No. 21-380

IN THE
Supreme Court of the United States

CHAD EVERET BRACKEEN, *et al.*,

Petitioners,

v.

DEB HAALAND, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, AND MORONGO BAND OF MISSION INDIANS

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QUESTIONS PRESENTED

In 1978, Congress enacted the Indian Child Welfare Act ("ICWA") to remedy the "alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. §1901(4). ICWA—just the latest chapter in the federal government's centuries of efforts to protect Indian children—establishes placement preferences that apply in child-welfare cases concerning an "Indian child." In the two preferences upheld below, ICWA prefers adoptive placements with "(1) a member of the child's extended family" or "(2) other members of the Indian child's tribe." *Id.* §1915(a); *see id.* §1915(b)(i)-(ii). ICWA ties its definition of "Indian child," and its preferences, to membership in federally recognized Tribes. Many families that are not racially Indian can receive ICWA's highest preference (because they are an Indian child's extended family), even as ICWA grants no preference to many racially Indian families (because they are not enrolled members). The questions presented are:

1. Do ICWA's adoptive preferences for members of an Indian child's "extended family" and for "members of the Indian child's tribe"—and analogous preadoptive and foster preferences—unlawfully discriminate based on race?

2. Do ICWA's placement preferences transgress Congress's Article I powers over Indian affairs, which this Court has described as "plenary," *Morton v. Mancari*, 417 U.S. 535, 551 (1974), or violate the anti-commandeering doctrine by preempting state-law standards in state courts?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

Respondents hereby file this brief in opposition to the petition of Chad and Jennifer Brackeen ("the Brackeens"); Danielle and Jason Clifford ("the Cliffords"); Altagracia Socorro Hernandez; and Frank and Heather Libretti ("the Librettis").

INTRODUCTION

In 1978, Congress found that Tribes and their members faced an existential crisis: More than a quarter of Indian children found themselves sundered from their families and Tribes, often due to the ignorance and contempt of case workers who did not understand Tribes and believed their children should be raised elsewhere. In response, and pursuant to its trust obligation to Indians and Tribes, Congress enacted the Indian Child Welfare Act ("ICWA").

ICWA is based on a simple idea: All else equal, children are better off when they can stay with their families and communities. By implementing that simple idea, ICWA aims both to "protect the best interests of Indian children" and to "promote the stability and security of Indian tribes and families." §1902.[1] And because it implements that idea, ICWA has become the "gold standard" for child-welfare practices generally—not just for Indians. Pet. App. 13a.

The *en banc* Fifth Circuit correctly rejected Petitioners' challenges to ICWA's placement preferences, in a decision warranting no further review. The decision below accords with the consensus of federal

[1] Unless otherwise specified, statutory citations are to Title 25 of the U.S. Code.

circuits and state appellate courts—which have heard dozens of challenges to ICWA but have never endorsed Petitioners' theories. It also accords with this Court's cases, which make clear that ICWA's placement preferences are well within Congress's broad powers over Indian affairs and classify based on tribal political affiliation, not race.

The Court, moreover, cannot even reach Petitioners' challenges without addressing antecedent questions of standing and mootness. Child-welfare cases happen in state courts. Those courts, however, have uniformly rejected arguments like those here. So Petitioners sought a forum that they deemed more favorable and filed suit in federal district court. They could not, however, manufacture Article III jurisdiction in the federal forum they procured. First, the decisions below could never have *bound* the state-court judges adjudicating Petitioners' child-welfare cases. That means redressability—one of Article III's essential ingredients—is absent, as Judge Costa below explained. And regardless, those child-welfare cases have *ended*. So Petitioners' claims are moot. Federal courts have no business weighing the constitutionality of a landmark federal statute when no plaintiff has a concrete stake.

In any event, Petitioners' arguments do not warrant review. They make inflammatory claims that ICWA's placement preferences "racially discriminate[]," classify "based on race," and place "all non-Indian families" last in line. *E.g.*, Pet. 21, 23. But Petitioners are wrong. ICWA's "Indian child" definition, for example, includes only children who are either tribal members or who are *both* eligible for membership *and* biological children of

members. §1903(4). Such classifications are "political rather than racial." *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). And Indian children "[a]re not subjected to [ICWA] because they are of the Indian race but because" they or their parents "are enrolled [tribal] members." *United States v. Antelope*, 430 U.S. 641, 646 (1977).

Confirming as much, ICWA's coverage does not track race. Some people who *are* "Indian children" under ICWA are not racially Indian. Many children who are racially Indian *are not* ICWA "Indian children." Meanwhile, many families who *are not* racially Indian receive ICWA's highest preference (as "member[s] of [a] child's extended family," §1915(a)(1)), even as many families who *are* racially Indian would receive the same preference as Petitioners (because they are not enrolled in federally recognized Tribes). Petitioners spill much ink on ICWA's preference for "other Indian families." Pet. i, 5, 23, 25. That preference is also political—but more importantly, Petitioners *prevailed* on that issue. An equally divided Fifth Circuit applied rational-basis review to invalidate that preference and left intact the district court judgment in Petitioners' favor. This preference is thus irrelevant to their petition.

Petitioners also claim that ICWA's placement preferences raise "serious … federalism concerns." Pet. 3. But again, no appellate court has agreed. Indeed, the *en banc* Fifth Circuit rejected the anti-commandeering arguments Petitioners press here unanimously (or with just one dissent). The provisions that spurred division are those that the decisions below *invalidated* and that are the subject of the separate petitions by Respondent

Tribes and the Solicitor General. Nor does Petitioners' claim that ICWA exceeds Congress's "enumerated powers," Pet. 27, implicate any conflict. The Fifth Circuit below correctly held that ICWA—which Congress found necessary to ensure "the continued existence and integrity of Indian tribes," §1901(3)—fits comfortably within Congress's broad power over Indian affairs. No appellate court, anywhere, disagrees.

The only remaining argument for review, then, is that because Respondent Tribes and the Solicitor General have filed their own petitions, the Court should grant Petitioners' request too. But there is nothing to that argument. When this Court reviews decisions invalidating acts of Congress, it exhibits due respect to a coordinate branch. Every day, however, federal courts reject constitutional challenges to federal statutes. So here, the ordinary *certiorari* factors apply. And the simple reality is this: Petitioners cite no genuine conflict among appellate courts, comprehensively lack standing, and build their arguments largely on an issue that they *won* below.

The petition should be denied.

