermissibly commandeering state courts and state agencies to apply federal standards.[10] Supporters of ICWA maintain that the procedural and substantive standards set out in the Final Rule are appropriate under the anti-commandeering doctrine because they preempt conflicting state rules rather than direct state officials.[11] Support for ICWA is also found in U.S. Supreme Court decisions that have held certain federal legislation exempt from Tenth Amendment restrictions. This immunity extends to statutes that are passed pursuant to Congress' power under

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2 *See generally* Indian Child Welfare Act (ICWA) of 1978, 25 U.S.C. § 1901 (1978).

3 This Note will refer to Native Americans as "Indians" and "American Indians" as it pertains to the language of ICWA. 25 U.S.C. § 1901.

4 *See Bernhardt*, 937 F.3d at 416 ("This case presents facial constitutional challenges to the Indian Child Welfare Act of 1978 (ICWA) and statutory and constitutional challenges to the 2016 administrative rule . . .").

5 *See generally* Indian Child Welfare Act Proceedings, 25 C.F.R. § 23 (2021).

6 The Texas Northern District Court granted summary judgement in favor of the plaintiffs challenging ICWA and the Final Rule holding that the Act was in violation of "equal protection, the Tenth Amendment, the nondelegation doctrine, and the Administrative Procedure Act." *Bernhardt*, 937 F.3d at 416.

7 *Bernhardt*, 937 F.3d at 441 (Owen, J., dissenting).

8 Brackeen v. Bernhardt, 942 F.3d 287 (5th Cir. 2019).

9 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1489 (2018); Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 145 (1992).

10 *Bernhardt*, 937 F.3d at 430; Federal Appellants' En Banc Brief at 9, Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479), 2019 WL 6699234.

11 Federal Appellants' En Banc Brief, *supra* note 10, at 47–48.

the Reconstruction Amendments and the Commerce Clause.[12] The reparative purpose and need for a uniform application of federal legislation passed under these constitutional amendments make the legislation resilient to a strict application of the Tenth Amendment. ICWA shares these unique characteristics and should similarly be exempt from anti-commandeering challenges.

This Note will focus on analyzing ICWA and the Final Rule through the lens of the Tenth Amendment anti-commandeering doctrine. Part I summarizes the history of ICWA and the Final Rule and outlines the procedural history and background of *Brackeen v. Bernhardt*. Part I will also discuss the Supreme Court's modern approach to both cases involving ICWA, and its interpretation of the Tenth Amendment. Although the focus of this Note is not to predict the outcome of this case, an understanding of the Supreme Court's articulation of both ICWA and the anti-commandeering doctrine is necessary to navigate the current arguments being made at the circuit level. Finally, Part I will analyze the relationship between the anti-commandeering doctrine and the three ICWA provisions—§ 1912(d), § 1912(e), and § 1915(e)—highlighted in the dissenting opinion of *Brackeen v. Bernhardt*. Part II will then consider two exceptions to the anti-commandeering doctrine. First, it will discuss the exception granted for legislation falling under the Reconstruction Amendments in order to remedy unconstitutional discriminatory practices of the states. Then, it will discuss an exception for certain statutes passed under the Commerce Clause when there is a strong federal interest in the universal application of a federal program. Through an evaluation of the similar characteristics of ICWA, the Voting Rights Act and Age Discrimination in Employment Act, this Note will argue that ICWA should be immune to anti-commandeering challenges because it was created with the purpose of repairing states' historically discriminatory practices against Native American families.

I. BACKGROUND

A. *History of ICWA and the Final Rule*

Congress passed ICWA on November 8, 1978 in response to the systematic forced separation of Native American children from their

[12] For an analysis of the immunity extending to Congress' power under the Reconstruction Amendments, see *infra* Section II.A. For an analysis of the immunity extending to their power under the Commerce Clause, see *infra* Section II.B.

families.[13] Congress found that an "alarmingly high percentage" of Indian children were forcibly removed from their homes by public and private agencies and were being placed overwhelmingly with non-Indian families.[14] Studies from the Association on American Indian Affairs found that, from 1969 to 1974, 25% to 35% of all Indian children had been placed in foster care or had been adopted.[15] The report also found that approximately 90% of those children were placed in a non-Indian home.[16]

Additionally, studies by the Association on American Indian Affairs revealed that Native American children were not removed from their homes in the best interest of the child,[17] but rather were removed for racially motivated reasons.[18] The historical pattern of childhood removal began in the 1860s with state programs that took Native American children from their homes and placed them into boarding schools as part of a targeted process of assimilation.[19] States later used the adoption system to place Indian children in non-Indian homes with a shared goal of assimilating the child into white society.[20] Native American child adoption rates continued to rise from February 1959 to

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13 Indian Child Welfare Act (ICWA) of 1978, 25 U.S.C. § 1901(4) (1978).

14 *Id.*

15 *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affs. of the Comm. on Interior and Insular Affs.*, 93d Cong. 108 (1974) [hereinafter *ICWA Subcommittee Hearings*].

16 Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989).

17 The "best interest of the child" standard refers to the legal standard used to determine whether the court may remove a child from their parent or guardian. ICWA integrates this standard by applying "specific minimum Federal standards for the removal of Indian children . . . designed to protect children and their relationship with their parents, extended family, and Tribe." *See Guidelines for Implementing the Indian Child Welfare Act*, BUREAU OF INDIAN AFFS. 89 (Dec. 2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf [https://perma.cc/2ZPC-33R3].

18 William Byler, the Executive Director for the Association on American Indian Affairs, gave testimony before the Subcommittee on Indian Affairs addressing the reason for the high removal rates of Native American children. *ICWA Subcommittee Hearings*, *supra* note 15 (statement of William Byler, Exec. Dir. of the Ass'n on Am. Indian Affs.). He used the surveys of the removal process in North Dakota and Minnesota to demonstrate that children were being removed under vague standards, misunderstanding of cultural practices, and economic incentives. *Id.* at 4–5. *See also* Claire Palmiste, *From the Indian Adoption Project to the Indian Child Welfare Act: The Resistance of Native American Communities*, 22 INDIGENOUS POL'Y J. 1, 7 (2011), (discussing that the criteria for removal were "set for white middle class families as more than a half of Native homes could not meet them").

19 *History and Culture: Boarding Schools*, AM. INDIAN RELIEF COUNCIL, http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools [https://perma.cc/Z8FT-5TKU]; Gabby Deutch, *A Court Battle Over Dallas Toddler Could Decide the Future of Native American Law*, ATLANTIC (Feb. 21, 2019, 8:25 PM), https://www.theatlantic.com/family/archive/2019/02/indian-child-welfare-acts-uncertain-future/582628 [https://perma.cc/DM46-V9YK].

20 Deutch, *supra* note 19.

1967 under the Indian Adoption Project.[21] The Project was meant to respond to the increase in the adoption demand, which rose as the birth rate amongst non-Indian families declined, while simultaneously addressing then President Lyndon Johnson's "concern" with the living conditions on Native American reservations.[22]

During the congressional hearings for the enactment of ICWA, the executive director of the Association on American Indian Affairs reported that the majority of children in North Dakota were removed for vague reasons such as a determination that a child was living in poverty, deprivation, or neglect.[23] Only 1% of Native American children removed from their homes were removed for physical abuse.[24] Native American families were evaluated based on social and economic factors set for middle class white families.[25] This led officials to remove Native American children because their families were low income or unemployed, or because their living conditions did not meet sanitary requirements.[26] Additionally, child welfare officials did not have training or knowledge of the social structure and culture of tribes.[27] Child custody officials would determine that a Native American guardian was unfit to parent because of the parent's different cultural approach to raising their child.[28] This policy allowed many states to succeed in removing Native American children for unsubstantiated reasons and at much higher rates than non-Indian children.

Congress noted, and federal courts have emphasized, that adopting a statute to remedy the disproportionate removal of Native American children was also intended to preserve tribal culture.[29] In *Mississippi Band of Choctaw Indians v. Holyfield*, the Supreme Court cited the Tribal Chief of the Mississippi Bank of Choctaw Indians, Calvin Isaac, during his testimony at the Senate Hearings for the Indian Child

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21 Palmiste, *supra* note 18, at 1, 5.

22 *Id.* at 2.

23 *ICWA Subcommittee Hearings*, *supra* note 15.

