Nos. 21-378 & 21-380

IN THE

Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, et al.,

Respondents.

CHAD EVERET BRACKEEN, et al.,

Petitioners,

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, et al.,

Respondents.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR NAVAJO NATION IN OPPOSITION

Jeffrey L. Fisher
Edward C. DuMont
Kendall Turner
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Doreen N. McPaul
Attorney General
Paul Spruhan
Assistant Attorney General
Counsel of Record
Louis Mallette
Jason Searle
Sage Metoxen
NAVAJO NATION
DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, AZ 86515
(928) 871-6210
paspruhan@nndoj.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Treaties

Statutes

Other Authorities

STATEMENT OF THE CASE

Respondent Navajo Nation has experienced immense cultural damage caused by past federal and state policies towards its children. Through boarding schools, assimilation programs, and destructive child-removal and adoption practices, the Nation's families have been separated and its children removed from their communities. Our children have experienced the loss of kinship ties, the Navajo language, and Navajo cultural ways, and such damage has passed down through multiple generations. At the same time, the United States long ago promised in two ratified treaties to protect and promote the happiness and welfare of the Nation and its children. Through the enactment of the Indian Child Welfare Act (ICWA), the United States, at long last, carried out those treaty obligations. By imposing certain minimum standards that govern child custody proceedings involving Indian children, ICWA seeks to prevent future disruption of Indian families.

The Nation has a strong interest in ICWA and, for jurisdictional and prudential reasons, submits that this Court should deny the petitions that have been filed by the Brackeens and other individual plaintiffs (hereafter, "petitioners"). Petitioners seek only prospective relief but have no actual or redressable injuries. They are also improperly attempting to bypass state court systems—the courts in which ICWA cases are actually litigated—and to concoct a sprawling, abstract federal facial challenge to the

statute. Finally, petitioners' constitutional claims are plainly foreclosed by this Court's precedent.[1]

A. Legislative background

1. "[T]hrough statutes, treaties, and the general course of dealing with Indian tribes," Congress—and the United States in general—"has assumed the responsibility for the protection and preservation of Indian tribes and their resources," including the most vital resource of all: "Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. §§ 1901(2), (3). In spite of this federal responsibility, states became increasingly active during the twentieth century in regulating the welfare of children—and, in particular, in removing children from parents deemed unfit to care for them and placing those children in new homes. Over the years, these state-law regimes "resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

In the 1970s, public concern mounted over these "abusive child welfare practices." *Mississippi Band of Choctaw Indians*, 490 U.S. at 32. In response, Congress passed the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 *et seq.* In doing so, Congress invoked its powers under the Indian Commerce Clause, as well as "other constitutional authority," including its treaty obligations and trust

---

[1] For much the same reasons, and for the substantive reasons stated in the Brief of Cherokee Nation, et al. in Opposition in No. 21-378, the Nation also opposes review of the petition filed by the State of Texas.

responsibilities. 25 U.S.C. § 1901(1). Especially relevant here, in two treaties with Navajo Nation, the federal government long ago assumed obligations to provide for the stability of the Navajo people and for the welfare of Navajo children. In an 1849 treaty, the United States promised to "legislate and act as to secure the permanent prosperity and happiness of" Navajo Nation. Treaty with the Navajo, art. XI, Sept. 9, 1849, 9 Stat. 974. In an 1868 treaty, the United States promised to provide for the education of Navajo children. Treaty with the Navajo, art. VI, June 1, 1868, 15 Stat. 667.

2. Through ICWA, Congress confirmed that it is the policy of the United States "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. ICWA applies around the country in state-court custody proceedings involving these children.

ICWA protects Indian families through multiple procedural safeguards. First, certain "minimum Federal standards," 25 U.S.C. § 1902, must be met in any child custody proceeding that involves an "Indian child," defined as someone under 18 who "is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," *id.* § 1903(4). Second, any party seeking termination of parental rights or foster care placement in a state court proceeding involving an Indian child must give notice to the child's parents, custodians, and Tribe of the proceeding and inform them of their right to intervene. *Id.* § 1912(a). Finally, record keeping provisions require that placement records be maintained and

made available at any time to the Department of the Interior and the child's Tribe, and state courts must provide copies of final decrees for adoptive placements to the Department of the Interior. *Id.* §§ 1915(e), 1951(a).

ICWA also ensures the protection of Indian families through substantive requirements. Any party seeking foster care placement or termination of parental rights in the interest of an Indian child must satisfy the court that "active efforts" have been made to "prevent the breakup of the Indian family" and that the efforts have proven to be unsuccessful. 25 U.S.C. § 1912(d). Additionally, for the court to order a foster care placement or a termination of parental rights, a qualified expert witness must attest that continued parental custody is likely to result in serious emotional or physical damage to the child. *Id.* §§ 1912(e), (f).

ICWA also establishes a set of placement preferences in adoptive or foster homes that is designed to "promote the stability and security of Indian tribes and families" and to "reflect the unique values of Indian culture." 25 U.S.C. § 1902. "[I]n the absence of good cause to the contrary," "preference" should be given to the placement of an Indian child with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) "other Indian families." *Id.* § 1915(a) (adoption provision); *see also id.* § 1915(b) (similar system of preferences for foster care placements); *id.* §§ 1903(3), (8) (defining "Indian" based on a person's political membership in a federally recognized tribe).

B. Factual background

This federal lawsuit arises from state-court child custody cases involving three families.

1. *The Brackeens*. In early 2016, the Brackeens accepted a foster care placement of an Indian child known as A.L.M. The child's biological mother is an enrolled member of Navajo Nation, and his biological father is an enrolled member of the Cherokee Nation. When A.L.M. was 10 months old, Texas Child Protective Services removed him from his paternal grandmother's custody, Pet. App. 216a, and, pursuant to ICWA's notice requirements, notified both Navajo Nation and Cherokee Nation, *id.* 52a.[2] By agreement with Cherokee Nation, Navajo Nation proceeded as the "Indian child's tribe" for purposes of ICWA. *Id.*; *see* 25 U.S.C. § 1903(5) (where an Indian child has multiple tribal affiliations, the child's tribe for purposes of ICWA is the one with "more significant contacts").