STATEMENT

A. Statutory Background.

Congress passed ICWA in 1978 in response to a crisis: the "wholesale removal of Indian children" from their families and Tribes based on "abusive child welfare practices." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Up to a third of Indian children were separated from their families and communities by decisionmakers who were either "ignorant of [Indian]

cultural values" or actively "contemptful of the Indian way." *Id.* at 34-35. Many of these removals, Congress found, were "wholly inappropriate." *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 18 (1974) (statement of William Byler); H.R. Rep. No. 95-1386, at 9-10 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7531-32.

In response, Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." §1902. ICWA did so by "establish[ing] minimum Federal standards for the removal of Indian children from their families." *Id.* For example, no foster-care placement or termination of parental rights "may be ordered in such proceeding in the absence of" an adequate showing that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." §1912(e), (f).

This petition concerns ICWA's placement preferences, which apply when removals are warranted. For adoptive placements, ICWA grants a preference to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." §1915(a). ICWA defines "extended family" to include (among others) aunts, cousins, nephews, grandparents, in-laws, and stepparents (whether or not they are tribal members or racially Indian). §1903(2). For foster-care and preadoptive placements, ICWA again grants its highest preference to "a member of the Indian child's extended family," followed by "a foster

home licensed, approved, or specified by the Indian child's tribe," "an Indian foster home licensed or approved by an authorized non-Indian licensing authority," and an "institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." §1915(b).

ICWA pegs its applicability to membership in federally recognized Tribes. An "Indian" is "any person who is a member of an Indian tribe." §1903(3). An "Indian child" is anyone under 18 who is either "a member of an Indian tribe" or *both* "eligible for membership in an Indian tribe" and "the biological child of a member of an Indian tribe." §1903(4). For ICWA to achieve its goals, Congress had to extend the "Indian child" definition beyond children who were themselves enrolled members—because a "minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled." Pet. App. 159a (quoting H.R. Rep. No. 95-1386, at 17).

In the four decades since Congress enacted ICWA, ICWA has become the "gold standard in child welfare" proceedings. Casey Family Programs 5th Cir. Br. at 5. In fact, many States have incorporated ICWA's framework into their own statutes and policies. Br. for California et al. as Amici Curiae Supporting Petitioners at 8, *Haaland v. Brackeen*, Nos. 21-376 & 21-377.

B. Factual and Procedural Background.

1. This Suit.

This petition arises from Petitioners' attempts to bypass the state courts that were adjudicating their

child-welfare cases. Petitioners are three non-Indian couples and the biological mother of an Indian child, all of whom were involved in state-court cases seeking to foster or adopt Indian children. Instead of asserting their federal constitutional rights in those cases, Petitioners filed suit in federal district court, pressing a facial constitutional attack and claiming that they were harmed by ICWA's application in state court. Pet. App. 51a-54a.

Chad and Jennifer Brackeen, a Texas couple, agreed to foster A.L.M., an Indian child, and fostered him for sixteen months until a Texas court terminated the parental rights of his biological parents in May 2017. Pet. App. 52a. Foster parents understand that they often will not be permitted to adopt the children they foster and that the children will often return to their families or be placed with extended family members.[2] Some foster parents, however, do adopt—and in July 2017, the Brackeens filed to adopt A.L.M. in Texas state court. *Id.*

Initially, the Navajo Nation, A.L.M.'s tribe under ICWA, pressed for a placement with a Navajo family. *Id.* That placement, however, failed to materialize, which cleared the way for the Brackeens to adopt A.L.M. *Id.* No one else intervened in the Texas case or sought to adopt A.L.M. *Id.* Yet even though the Brackeens were on the cusp of prevailing in state court, they filed—on October 25, 2017—a sweeping federal lawsuit seeking to declare ICWA unconstitutional. *See*

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[2] Child Welfare Information Gateway, *Home Study Requirements for Prospective Foster Parents* 1 (2018), https://bit.ly/3DxhVoq.

Second Amended Complaint, *Brackeen v. Zinke*, No. 4:17-cv-868 (N.D. Tex.), ECF No. 35; Pet. App. 55a.[3]

Petitioners filed an amended complaint (on December 15, 2017) and a second amended complaint (on March 22, 2018). These complaints added the Librettis and Cliffords as plaintiffs. Pet. App. 53a-54a. By the time Petitioners filed the second amended complaint—the operative pleading—the Brackeens had finalized A.L.M.'s adoption. Pet. App. 52a.

Frank and Heather Libretti, a Nevada couple, joined the suit during their attempt to adopt Baby O. in Nevada state court. Pet. App. 53a. Baby O. is an "Indian child" under ICWA, and her Tribe—the Ysleta del sur Pueblo Tribe—intervened. Shortly after, however, the Librettis entered into a "settlement" in which the Tribe "agreed not to contest [the Librettis'] adoption." Libretti Declaration at 66-70, *Brackeen*, No. 4:17-cv-868, ECF No. 81. The adoption became final on December 19, 2018. Pet. App. 53a.

Danielle and Jason Clifford's Minnesota state-court case concerned Child P., a member of the White Earth Band of Ojibwe Tribe. The Cliffords opposed the attempts to foster and then adopt Child P. by her grandmother R.B. R.B. was also a member of the White Earth Band, had been the "primary caregiver for the first four years of [Child P.'s] life," and had been

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[3] Indeed, press reports show that, two days after the Brackeens filed their federal lawsuit, state court records memorialized that all barriers to A.L.M.'s adoption had been lifted. *This Land*, Crooked Media, at 20:40-21:32 (Aug. 23, 2021), https://crooked.com/podcast/2-behind-the-curtain/.

"unwavering in her desire to adopt" her. *In re Welfare of Child of S.B.*, No. A19-0225, 2019 WL 6698079, at *1 (Minn. App. Ct. Dec. 9, 2019). Instead, the Cliffords sought to foster and then adopt Child P. themselves. The White Earth Band intervened in the Cliffords' state adoption proceedings. Both the Tribe and the local county supported R.B.'s efforts to adopt Child P. *Id.* at *1-2. While this suit was pending before the Fifth Circuit, R.B.'s adoption of Child P. became final. Pet. 7 n.1.

2. The Decisions Below.

The district court invalidated nearly all of ICWA in a sweeping opinion. Pet. App. 485a-546a. A Fifth Circuit panel, however, reversed that judgment in full. Pet. App. 466a. The panel was unanimous on nearly all points, except that Chief Judge Owen would have invalidated, on anti-commandeering grounds, three discrete provisions—none of which is at issue here. Pet. App. 466a; Pet. App. 475-76a.