24 *Id.*

25 Palmiste, *supra* note 18, at 7.

26 *Id.*

27 *Indian Child Welfare Act of 1978: Hearings Before the Subcomm., on Indian Affairs and Public Lands of the Comm. on Interior and Insular Affairs*, 95th Cong. 4 (1978) [hereinafter *Senate Hearings*].

28 *ICWA Subcommittee Hearings*, *supra* note 15, at 4 ("[T]hey may consider the children to be running wild. They assume neglect. In many cases, it may simply be another perspective on child-rearing.").

29 25 U.S.C. § 1902 ("[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ."); *see also* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).

Welfare Program.[30] Isaac testified that the survival of Indian culture would be "significantly reduced" if the children were raised with non-Indian families.[31] Tribes are reliant on American Indian children to continue to pass down the practices and traditions to maintain the culture of their tribe. If these children are raised in non-Indian homes, they will be deprived of the customs and culture of their ancestry.[32] ICWA reaffirms the significance of keeping American Indian children with their communities, stating, "there is no resource that is more vital to the continued existence and integrity of [the] tribes than their children."[33]

Tribal sovereignty over the domestic relations of their tribal members is inhibited by the forced removal of Native American children from their families and communities.[34] Having authority over family relationships is important for a nation to remain sovereign over its members.[35] Historically, states have been given the authority to preside over family matters, such as divorce and child custody proceedings, within their own jurisdiction.[36] Maintaining jurisdiction over family dynamics within the state has been recognized as a central aspect of state sovereignty.[37] The recognition of tribes as distinct governments is constitutionally protected,[38] and as sovereigns, they maintain the same interest as states in presiding over the family matters of their tribe.

Even after ICWA's implementation, Native American children continued to be forced into the foster system at disproportionately higher rates than non-Indian children. A study conducted in 2013 showed that, nationally, Native American children were 2.5 times more likely to be in a foster home than children among the general

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30 *Holyfield*, 490 U.S. at 34–35.

31 *Id.*

32 *Senate Hearings*, *supra* note 27, at 155 ("The Indian culture with its customs and traditions, especially that of the Indian extended family, is a very valuable heritage and must not be lost. There is much we have to tell and teach the culture threatening our demise.").

33 25 U.S.C. § 1901(3).

34 *Holyfield*, 490 U.S. at 58.

35 *Senate Hearings*, *supra* note 27, at 193.

36 Sharon Elizabeth Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1, 1 (1984) ("[F]ederal courts have adamantly declared that the domestic relations exception divests them of jurisdiction over divorce, alimony, and child custody.").

37 *In re* Burrus, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."); *see also* Rush, *supra* note 36, at 6–10 (discussing that the Supreme Court and lower federal courts generally still follow the domestic relations exception from *Burrus*).

38 U.S. CONST. art. I, § 8, cl. 3.

population.[39] In some states, Native American children were up to 14.8 times more likely to be placed in foster care.[40] The Obama administration responded to this issue by updating ICWA guidelines in December 2016 to fortify the purpose of ICWA.[41] These amendments, known as the Final Rule, were meant to create a more consistent interpretation of ICWA amongst the courts,[42] and were binding on both states and tribes.[43] Prior to the 2016 amendments, state courts presiding over child custody cases were given the authority to interpret the language and definitions within the Act.[44] The new guidelines restricted state courts' discretion. The Department of Interior (DOI) explained that the agency must balance the need to create uniformity in the application of ICWA against the autonomy of state courts in determining how to apply the law.[45] The DOI also noted the importance of maintaining Congress' intended purpose for ICWA to ensure that courts were not acting beyond the authority statutorily granted to them.[46] The Final Rule included new definitions[47] and restrictions on what factors state courts may consider when removing a Native American child from their home.[48] The guidelines also required that the parties seeking to terminate a parental right and place a child in an adoptive or foster home give notice to the Indian child's parents or guardians as well as to the tribe.[49] The amendments that this Note will

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39 *Principal Deputy Assistant Secretary Roberts Announces Updated BIA Guidelines That Strengthen Implementation of the Indian Child Welfare Act with Focus on Family Unification*, BUREAU OF INDIAN AFFS. (Dec. 30, 2016), https://www.bia.gov/as-ia/opa/online-press-release/principal-deputy-assistant-secretary-roberts-announces-updated-bia [https://perma.cc/LFR7-ESEK].

40 *Id.*

41 *Id.*

42 *Id.*

43 *ICWA Final Rule: Summary of Provisions*, ABA (July 1, 2016), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/july-2016/icwa-final-rule—summary-of-provisions [https://perma.cc/2CZF-F8LY] ("The regulations provide the first legally-binding federal guidance on how to implement ICWA."); *Federal Government Issues New Regulations to Protect Native Children for First Time Since 1979*, NATIVE AM. RTS. FUND (June 9, 2016), https://www.narf.org/federal-government-issues-new-regulations-protect-native-children-first-time-since-1979-icwa-defense-project-praises-new-steps-toward-enforcement [https://perma.cc/JQY7-W86D].

44 Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67584 (Nov. 26, 1979).

45 Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38780 (June 14, 2016) [hereinafter ICWA Proceedings].

46 *Id.*

47 *ICWA Final Rule: Summary of Provisions*, ABA, *supra* note 43.

48 25 C.F.R. § 23.103(c).

49 25 C.F.R. § 23.11(a).

focus on are: (1) the requirement for state courts and agencies to make "active efforts" to provide the Indian parent or guardian with rehabilitative programs,[50] (2) the requirement for a qualified expert witness to testify to the removal of the Indian child,[51] and (3) the requirement for the state court or state agency to make a record of the proceedings and placement of the Indian child.[52]

B. *Challenging the Final Rule*

The holding of *Brackeen v. Zinke* received scrutiny from many tribes and states as it was the first decision since ICWA's enactment in 1978 that held that the statute, and specifically the Final Rule's amendments of the statute, was unconstitutional.[53] Plaintiffs—comprised of seven non-Indian families including the Brackeens, and the states of Texas, Louisiana, and Indiana—brought an action against a group of defendants—including the United States, the Department of Interior, the Department of Interior's Secretary Ryan Zinke, and five federally recognized tribes—to challenge the constitutionality of provisions of ICWA after its 2016 amendment.[54]

The Brackeen family fostered A.L.M., a member of the Navajo Nation with the legal status of an "Indian child" under ICWA.[55] The child's tribe was notified through Texas Child Protective Services' placement process and, although initially the Navajo Nation sought to place the child with Native American non-relatives, ultimately, the Tribe did not intervene in the Brackeens' adoption of A.L.M.[56] After finalizing the adoption of A.L.M., the Brackeens sought to adopt A.L.M.'s sister, Y.R.J., who was also a member of the Navajo Nation.[57] The Tribe did not accept the Brackeens' petition to adopt Y.R.J.[58] The

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50 25 U.S.C. § 1912(d).

51 25 C.F.R. § 23.121.

52 25 C.F.R. § 23.141.

53 *Summary of the Brackeen (Texas) v. Zinke Decision*, NAT'L INDIAN CHILD WELFARE ASS'N. (Oct. 15, 2018), https:/www.nicwa.org/wp-content/uploads/2018/10/Texas-federal-district-court-decision-summary-10.15.2018-final-1.pdf [https://perma.cc/V4MY-W9VA] ("To reach this decision, the court had to ignore decades of federal court precedent that affirmed inherent tribal sovereignty . . . .").

54 Brackeen v. Bernhardt, 937 F.3d 406, 416, 420 (5th Cir. 2019).

55 *See id.* at 418–19. The child's biological mother was a member of the Navajo Nation and biological father was a member of the Cherokee Nation. However, the tribes came to an agreement that the child would be considered a member of the Navajo Nation despite their mixed heritage. *Id.* at 419.

56 Brackeen v. Zinke, 338 F. Supp. 3d 514, 525–26 (N.D. Tex. 2018).

57 *Bernhardt*, 937 F.3d at 419.

