No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

State child-custody proceedings generally are governed by state law, with placement decisions based on the child's best interests. The Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901–1963, however, dictates that, in any custody proceeding "under State law" involving an "Indian child," "preference shall be given" to placing the 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" rather than with non-Indian adoptive parents. *Id.* § 1915(a); *see also id.* § 1915(b). The en banc Fifth Circuit fractured over the constitutionality of the placement preferences, affirming in part the lower court's decision striking them down as unconstitutional.

The questions presented are:

1. Whether ICWA's placement preferences—which disfavor non-Indian adoptive families in child-placement proceedings involving an "Indian child" and thereby disadvantage those children—discriminate on the basis of race in violation of the U.S. Constitution.

2. Whether ICWA's placement preferences exceed Congress's Article I authority by invading the arena of child placement—the "virtually exclusive province of the States," *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975)—and otherwise commandeering state courts and state agencies to carry out a federal child-placement program.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. Petitioners Chad Everet Brackeen; Jennifer Kay Brackeen; Danielle Clifford; Jason Clifford; Altagracia Socorro Hernandez; Frank Nicholas Libretti; and Heather Lynn Libretti were plaintiffs in the district court and appellees before the court of appeals.

Respondents the State of Texas; the State of Indiana; and the State of Louisiana were also plaintiffs in the district court and appellees before the court of appeals.

Respondents Deb Haaland, in her official capacity as Secretary, United States Department of the Interior; Bryan Newland, in his official capacity as Acting Assistant Secretary for Indian Affairs; the Bureau of Indian Affairs; the United States Department of the Interior; the United States of America; Xavier Becerra, in his official capacity as Secretary, United States Department of Health and Human Services; and the United States Department of Health and Human Services were defendants in the district court and appellants before the court of appeals.[*]

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[*] In the court of appeals, Secretary Haaland was automatically substituted for her predecessor under Federal Rule of Appellate Procedure 43(c)(2). In the courts below, defendants-appellants included Ryan Zinke, David Bernhardt, and Scott de la Vega.

Acting Assistant Secretary Newland is automatically substituted for his predecessor under this Court's Rule 35.3. In the courts below, defendants-appellants included Michael Black, Tara Sweeney, John Tahsuda III, and Darryl LaCounte.

In the court of appeals, Secretary Becerra was automatically substituted for his predecessor under Federal Rule of Appellate

Respondents the Cherokee Nation; Oneida Nation; Quinault Indian Nation; and Morongo Band of Mission Indians were intervenor-defendants in the district court and intervenor defendants-appellants before the court of appeals.

Respondent the Navajo Nation was an intervenor-appellant before the court of appeals.

2. Petitioners are all individuals.

Procedure 43(c)(2). Defendants-appellants below included Alex Azar.

RULE 14.1(b)(iii) STATEMENT

Petitioners are aware of the following related cases:

- *Brackeen, et al.* v. *Zinke, et al.*, No. 4:17-cv-00868-O (N.D. Tex.) (final judgment entered October 4, 2018);
- *Brackeen, et al.* v. *Haaland, et al.*, No. 18-11479 (5th Cir.) (panel judgment entered August 9, 2019; en banc judgment entered April 6, 2021).

Petitioners are unaware of any other directly related cases in this Court or any other court, within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, and Heather Lynn Libretti respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the en banc court of appeals, Pet. App. 4a–409a, is reported at 994 F.3d 249 (5th Cir. 2021). The opinion of the three-judge panel of the court of appeals, Pet. App. 410a–80a, is reported at 937 F.3d 406 (5th Cir. 2019). The opinion of the district court, Pet. App. 485a–544a, is reported at 338 F. Supp. 3d 514 (N.D. Tex. 2018).

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2021. Pet. App. 1a–3a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the constitutional and statutory provisions are reproduced in the Appendix. Pet. App. 549a–66a.

INTRODUCTION

When a child comes into contact with a state child-welfare system, one of the first—and, as the Petitioners' cases vividly illustrate, one of the most consequential—determinations that the state must make is whether the child qualifies as an "Indian child" under the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. § 1903(4). If not, state law applies and the

child's placement is governed primarily by her best interests. If she is an "Indian child," however, ICWA dictates the application of an entirely different regime that treats her as a "resource" of an Indian tribe, 25 U.S.C. § 1901(3), and that is geared primarily to place "Indian children" with the "Indian community," H.R. Rep. No. 95-1386, at 23 (1978). Individualized consideration of her best interests is subordinated to Section 1915's placement preferences, which command that state courts, "under State law," prefer placing the child with an "Indian famil[y]"—that is, *any* family from *any* one of 574 Indian tribes—over *all* non-Indian families. 25 U.S.C. § 1915(a). ICWA then imposes a further series of mandates on state courts and state agencies to ensure that Congress's preference for routing Indian children to Indian adults is carried out. Whether a child is an "Indian child" changes virtually everything about that child's placement proceeding—especially when a proposed placement family is non-Indian.