En banc, the Fifth Circuit again upheld virtually all of ICWA and rejected virtually all of Petitioners' arguments, often by lopsided majorities.

Standing. The majority reached the merits of Petitioners' challenges over a dissent by Judge Costa (joined in relevant part by four judges), who would have held that the plaintiffs lacked Article III standing in significant part. The majority's "argument for redressability," Judge Costa explained, was that "the family court judge[s]" adjudicating the individual plaintiffs' custody proceedings "may, or even say[] [they] will, follow our constitutional ruling." Pet. App.

386a. But "[t]here is a term for a judicial decision that does nothing more than opine on what the law should be," in the hope others will follow it: "an advisory opinion." Pet. App. 385a.

Equal Protection. This Court has held that classifications based on tribal status draw political, not racial, classifications and "will not be disturbed" "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Pet. App. 147a (quoting *Mancari*, 417 U.S. at 555). The *en banc* majority applied this settled rule and upheld ICWA's "Indian child" definition, its first two adoptive placement preferences, and three of its four foster care and preadoptive placement preferences. Pet. App. 161a-63a.

Judge Duncan dissented and would have invalidated ICWA's "Indian child" definition and all of its placement preferences on equal-protection grounds. He did not, however, conclude that ICWA is race-based. Pet. App. 278a-79a. He applied rational-basis review and concluded that ICWA's classifications do not satisfy that standard. Pet. App. 279a-89a.

Article I. The Fifth Circuit recognized, as this Court has held, that Congress has "plenary power … to deal with the special problems of Indians." Pet. App. 73a (quoting *Mancari*, 417 U.S. at 551-52). The court carefully analyzed whether ICWA falls within Congress's power and concluded it did. Pet. App. 75a-110a.

Judge Duncan would have found an Article I violation under the theory that Congress's Indian-affairs

power does not permit "regulat[ing] a state sovereign function like child-custody proceedings." Pet. App. 215a.

Anti-Commandeering. The *en banc* court unanimously upheld the vast majority of ICWA against Petitioners' anti-commandeering challenge. All sixteen judges agreed that there was no anti-commandeering problem with most of ICWA's provisions, which validly preempt contrary state law and do no more than provide rules of decision for state courts to apply. Pet. App. 116a (Dennis, J.); *id.* 322a-23a (Duncan, J.). This unanimity extended, in relevant part, to ICWA's placement preferences: The Fifth Circuit unanimously agreed that the placement preferences do not violate the anti-commandeering doctrine "to the extent they apply to state courts." Pet. App. 9a; *see* Pet. App. 322a.

The Fifth Circuit's more divided conclusions are not at issue here—because Petitioners *prevailed* on those issues. The court divided equally as to whether the placement preferences (and two other provisions) "violate anticommandeering to the extent they direct action by state agencies and officials." Pet. App. 8a. A narrow majority also held that three additional provisions violate the anti-commandeering doctrine. Pet. App. 7a-8a. Those provisions are the subject of the separate petitions filed by Respondent Tribes and the Solicitor General. *See Cherokee Nation v. Brackeen*, No. 21-377; *Haaland v. Brackeen*, No. 21-376.

REASONS FOR DENYING THE PETITION

The petition does not merit this Court's review. The Fifth Circuit's application of settled law implicates no division of authority. In fact, *no* Fifth Circuit judge

endorsed most of the arguments that Petitioners press. Meanwhile, the Court cannot even reach these meritless arguments without addressing threshold issues concerning Article III jurisdiction (or the lack thereof). The Court should deny the petition.

I. Petitioners' Equal-Protection Arguments Do Not Warrant Review.

Petitioners' first question presented asks whether ICWA's placement preferences unlawfully "discriminate on the basis of race." Pet. i. The Fifth Circuit straightforwardly answered no, in a decision implicating neither disagreement nor error. Petitioners' arguments lack merit.

A. The Fifth Circuit's Application Of Settled Law Implicates No Conflict.

1. The decision below applied a simple, settled rule to reject Petitioners' claims of race-based discrimination: When Congress classifies based on tribal status, it draws a political—not racial—classification. Hence, classifications based on tribal status are permissible so long as they satisfy the usual rational-basis test: "the special treatment [must] be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 554-55; *see, e.g.*, *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979). Indeed, "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians." *Antelope*, 430 U.S. at 645. If such laws "were deemed

invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Mancari*, 417 U.S. at 552.

The Fifth Circuit properly held that both of the ICWA provisions Petitioners challenge—the "Indian child" definition and the placement preferences—classify based on tribal status, not race. The "Indian child" definition reaches only children who are (a) themselves tribal members or (b) "eligible for membership in an Indian tribe and [are] the biological child[ren] of a member of an Indian tribe." §1903(4). Both prongs classify based on membership in federally recognized Tribes. And both "operate[] to exclude many individuals who are racially to be classified as 'Indians,'" *Mancari*, 417 U.S. at 553 n.24, while encompassing some children who are *not* racially Indian, such as Cherokee Freedmen.[4] Hence, children "[a]re not subject to [ICWA] because they are of the Indian race but because" they or their parents "are enrolled [tribal] members." *Antelope*, 430 U.S. at 646.

The Fifth Circuit correctly reached the same result as to ICWA's placement preferences. On the adoptive

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[4] *See* Press Release, U.S. Dep't of Interior, *Secretary Haaland Approves New Constitution for Cherokee Nation, Guaranteeing Full Citizenship Rights for Cherokee Freedmen* (May 12, 2021), https://on.doi.gov/3rH659e. Other examples of "non-Indian" tribal members include descendants of non-Indians who were adopted into Tribes in the 19th century. *E.g.*, Treaty with the Shawnee, art. II, May 10, 1854, 10 Stat. 1053; Treaty with the Wyandot, art. VIII, Sept. 29, 1817, 7 Stat. 160.

preferences, only the first two preferences are at issue here. *Supra* 3, 10. The first, for members of the Indian child's extended family, §1915(a)(1), applies to any such family member regardless of race. *See, e.g.*, *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 622 (Ct. App. 2016). And the second preference, for members of a child's Tribe, §1915(a)(2), is directly tied to membership. Ignoring all this, Petitioners focus on the "other Indian families" preference. Pet. i, 5, 23, 25. But that preference (which, quite obviously, also classifies based on tribal status) is irrelevant: Petitioners *prevailed* below.[5]

2. Petitioners' contrary arguments implicate no conflict. For 40 years, state courts have routinely applied *Mancari* to reject facial equal-protection challenges to ICWA like those Petitioners press.[6] And below, not even the lead dissent endorsed Petitioners' argument that ICWA draws race-based classifications

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[5] The same is true of ICWA's foster-care and preadoptive placement preferences, which Petitioners barely mention. The "Indian foster home" preference—the closest equivalent to the "other Indian families" adoptive preference—(1) classifies based on tribal status; and (2) is irrelevant because Petitioners prevailed. Pet. App. 7a.