In May 2017, the parental rights of A.L.M.'s biological parents were terminated, making him eligible for adoption in Texas. Pet. App. 52a. Shortly thereafter, the Brackeens filed a petition in Texas state court seeking to adopt A.L.M. The Texas family court confirmed that ICWA's placement preferences applied to A.L.M., *id.* 216a, and the Nation identified "other members of the Indian child's tribe" who would adopt A.L.M., 25 U.S.C. § 1915(a)(2). Specifically, Navajo Nation put forth a Navajo family to adopt

---

[2] All citations to the Petition Appendix refer to the appendix in *Brackeen v. Haaland*, No. 21-380.

A.L.M. The family court ordered that A.L.M. be placed with that family. Pet. App. 216a.

The Brackeens appealed the Texas family court's decision to apply ICWA's placement preferences. The Navajo family then notified the Nation that they could not face the uncertainty of whether they would get custody of A.L.M., and they asked to withdraw from the custody proceedings. Pet. App. 216a. That left the Brackeens as the only party remaining in A.L.M.'s adoption proceeding—and left no further role for ICWA to play. In January 2018, the Brackeens completed their adoption of A.L.M. *Id.* 52a.

Meanwhile, in October 2017, the Brackeens filed suit in the U.S. District Court for the Northern District of Texas, challenging ICWA on various constitutional grounds. When they filed this complaint, the Brackeens noted that they were seeking to adopt A.L.M. They also stated that due to their experience in adopting A.L.M., they were reluctant to adopt or foster additional children. First Amended Complaint ¶ 119.[3]

2. *The Cliffords*. The Cliffords live in Minnesota and sought to adopt Child P. The child's maternal grandmother is a member of the White Earth Band of Ojibwe Tribe (the "White Earth Band"), and Child P. is a member of the White Earth Band for purposes of ICWA. A Minnesota state court applied the foster care placement preferences under Section 1915(b), placing Child P. with her maternal grandmother in January 2018. Pet. App. 54a. The Minnesota Court of Appeals

---

[3] Unless otherwise indicated, docket entries cited in this brief are to the docket in *Brackeen v. Zinke*, No. 4:17-CV-00868 (N.D. Tex.).

affirmed the placement, *In re Child of S.B.*, No. A19-0225, 2019 WL 6698079, at *1 (Minn. Ct. App. Dec. 9, 2019), and the Minnesota Supreme Court denied review, *In re Child of S.B.*, No. A19-0225, 2020 Minn. LEXIS 17, at *1 (Minn. Jan. 9, 2020). The Cliffords did not seek review in this Court. Subsequently, Child P.'s grandmother adopted her.

3. *The Librettis*. In 2016, the Librettis, a Nevada couple, sought to adopt Baby O. The child's biological father, E.R.G., descends from members of the Ysleta del Sur Pueblo Tribe (the "Pueblo Tribe"), but was not an enrolled member at the time of Baby O.'s birth. The Pueblo Tribe intervened in the Nevada adoption proceedings, but the case settled in late 2018, allowing the Librettis to adopt Baby O. Pet. App. 53a. Like the Brackeens, the Librettis allege that their experience in adopting Baby O. has made them reluctant to adopt and foster additional children. Second Amended Complaint ¶ 170.

C. Procedural background

1. In October 2017, petitioners—along with the States of Texas, Indiana, and Louisiana—filed this action in the U.S. District Court for the Northern District of Texas against the federal defendants, claiming that ICWA is unconstitutional on various grounds. Petitioners requested only injunctive and declaratory relief.

The district court held that petitioners had standing due to the burdens that ICWA placed on their adoption proceedings. Pet. App. 425a. Turning to the merits, the court declared that ICWA violated the Equal Protection Clause because it discriminated on the basis of race. *Id.* 521a. The court also held that Congress lacked Article I authority to enact ICWA. *Id.*

544a. Finally, the court ruled that various provisions of ICWA commandeered the states. *Id.* 533a.

2. After the district court issued its decision, the Brackeens advised the court that they wanted to adopt A.L.M.'s half-sister, Y.R.J., and had filed a petition to that effect in Texas state court. Navajo Nation supports placing Y.R.J. with her maternal great-aunt, an enrolled member of the Nation who has been vetted by its ICWA caseworker and the Texas Department of Family Protective Services. *See In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728, at *9-10 (Tex. Ct. App. Dec. 19, 2019, pet. denied). Under Navajo kinship, the great-aunt is a grandmother to A.L.M. and Y.R.J. and a matriarch of their maternal Navajo clan. *Id.* at *4 n.8. She also resides on the Navajo Reservation and lives near A.L.M. and Y.R.J.'s other siblings, who understand the Navajo language and practice traditional Navajo cultural ways. *Id.* at *3, 11.

Petitioners assert that "Y.R.J.'s mother supports the Brackeens' efforts to adopt Y.R.J." Pet. 6. Evidence presented to the Texas family court, however, showed that Y.R.J.'s mother agreed that *either* the Brackeens or the great-aunt were suitable to take custody of Y.R.J. *In re Y.J.*, 2019 WL 6904728, at *11.

No final placement decision has been made. The Nation, the Brackeens, and the State of Texas recently filed petitions for discretionary review in the Texas Supreme Court asking the court to consider various issues regarding ICWA's application to Y.R.J.'s case. The Texas Supreme Court denied review, *In the Interest of Y.J.*, No. 20-0081, 2021 Tex. LEXIS 977 (Tex. Oct. 15, 2021), and the case has been remanded to the trial court. There, the trial court may consider previously raised legal issues on which the Texas

appellate courts did not rule, such as various challenges to ICWA's constitutionality. *In re Y.J.*, 2019 WL 6904728, at *18.