58 *Id.*

seven other individual plaintiffs were non-Indian families similarly situated that allegedly faced legal barriers when trying to adopt Native American children due to provisions in ICWA granting tribes authority over child custody proceedings.[59]

The plaintiffs first brought this action in the U.S. District Court for the Northern District of Texas.[60] Plaintiffs argued that the Final Rule of ICWA violated: (1) equal protection and substantive due process under the Fourteenth Amendment, (2) the anti-commandeering doctrine under the Tenth Amendment, (3) the nondelegation doctrine, and (4) the Administrative Procedure Act.[61] The District Court found that the Final Rule violated the Equal Protection Clause, the nondelegation doctrine, and the Administrative Procedure Act, and it granted the plaintiffs' motion for summary judgement.[62] The defendants promptly brought an appeal to the Fifth Circuit. The Circuit Court held the provisions of ICWA and Final Rule constitutional.[63] Judge Owen, however, concurred in part and dissented in part.[64] In her dissent, the judge concluded that certain provisions of ICWA and Final Rule are in violation of the anti-commandeering doctrine under the Tenth Amendment.[65] The plaintiffs filed a petition for an en banc review, and the Fifth Circuit granted their petition.[66] After the petition to review was granted, 486 federally recognized tribes, 59 Native American organizations, and 26 other states filed amicus briefs in support of preserving the constitutionality of ICWA.[67]

Over one year after hearing oral arguments, and shortly before this Note was published, the Fifth Circuit released their extremely divided en banc opinion.[68] In *Brackeen v. Haaland*, the Circuit Court upheld the constitutionality of several ICWA provisions and found that it was within the BIA's statutory authority to issue binding regulations in the

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59 *Id.* at 419–20.

60 *Zinke*, 338 F. Supp. 3d 514.

61 *Bernhardt*, 937 F.3d at 420.

62 *Id.*

63 *Id.* at 437.

64 *See id.* at 442–43 (Owen, J. concurring).

65 *See id.* On November 7, 2019, the Fifth Circuit agreed to rehear the case en banc. At the time this note is being written, the court has not set a date to hear oral arguments. Brackeen v. Bernhardt, 942 F.3d 287, 289 (5th Cir.2019).

66 *Bernhardt*, 942 F.3d at 289.

67 Erin Dougherty Lynch & Dan Lewerenz, *Brackeen v. Bernhardt—Indian Child Welfare Act*, NATIVE AM. RTS. FUND (Jan. 22, 2020), https://www.narf.org/cases/brackeen-v-bernhardt [https://perma.cc/SP98-FRCE].

68 Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021). The decision is 325 pages in length and includes a per curiam opinion and two plurality opinions written by Judge Dennis and Judge Duncan Neither opinion garnered the en banc majority of the court although a majority did agree in holding certain provisions of ICWA unconstitutional. *Id.*

Final Rule.[69] Despite this, the majority found four provisions unconstitutionally commandeered states.[70] This Note incorporates parts of the analysis of the en banc opinions. However, given the length and complexity of the recently released decision, this Note will focus only on the court's holding as it pertains to § 1912(d), § 1912(e), and § 1915(e).

C. *Challenges to ICWA at the Supreme Court*

Prior decisions involving ICWA shape how the Supreme Court may approach the current constitutional challenges. In recent years, the Supreme Court has refused to grant certiorari for ICWA cases. The highest court has heard two cases in opposition of ICWA since it was enacted: *Mississippi Choctaw v. Holyfield* in 1989 and *Adoptive Couple v. Baby Girl* in 2013.[71] In *Baby Girl*, the Supreme Court did not address the plaintiff's constitutional challenge of ICWA, holding that the statute was not implicated because the petitioning Native American parent never had custody of the child.[72] The Supreme Court focused on the South Carolina Supreme Court's erroneous interpretation of the statute, rather than considering any arguments regarding the constitutionality of ICWA.[73] Additionally, both *Baby Girl* and *Holyfield* were decided before the 2016 guidelines. The challengers in these prior cases did not bring forth the same arguments that are currently being considered at the district and circuit court levels, which focus on the amended guidelines.[74] Earlier this year, the Supreme Court additionally denied to grant certiorari in *Carter v. Sweeney*.[75] The plaintiffs in *Carter* were unsuccessful in arguing that ICWA was unconstitutional under Title VI of the Civil Rights Act.[76] *Carter* does not implicate the same constitutional challenges that are presented in *Brackeen* since the

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69 *Id.* at 361.

70 *Id.* at 268 ("An en banc majority holds that . . . § 1912(d) . . . § 1912(e) and (f), and . . . § 1915(e), unconstitutionally commandeer state actors.").

71 *U.S. Supreme Court to Hear ICWA Case*, NAT'L CHILD WELFARE RES. CTR. FOR TRIBES, http://www.nrc4tribes.org/Disproportionality.cfm [https://perma.cc/6A3H-JW7M].

72 Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013).

73 *Baby Girl*, 570 U.S. at 641–42; *see also id.* at 656 (Thomas, J., concurring) (arguing that the majority opinion avoids the significant constitutional problems raised by respondent).

74 Both *Baby Girl* and *Holyfield* analyze ICWA as it was enacted in 1978 before the Guidelines and Final Rule. *Baby Girl*, 570 U.S. at 637; Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

75 Carter v. Sweeney, No. 18-923, 2019 U.S. LEXIS 3696 (May 28, 2019).

76 A.D. v. Washburn, No. CV-15-01259, 2017 U.S. Dist. LEXIS 38060, at *30–34 (D. Ariz. Mar. 16, 2017).

plaintiffs in *Carter* did not challenge ICWA, or the Final Rule, under the Tenth Amendment.[77]

While the Supreme Court has been silent on cases challenging ICWA, they have consistently decided cases that challenge federal action or legislation under the Tenth Amendment, using the Tenth Amendment to strengthen states' rights. The Supreme Court's reluctance to hear ICWA cases makes the recent en banc decision especially concerning. If the Supreme Court were to deny certiorari, the Circuit Court's rejection of critical provisions of the Final Rule will be binding within its jurisdiction.

D. *The Anti-Commandeering Doctrine*

The anti-commandeering doctrine interprets the Tenth Amendment as prohibiting the federal government from forcing states to carry out a federal regulatory program.[78] The Supreme Court first articulated the doctrine in *New York v. United States*.[79] In an opinion written by Justice O'Connor,[80] the Court held the Low-Level Radioactive Waste Policy Act unconstitutional because it forced states to enact and administer a federal program in violation of the Tenth Amendment.[81] Specifically, the Court stated that the Act's provision giving states the option to take title to and possess the low level radioactive waste created in their borders, as an alternative to following the other regulations listed in the Act, unconstitutionally coerced the state in violation of the Tenth Amendment.[82]

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77 *Id.* at *4–5

78 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1467 ("Congress may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.'" (quoting New York v. United States, 505 U.S. 144, 161 (1992)).

79 New York v. United States, 505 U.S. 144 (1992).

80 The majority opinion was joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, Souter, and Thomas. *Id.*

81 *Id.* at 188 ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

82 *Id.* at 174–77. The Act included two other incentives for states to implement: (1) an incentive requiring states to impose a surcharge on radioactive waste, or (2) an incentive authorizing states to increase the cost of radioactive waste disposal sites and eventually closing these sites. The Court did not find these incentives to be unconstitutional commandeering. *Id.* at 171–75. However, the incentive they held unconstitutional required states to take title to the waste if they did not choose to implement either of the other incentives. In rejecting this provision, the Court stated that "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." *Id.* at 176.

The Court strengthened the doctrine in *Printz v. United States*, a 5-4 decision with the conservative Justices joining Justice Scalia's majority opinion.[83] In *Printz*, the Court held the Brady Act unconstitutional under the Tenth Amendment and directed that the federal government could not force states to enact programs to address a specific issue, or force agents of the states to enforce federal programs.[84] The Court found the provision, which instructed state law enforcement officials to review applications for firearms purchases to determine whether the applicant's possession violated federal firearm laws, unconstitutional.[85]

The Supreme Court has continued to strengthen the anti-commandeering doctrine in recent cases. In *Murphy v. National Collegiate Athletic Association*, the Supreme Court struck down a provision in the Professional and Amateur Sports Protection Act prohibiting a state from allowing sports gambling, holding that the federal government could not command states to construct their own legislation in accordance with a federal program.[86] Additionally, the Court emphasized that there existed no valid distinction between forcing a state to pass certain legislation in accordance with a federal program and prohibiting a state from passing legislation in conflict with a federal program.[87] This pronouncement demonstrates the Supreme Court's shift toward using anti-commandeering principles to grant even more power to the states and limit federal legislation that inhibits state sovereignty.

Despite the Supreme Court's adherence to the doctrine as it was set forth in *Printz*, there have been general criticisms arising from the Court's interpretation of the Tenth Amendment. Textualists emphasize that the concept of federal "commandeering" is never actually articulated in the Tenth Amendment.[88] This was emphasized by Justice

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83 Printz v. United States, 521 U.S. 898, 902 (1997).