The result, as this Court has already observed, is that ICWA hinders prospective adoptive parents "from seeking to adopt Indian children" and thus "unnecessarily plac[es] vulnerable Indian children at a unique disadvantage in finding a permanent and loving home." *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 653–54 (2013). This, the Court recognized, "rais[es] equal protection concerns." *Id.* at 656.

The en banc Fifth Circuit now has fractured over whether ICWA's separate child-placement system for Indian children violates equal protection or otherwise exceeds Congress's authority. Across six splintered opinions, eight judges concluded that all three of ICWA's placement preferences were constitutional,

six judges concluded that all three violated equal protection, and two judges concluded that at least the third placement preference was unconstitutional, resulting in an affirmance of the district court's invalidation of that provision. A different majority of the en banc court further held that certain provisions of ICWA violated the anti-commandeering doctrine, and an equally divided court affirmed the district court's holding that the preferences unconstitutionally commandeered state agencies. Yet another majority of the Fifth Circuit, however, upheld the placement preferences as applied to state *courts* based on the conclusion that the anti-commandeering doctrine provides no protections to state judiciaries.

The serious equal-protection and federalism concerns that divided the Fifth Circuit are not new. When ICWA was enacted, the Department of Justice raised similar concerns about ICWA's constitutionality. In the 43 years since ICWA's enactment, moreover, multiple lower courts have noted ICWA's constitutional problems. Indeed, this Court cautioned just eight years ago that ICWA raises equal-protection concerns.

This confusion and conflict over the constitutionality of a federal statute would be problematic in any context, but is untenable in the sensitive area of parent-child relationships. The legal uncertainty discourages foster and adoptive families and leads inexorably to delay in the disposition of placement cases that deprives the children involved of stability that is critical to their well-being. This Court's review is warranted.

STATEMENT

1. In the mid-1970s, Congress became concerned that "abusive child welfare practices" in certain States were "result[ing] in the separation of large numbers of Indian children from their families and tribes." *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32 (1989). Children were being "forcibly removed from Indian homes" by state officials "and sent off-reservation" to live with foster families. *Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction*: Hearings Before the Subcommittee on Indian Affairs, 93d Cong., 2d Sess., 95 (1974). Congress enacted ICWA to end those abuses and to help tribes "retain[] [their] children in [their] society." *Holyfield*, 490 U.S. at 37.

Congress's remedy, however, swept far more broadly than the identified problem. ICWA does not merely regulate placement proceedings involving children residing on Indian lands. In fact, ICWA does not apply *at all* in proceedings in tribal courts. *See* 25 C.F.R. § 23.103. Instead, ICWA regulates proceedings "under State law," imposing an array of federal mandates on state courts and agencies in any child-welfare or placement proceeding involving an "Indian child." Moreover, Congress broadly defines "Indian child" to include not just children who are members of Indian tribes, but also any child that is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). For these children—even those that are not tribal members and have lived their lives only under state jurisdiction—ICWA commands that "in the absence of good cause to the contrary," state courts and agencies must accord a preference to placing the 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); *see also id.* § 1915(b) (similar preferences for foster and pre-adoptive placement).

To ensure implementation of the "Federal policy that, where possible, an Indian child should remain in the Indian community," *Holyfield*, 490 U.S. at 37, ICWA imposes several additional mandates on state courts and agencies:

- Before any Indian child can be adopted, the state agency must make "active efforts" to prevent the breakup of Indian families. 25 U.S.C. § 1912(d); *see also* 25 C.F.R. § 23.122(a).
- State courts must notify the tribe associated with any Indian child of the proceeding and delay it to allow them to intervene. 25 U.S.C. §§ 1911(c), 1912(a).
- State courts must produce and maintain indefinitely records "evidencing the[ir] efforts to comply with" the placement preferences. 25 U.S.C. § 1915(e).

2. Petitioners each were confronted by ICWA's discriminatory regime when they became foster parents to an Indian child and later attempted to adopt that child.

a. The Brackeens are the adoptive parents to A.L.M., whose biological mother is Navajo, and whose biological father is Cherokee. Pet. App. 216a. When A.L.M. was ten months old, Texas officials removed him from his mother and placed him in the Brackeens' care. Ct. App. ROA.2684. After A.L.M.'s biological parents voluntarily terminated their parental rights,

the Brackeens sought to adopt A.L.M., with the support of both biological parents and the child's guardian ad litem. Pet. App. 216a. Even though A.L.M. was not a member of any tribe, the Navajo Nation was able to insert itself into the adoption proceedings because of his ancestry and "designate Navajo as A.L.M.'s tribe." *Ibid.*; *see also* Pet. App. 283a (Duncan, J.) ("the only reason A.L.M. is considered Navajo … is that representatives of the Cherokee and Navajo Nations reached an agreement in the hallway outside the hearing room that A.L.M. would become a member of the Navajo Nation" (cleaned up)). After he had lived with the Brackeens for over a year, the Navajo identified an alternative placement for A.L.M. with tribal members who were not related to A.L.M. and who lived in a different State. Pet. App. 216a. The state court denied the Brackeens' adoption petition after concluding that the Brackeens had failed to establish good cause to depart from ICWA's placement preferences. *Ibid*. Only after the Navajo Nation's placement withdrew did the Texas court grant the Brackeens' adoption petition in January 2018. Pet. App. 216a, 500a.