2. On appeal of the district court's decision, a three-judge panel of the Fifth Circuit agreed that petitioners had standing when the cases were filed and held that any mootness problems were excused because the injuries they alleged were "capable of repetition yet evading review." Pet. App. 428a. The panel, however, disagreed with the district court's equal protection ruling, holding that ICWA's protections for "Indian children" are based on a political, not racial, classification and are "rationally tied" to Congress's fulfillment of its unique obligation toward Indian nations. Pet. App. 441a-42a. The panel also rejected the district court's Article I and anti-commandeering holdings. *Id.* 448a, 452a.

3. On rehearing en banc, a majority of the court of appeals found that petitioners had standing to assert their equal protection claims. Some judges relied on petitioners' past adoptions, and others relied on the Brackeens' ongoing attempts to adopt Y.R.J. Several judges dissented, maintaining that none of the individual plaintiffs could establish redressability because their ICWA cases arose solely in state court, and state courts need not follow the Fifth Circuit's views on whether ICWA is constitutional. Pet. App. 388a-89a (Costa, J.); *see also id.* 374a-75a (Wiener, J.) (making this point with respect to the Cliffords).[4]

---

[4] The en banc court divided equally over whether the petitioners had standing to challenge rules in Sections 1913 and 1914 regarding the termination of parental rights. Pet. App. 58a, 226a. Petitioners do not directly challenge those provisions here.

The Fifth Circuit judges who reached the merits of petitioners' claims agreed with the three-judge panel that ICWA's provisions are political, not racial, classifications. Pet. App. 161a. At the same time, an equally divided court affirmed the district court's invalidation of ICWA's adoption and foster placement preference for "Indian families," reasoning that the preference is not rationally related to the fulfillment of Congress's obligations to Indian tribes. *Id.* 167a, 286a.

The en banc court further held that Congress had constitutional power to pass ICWA under the Indian Commerce Clause and Article I more generally, explaining that "Congress is empowered fully to make good on its trust obligations to Indian tribes," including the protection of Indian children and their tribes under ICWA. Pet. App. 110a.

Finally, the court of appeals unanimously held that the anti-commandeering doctrine does not prevent Congress from requiring state courts to apply federal standards in adoption proceedings and that many ICWA provisions validly supersede state standards. Pet. App. 321a-24a. At the same time, the court (at some points acting through a majority and at others acting through an equally divided court) held that other provisions of ICWA—specifically, the "active efforts" mandate codified at 25 U.S.C. § 1912(d), as well as provisions dealing with qualified expert witnesses, *id.* §§ 1912(e), (f), and notice, recordkeeping, and record retention, *id.* §§ 1912(a), 1915(e), 1951(a)—unconstitutionally commandeer state officials. Pet. App. 7a-8a.

REASONS FOR DENYING THE WRIT

Petitioners ask the Court to decide whether ICWA's placement preferences constitute impermissible "racial classifications" and whether components of the statute are valid exercises of Congress's Article I authority. But every Fifth Circuit judge who addressed these claims rejected petitioners' arguments. (The issues over which the Fifth Circuit disagreed are the subject of other petitions for certiorari.) Moreover, "at least when it comes to [petitioners'] far-reaching claims challenging the Indian Child Welfare Act's preferences for tribe members, [the Fifth Circuit's decision] will not have binding effect in a single adoption." Pet. App. 384a (Costa, J.). Because all child custody proceedings take place in state courts, which need not follow the views of Fifth Circuit judges, the Fifth Circuit's decision "has no more legal force than a law review article," *id.* 386a, or competing views in a legislative committee report.

Under these circumstances, the Court should deny certiorari. Jurisdictional and prudential defects abound, ranging from an absence of standing to presentation of the issues in an omnibus, abstract manner. All told, it is highly unlikely this Court would reach the merits of any of petitioners' claims. Meanwhile, this Court will have ample opportunities in future live cases arising out of actual state-court child custody proceedings to consider challenges to ICWA's provisions that petitioners criticize. Such a case would be the appropriate setting for the Court to review any such constitutional claims.

Finally, petitioners' claims lack merit. As every judge on the Fifth Circuit recognized or assumed, ICWA's provisions governing the custody of Indian

children rest on political, not racial, classifications. Congress had authority to enact ICWA not only under the Indian Commerce Clause, but also under the Treaty Clause. And no provision that petitioners challenge improperly commandeers state officials. Further review is unwarranted.

I. There is no Article III jurisdiction for any of petitioners' claims.

This Court should deny review of petitioners' claims because this case has been improper from the moment it was filed in federal court.

Federal courts may not issue "advisory opinions" that do not affect the legal rights of those before them. *See Flast v. Cohen*, 392 U.S. 83, 95 (1962). Article III commands that federal courts limit their reach to only "Cases" and "Controversies"—that is, lawsuits in which a plaintiff has a "personal stake" in the outcome. *Raines v. Byrd*, 521 U.S. 811, 819 (1997). And the importance of enforcing this limit on "the role assigned to the judiciary in [our] tripartite allocation of power" is "most vivid" where, as here, a federal court is asked to "declare[] unconstitutional an act of the Legislative or Executive Branch." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473-74 (1982) (internal quotation marks and citations omitted).

In particular, Article III demands that a plaintiff establish standing by satisfying three coequal elements, typically referred to as injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Furthermore, "[t]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not

merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citations omitted). Thus, if any of the elements of standing cease to exist during the pendency of the case, the case becomes moot and must be dismissed. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013).

For the reasons that follow, petitioners cannot meet these requirements. Petitioners cannot show that they are being injured or will be injured imminently by ICWA's child custody preferences because the custody proceedings they identified in their operative complaint have all been resolved, and no new developments make up for that absence of continuing harm. In addition, no "favorable" ruling for petitioners in the courts below could have satisfied the redressability requirement because those courts' rulings are not binding on state courts.