84 *Id.* at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

85 *Id.* at 903. The Court stated that *New York v. United States* held that states cannot be forced to enact or enforce federal regulatory programs, and Congress "cannot circumvent that prohibition by conscripting the State's officers directly." *Id.* at 935.

86 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1481 (2018).

87 *Id.* at 1467.

88 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 165–66 (2001).

Stevens's dissent in *Printz*.[89] The argument failed to persuade even the strict textualist Justice Scalia,[90] perhaps because the Court's interpretation of the Constitution often goes beyond a simple textualist reading.[91] Other criticisms discredit the Supreme Court's reasoning behind the anti-commandeering doctrine—specifically, the Court's articulation that the doctrine is necessary to ensure political accountability.[92] Legal academics opine that the Court's argument is based on a false assumption of voter incompetence, and are skeptical that states actually suffer from voters improperly holding the state responsible for federally imposed legislation.[93] Critics also argue that there are much greater risks posed to political accountability than commandeering a state that the Court has failed to denounce.[94] The Supreme Court itself is often divided on anti-commandeering issues with conservative justices joining majority opinions strengthening its power and liberal justices dissenting.[95] Despite the controversial nature of the doctrine, the Supreme Court has continued to use anti-commandeering to strike down federally imposed laws.[96]

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89 Printz v. United States, 521 U.S. 898, 944 (1997) (Stevens, J., dissenting) ("There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress . . . .").

90 Justice Scalia wrote the majority opinion in *Printz* articulating the Tenth Amendment interpretation. *Printz*, 521 U.S. at 902 (majority opinion). Justice Scalia still rooted his adoption of the anti-commandeering doctrine in the Framers' intent when writing the Constitution, which may arguably be regarded as in line with his textualist ideology. *See Printz*, 521 U.S. at 918–21; *see also* Caleb Seckman, Note, *Anti-Commandeering: A Modern Doctrine for a Modern World*, 13 N.Y.U. J.L. & LIBERTY 150, 153 (2019).

91 Adler, *supra* note 88, at 166.

92 Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 3 (2015).

93 Andrew Coan notes that there is no evidence to suggest that anti-commandeering is successful in increasing political accountability for voters. He additionally argues that the principle is based on a false assumption that voters are not competent to hold the correct government branch accountable. *Id.* at 13–15.

94 *Id.*; *see also Printz*, 521 U.S. at 957 n.18 (Stevens, J., dissenting).

95 *New York v. United States* was a 6-3 decision with the liberal justices dissenting. New York v. United States, 505 U.S. 144 (1992); *Printz* was a 5-4 decision led by the conservatives of the court with the liberal justices dissenting. *Printz*, 521 U.S. 902 (majority opinion); *Murphy* was a 6-3 decision with the liberal justices dissenting. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

96 *Murphy,* for example, was decided in 2018 and strengthened the anti-commandeering doctrine. *Murphy*, 138 S. Ct. 1461.

E. *ICWA Provisions Under the Anti-Commandeering Doctrine*

States joining the plaintiffs in *Brackeen* have an interest in supporting an application of the anti-commandeering doctrine to limit the scope of the federal government's power and expand state sovereignty.[97] A holding that ICWA is unconstitutional would ensure the states' powers over all child custody proceedings, including those involving Native American children, without federal government intervention. The dissenting judge in *Brackeen* found that three ICWA provisions specifically violated the Tenth Amendment: (1) § 1912(d); (2) § 1912(e); and (3) § 1915(e).[98] Although the petitioners challenge several provisions, this Note focuses on the three provisions that Judge Priscilla Owen highlighted in her dissent.

Under § 1912(d), a party that seeks to place an Indian child in foster care or remove the child from their parent shall show that they have made "active efforts" to provide the parent with rehabilitative or remedial services prior to taking the child away from their parents.[99] Further, the party may only remove the child if those services have been proven ineffective.[100] Congress originally enacted this requirement in an effort to keep Native American children and their families together whenever possible. When enacting ICWA, Congress found that Indian children were forcibly removed from their homes if a child's guardians were living below the poverty line, without a job, or living in unsuitable housing.[101] Congress instructed that the state must intervene and take "substantial and meaningful" steps to first combat the issue that is causing the child to be separated from their parent.[102]

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97 It is important to note that, while the states of Texas, Louisiana, and Indiana have joined the case in favor of the plaintiffs challenging ICWA, 26 other states and D.C. have supported the defendant Tribes including California, New York, Alaska, Arizona, Oklahoma, and Colorado. Brief of the Amicus States, Brackeen v. Bernhardt, 942 F.3d 287 (2019) (No. 18-11479), 2019 WL 261978, at *1. Interestingly, as of November 2019, the states with the largest Native American population are California, Arizona, and Oklahoma. Andrew Soergel, *Where Most Native Americans Live*, U.S. NEWS (Nov. 29, 2019, 6:00 AM), https://www.usnews.com/news/best-states/articles/2019-11-29/california-arizona-oklahoma-where-most-native-americans-live [https://perma.cc/PHM3-L93E].

98 Brackeen v. Bernhardt, 937 F.3d 406, 442 (5th Cir. 2019) (Owen, J., concurring).

99 25 U.S.C § 1912(d) ("Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.").

100 *Id.*

101 ICWA Proceedings, *supra* note 45, at 38,790.

102 *Id.*

Prior to the 2016 Final Rule, Congress allowed states and state courts to determine what constituted an "active effort."[103] However, the BIA found inconsistencies in different states' application of the requirement and sought to create a nationwide definition of the term to eliminate variation amongst state courts as to what amount of effort is required.[104] Under the Final Rule, active efforts is defined as "actions intended primarily to maintain and reunite an Indian child with his or her family."[105] The BIA went on to say that when a state agency is involved in the child-custody proceeding, that agency must work with the parent to develop a case plan and must provide the parent with resources that will enable them to be reunited with the Indian child.[106] Under this clarification, if an Indian child was going to be taken away from their parent because there was substance abuse in the home, for example, the state agency may be required to develop a case plan with the child's parents and tribe, locate and connect the parent with an appropriate substance abuse program, and facilitate with the child visitations to the parent at the facility.[107]

The Final Rule also requires that the state make active efforts considering both the social and cultural conditions of the Indian child and work jointly with the child's parents, extended family, and tribe.[108] This addition ensures that the purpose of ICWA, to preserve and protect a tribe's culture through child-custody proceedings, is maintained. The BIA does not give specific instructions on how this requirement should be carried out in a child custody proceeding. The agency also acknowledges that active efforts may look different when applied to different cases and family situations, and it notes that the state court may use their discretion accordingly.[109] However, this requirement in the BIA's Final Rule still ensures that some affirmative action must be made on behalf of both state courts and state agencies to remediate a Native American guardian prior to removing the child from their custody.

The majority opinion in *Brackeen v. Bernhardt* emphasizes that the federal law does not specifically instruct that a state *agency* must follow the guideline set out in § 1912(d), but rather applies to "a party" seeking

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103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 JUD. COUNCIL CAL., ICWA INFORMATION SHEET: ACTIVE EFFORTS AND RESOURCES 3, https://www.courtinfo.ca.gov/documents/ICWA-active-efforts.pdf [https://perma.cc/DLZ9-U3S6].

108 ICWA Proceedings, *supra* note 45, at 38,790.

109 *Id.* at 38,791.

to terminate an Indian guardian's parental rights or place the child in the foster care system.[110] The majority argues that this process may be initiated by a private party,[111] citing *Murphy v. NCAA*, which reiterated that the anti-commandeering doctrine is not implicated when Congress is regulating an activity in which the state and private actors both engage.[112] Judge James L. Dennis released a plurality opinion agreeing with this holding.[113] However, the majority of the Fifth Circuit did not agree with the analysis.

In her dissent, Judge Owen disagrees with the majority's interpretation of the Final Rule and instead assumes that a state agency is directly implicated in the ICWA revision.[114] Although the text of ICWA applies broadly to "a party," she argues that the removal of a child from their home will inevitably fall upon a state officer or state agency, as they handle child removal and custody matters.[115] Judge Kyle Duncan, writing for the en banc majority in *Brackeen v. Haaland*, agreed with Judge Owen and found § 1912(d) unconstitutionally commandeered state agencies.[116]

The appellants in *Brackeen* responded to the dissenting judge in their en banc briefs, stating that this requirement falls under a longstanding principle that state actors cannot impede on a federal law's protection of private citizens.[117] In this case, appellants argue, ICWA lawfully restricts state agencies from impeding on federal rights conferred to individual Native American families.[118]

The subsequent provision, § 1912(e), outlines the requirements for a court proceeding for the foster care placement of an Indian child.[119]

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110 Brackeen v. Bernhardt, 937 F.3d 406, 432 (5th Cir. 2019).