[6] *E.g.*, *In re Welfare of Child of S.B.*, 2019 WL 6698079, at *4-5; *In re Termination of Parental Rights of K.M.O.*, 280 P.3d 1203, 1214-15 (Wyo. 2012); *In re Phoenix L.*, 708 N.W.2d 786, 795-98 (Neb. 2006), *disapproved of on other grounds by In re Destiny A.*, 742 N.W.2d 758 (Neb. 2007); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 326 (N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Marcus S.*, 638 A.2d 1158, 1158-59 (Me. 1994); *In re Armell*, 550 N.E.2d 1060, 1067-68 (Ill. App. Ct. 1990); *In re Application of Angus*, 655 P.2d 208, 212 (Or. Ct. App. 1982); *In re Appeal in Pima Cnty. Juv. Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980).

triggering strict scrutiny; instead, that opinion purported to apply *Mancari*'s rational-basis test. Pet. App. 278a-79a (Duncan, J.).

The only case Petitioners cite as supposedly in conflict, *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001)—an intermediate court of appeals decision—concerned an as-applied equal-protection challenge based on the "existing Indian family doctrine." *Santos*'s endorsement of that doctrine—which posits that ICWA should not apply "to situations in which a child is not being removed from an existing Indian family"—does not establish a conflict as to Petitioners' facial challenge. *Id.* at 715; *see* Tex. Pet. 23 (agreeing that *Santos* is an "existing Indian family" case). Indeed, *Santos* has been rejected by other California appellate courts,[7] while this Court has repeatedly denied review in cases asserting a split over the "existing Indian family" doctrine.[8]

Petitioners fare no better with their cursory assertion of conflict with *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). Pet. 16. That decision, too, suggests only that certain interpretations of ICWA could "raise equal protection concerns." 570 U.S. at 656. It does not suggest that ICWA is facially suspect.

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[7] *E.g.*, *Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605, 610-11 (Ct. App. 2006); *In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 485 (Ct. App. 2014).

[8] *E.g.*, *R.P. v. L.A. Cnty. Dep't of Children & Family Servs.*, 137 S. Ct. 713 (2017); *Hoots ex rel. A.B. v. K.B.*, 541 U.S. 972 (2004); *Dry Creek Rancheria v. Bridget & Lucy R.*, 520 U.S. 1181 (1997). Petitioners' "see also" and "cf." citations also concern the existing Indian family doctrine. Pet. 15-16.

3. Nor, contrary to Petitioners' claim, Pet. 25, will denying review open the floodgates to race-based classifications. When courts conclude that a law classifies by race, they apply the appropriate level of scrutiny. *E.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 207-08, 213 (1995) (plurality op.); *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 236, 241 (4th Cir. 2010). Here, Petitioners' facial challenge failed because ICWA draws political classifications based on tribal status.[9]

B. The Decision Below Is Correct.

Petitioners also fail to show error in the Fifth Circuit's application of settled law.

1. Principally, Petitioners claim that the Fifth Circuit erred by declining their invitation to impose arbitrary limits on *Mancari*—which they urge applies only to classifications based on "tribal membership and that advance[] tribal self-government on or near Indian lands." Pet. 18. ICWA, of course, *does* classify based on tribal membership, *supra* 13-14, and *does* further tribal self-government: Congress enacted ICWA to "promote the stability and security of Indian tribes and families," § 1902, because Congress concluded that "often unwarranted" removals threatened "the continued existence and integrity of Indian tribes," §1901(3)-(4).

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[9] This point shows why Petitioners cannot gain by citing *Adarand*. Pet. 23. The *Adarand* plurality reached the result it did because it found that, there, the preference for "Native Americans" referred to a racial group—like the preferences for "Black Americans, Hispanic Americans, … Asian Pacific Americans, and other minorities," which the plurality also invalidated. 515 U.S. at 205.

More important, Petitioners' gerrymandered limits make no sense. They have nothing to do with whether a classification is political (and so subject to *Mancari*) or racial (triggering heightened scrutiny). At most, these issues may affect whether statutes are rational. No wonder, then, that Petitioners cite no case endorsing their made-up limits. Certainly, this Court's cases do not do so. *Antelope*, for example, observed that some of this Court's cases "involved preferences or disabilities directly promoting Indian interests in self-government." 430 U.S. at 646. Then, however, *Antelope* explained that those cases "point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications." *Id.* And based on that principle, *Antelope* upheld a law that dealt "*not* with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests." *Id.* (emphasis added); *accord Yakima Nation*, 439 U.S. at 500-02 (applying *Mancari* to reject equal-protection challenge to state regulation of criminal conduct within Indian country).

Likewise, *no* Fifth Circuit judge below endorsed the notion that *Mancari* applies only to "tribal Indians living on or near reservations." Pet. 18; *see* Pet. App. 273a-74a (Duncan, J.). And for good reason: In *Mancari* itself, the relevant tribal classification—a hiring preference in the Bureau of Indian Affairs—was not restricted to positions located on or near Indian lands, and the non-Indian challengers "state[d] that *none* of them [was] employed on or near an Indian reservation." 417 U.S. at 539 n.4 (emphasis added). As this Court has reaffirmed, "Congress possesses the broad power of legislating for

the protection of the Indians wherever they may be." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (citation omitted).

Meanwhile, Petitioners badly fail with their footnoted attempt to downplay their theory's sweeping consequences. Pet. 25-26 n.4. For example, if *Mancari* is limited to laws promoting "tribal self-government," as Petitioners narrowly understand that term, the Major Crimes Act and General Crimes Act—which allow federal prosecution for crimes by or against "Indians"—may be unconstitutional. And if Congress can only legislate for Indians who have *already enrolled* in Tribes, then many convictions under those statutes—which have been interpreted to reach "Indians" who are not enrolled members[10]—will be invalid. Meanwhile, non-Indian mothers carrying unborn children of tribal members will lose health care provided by the Indian Health Service ("IHS"). §1680c. And if *Mancari* is limited to laws that apply "on or near reservations," the large tribal populations in urban areas such as Los Angeles, Dallas, and Chicago may lose IHS health care[11]—even though those urban populations reflect, in large part, the federal government's efforts to relocate Indians *away* from reservations during the 1950s.