A. No injury-in-fact

1. *Past adoptions*. All three sets of plaintiffs—the Brackeens, the Cliffords, and the Librettis—claim that they suffered injuries stemming from past experiences attempting to adopt Indian children. Because these adoption cases have all concluded, none of these plaintiffs has a live injury sufficient to grant them standing to seek prospective relief.

a. *The Brackeens*. In their initial complaint in district court, the Brackeens alleged harm based on the "delay, and perhaps denial, of their adoption of A.L.M." First Amended Complaint ¶ 193. But standing is assessed as of the time of the operative complaint. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007); *City of Riverside v. McLaughlin*,

500 U.S. 44, 51 (1991). And by the time the Brackeens filed their Second Amended Complaint, they had successfully adopted A.L.M. Pet. App. 52a. At that point, they no longer had a "'personal stake in the outcome of the lawsuit,'" so the case should have been "dismissed as moot." *Symczyk*, 569 U.S. at 72 (quoting *Lewis v. Cont. Bank Corp.*, 494 U.S. 472, 477-78 (1990)).

b. *The Cliffords*. Regardless of whether the Cliffords ever suffered an injury-in-fact, their claims are now moot. The Minnesota courts denied the Cliffords' motion for adoptive placement and affirmed the placement of Child P. with her maternal grandmother. *In re Child of S.B.*, No. A19-225, 2019 WL 6698079, at *1 (Minn. Ct. App. Dec. 9, 2019). The Minnesota Supreme Court denied review in 2020, *In re Child of S.B.*, No. A19-0225, 2020 Minn. LEXIS 17, at *1 (Minn. Jan. 9, 2020), and the Cliffords did not seek review of that placement in this Court, *see* Pet. 7 n.1. Child P.'s grandmother finalized the adoption after the Fifth Circuit's en banc decision. Because the controversy that provided the basis for their claims has ceased, the Cliffords, like the Brackeens, no longer have a personal stake in this litigation.

c. *The Librettis*. The Librettis can no longer claim any justiciable injury either because they succeeded in adopting Baby O. in 2018. Pet. App. 53a. While they allege that their adoption was "severely delayed" due to ICWA, Pet. 8, such an assertion does not grant them standing for prospective relief "because it relates to past injury rather than imminent future injury that is sought to be enjoined," *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009).

d. *No exception to mootness applies here*. Judge Duncan posited that the Brackeens retained standing based on their adoption of A.L.M. because their alleged injuries related to that adoption fall within the "capable of repetition yet evading review" exception to mootness. Pet. App. 225a n.14. The Cliffords similarly suggest in their petition to this Court that this exception applies to them. Pet. 7 n.1. But petitioners cannot show that this exception excuses the mootness of their claims.

The exception petitioners invoke applies only where a controversy is both capable of repetition *and*, by its nature, cannot "be fully litigated prior to its cessation or expiration." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam); *see also, e.g., Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008) (holding that plaintiff's challenge to campaign finance law could not be fully litigated before election). The Brackeens or Cliffords (or anyone else) could fully litigate any constitutional claims in a state court proceeding regarding any future adoption of an Indian child. In fact, the Brackeens are currently litigating such a case (involving Y.R.J.) in the Texas courts and could seek review in this Court of the final state court judgment.

2. *Potential future adoptions.* Petitioners have also made various assertions, in the Second Amended Complaint and in subsequent filings, that they might adopt other children in the future. *See* Second Amended Complaint ¶ 12 (Brackeens); *id.* ¶ 13 (Librettis); Pet. 7 n.1 (Cliffords). Judge Dennis found—at least as to the Brackeens—that the regulatory burdens they might encounter in that event

were "sufficiently imminent to support standing." Pet. App. 64a n.15.

To establish an Article III injury, however, plaintiffs must "set forth by affidavit or other evidence specific facts" establishing standing. *Lujan*, 504 U.S. at 561 (internal quotation marks and citation omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013). The Brackeens' assertions that they "intend to provide foster care for, and possibly adopt, additional children in need" fall far short of that mark. Second Amended Complaint ¶ 12. It makes no difference that the Brackeens advance an equal protection claim for differential treatment; even there, plaintiffs still must demonstrate—with particularized facts—that the allegedly unequal burden they face poses at least an "imminent" injury. *Adarand Const. Co. v. Pena*, 515 U.S. 200, 211 (1995).

More fundamentally, petitioners' assertions of "*possible* future injur[ies] are not sufficient" to give them a personal stake in this litigation. *Clapper*, 568 U.S. at 409. *Lujan* is instructive. In that case, the respondents, wildlife conservation organizations, sought declaratory and injunctive relief against a new regulation interpreting the Endangered Species Act. *Lujan*, 504 U.S. at 559. Respondents asserted that the new regulation would accelerate the extinction rates of endangered species abroad. *Id.* at 562. The Court ruled that affidavits submitted by respondents' members, in which they alleged future intentions to re-visit foreign countries to observe the endangered species that lived there, were insufficient to grant them standing. *Id.* at 563-64. "[W]ithout any description of concrete plans, or indeed even any specification of *when*" they would go, the affiants had

articulated only "'some day' intentions" that did not amount to the "'actual or imminent' injury that our cases require." *Id.* at 564.

The prospect that ICWA's placement preferences could affect petitioners in any future adoption is even more speculative. The Brackeens made no suggestion in the Second Amended Complaint about how likely it was that they would seek to adopt another "child in need." Indeed, they did not even assert that they intended to adopt an "Indian child" under ICWA, and therefore that ICWA would even apply to such theoretical adoptions. Nor did the Cliffords or Librettis offer any specifics evincing an imminent injury. Moreover, even if petitioners had provided concrete details of relevant future plans, the questions whether or how ICWA would impede those plans would "rest on speculation about the decisions of independent actors," *Clapper*, 568 U.S. at 414, such as the child's parents, tribe, and extended family members. Such contingencies prevent petitioners from having standing. *Id.* at 413-14.