111 *Id.*

112 *Id.*at 432–33 (citing Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018)).

113 Brackeen v. Haaland, 994 F.3d 249, 324–26 (5th Cir. 2021).

114 Brackeen v. Bernhardt, 937 F.3d 406, 443 (5th Cir. 2019) (Owen, J., concurring).

115 *Id.*

116 Brackeen v. Haaland, 994 F.3d 249, 404–06 (5th Cir. 2021). The majority found that state agencies are typically the party to seek placement or termination with respect to Indian children and therefore the provision directly requires action by a state agency. *Id*.

117 Federal Appellants' En Banc Brief, *supra* note 10, at 44–46.

118 *Id.* Judge Dennis also adopted this argument in favor of the tribes in his en banc opinion. However, the majority of the Fifth Circuit did not sign on to this part of the analysis. Brackeen v. Haaland, 994 F.3d 249, 328–32 (5th Cir. 2021). The Judge argues that the provision "confers upon private actors an enforceable right to demand in custody proceedings that 'active efforts' be made" and the Supremacy Clause validly "prevents states from interfering with these federal rights" under preemption. *Id.* at 329, 331.

119 25 U.S.C § 1912(e) (stating that the court proceeding must include, "a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses,

The provision states that the placement can only be ordered if "supported by clear and convincing evidence," which includes expert witness testimony.[120] The provision additionally requires that evidence demonstrate that, if the Indian child remained with their parent or custodian, the child would be subjected to "serious emotional or physical damage."[121] The Final Rule clarifies both the applicable standards of evidence and who may serve as a qualified expert witness.[122] The BIA states that there must be a relationship between the conditions that are causing the child to be removed from the home and the risk of physical or emotional harm.[123] This provision was originally enacted to prevent state courts from concluding that it was appropriate to remove an Indian child from their home due to a single factor such as poverty, inadequate housing, or nonconforming social behavior.[124] The state court must additionally find that the totality of the evidence justifies, beyond a reasonable doubt, removing the child from the parent's custody.[125] The Final Rule requires that a qualified expert witness must have an understanding of the "social and cultural standards" of the tribe to which the child belongs,[126] and it prohibits social workers that are assigned to the Indian child's case from serving as an expert witness in the custody proceedings.[127]

Judge Owen argued that the burden to call an expert witness falls upon the state rather than the court.[128] She assumed that, if a state agency were the party bringing a child custody proceeding against the Indian parent or guardian, they would also be the party responsible for calling the expert witness. Judge Owen suggested that the federal program creates a financial burden on the states and, therefore, the

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that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child").

120 *Id.*

121 25 U.S.C § 1912(e).

122 25 C.F.R. § 23.121(c) ("For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.").

123 *Id.*

124 *Guidelines for Implementing the Indian Child Welfare Act*, BUREAU OF INDIAN AFFS. (Dec. 2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf [https://perma.cc/2ZPC-33R3] [hereinafter The Guidelines].

125 *Id.*

126 ICWA Proceedings, *supra* note 45, at 38,873.

127 The Guidelines, *supra* note 124, at 53.

128 Brackeen v. Bernhardt, 937 F.3d 406, 444 (5th Cir. 2019) (Owen, J., concurring).

states should be compensated by the federal government.[129] The en banc majority of the Fifth Circuit agreed that the provision unconstitutionally burdens state agencies with the cost of obtaining an expert witness to meet the regulatory requirements.[130]

In accordance with his analysis of § 1912(d), Judge Dennis reiterates that the provision is again not singling out state officers or agencies to provide expert witnesses.[131] Rather, the provision applies to "any party" seeking to remove the child and, therefore, the provision may be seen as regulating conduct that is carried out by both state and private actors, which is not prohibited by the Tenth Amendment.[132] The appellants additionally argued that the guideline falls under the federal government's power to prohibit a state agency from violating a Native American parents' federally protected right by having their child removed from the home without an expert determination.[133]

The provision under § 1915(e) outlines the court's recordkeeping requirements for the placement of a Native American child.[134] The section states that records of the placement of the child shall be kept "by the State" and shall demonstrate that the state made efforts to follow the placement preferences outlined in ICWA.[135] The provision further explains that the record must be available to the BIA Secretary or tribe at any time.[136] The Final Rule amends this provision to specify what shall be kept as part of the record,[137] including: (1) the petition or complaint to remove the child, (2) any of the child-custody proceeding's substantive orders, (3) a full record of the child's

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129 *Id.* ("If the federal government has concluded that such testimony is necessary in every case involving an Indian child's foster care placement, then the federal government should provide it.").

130 Brackeen v. Haaland, 994 F.3d 249, 406 (5th Cir. 2021) ("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 . . . therefore commandeer states.").

131 *Id.* at 326–27.

132 *Brackeen*, 937 F.3d at 432.

133 Federal Appellants' En Banc Brief, *supra* note 10, at 44–46.

134 25 U.S.C. § 1915(e).

135 *Id.* ("A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section."). Placement preferences are listed in § 1915(b) and explain that a state shall first try to place an Indian child with a member of their (1) extended family, (2) a foster family licensed, approved, or specified by the tribe, (3) an Indian foster family licensed or approved by a non-Indian licensing authority, or (4) an institution or organization approved or operated by the tribe. *See* 25 U.S.C. § 1915(b).

136 25 U.S.C § 1915(e).

137 25 C.F.R. § 23.141.

placement determination, and (4) a detailed record of the efforts that were made to comply with placement preferences.[138]

This requirement seems to be directly related to the obligations of the state court. The anti-commandeering doctrine only applies to ICWA provisions that commandeer state agencies or officers, rather than provisions that direct a state court to act. The Supreme Court has established an exception to the Tenth Amendment stating that, under the Supremacy Clause, state courts and state judges are required to apply federal law.[139] Therefore, if a state court were the only state body to maintain this kind of record, the anti-commandeering doctrine would not apply. The Final Rule does articulate that a state agency *may* be designated as a repository of the record.[140] However, as Judge Dennis articulated in *Brackeen v. Haaland*, if a state voluntarily chooses to have a state agency take on the responsibility instead of a court, the action should not be seen as commandeering.[141] Section 1915(e) regulates the activity of the state rather than requiring the state to pass certain laws or regulations.[142] The provision is, therefore, an administrative requirement, which is not prohibited by the anti-commandeering doctrine.[143]

Although Judge Owen submits that certain ICWA provisions set only state administrative requirements, which are permissible under the Tenth Amendment,[144] she does not agree that § 1915(e) falls within this category.[145] The judge argued that the record must exhibit evidence that the party made efforts to comply with the placement preferences set out in ICWA, which would be more than routine administrative recordkeeping and, therefore, cannot be required of a state agency.[146] The majority opinion in *Brackeen v. Haaland* agrees with Judge Owen

138 ICWA Proceedings, *supra* note 45, at 38,875–76.

139 Printz v. United States, 521 U.S. 898, 907 (1997) ("[T]he Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions . . . ."); New York v. United States, 505 U.S. 144, 178 (1992) (noting that enforcing federal statutes "direct[s] state judges to enforce them" but this is constitutional under the Supremacy Clause); Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 211–12 (1997).

140 25 C.F.R. § 23.141(c).

141 Brackeen v. Haaland, 994 F.3d 249, 321–22 (5th Cir. 2021).

142 Brackeen v. Bernhardt, 937 F.3d 406, 433 (5th Cir. 2019).

143 *Id.*; *see also* Reno v. Condon, 528 U.S. 141, 151 (2000) ("[T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases.").

144 *Brackeen*, 937 F.3d at 446 (Owen, J., concurring).

145 *Id.* at 445.