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[10] *Antelope*, 430 U.S. at 646 n.7; *accord United States v. Nowlin*, 555 F. App'x 820, 822-24 (10th Cir. 2014); *United States v. LaBuff*, 658 F.3d 873, 877-79 (9th Cir. 2011); *United States v. Stymiest*, 581 F.3d 759, 763 (8th Cir. 2009).

[11] *Urban Indian Organizations*, Indian Health Serv., https://www.ihs.gov/urban/urban-indian-organizations/ (last visited Dec. 1, 2021).

Cohen's Handbook of Federal Indian Law §1.06, at 88 (Nell Jessup Newton ed., 2012). The list goes on.[12]

2. Equally invented is Petitioners' claim that *Mancari* does not apply because ICWA supposedly intrudes on "critical state affairs." Pet. 22. Again, this limit has no basis in *Mancari* or this Court's cases and has nothing to do with whether a classification is racial. Moreover, child-welfare proceedings involving *Indian children* are not quintessential state concerns; Tribes and the federal government have powerful interests in those proceedings (particularly given the federal government's long history of legislating for Indian children, *infra* 27; Pet. App. 37a-42a). And regardless, Congress's Indian legislation regularly impacts state affairs that are as critical (or more critical) than child-welfare proceedings. When the United States creates an Indian reservation, for example, it divests States of

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[12] Other examples include: the Indian Reorganization Act of 1934, which covers "persons of one-half or more Indian blood" and permits the creation of Indian country not near existing Indian lands, §§5108, 5129; the very first Indian statute—the Nonintercourse Act—under which a "tribe" is, *inter alia*, "a body of Indians of same or a similar race," *United States v. Candelaria*, 271 U.S. 432, 442 (1926); laws pertaining to tribal education and tribal housing, *e.g.*, 20 U.S.C. §7491(3) (Indian education benefits for descendants of federally recognized tribes); 25 U.S.C. §4131(a)(1) (off-reservation Indian housing); treaty rights that are not bound by reservation boundaries and that relate to economic, rather than self-government, issues, *e.g.*, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1007 (2019) (treaty right to travel "upon all public highways"); and laws that apply to terminated Tribes, state-recognized Tribes, or Tribes lacking "Indian country," *see Cohen*, §§3.02[8], [9], 3.03[1], at 163-70, 172; *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523, 534 (1998).

much of their jurisdiction—but that has never rendered these laws suspect. *E.g.*, *United States v. John*, 437 U.S. 634, 646-49, 652-53 (1978).

Nor does *Rice v. Cayetano*, 528 U.S. 495 (2000), support Petitioners' invented limit. *Rice* was a 15th Amendment challenge to a state classification that was expressly racial—*i.e.*, that singled out individuals "*solely* because of their ancestry or ethnic characteristics." *Id.* at 515 (emphasis added). Then, the *Rice* statute used that racial classification to "fence out" part of the electorate from elections for statewide office. *Id.* at 522. ICWA neither classifies by race nor concerns elections subject to the 15th Amendment. *Rice* has nothing to say about federal statutes, like ICWA, that classify based on tribal membership in order to advance the federal government's trust obligation.

3. Petitioners incorrectly claim that ICWA's "Indian child" definition classifies by race because "'biology' is [its] touchstone." Pet. 21. ICWA's touchstone is *tribal membership* (either existing or prospective). *Supra* 13. It relies on descent only to limit ICWA's Indian-child definition to individuals who are *both* "eligible for [tribal] membership" *and* "the biological child of a [tribal] member." §1903(4). This narrowing aspect of ICWA does not harm Petitioners one whit. And it is perfectly normal: Citizenship laws routinely consider whether someone is a citizen's biological child.[13] Nor does this

[13] Many countries determine "citizenship based on descent," including (to name a few) Ireland, Greece, Armenia, Israel, Italy, and Poland. Pet. App. 155a n.51 (Dennis, J.). The same is true of the United States, where many pathways to citizenship turn on parentage. 8 U.S.C. §1401(b)-(h). Indeed, citizenship extends to

aspect of ICWA turn the Indian-child definition into a proxy for race. Biological children of Cherokee Freedmen, for example, are ICWA "Indian children" even though they are not racially Indian—even as many racially Indian children are not (because their parents are not enrolled). In this respect, ICWA is narrower than the statute *Mancari* approved, which applied its preference to tribal members of "one-fourth or more degree of Indian blood." 417 U.S. at 554 n.24.

This same point shows why Petitioners get nowhere with their misleading reliance on the memorandum from then–Assistant Attorney General Patricia Wald. Pet. 15. Petitioners neglect to mention that her memorandum raised concerns about a *prior version* of the bill, which would have applied ICWA to any child eligible for enrollment even if no parent had enrolled. H.R. Rep. No. 95-1386, at 37-39, 1978 U.S.C.C.A.N. at 7560-62. Petitioners also omit that Congress responded by narrowing ICWA to require that the child's parent *also* have opted to maintain tribal ties by enrolling as a member. And Petitioners fail to disclose that, when Congress did so, Assistant Attorney General Wald explained that the change "for the most part[] eliminated" her concerns. *Id.* at 39, 1978 U.S.C.C.A.N. at 7561-62.

4. Petitioners badly misstate how ICWA works with their claim that its preferences classify by race by placing all non-Indian families "fourth in line." Pet. 23. To begin, this argument relies largely on the "other

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children born in the United States "to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe." *Id.* §1401(b).

Indian families" preference that is not at issue here (because Petitioners prevailed below). Pet. 23; *supra* 3, 10. Regardless, Petitioners' claim fails in every respect. ICWA's preferences place many non-Indian families *first* in line—whenever those non-Indians are members of a child's extended family. The "other Indian family" preference, meanwhile, *excludes* families that are racially Indian but whose members are not enrolled tribal members. Hence, many non-racially Indian families get the highest preference, while many racially Indian families would get the same preference as Petitioners.

5. Petitioners' cursory argument that ICWA "cannot survive any level of scrutiny," Pet. 24, is outside their question presented and lacks merit. ICWA's first two adoptive placement preferences—again, the only adoptive provisions at issue—rationally further Congress's twin goals of "protect[ing] the best interests of Indian children" and "promot[ing] the stability and security of Indian tribes." §1902. They do so, straightforwardly, by preferring placements with an Indian child's own family or Tribe, "in the absence of good cause" to depart. §1915(a)-(b).[14] Indeed, as Judge Haynes observed, these preferences would survive even strict scrutiny. Pet. App. 376a.