In short, as plaintiffs seeking prospective relief, petitioners cannot demonstrate that the regulatory burdens they may face are sufficiently "'real and immediate,' not 'conjectural' or 'hypothetical,'" to constitute harm for which a federal court can grant relief. *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Their stated goals to foster or adopt children

in need amount to nothing more than "'some day' intentions." *Id.* at 564.[5]

3. *The Brackeens' proceedings regarding Y.R.J.* The Fifth Circuit also suggested that the Brackeens' current efforts to adopt Y.R.J. confer standing. *See* Pet. App. 63a-64a, 225a-26a. The adoption of Y.R.J., however, cannot be considered in any standing analysis. At the time of the Second Amended Complaint, the Brackeens had not yet sought to adopt Y.R.J. *Id.* 64a n.15. In fact, Y.R.J. was not even born or removed from her mother until June 2018, three months after the Brackeens filed the Second Amended Complaint. *In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728, at *2 (Tex. Ct. App. Dec. 19, 2019, pet. denied).

After the district court issued its final judgment in October 2018, the Brackeens supplemented the record with information regarding their attempts to adopt Y.R.J. Pet. App. 373a. But this amendment came too late. This Court has expressly held that if plaintiffs do not demonstrate an ongoing injury-in-fact "at the time of judgment, they cannot remedy the defect retroactively." *Summers*, 555 U.S. at 495 n*. Judge Dennis cited *Matthews v. Diaz*, 426 U.S. 67 (1976), for the notion that the Brackeens could cure their standing problem with a supplementary filing. Pet. App. 65a n.16. But the plaintiffs there brought the additional facts to the attention of the district court

---

[5] For similar reasons, Judge Duncan was incorrect in suggesting that the Brackeens are injured because their adoption of A.L.M. is "open to collateral attack under ICWA." Pet. App. 226a & n.15. No such attack has been filed, nor is there any reason to believe one will be. Indeed, the two-year period for filing any such attack expired in January 2020. *See* 25 U.S.C. § 1913(d).

before it issued its judgment, enabling orderly litigation over the plaintiffs' claims. *Matthews*, 426 U.S. at 75 n.9.

B. No redressability

While each petitioner fails for various reasons to demonstrate any actual injury, all of their claims share the same flaw from the standpoint of redressability: Neither federal district court nor Fifth Circuit decisions are binding on any of the state courts in which the petitioners' custody proceedings were, or are, pending. "While Texas courts may certainly draw upon the precedents of the Fifth Circuit or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court." *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993); *see also Arizonans for Official English*, 520 U.S. at 58 n.11 (making same point with respect to state courts in general).

The Fifth Circuit judges who held that petitioners established redressability reasoned that, while no state court can be "bound by a decree of this court," "the likelihood that the Texas trial court will follow [the court of appeals'] interpretation of ICWA" is sufficient to satisfy Article III. Pet. App. at 65a-67a (Dennis, J.). But that is not how redressability works. Indeed, in the very case these Fifth Circuit judges cited for this theory of redressability, Justice Scalia explained for the Court that redressability must flow "from exercise [of a court's] power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (emphasis omitted).

Perhaps recognizing this problem, Judge Dennis also noted that the Texas court that is hearing the Brackeens' case regarding Y.R.J. has "stat[ed] that it will defer to [the court of appeals'] ruling." Pet. App. 65a. Judge Dennis added that a plaintiff "must show only that its injury is '*likely* to be redressed by a favorable decision.'" *Id.* (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 (1977) (emphasis added)). But these propositions do not solve petitioners' redressability problem.

While a federal court's decree need not ensure that the plaintiffs will obtain the redress they seek, a judicial or administrative decree in a situation like this must at least have a "determinative or coercive effect" on another decision-making body to establish redressability. *Bennett v. Spear*, 520 U.S. 154, 169 (1997). The Fifth Circuit's decision has no such effect here. Texas courts remain as legally free as they were before the Fifth Circuit's decision to consider for themselves whether ICWA's placement provisions are constitutional.

Indeed, since the Fifth Circuit published its en banc opinion, family courts in Texas have continued to apply ICWA, including the notice provision of Section 1912(a) on which there was an en banc split. *See In the Interest of E.A.C.*, No. 07-21-00145-CV, 2021 Tex. App. LEXIS 9306, at *5 (Tex. Ct. App. Nov. 16, 2021) (holding that trial court did not err in applying both ICWA and Texas Family Code in termination of parental rights case); *In the Interest of X.E.V.*, No. 08-21-00096-CV, 2021 Tex. App. LEXIS 8680, at *1 (Tex. Ct. App. Oct. 27, 2021) (stating that proper notice was given to Cherokee and Ketchikan tribal authorities as required by ICWA); *In the Interest of J.S.*, No. 07-21-

00110-CV, 2021 Tex. App. LEXIS 7701, at *6 (Tex. Ct. App. Sept. 17, 2021) ("Pursuant to the ICWA, an Indian tribe is entitled to notice of a custody proceeding involving an Indian child.").

II. Even if Article III jurisdiction were present, this case would be a poor vehicle for considering petitioners' constitutional claims.

Aside from petitioners' inability to demonstrate Article III jurisdiction, this case is a poor vehicle for considering petitioners' claims. The case involves constitutional issues divorced from any ongoing child custody proceeding in which those claims could be outcome-determinative. Further, no serious problem would come from this Court's waiting for a more suitable vehicle to consider any constitutional challenges to ICWA that it might wish to hear.

A. Petitioners press their claims in an omnibus federal declaratory judgment action that presents the issues in an abstract manner.