146 *Id.* Judge Owen additionally distinguishes the provision from those cited by the majority in *Condon* and *Baker* and highlights that *Printz* explicitly did not address whether a federal law that required a State to provide information to the federal government was constitutional. *Id.*

and found the provision unconstitutionally commandeers states because it goes beyond the scope of administrative recordkeeping.[147]

The provision anticipated to receive the most scrutiny under the anti-commandeering doctrine is § 1912(d), which directs parties responsible for making the decision to remove a child from their home to make "active efforts" to provide rehabilitative services to prevent the removal of the Indian child.[148] Although the provision does not explicitly direct state agencies to carry out this provision, it may be that, in many states, it is state-run law enforcement or child protective services that are responsible for removing children from their homes. For example, in Texas—one of the states challenging ICWA in *Brackeen*—the Department of Family and Protective Services is responsible for complaints and investigations of child neglect or abuse that would lead to the child's removal.[149] The Texas Family Code also requires that a governmental body remove a child from their home.[150] The Texas law does not give this same power to private individuals.[151] Therefore, a Texas state agency would be the party responsible for carrying out the Final Rule provision.

If petitioned to the Supreme Court, appellants may be required to show that state agencies are in fact the parties generally responsible for removing a child or terminating parental rights.[152] If this provision *is* predominately applicable to state agencies, this seems to be the provision that would most implicate concerns of unconstitutional commandeering. A primary issue in *Printz* was the increased financial burden on states to implement a federal program, which was not compensated by the federal government.[153] If a state agency requires additional funds to adhere to the requirement of providing

147 Brackeen v. Haaland, 994 F.3d 249, 406–09 (5th Cir. 2021). Although not adopted by the en banc majority, the tribal appellants respond to this arguing that § 1915(e) is a federal information-sharing requirement of the state, which the Supreme Court has held does not violate the Tenth Amendment. Federal Appellants' En Banc Brief, *supra* note 10, at 46.

148 25 U.S.C. § 1912(d).

149 TEX. FAM. CODE § 261.401–261.410.

150 TEX. FAM. CODE § 262.101–262.116.

151 *Id.*

152 Brackeen v. Bernhardt, 937 F.3d 406, 444 (5th Cir. 2019) (Owen, J., concurring) ("I would remand for further factual development. It may be that in the vast majority of *involuntary* parental termination proceedings, the party seeking the termination is a state official or agency.") (emphasis added).

153 Printz v. United States, 521 U.S. 898, 930 (1997) ("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."); *see also* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1477 (2018) ("If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program.").

rehabilitative services to Native American guardians prior to removing a child from their custody, in accordance with § 1912(d), the state will argue the federal government is required to compensate for these costs under the anti-commandeering doctrine.

ICWA provisions, as they were originally enacted in 1978, gave broad discretion to state courts to interpret the language and definitions in the Act as they saw fit.[154] When analyzing ICWA without the enactment of the Final Rule under the Supreme Court's articulation of the anti-commandeering doctrine, a court may find that the legislation does not commandeer the states largely *because of* this deference. Challengers of ICWA argue that by taking away the deference to the state, the guidelines can be interpreted as directly regulating the actions of the state.

It is important to emphasize that the appellants supporting the constitutionality of ICWA have adequately responded to this argument. They point out that, even if the challenged provisions apply to state agencies rather than private parties, they still do not unlawfully commandeer state agencies but rather restrict the agency's ability to violate the federal protections given to Native American children and their families.[155] This Note fully supports the appellants' arguments. However, the en banc panel of judges for the Fifth Circuit found certain provisions of the ICWA to be in conflict with the Tenth Amendment. This suggests that, while the binding provisions of the Final Rule fortify ICWA, they also make the statute more vulnerable to Tenth Amendment criticisms. This Note, therefore, aims to argue that characteristics of ICWA and its necessary regulations make the statute immune to the anti-commandeering doctrine.

II. ANALYSIS: IMMUNITY OF ICWA

A. *Exceptions to Anti-Commandeering: The Reconstruction Amendments*

The Thirteenth, Fourteenth, and Fifteenth Amendments (Reconstruction Amendments) are understood to have a unique immunity to the anti-commandeering doctrine.[156] The Court

154 The Guidelines, *supra* note 124, at 5.

155 Federal Appellants' En Banc Brief, *supra* note 10, at 44–46.

156 Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 171 (2012) ("Congress may commandeer the states pursuant to its powers under the Reconstruction Era Amendments."); *see also* Matthew D. Adler & Seth F. Kreimer, *The New*

acknowledged that the Amendments successfully altered the relationship between Congress and the states by expanding Congress' power while limiting the sovereignty of the states.[157] Congress is not restrained by the Tenth Amendment anti-commandeering doctrine when exercising their power pursuant to the Reconstruction Amendments.[158] When explaining this exception, the Supreme Court established that federal statutes, which seek to remedy constitutional violations, fall within Congress' powers, despite their intrusion on state sovereignty.[159] The Supreme Court has demonstrated the immunity of legislation passed under the Reconstruction Amendments against Tenth Amendment challenges by upholding the constitutional validity of the Voting Rights Act of 1965 (VRA).[160] Pursuant to the power granted to them under the Fourteenth and Fifteenth Amendments, Congress enacted the VRA in response to nationwide discriminatory practices of states' voting systems.[161]

Etiquette of Federalism: New York*,* Printz*, and* Yeskey, 1998 SUP. CT. REV. 71, 119 (1998) ("[T]he majority position has been a tentative conclusion that statutes adopted pursuant to the Thirteenth, Fourteenth, and Fifteenth Amendments will fall outside of the prohibition on commandeering."); *see also* Daniel Hemel, *Murphy's Law and Economics*, MEDIUM (May 16, 2018), https://medium.com/whatever-source-derived/murphys-law-and-economics-3c0974e21ac8 [https://perma.cc/Z45J-7KTD].

157 Fitzpatrick v. Bitzer, 427 U.S. 445, 455–56 (1976) ("There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers with the corresponding diminution of state sovereignty found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments . . . ."); *see also* Mikos, *supra* note 156, at 171; Adler & Kreimer, *supra* note 156, at 120–22.

158 The Supreme Court specifically articulated that Congress was not in violation of the Tenth Amendment when exercising their power under § 5 of the Fourteenth Amendment. EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983).

159 City of Boerne v. Flores, 521 U.S. 507, 518 (1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it . . . intrudes into 'legislative spheres of autonomy previously reserved to the States.'" (quoting *Fitzpatrick*, 427 U.S. at 455)).

160 *Boerne*, 521 U.S. at 518. After the Supreme Court's holding in *Shelby County v. Holder* striking down Section 4 of the VRA, legal scholars argue the Court no longer views the Reconstruction Amendments as altering the relationship between Congress and the states. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113, 115 (2015). However, in *Shelby County*, the Court just cites the Tenth Amendment to support the statement that states have broad authority to structure government and create legislation. Shelby County v. Holder, 570 U.S. 529, 530 (2013). The Court does not discuss the anti-commandeering doctrine or the relationship between the Reconstruction Amendments and the anti-commandeering doctrine. Charles & Fuentes-Rohwer, *supra* note 160, at 135–36. Therefore, this Note assumes that the Court did not intend to reject the presumption that the Reconstruction Amendments altered the relationship between Congress and the states for the purposes of the anti-commandeering doctrine.

161 South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

The VRA should be treated differently than other federal regulatory legislation, despite provisions that may appear to commandeer the actions of states, because the purpose of the VRA is to repair the harm caused by discriminatory acts of the states.[162] The Supreme Court upheld a provision of the VRA that prohibited the distribution of literacy tests, holding that Congress had the power to pass this provision in accordance with the Fifteenth Amendment.[163] This prohibition was enacted as a direct response to the racially discriminatory regulations that prohibited minority populations with lower literacy rates—specifically Black Americans—from voting.[164] Although the Court did not analyze the VRA under the Tenth Amendment when deciding this case,[165] banning states from distributing literacy tests restricts the state legislature's ability to enact state law—which the Court has prohibited under the anti-commandeering doctrine.[166] The Supreme Court stated that there is no distinction between commanding a state to act and prohibiting a state from acting.[167] Therefore, banning a state from distributing literacy tests as part of their voting requirements would be considered commandeering the state to enact a federal regulatory program.[168] However, the Supreme Court found this provision necessary to

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162 Historically, the Court has upheld the constitutionality of provisions in the Voting Rights Act because it was within their § 5 power to remedy discrimination in voting. *Boerne*, 521 U.S. at 524–29.

163 *Katzenbach*, 383 U.S. at 308; *see also* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

164 U.S. CONST. amend. XV, § 1; *see also South Carolina v. Katzenbach*, 383 U.S. at 308 ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."). Interestingly, in the same year the Supreme Court decided *Printz*, the Court upheld this prohibition despite its nature directing the State to act in accordance with a regulatory program. Printz v. United States, 521 U.S. 898 (1997).