Petitioners complain, first, that ICWA's placement preferences are "underinclusive" because they do not apply "on Indian land[s]," where "tribal courts have

[14] Petitioners make no effort to show that ICWA's foster-care placement preferences do not also advance these goals. *Cf.* §1915(b).

exclusive jurisdiction." Pet. 24. Mere underinclusiveness, of course, *never* invalidates a statute on rational-basis review. *Yakima Nation*, 439 U.S. at 501. And here, the logic is obvious: Congress judged that tribal laws would adequately protect Indian children on Indian lands and that tribal child-welfare employees were unlikely to repeat the abuses that spurred ICWA.

Last, Petitioners aver that ICWA "overrides the wishes of biological parents who support their child's adoption outside the tribe." Pet. 24 (quoting Pet. App. 284a). But to begin, that as-applied concern could never justify invalidating ICWA *on its face*, particularly given that ICWA always allows departures from its preferences for "good cause." §1915(a)-(b). And regardless, this Court has already explained why Congress could rationally decline to enact a general exception along the lines Petitioners urge: "Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." *Holyfield*, 490 U.S. at 50. If individuals do not wish themselves or their children to be subject to Congress's special legislation governing members of Indian Tribes (including ICWA) they need only terminate their and their children's membership.

II. Petitioners' Article I And Anti-Commandeering Arguments Do Not Warrant Review.

The Fifth Circuit properly rejected the argument that ICWA's placement preferences exceed Congress's Article I powers or impermissibly commandeer state courts. Indeed, no Fifth Circuit judge accepted the

sweeping theories Petitioners press. Neither has any other court. Further review is unwarranted.

A. Petitioners' Article I Arguments Do Not Warrant Review.

Petitioners' five-paragraph argument that ICWA's placement preferences exceed Congress's Article I powers, Pet. 27-29, does not warrant review. Their core contention is that Congress's authority over Indians is limited to "commerce" (in the sense meant by the Court's Interstate Commerce Clause precedent) with "Indian tribes" (not individual Indians). Pet. 27-28. But for hundreds of years and without exception, this Court has held the opposite. Again and again, it has held that Congress has "plenary power … to deal with the special problems of Indians," "drawn both explicitly and implicitly from the Constitution itself." *Mancari*, 417 U.S. at 551-52.[15] The decision below properly followed this settled law to reject Petitioners' arguments.

With Petitioners' arguments so squarely foreclosed, it is no surprise that they identify no split. No case has deemed any aspect of ICWA (much less its placement preferences) to fall outside Congress's Article I

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[15] *See, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011); *United States v. Lara*, 541 U.S. 193, 200 (2004); *United States v. Wheeler*, 435 U.S. 313, 319 (1978); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *accord McGowan*, 302 U.S. at 539 ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." (citation omitted)); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) ("[Congress's] powers comprehend all that is required for the regulation of … intercourse with the Indians.").

authority. And the courts to have considered the issue have rejected Petitioners' arguments. *E.g.*, *In re Beach*, 246 P.3d 845, 849 (Wash. Ct. App. 2011); *In re Welfare of Child of S.B.*, 2019 WL 6698079, at *5; *In re N.B.*, 199 P.3d 16, 23 (Colo. App. 2007); *In re A.B.*, 663 N.W.2d 625, 636-37 (N.D. 2003). While Petitioners assert "confusion," Pet. 27, saying that does not make it so. As Judge Duncan recognized, "binding Supreme Court precedent" forecloses the narrow limits they urge. Pet. App. 232a.

First, as the Fifth Circuit unanimously concluded, this Court has held that the Indian Commerce Clause "accomplishes a greater transfer of power from the States to the Federal Government than does the interstate commerce clause." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996); *see* Pet. App. 100a (Dennis, J.); Pet. App. 232a (Duncan, J.). Nor is the Indian Commerce Clause the exclusive source of Congress's powers over Indians; instead, Congress's plenary authority rests on a constellation of express and implied powers. *United States v. Lara*, 541 U.S. 193, 200-02 (2004) (citing, *inter alia*, the Treaty Clause, Property Clause, and Congress's war and foreign-affairs powers). In reliance on that settled law, Congress has repeatedly enacted—and this Court has repeatedly endorsed—laws concerning Indians that do not relate to "commodities or objects of commerce." Pet. 28. That includes, as Judge Duncan observed, "[l]ongstanding … federal legislation … in non-commercial fields like criminal law, education, probate, health care, and housing assistance." Pet. App. 232a-33a (footnotes omitted); *e.g.*, 18 U.S.C. §1153; 25 U.S.C. §§1601, 2000, 2205, 4101-4243.

The Fifth Circuit was equally unanimous in rejecting Petitioners' argument that Congress possesses authority only over *Tribes*, not "Indian *persons*." Pet. 28 (quotation marks omitted); *see* Pet. App. 232a (Duncan, J.) ("Congress's authority … extends beyond regulating commerce *with Indian tribes*" (emphasis added)); Pet. App. 267a n.64 ((Duncan, J.) ("no one denies that federal power 'reaches the Indian family'" (quoting opinion of Costa, J.)). Again, that consensus was so overwhelming because this Court's cases are so clear: Long ago, the Court explained that "commerce with Indian tribes means commerce with the individuals composing those tribes." *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417 (1865). And again, Congress in reliance on that clear law has enacted hundreds of laws regulating individual Indians, which Petitioners' theory would invalidate. *E.g.*, 12 U.S.C. §1715z-13a; 18 U.S.C. §1153; 25 U.S.C. §§1601, 2000, 5108.