This Court has expressed a strong preference for deciding constitutional issues in a concrete setting that features an actual application of the statute involved to real facts. A concrete setting—one in which the stakes of invalidating a law are "real, and not abstract"—ensures that federal courts understand exactly how the statutes at issue work and when they truly matter. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (citations omitted). These concerns are similar to the requirement that a case be ripe, in that the "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148

(1967); *see also International Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) ("Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.") (citations omitted).

Given these principles, petitioners' constitutional arguments are not properly presented here. Instead of challenging any particular ICWA provisions that supposedly harm them in an ongoing child custody proceeding, petitioners ask this Court to invalidate all of ICWA's placement preferences—even those that have *never* been at issue in petitioners' state court cases. *See, e.g.*, 25 U.S.C. § 1915(b)(ii) (establishing a second-tier preference for preadoptive placement in a foster home approved by the child's tribe). With the possible exception of the initial litigation over the constitutionality of the Affordable Care Act, *see NFIB v. Sebelius*, 567 U.S. 519 (2012), it is hard to think of any case in recent decades in which this Court has considered an omnibus declaratory judgment action against an entire piece of federal legislation—a challenge that involves numerous disparate claims levied against various parts of the legislation. And for good reason. Judicial decision-making is aided by focused consideration of discrete legal issues—the exact opposite of what petitioners' scattershot challenge to ICWA would require.

Perhaps if there were no other way besides a wide-ranging facial challenge like this to consider whether ICWA somehow trenches on constitutional values, then it would make sense to take up petitioners' claims

in this posture. But there is an obvious and ready alternative: a state-court child custody proceeding in which ICWA is actually applied and its constitutionality is outcome-determinative. Indeed, those asserting injury by ICWA have filed challenges in various live child custody cases in state courts and will continue to do so. In recent years, state appellate courts have heard two hundred or more ICWA cases per year. Kathryn Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 8 Am. Indian L.J. 105, 112 (2020).

The Brackeens, Cliffords, Librettis, and others are free to challenge ICWA's constitutionality in actual state court proceedings and may bring any adverse ruling to this Court upon final determination from the state courts. If the Court feels the need to consider the constitutionality of any portion of ICWA, it can do so in that more appropriate setting—as it has in the past in other ICWA challenges. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (arising out of the Mississippi state court system); *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (arising out of the South Carolina state court system).

B. The Fifth Circuit's decision has limited, if any, practical effect.

Petitioners also greatly exaggerate the practical effect of the opinions below. Leaving the Fifth Circuit's decision undisturbed would not cause any serious problem while ICWA cases are litigated in state courts and parties have opportunities to raise any constitutional claims they might wish to advance.

1. Because the Fifth Circuit's decision is binding only on *federal* courts, no actual child custody case—

in Texas or elsewhere—will necessarily be conducted any differently as a result of the Fifth Circuit's decision here.

All applications of ICWA occur in state court cases. There is no federal child custody regime. And "Texas state courts are obligated to follow only higher Texas courts and the United States Supreme Court." Pet. App. 384a (Costa, J.) (internal quotation marks and citation omitted). The equivalent situation exists, of course, in other state court systems as well. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997). Therefore, even the parts of the Fifth Circuit decision that garnered a majority vote "will not have binding effect in a single adoption." Pet. App. 384a (Costa, J.). Even in states within the Fifth Circuit, courts remain free to apply ICWA's provisions—and, indeed, are required to do so absent their own declaration of unconstitutionality. *See supra* at 19. The Fifth Circuit's decision has "all of the binding effect of a law review article," Pet. App. 408a-09a (Costa, J.)—which is to say, none.

2. Even if the Fifth Circuit's decision had some tangible effect on child custody matters within that circuit, its impact would be limited. Only nine of the 226 cases concerning ICWA that arose in state appellate courts in 2019 (the last year for which statistics exist) took place in Texas. Fort & Smith, 8 Am. Indian L.J. at 138-54. No case arose in Louisiana or Mississippi. *Id.* Moreover, only two states, Texas and Ohio, contend here that ICWA is negatively affecting their child custody regimes. By contrast, twenty-five states and the District of Columbia support the law. The overwhelming majority of cases involving ICWA arise in these jurisdictions, and these

states believe the statute to be the "gold standard" of child welfare laws. Pet. App. 13a. Consequently, there is no reason to believe that waiting for a suitable vehicle to address petitioners' constitutional claims will pose any widespread threat to state interests.

III. Petitioners' constitutional claims are unworthy of review.

Even if petitioners' equal protection, Article I, and commandeering claims were properly presented, they would still be unworthy of review.

A. Equal protection

Petitioners' claim that ICWA violates the Equal Protection Clause as an allegedly "racial" statute does not implicate any split of authority, and the Fifth Circuit unanimously and correctly rejected it.

1. No federal appellate court has held that ICWA draws "racial," as opposed to political, classifications. Nor was there any disagreement within the Fifth Circuit on this issue. In fact, every judge agreed or assumed that ICWA rests on political classifications. *See* Pet. App. 160a (Dennis, J.) ("It therefore does not alter our conclusion that ICWA's definition of 'Indian child' is a political classification subject to rational basis review."); *id.* at 286a (Duncan, J.) ("As with the Indian child classification, however, we assume *arguendo* that 'Indian family' is a tribal, not a racial, category.").

Contrary to petitioners' assertions, the Fifth Circuit's decision does not conflict with any state court cases either. In *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Cal. Ct. App. 2001), California's intermediate appellate court held that the Constitution does not allow ICWA to be applied when a child is not being

removed from "an existing Indian family." *Id.* at 715, 723. But this case involves no such scenario, and the California court "decline[d] to address the general constitutionality of [ICWA]." *Id.* at 723.[6]

2. The Fifth Circuit was also right to reject petitioners' "racial" classification argument. In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court upheld a hiring preference for Indians at the Bureau of Indian Affairs. The Court reasoned that because the challenged statute defined "Indian" as a person belonging to a "'federally recognized' tribe[]," the classification was "not directed towards a 'racial' group" but was instead "political" in nature. *Id.* at 553 n.24. The Court noted that it had on "numerous occasions . . . upheld legislation that singles out Indians for particular and special treatment." *Id.* at 554-55. "As long as the special treatment can be tied rationally to Congress' unique obligation towards the Indians, such legislative judgments will not be disturbed." *Id.* at 555. Consequently, the Fifth Circuit was correct to hold that ICWA's definition of "Indian child" is a political classification and subject only to rational basis review.