165 *Katzenbach*, 383 U.S. at 324 ("The objections to the Act which are raised under these provisions may therefore be considered only as additional aspects of the basic question presented by the case: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?").

166 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018) ("In none of them did we uphold the constitutionality of a federal statute that commanded state legislatures to enact or refrain from enacting state law.").

167 *Id.* (noting that there is no distinction between commanding an affirmative action rather than imposing a prohibition).

168 Additionally, a ban on literacy tests may trigger concerns of political accountability. The Supreme Court has upheld the anti-commandeering doctrine when there is concern that the electorate will retaliate against the state government, rather than the federal government, when they disagree with the federal program the state is being forced to enact. *Id.* at 1478 (where the majority outlines the importance of the anti-commandeering doctrine including to promote political accountability).

accomplish the VRA's goal of remedying racist voting practices that were historically used by the Southern states to prohibit Black Americans from voting.[169] States distributed literacy tests to inhibit voter registration of black men who experienced higher rates of illiteracy.[170] The VRA prohibited this discriminatory practice in order to protect the right to vote.

ICWA was also enacted with the purpose of remedying discrimination, the discrimination Native American families experienced through the states' forced child removal processes.[171] The provisions challenged in *Brackeen* are necessary in order to effectuate this purpose. The requirement under § 1912(e), which obligates state agencies to provide evidence that the conditions requiring the removal of the Indian child puts the child at risk of serious emotional or physical harm, was a direct response to the discriminatory way in which the states were removing Indian children from their homes.[172] Enacting policies that allowed removal of a child because of their parents' socioeconomic status led to Native American children, who were disproportionately affected by poverty,[173] being removed from their families at higher rates than non-Native American children.[174] Creating a higher standard for removal under § 1912(e) remedied this issue.

Section 1912(d), requires the state to provide remedial or rehabilitative services to a Native American guardian before removing their child from the home.[175] Prior to the enactment of ICWA, many Indian children were taken away from their families because of alcohol abuse in the home.[176] Indian parents experienced removal for alcoholism at higher rates than non-Indian parents both because tribal communities experienced high numbers of alcohol abuse and because non-Indian social workers were ignorant of how alcoholism affected the

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169 *Katzenbach*, 383 U.S. at 316; *see also Race and Voting*, CONST. RTS. FOUND., https://www.crf-usa.org/brown-v-board-50th-anniversary/race-and-voting.html [https://perma.cc/3E6Y-5SJM].

170 *Katzenbach*, 383 U.S. at 310–12, 316.

171 25 U.S.C. § 1901.

172 ICWA Proceedings, *supra* note 45, at 38,873.

173 Valerie Wilson & Zane Mokhiber, *2016 ACS Shows Stubbornly High Native American Poverty and Different Degrees of Economic Well-being for Asian Ethnic Groups*, ECON. POL'Y INST.: WORKING ECON. BLOG (Sept. 15, 2017, 3:06 PM), https://www.epi.org/blog/2016-acs-shows-stubbornly-high-native-american-poverty-and-different-degrees-of-economic-well-being-for-asian-ethnic-groups [https://perma.cc/JZ78-AU4W].

174 ICWA Proceedings, *supra* note 45, at 38,813–14 ("Congress recognized that the social conditions, including poverty, facing many Tribes and Indian people—some brought about or exacerbated by Federal policies—were often cited as a reason for the removal of children by State and private agencies.").

175 25 U.S.C. § 1912(d).

176 *ICWA Subcommittee Hearings*, *supra* note 15, at 4.

community.[177] Indeed, issues of alcohol abuse in Native American communities have been tied to the loss of culture,[178] which is exacerbated by the widespread forced removal of children from their community. § 1912(d) responds to the harm caused by these statewide practices by requiring the state to instead take remedial steps to help a Native American parent suffering from alcohol abuse. The Final Rule's enforcement of these provisions is essential to maintain the purpose of ICWA.

One potential issue of drawing comparisons between the anti-commandeering doctrine's relationship with the VRA and the effect the doctrine may have on ICWA is that ICWA was not enacted under Congress' authority under the Reconstruction Amendments. In upholding the VRA, the Supreme Court noted that the legislation was valid *because* it was passed under the Fifteenth Amendment, which allows the federal government to restrict state power.[179] The Court articulated that this Fifteenth Amendment power may be exercised specifically when states violate a federally protected right.[180] ICWA, although sharing many characteristics with the VRA, was passed under the Indian Commerce Clause, which delegates to Congress the power to regulate commerce with tribes.[181] In previous cases where the federal government invokes their power to pass a federal statute under the Commerce Clause, the Supreme Court has held the government's actions unconstitutional under the anti-commandeering doctrine.[182] In *NCAA v. Governor of New Jersey*, for example, the Supreme Court found that Congress' authority under the Commerce Clause is distinct from their authority under the Reconstruction Amendments because legislation passed under the Commerce Clause often does not require

177 *Id.* at 4–5.

178 Fred Beauvais *American Indians and Alcohol*, 22 NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM 253, 256 (1998).

179 South Carolina v. Katzenbach, 383 U.S. 301, 325–26 (1996).

180 *Id.* at 325.

181 Brackeen v. Bernhardt, 937 F.3d 406, 434 (2019) (discussing the broad powers implicated in the Indian Commerce Clause and adopting the argument that the Clause allows Congress to regulate the adoption of Native American children); *see also* U.S. CONST. art. I, § 8, cl. 3; 25 U.S.C. § 1901(1) (explaining the connection between the adoption and placement of Native American children and the regulation of commerce between the United States and Tribes).

182 Adler & Kreimer, *supra* note 156, at 119 ("The cases in which the Court has enunciated and elaborated the anticommandeering principle have exclusively concerned statutes adopted under the Commerce Clause."); Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 238 (3d Cir. 2013) (distinguishing between the regulation of gambling under the Commerce Clause and the regulation of elections under the Reconstruction Amendments).

uniformity.[183] However, the effectiveness of ICWA is reliant on a national application of the statute so that the placement of all Native American children is handled in a uniform manner.[184] The Bureau of Indian Affairs found that ICWA, as it was written in 1978, led to discrepancies between the process of adopting Indian children from state to state.[185] The purpose of ICWA was to protect Indian children and protect the integrity of tribes.[186] This purpose cannot be accomplished if certain states make minimal efforts to follow ICWA requirements.[187] The specific provisions of the Final Rule being challenged[188] are necessary to ensure these consistencies are maintained. Although passed under the Congressional authority of the Commerce Clause, ICWA mirrors the reparative nature of the Reconstruction Amendments and thus must be analyzed differently than other federal statutes that have been held unconstitutional under the Commerce Clause.

B. *Exceptions to Anti-Commandeering: The Commerce Clause*

Despite the articulation that legislation passed under the Reconstruction Amendments is uniquely immune to the Tenth Amendment challenges, the Supreme Court has upheld legislation passed under the Commerce Clause when the legislation's purpose was to combat historically discriminatory practices. In 1967, Congress passed the Age Discrimination in Employment Act (ADEA) pursuant to their Commerce Clause powers.[189] The purpose of the ADEA is to combat age discrimination in employment by protecting an individual's ability to secure employment based on their skills and qualifications

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183 *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 238 ("Congress' exercises of Commerce Clause authority are aimed at matters of national concern and finding national solutions will necessarily affect states differently; accordingly, the Commerce Clause . . . does not require geographic uniformity." (citations and quotation marks omitted)).

184 The Guidelines, *supra* note 124, at 5.

185 *Id.* at 6.

186 25 U.S.C. § 1902 (stating the purpose of ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.").

187 *Id.*

188 25 U.S.C. §§ 1912(d)–(e), 1915(e).

189 *See* U.S. CONST. art. 1, § 8, cl. 3 (Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."); *see also* EEOC v. Wyoming, 460 U.S. 226 (1983). The Supreme Court held that, although disputed amongst district courts whether the ADEA fell within Congress's power under the Commerce Clause or § 5 of the Fourteenth Amendment, the Court did not have to decide whether it was valid under the Fourteenth Amendment because they found the ADEA was a valid exercise of the Commerce Clause. *Id.* at 243.

rather than their age.[190] The Act originally controlled the relationship between private employers and employees,[191] but Congress later amended the ADEA to include state and local governments as employers.[192] The Supreme Court recently upheld the ADEA's application to state and local governments, reaffirming the statute's immunity to anti-commandeering doctrine restrictions.[193] Certain provisions of the ADEA, such as the provision preventing a state government from discharging an employee due to their age, seem to conflict with the anti-commandeering doctrine.[194] The provision allows the federal government to control the relationship between a state and their employees and forces the state to address the federal issue of age discrimination, actions that the Court has determined commandeer the state.[195] Despite this, the Supreme Court has maintained the constitutional validity of the ADEA.