Petitioners' only argument that garnered any votes—that ICWA concerns an area "reserved to the States," Pet. 28—also lacks merit. For one thing, this Court has rejected the argument that Article I limits Congress from legislating in some ill-defined sphere of "traditional governmental functions." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985).[16]

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[16] The memorandum from then-Assistant Attorney General Wald, on which Petitioners again rely, Pet. 29, does not support their argument here either. Writing in 1978, the Department of Justice naturally worried about regulations of anything that might be deemed "a traditionally state matter." H.R. Rep. No. 95-1386 at 40, 1979 U.S.C.C.A.N. at 7563. This Court had just decided *National League of Cities v. Usery*, 426 U.S. 833 (1976), which limited Congress's authority to legislate "in areas of traditional [state]

Regardless, again, *Indian children* are not a traditional state sphere. *See Cohen* §5.04[2][b], at 408 ("Indian affairs is not an area of traditional state control."). The federal government has long legislated in this realm, which implicates the overlapping interests of multiple sovereigns—not just States, but Indian Tribes and the federal government that serves as the Tribes' "guardian and trustee." *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962). Indeed, Congress frequently made promises to Tribes concerning their children, including to several Respondents. *E.g.*, Treaty with the Cherokee, art. X, Dec. 29, 1835, 7 Stat. 478; Treaty with the Quinaielts, etc., art. X, July 1, 1855, 12 Stat. 971.[17] Nor, contra Petitioners, is ICWA unprecedented in regulating family-law proceedings. Congress has enacted such statutes time and again—both generally, *e.g.*, *McCarty v. McCarty*, 453 U.S. 210, 235-36 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979); International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988), and concerning Indians in particular, *e.g.*, 25 U.S.C. §375.[18]

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governmental functions," *id.* at 852, and had not yet overruled *Usery* in *Garcia*.

[17] *Accord* Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, etc., art. XIX, Feb. 23, 1867, 15 Stat. 513; Treaty with the Potawatomi, art. VIII, Feb. 27, 1867, 15 Stat. 531; Treaty with the Shawnee, art. VIII, 10 Stat. 1053; Treaty with the Choctaw, art. XIX, Sept. 27, 1830, 7 Stat. 333.

[18] ICWA's purported regulation of a "state sphere" also poses no constitutional problem because, in addition to being a proper exercise of Congress's Indian affairs power, ICWA is "authorized under Congress's Spending Clause powers." Pet. App. 74a n.20

Respondents recognize that one member of the Court has offered a more limited interpretation of Congress's power over Indian affairs. *See Adoptive Couple*, 570 U.S. at 658-66 (Thomas, J., concurring). But respectfully, that interpretation conflicts with this Court's cases, and later work has identified critical errors in the scholarship on which the opinion relied.[19]

B. Petitioners' Anti-Commandeering Arguments Do Not Warrant Review.

Petitioners' anti-commandeering arguments are also unworthy of review. ICWA "establish[es] … minimum Federal standards" governing child-welfare proceedings involving Indian children. §1902. The Fifth Circuit *unanimously* rejected Petitioners' theory that ICWA's placement preferences, by modifying "the substantive standards to be applied … in state-law causes of action," unconstitutionally commandeer state courts. Pet. 30. That decision implicates no split and is clearly correct.

1. When ICWA establishes federal standards that preempt conflicting state-law standards, it does the one thing that Congress can *most obviously* do without violating the anti-commandeering doctrine: establish preemptive federal rules of decision for state courts. True, "[f]ederal statutes enforceable in state courts do,

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(Dennis, J.) (noting that Tribal Respondents made this argument, but not resolving it).

[19] *See* Ablavsky 5th Cir. Amicus Br. at 12-15; *accord* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1023 n.48, 1028-32 (2015); Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 Stan. L. Rev. 1025, 1037 n. 42 (2018).

in a sense, direct state judges to enforce them." *New York v. United States*, 505 U.S. 144, 178-79 (1992). But "this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *Id.* This Court has repeatedly held that such bread-and-butter preemption poses no Tenth Amendment problem. *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018); *Printz v. United States*, 521 U.S. 898, 907 (1997).

2. Petitioners, unsurprisingly, cite no conflict on this settled point. No case has held that ICWA's placement preferences violate the Tenth Amendment by preempting state-law standards in state courts. Indeed, even the Fifth Circuit judges who agreed that ICWA impermissibly commandeers state executive agencies in certain respects—in the holdings challenged in the separate petitions by the United States and Respondents, *supra* 11—rejected the argument that ICWA's placement preferences are invalid "to the extent they apply to state courts." Pet. App. 9a; *see* Pet. App. 322a (Duncan, J.) ("To the extent those substantive standards compel state *courts* … we conclude they are valid preemption provisions.").

Indeed, Petitioners cite no case under *any statute* holding that Congress violated the anti-commandeering doctrine by modifying "the substantive standards [under] state-law causes of action." Pet. 30. That is not because this issue is novel. For hundreds of years, Congress has enacted federal standards that preempt state law in state courts, including in family law and under state-law causes of action. And for just as long, as Judge Duncan explained, this "Court has ruled that federal standards may supersede state standards even

in realms of traditional state authority such as family and community property law." Pet. App. 322a (Duncan, J.); *see also* Pet. App. 315a-17a; *Boggs v. Boggs*, 520 U.S. 833 (1997); *McCarty*, 453 U.S. at 232.

3. On the merits, Petitioners' arguments comprehensively fail. Principally, they fault the Fifth Circuit for distinguishing "between state legislatures and executive officers on the one hand, and state courts on the other." Pet. 30. In drawing that distinction, however, the Fifth Circuit merely did what this Court's cases direct: As *Printz* held, "courts … have been viewed distinctively" because "unlike legislatures and executives, they applied the law of other sovereigns all the time." 521 U.S. at 907.

Nor is there anything to Petitioners' claim that the decision below permits Congress to "circumvent" the anti-commandeering doctrine by, for example, "command[ing] state *courts* to conduct background checks of handgun purchasers" (as in *Printz*) or "take title to radioactive waste" (as in *New York*). Pet. 31. The Fifth Circuit did not embrace any such theory. It just rejected Petitioners' meritless argument that Congress cannot "alter substantive aspects of state claims," in child-welfare cases in state courts. Pet. App. 116a (Dennis, J.).[20]

Indeed, Petitioners' position would badly undermine federalism. They concede (as they must) that Congress

[20] For this reason, Petitioners cannot gain by invoking *United States v. Jones*, 109 U.S. 513 (1883). Pet. 31. That case addressed laws that imposed *executive* functions on state courts. *See Printz*, 521 U.S. at

could have enacted preemptive "federal cause[s] of action" governing Indian child-welfare proceedings and that "state courts [would be] obliged to hear" such causes of action under *Testa v. Katt*, 330 U.S. 386, 394 (1947). Pet. 30. But Petitioners would forbid Congress from respecting state sovereignty by preserving state-law causes of action and narrowly preempting select rules. Nothing in the Tenth Amendment requires that perverse result.