Petitioners protest that *Mancari* should apply only in a narrow set of circumstances relating to "tribal self-government on or near tribal lands." Pet. 18 (internal quotation marks and citation omitted).

---

[6] Furthermore, other California appellate courts have since rejected *Santos*'s reasoning. *See, e.g.*, *Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605, 610-11 (Cal. Ct. App. 2006); *In re Vincent M.*, 59 Cal. Rptr. 3d 321, 335 (Cal. Ct. App. 2007) ("There is no equal protection violation in the application of the ICWA's provisions to Indian children, even where those children are not part of an existing Indian family.").

But *Mancari* itself contains no such limitation, and this Court subsequently made clear that the case "point[s] more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications." *United States v. Antelope*, 430 U.S. 641, 646 (1977). Nor is there any basis for deeming *Mancari* inapplicable to federal statutes touching on so-called "critical state affairs." Pet. 20. As the Fifth Circuit explained, "*Mancari*—and its progeny—confirm that classifications relating to Indians need not be specifically directed at Indian self-government to be considered political classifications for which rational basis scrutiny applies." Pet. App. 148a (Dennis, J.).

Petitioners also argue that *Rice v. Cayetano,* 528 U.S. 495 (2000), supports their narrow reading of *Mancari.* Pet. 20. But *Rice* does no such thing. First, the statute at issue in *Rice* was a state statute concerning state elections, not a federal statute fulfilling a federal trust responsibility. *Rice*, 528 U.S. at 519. Moreover, the state statute explicitly defined "Hawaiian" through bare descent, which this Court concluded *was* racial and not equivalent to tribal membership. *Id.* at 515. Unlike tribes, Native Hawaiians are not afforded federal recognition and do not have a government-to-government political relationship with the United States.

Petitioners next assert that ICWA places "all non-Indian families . . . fourth in line" behind all those who are racially Indian. Pet. 23. In fact, *any* non-Indian person may be *first* in line if that person is "a member of the child's extended family." 25 U.S.C. § 1915(a)(1). Similarly, a family need not be racially Indian to constitute "other members of the Indian child's tribe,"

under ICWA's second-tier preference. *Id.* § 1915(a)(2). For instance, Cherokee Freedmen—formerly enslaved African Americans enrolled in the Cherokee Nation—fall within this preference even though they are not racially Indian. *See Antelope*, 430 U.S. at 646 (statute keyed to whether persons are "enrolled members" of an Indian tribe is not racial).

Finally, petitioners argue that the term "Indian child" is a racial classification because it includes not only children who are members of tribes but also those who are both eligible for such membership and are the "biological" child of Indians. Pet. 21-23. But biology and race are not inextricably linked. *See, e.g.*, *Davis v. Guam*, 932 F.3d 822, 837 (9th Cir. 2019) (explaining that "an ancestral classification is not always a racial one"). Federal and state laws reference biological descent without any racial component in a number of areas—including, importantly, child custody. *See, e.g.,* 8 U.S.C. § 1433 (granting U.S. citizenship to children born abroad to U.S. citizen parents); Conn. Gen. Stat. Ann. § 45a-607 (establishing a presumption that awarding temporary custody to a relative is in the best interests of the child and defining "relative" as "a person related to the child by blood or marriage"). In addition, many nations—including Ireland, Greece, Armenia, Israel, Italy, and Poland—base citizenship on descent or ancestry. Pet. App. 155a-56a n.51. And the United States respects these determinations. *See, e.g.*, 8 U.S.C. § 1253(d) (referring to "citizens" of foreign countries).

ICWA's definition of "Indian child" is of a piece. The definition is not drawn along racial lines simply because it includes minors eligible for tribal membership (who have a biological parent who is a

tribal member). "Tribal eligibility does not inherently turn on race, but rather on the criteria set by the tribes, which are present-day political entities." Pet. App. 154a-55a (Dennis, J.). Indeed, ICWA does not apply to racially Indian children whose parents are not enrolled members of a tribe.

Put another way, ICWA's reference to a "biological" child of an Indian merely defines an individual's familial link that must exist between a child and a tribal citizen. All definitions of "Indian" and "Indian child" in ICWA are explicitly tied to membership in sovereign tribal nations. *See* 25 U.S.C. § 1903(3) (defining "Indian" as "any person who is a member of an Indian tribe"); *id.* § 1903(4) (defining "Indian child" as a person under 18 who is a member of an Indian tribe or is eligible for membership). Such definitions have no ancestry, descent, or "blood" requirement on their face, but apply the political definitions tribal sovereigns have used to define membership in their own nations.

B. Article I authority

Petitioners argue that Congress lacked authority under Article I to enact ICWA, contending that Congress's authority to legislate concerning Indian affairs is limited to regulating "commerce." There is no circuit conflict regarding this issue, and this case would be a poor vehicle for considering it anyway given the Nation's two ratified treaties. Furthermore, the Fifth Circuit correctly rejected petitioners' argument.

1. There was neither confusion nor conflict in the Fifth Circuit regarding whether Congress had the power to enact ICWA; all sixteen judges agreed that petitioners' "construction of the Indian Commerce

Clause [is] unduly cramped [and] at odds with both the original understanding of the clause and the Supreme Court's more recent instructions." Pet. App. 90a (Dennis, J.); *see also id.* 233a (Duncan, J.) ("[W]e cannot agree with Plaintiffs that ICWA is unconstitutional because it does not regulate tribal 'commerce.'"); *id.* 363a (Owen, J.); *id.* 366a (Wiener, J.); *id.* 376a (Haynes, J.); *id.* 398a-401a (Costa, J.). Nor does any conflict exist beyond the Fifth Circuit on the issue. Accordingly, there is no need for this Court's intervention.