The ADEA's immunity to Tenth Amendment challenges is grounded in the need to create uniformity of the treatment of employees across state borders. The expansion of the ADEA came after Congress found the discrimination of older employees working in state and local governments.[196] While the original enactment of the ADEA protected employees working for private employers, workers were still treated inconsistently based on whether they were employed by a private or public entity.[197] The Supreme Court accepted the expansion of the ADEA and recognized the need for consistency, not only amongst states, but amongst the treatment of employees as well, regardless of who they are employed by. By including state and local employees under the ADEA, the Court again acknowledged that legislation may be immune to the anti-commandeering doctrine when the federal

190 29 U.S.C. § 621.

191 42 U.S.C. § 2000e(a)–(b); *see also* Mount Lemmon Fire Dist. v. Guido, 139 S. Ct. 22, 25 (2018) (discussing the previous definition of employer under the ADEA).

192 29 U.S.C. § 630(b) ("The term 'employer' means . . . a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of the State . . . .").

193 In *Mount Lemmon Fire District* the petitioners brought a claim under the ADEA for age discrimination, and challenged the Fire District's claim that they did not fall within the provisions of the ADEA because they did not meet the minimum requirement of employees. *Mount Lemmon Fire Dist.*, 139 S. Ct. at 24. Although the case turned upon a textual understanding of the definition of "employer," the Supreme Court reiterated their decision in *EEOC v. Wyoming*, holding that the ADEA superseded state power granted by the Tenth Amendment. *Id.* at 26.

194 EEOC v. Wyoming, 460 U.S. 226, 232 (1983) ("The provisions of the Act as relevant here prohibited various forms of age discrimination in employment, including the discharge of workers on the basis of their age."); *see also* 29 U.S.C. § 623(a).

195 Printz v. United States, 521 U.S. 898, 935 (1997).

196 *EEOC*, 460 U.S. at 233.

197 *Id.*

government has a strong interest in preventing disparate treatment of individuals between states.[198]

The Bureau of Indian Affairs created guidelines under the Final Rule to promote consistency amongst the states' interpretations and executions of ICWA.[199] Not only were Native American children generally being put into the foster care system at higher rates,[200] certain states were removing Native American children at much higher rates than other states due to inconsistent handling of Indian child welfare cases.[201] The ICWA provisions challenged in *Brackeen* seek to remedy these inconsistencies. Section 1912(d) creates a nationwide standard for determining whether a state has shown that they used active efforts to provide remedial services to the family prior to removing the child to ensure that Native American children are treated consistently from state to state.[202] The Court articulated that the ADEA has a unique resilience to Tenth Amendment challenges because there is a strong federal interest in protecting the rights of employees whether they work for the state or a private entity.[203] This immunity should also be extended to uphold the validity of ICWA, as the federal government has a similar interest in protecting the rights of Native American children across state borders.

The Supreme Court's treatment of the ADEA also suggests the Court may find ICWA's restriction of state sovereignty permissible when the provision has a minimal effect on a state's existing practices. The ADEA infringes on state sovereignty by regulating the relationship between the government body or agency and their employee.[204] Infringing upon a state's ability to regulate employment matters is comparable to ICWA's alleged encroachment on a state's ability to regulate familial matters. The anti-commandeering doctrine is a way of promoting state sovereignty against federal government interference, particularly in matters that are traditionally under the state's control.[205]

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198 EEOC v. Wyoming, 460 U.S. 226 (1983).

199 The Guidelines, *supra* note 124, at 5.

200 *Principal Deputy Assistant Secretary Roberts Announces Updated BIA Guidelines that Strengthen Implementation of the Indian Child Welfare Act with Focus on Family Unification*, BUREAU OF INDIAN AFFS. (Dec. 30, 2016), https://www.bia.gov/as-ia/opa/online-press-release/principal-deputy-assistant-secretary-roberts-announces-updated-bia [https://perma.cc/W282-Y8J3].

201 *Id.*

202 25 U.S.C. § 1912(d); *see also* ICWA Proceedings, *supra* note 45, at 38,790.

203 City of Boerne v. Flores, 521 U.S. 507, 518 (1997).

204 29 U.S.C. § 623 (outlining what constitutes unlawful employer practices).

205 Printz v. United States, 521 U.S. 898, 932 (1997) ("[I]t is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework

However, the holding in *EEOC v. Wyoming* stated that the federal government's intrusion into the state's employment practices was insufficient to evoke Tenth Amendment concerns.[206] The ADEA only required states to approach their employment practices in a more "careful manner" and did not undermine the state party's pre-existing public policy.[207] The Supreme Court emphasized that, under the ADEA, states may continue to operate as they had been operating if their employment decisions proved to be non-discriminatory.[208] Although ICWA requires the state to take affirmative actions, the Final Rule only aims to clarify the statutory provisions that states have already been expected to carry out since ICWA's enactment.[209] The sections of the Final Rule being challenged do not violate a pre-existing public policy of the States bringing the action. Rather, as articulated in *EEOC*, the provisions of the Final Rule require state agencies and courts to take a careful approach in interpreting ICWA and handling child custody cases involving an Indian child.[210]

Both the ADEA and ICWA restrictions also have a shared goal of repairing the mental harm suffered by individuals as a result of state discriminatory practices. The U.S. Secretary of Labor found that age discrimination caused psychological harm to workers that lost employment.[211] Forced childhood removal similarly causes Native American children to suffer psychological trauma. When an Indian child is adopted by a non-Indian family, the child can experience an identity-based conflict by being forced to assimilate to a culture that differs from the culture of their tribe.[212] The impact of being culturally brought up in a home outside of their own has led to high suicide rates among Native American youth.[213] Both the purposes behind the ADEA and ICWA focus on addressing the psychological impacts discriminatory practices have historically had on the communities the

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of dual sovereignty . . . . It is the very *principle* of separate state sovereignty that such law offends. . . .").

206 EEOC v. Wyoming, 460 U.S. 226, 239 (1983).

207 *Id.*

208 *Id.*

209 The Guidelines, *supra* note 124, at 4 ("These guidelines are intended to assist those involved in child custody proceedings in understanding and uniformly applying the Indian Child Welfare Act. . . .").

210 25 U.S.C. §§ 1912(d)–(e), 1915(e).

211 U.S. DEP'T OF LAB., THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT (1965).

212 Lou Matheson, *The Politics of the Indian Child Welfare Act*, 41 SOC. WORK 233 (1996).

213 *Id.* at 233 ("Social scientists . . . have agreed that the suicide rate among Indian youths, twice the national average, can be directly related to having been raised outside of their own cultural system.").

legislation seeks to protect. The Court should find the government has a strong interest in allowing federal oversight over state actions to prevent these harms.

Congress enacted ICWA and the ADEA pursuant to the Commerce Clause in order to repair the discriminatory policies of states which violated rights of minority groups.[214] The Supreme Court articulated the importance of upholding the ADEA to promote consistency in the states' treatment of communities that were historically discriminated against. Furthermore, both pieces of legislation do not disrupt the states' public policy and seek to repair the psychological harm caused by discriminatory state practices.

CONCLUSION

The incredibly harmful and oppressive history of child custody proceedings involving Indian children under the jurisdiction of certain states has led to the need for national uniformity and federal regulation. The ICWA and its regulations in the Final Rule have successfully protected Native American children and are a cornerstone of American Indian law. The specific provisions that the Fifth Circuit Court found unconstitutional under the anti-commandeering doctrine are instrumental in ensuring that ICWA's purpose is achieved. Legislation passed under the Reconstruction Amendments and the Commerce Clause, such as the Voting Rights Act and the Age Discrimination in Employment Act, properly receive special immunity under the Supreme Court's interpretation of the Tenth Amendment because they seek to remedy statewide discriminatory practices. ICWA shares this history and purpose and should therefore be immune to the threats of the anti-commandeering doctrine.

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[214] EEOC v. Wyoming, 460 U.S. 226, 229 (1983) (discussing how age discrimination was initially going to be included in Title VII of the Civil Rights Act of 1964 and the passage of the ADEA was in response to the Secretary of Labor finding that age discrimination was a serious civil rights concern).