Finally, Petitioners claim that "ICWA's placement preferences cannot be justified as a form of federal preemption" because they cannot "be understood as a regulation of private actors." Pet. 31-32 (quoting *Murphy*, 138 S. Ct. at 1481); *see Murphy*, 138 S. Ct. at 1479. This argument is nonserious. *Every time* the placement preferences apply, they adjust the rights of an "Indian child" and regulate the competing claims of the "private actors" who seek to foster or adopt that child. §1915(a)-(b). Indeed, Petitioners trumpet that child-welfare proceedings "implicate fundamental rights" of "parents and children." Pet. 32.

III. This Case Is An Unsuitable Vehicle Because It Implicates Two Threshold Article III Issues.

This case is also an unsuitable vehicle for considering Petitioners' unmeritorious arguments. Before the Court could reach those arguments, it would have to address two Article III barriers—lack of redressability and present injury-in-fact. Moreover, because Texas *also* lacks standing to raise the arguments Petitioners press,

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906 (discussing *Jones*). *Jones* is no barrier to Congress preempting state law in cases already within the jurisdiction of state courts.

no litigant here has standing. Respondents' Br. in Opp. 32-37, *Texas v. Haaland*, No. 21-378. Certiorari would only embroil the Court in threshold Article III arguments that are not independently certworthy.

A. Redressability Is Absent.

This petition, as explained, arises out of three state-court child-welfare cases: The Brackeens' case seeking to adopt A.L.M., the Cliffords' case seeking to foster and then adopt Child P., and the Librettis' case seeking to foster and adopt Baby O. Pet. App. 51a-54a; *supra* 6-9. Petitioners' theory of standing was that ICWA imposed burdens on them in these proceedings, and that a federal-court order declaring ICWA unconstitutional would redress that injury. Pet. App. 65a-66a (Dennis, J.); *see* Pet. App. 387a-89a (Costa, J.). This theory, however, fails to establish redressability: A favorable decision from the federal courts below would never have bound the state-court judges who heard Petitioners' state-court cases.

To establish redressability, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And "[r]edressability requires that a court be able to afford relief *through the exercise of its 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) (Scalia, J., concurring in part) (emphasis in original). An Article III case-or-controversy does not arise simply because "a favorable decision in [one] case might serve as useful precedent for

respondent in" another lawsuit. *United States v. Juv. Male*, 564 U.S. 932, 937 (2011) (per curiam).

Here, no judgment from a federal district court could ever, via its legal effect, have redressed any injury Petitioners suffered from the placement preferences they challenge. Pet. App. 384a-385a. That is because all of their alleged injuries arise from orders of judges in the state-court lawsuits applying those preferences. *Supra* 6-9. But "no state family court [wa]s required to follow what" the district court or the Fifth Circuit said about ICWA's constitutionality. Pet. App. 384a (Costa, J.). Federal-court opinions, of course, do not bind state courts. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); *Lockhart v. Fretwell*, 506 U.S. 364, 375–76 (1993) (Thomas, J., concurring).[21] And while those state courts might (or might not) find the opinions below persuasive, that is irrelevant. In no event would the "exercise of [the federal court's] power" bind the state courts adjudicating Petitioners' cases. *Franklin*, 505 U.S. at 825 (Scalia, J., concurring in part). The rulings below were simply "advisory opinion[s]." Pet. App. 385a.

Nor does it matter that Petitioners now seek redress before this Court, whose decision *would* bind state courts. "[S]tanding is … determined as of the commencement of the suit … [and] at that point it could

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[21] *Accord Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam); *Blanton v. N. Las Vegas Mun. Court*, 748 P.2d 494, 500 (Nev. 1987), *aff'd*, 489 U.S. 538 (1989); *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. Ct. App. 2003) (all endorsing this principle).

certainly not be known that the suit would reach this Court." *Lujan*, 504 U.S. at 570 n.5.

B. No Petitioner Has Present Injury-In-Fact.

Standing is also absent because Petitioners suffer no present injury-in-fact from their child-welfare proceedings. "No principle is more fundamental to the judiciary's proper role … than the constitutional limitation … to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). And the requisite injury-in-fact "that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). A case becomes "moot … when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

The Brackeens never had injury-in-fact. Standing is assessed based on the operative complaint. *E.g.*, *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007); *County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991). And when Petitioners filed their second amended complaint, the Brackeens had already adopted A.L.M. Pet. App. 52a-53a. They thus faced no "concrete, particularized, and actual or imminent" injury-in-fact that is traceable to the placement preferences they challenge. *TransUnion, LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

Below, the Brackeens tried to dodge their lack of standing by relying on their later effort to adopt Y.R.J., A.L.M.'s half-sister. Pet. App. 64a-65a & n.15. But when

the Brackeens filed their operative complaint, Y.R.J. had not been born. Indeed, the Brackeens did not alert the district court to their effort to adopt Y.R.J. until after final judgment. Pet. App. 367a-368a, 371a. Such post-judgment evidence is irrelevant to Article III. "If [petitioners] [can]not me[e]t the challenge to their standing at the time of judgment, they [can]not remedy the defect retroactively." *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009).

As to the other Petitioners, mootness has overtaken their claims. The Librettis completed the adoption of Baby O. on December 19, 2018. Pet. App. 53a. ICWA's two-year period to collaterally attack that adoption has also now expired. §1913(d).[22] In January 2019, the Minnesota state court awarded custody of Child P. to her maternal grandmother. The Minnesota Court of Appeals affirmed, the Minnesota Supreme Court denied review, and the Cliffords did not seek this Court's review. Pet. App. 374a-375a & n.27.

Nor does the "'capable of repetition, yet evading review' exception" save this suit from mootness, as Judge Duncan incorrectly concluded. Pet. App. 225a-26a n.14 (Duncan, J.). This doctrine applies "only in exceptional situations," *Spencer v. Kemna*, 523 U.S. 1, 17 (1998), which this case is not. Even if ICWA's constitutionality could arise again in future child-welfare cases involving Petitioners, that issue cannot "evade

[22] Section 1914, which allows a collateral attack on a termination of parental rights, has been interpreted to apply the state-law limitations period, *see In re Adoption of Erin G.*, 140 P.3d 886, 889–93 (Alaska 2006), and that period also has expired.

review." Petitioners can always assert, and fully litigate, their constitutional arguments *in those cases*. Indeed, the Brackeens did just that in Y.R.J.'s case in Texas state courts (just as the Cliffords did in Minnesota state court). *See In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728, at *7-9 (Tex. App. Ct. Dec. 19, 2019, pet. denied); *In re Welfare of Child S.B.*, 2019 WL 6698079, at *3-4. Hence, "in no sense does that claim 'evade' review." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983); *see Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481-82 (1990).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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