2. Even if the scope of congressional power under the Indian Commerce Clause were uncertain, this case would be a poor vehicle for addressing the issue. Petitioners mount a facial challenge to ICWA, arguing that Congress lacked the constitutional power to even pass the statute. Pet. 27-29; Pet. App. 12a. Such challenges "are disfavored." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). They "often rest on speculation" and "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). Accordingly, a facial challenge is "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). To succeed in their argument that ICWA is facially invalid, petitioners must show that the statute is invalid in *all* applications. *Id.*

Petitioners cannot make any such showing. ICWA is constitutional—apart from or at least in addition to Congress's Indian Commerce Clause power—because, at least as applied to Navajo children, ICWA carries out Congress's Treaty Power. *See* U.S. Const., art. II, § 2, cl. 2. As the Court explained in *United States v. Lara*, 541 U.S. 193 (2004), "treaties made pursuant to the [treaty power] can authorize Congress to deal with matters with which otherwise Congress could not deal." *Id.* at 201 (internal quotation marks and citation omitted). This maxim applies with full force to treaties with tribal nations. *Id.* Indeed, "for much of the Nation's history, treaties, and legislation made pursuant to those treaties, governed relations between the Federal Government and the Indian tribes." *Id.*

In the Nation's two ratified treaties, from 1849 and 1868, the federal government promised generally to provide for the "permanent prosperity and happiness" of the Navajo People, and specifically to care for Navajo children. Treaty with the Navajo, art. XI, Sept. 9, 1849, 9 Stat. 974; Treaty with the Navajo, art. VI, June 1, 1868, 15 Stat. 667.[7] The 1868 treaty

---

[7] Other treaties include similar promises, manifesting the federal government's assumption of the responsibility to provide for the care of Indian children and the maintenance of their connections to their tribal communities. More than forty treaties specifically provide for the welfare of Indian children. *See, e.g.*, Treaty with the Senecas, et. al., art. XIX & XXIII, Feb. 23, 1867, 15 Stat. 513 (requiring that the tribes' children "be subsisted, clothed, educated, and attended in sickness," and that the tribe's chiefs shall determine "guardianship of orphan children"); Treaty with the Creeks & Seminoles, art. IX, Aug. 7, 1856, 11 Stat. 699 (providing that each child receive "a blanket, pair of shoes, and other necessary articles of comfortable clothing"); Treaty with the

also guaranteed that Navajo children would be educated on the reservation and thereby be unlikely to be taken away from their families. *See* Treaty with the Navajo, art. III & VI, 15 Stat. 667. Such promises must be construed "in the sense in which they would naturally be understood by" the tribal nation. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (citation omitted). And as understood by the Nation, these treaty provisions promised to the Nation the ability to maintain cultural and familial connections between the Nation and its children.

ICWA itself expressly notes that "Congress, through statutes, *treaties*, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources." 25 U.S.C. § 1901(1) (emphasis added). And ICWA's drafters based the law not just in the Indian Commerce Clause, but also in "other constitutional authority." *Id.* § 1901(2). ICWA protects Indian tribes through, among other provisions, the placement preferences for a member of the Indian child's extended family or a family of that Indian child's tribe—the specific sections of ICWA petitioners ask this Court to invalidate. *See id.* §§ 1915(a), (b).

Sauk & Foxes, art. X, Sept. 21, 1832, 7 Stat. 374 (promising cattle, pork, salt, flour, and maize "principally for the use of the Sac and Fox women and children"); Treaty with the Seminole, art. III, May 9, 1832, 7 Stat. 368 (promising to provide "a blanket and a homespun frock" to each Seminole child); Treaty with the Chickasaw, art. III, Oct. 19, 1818, 7 Stat. 192 (showing that the United States intended, by treaty, "to perpetuate the happiness of the Chickesaw [sic] nation of Indians").

Given Congress's multiple sources of constitutional authority, petitioners' *facial* challenge to Article I necessarily fails. At least as applied to Navajo children, this Court need not decide whether ICWA is a valid exercise of Congress's Indian Commerce Clause power alone.

3. Regardless, the Fifth Circuit's holding on this issue is correct for the reasons stated by Cherokee Nation et al. in their Brief in Opposition to the State of Texas's petition in No. 21-378. Unlike the Interstate Commerce Clause, Congress's Article I authority over Indian affairs is not confined to "commerce," as that term is understood in other settings. *See Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1989) ("The Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause," as the States "have been divested of virtually all authority over Indian commerce and Indian tribes."); *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (similar).

C. Commandeering

Petitioners also seek review of the Fifth Circuit's conclusion that various sections of ICWA comport with the anti-commandeering doctrine. No Fifth Circuit judge found that petitioners, as private individuals, have standing to press such claims. Nor do petitioners offer any argument why they have standing to bring a *commandeering* claim under the Tenth Amendment, as opposed to a claim based on the scope of Congress's Article I authority. *Compare Bond v. United States*, 564 U.S. 211 (2011) (holding that private party could bring a Tenth Amendment challenge on the grounds that Congress had exceeded its Article I authority).

In any event, for the reasons set forth in Brief of Cherokee Nation, et al. in Opposition in No. 21-378, ICWA does not commandeer states simply by setting minimum standards for state courts to follow when hearing child custody cases involving Indian children.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Jeffrey L. Fisher
Edward C. DuMont
Kendall Turner
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Doreen N. McPaul
Attorney General
Paul Spruhan
Assistant Attorney General
Counsel of Record
Louis Mallette
Jason Searle
Sage Metoxen
NAVAJO NATION
DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, AZ 86515
(928) 871-6210
paspruhan@nndoj.org

December 8, 2021