Yet, ICWA continues to hinder the Brackeens' attempts to foster and adopt children. The Brackeens have sought to adopt A.L.M.'s younger half-sister, Y.R.J., so that the siblings can grow up in the same home. Pet. App. 217a. Once again, Y.R.J.'s mother supports the Brackeens' efforts to adopt Y.R.J. *In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728, at *4 (Tex. Ct. App. Dec. 19, 2019); Pet. App. 284a–85a. But the Navajo Nation opposes Y.R.J.'s placement with the Brackeens and seeks to send Y.R.J. to live in another State hundreds of miles away with either a great-aunt or an unrelated Navajo couple, rather than with her brother A.L.M. Pet. App. 217a; *In re Y.J.*,

2019 WL 6904728, at *2. As with A.L.M., the Navajo designated Y.R.J. as an "Indian child" under ICWA by certifying that she is one half "Navajo Indian Blood." Pet. App. 278a. These proceedings are ongoing. *See In re Y.J.*, No. 20-0081 (Tex.).

b. The Cliffords were foster parents to Child P., whose maternal grandmother, R.B., is a member of the White Earth Band of Ojibwe. Pet. App. 217a–18a. When Child P. first entered foster care, the Band "notified the court that she was ineligible for membership." Pet. App. 218a. But when she was placed with the Cliffords, the Band "changed its position," first notifying the court that Child P. *was* eligible for membership, and then "announc[ing] that Child P. is a member." *Ibid*. As a result, Minnesota—which had initially supported the Cliffords' efforts to adopt Child P.—removed the child from the Cliffords and placed her with R.B. in 2018. *Ibid*. Child P. "cr[ied] uncontrollably" the entire time of her removal. Ct. App. ROA.2629. The state court concluded that the Cliffords did not establish good cause to deviate from ICWA's placement preferences. Pet. App. 218a. The Minnesota Court of Appeals affirmed. *In re Child of S.B.*, No. A19-0225, 2019 WL 6698079, at *6 (Minn. Ct. App. Dec. 9, 2019).[1]

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[1] Petitioners understand that Child P. has now been adopted by R.B. The Cliffords, however, intend to seek to foster and adopt children again in the future, and thus their challenge to Sections 1915(a) and (b) is capable of repetition but evading review. *See Honig* v. *Doe*, 484 U.S. 305, 318 n.6 (1988). Additionally, the Brackeens independently have standing to assert the equal-protection claim against the placement preferences. *See* Pet. App. 63a–66a (Dennis, J.); Pet. App. 225a–30a (Duncan, J.); *see also Rumsfeld* v. *F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing

c. The Librettis have cared for Baby O. since three days after her birth. Pet. App. 217a. Altagracia Hernandez is Baby O.'s biological mother. *Ibid*. Baby O.'s biological father is descended from members of the Yselta del sur Pueblo Tribe. *Ibid*. Ms. Hernandez chose to have the Librettis adopt Baby O., a decision that the biological father supported. Ct. App. ROA.2695–96. But the Tribe intervened in Baby O.'s custody proceedings and identified dozens of potential Indian-family placements. Pet. App. 217a. This severely delayed the Librettis' adoption of Baby O. because Nevada officials were forced to "diligent[ly] search" for ICWA-preferred placements, 25 C.F.R. § 23.132(c)(5), and methodically study each potential placement, Ct. App. ROA.2692. The Tribe eventually relented and the Librettis finalized their adoption of Baby O. in December 2018. Pet. App. 217a.

3. The Brackeens, Cliffords, Librettis, Ms. Hernandez, and the States of Texas, Louisiana, and Indiana brought this suit for injunctive relief and a declaration that ICWA and its implementing regulations are unconstitutional because they violate equal-protection guarantees and exceed Congress's Article I power, including by commandeering the States. They named federal agencies and officials as defendants, and several Indian tribes intervened as defendants. After the district court denied a motion to dismiss on standing grounds, *see* Pet. App. 219a, 509a n.6, the parties cross-moved for summary judgment.

The district court granted plaintiffs' motion in part and denied it in part. Pet. App. 486a. The court

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is sufficient to satisfy Article III's case-or-controversy requirement.").

held that the challenged provisions of ICWA and the implementing regulations violate the Constitution's guarantee of equal protection. Pet. App. 510a–11a, 521a. ICWA's application to "Indian child[ren]" (25 U.S.C. § 1903(4)) imposed a "racial classification" rather than a "political classification," and ICWA failed strict scrutiny because it was not narrowly tailored to an interest in maintaining a relationship between Indian children and tribes. Pet. App. 515a–21a. The district court further held that ICWA unconstitutionally commandeers state agencies and courts by "command[ing] states to *directly* adopt federal standards in their state causes of action." Pet. App. 532a.

4. A panel of the Fifth Circuit agreed with the district court that plaintiffs had standing to bring all of their claims, *see* Pet. App. 429a–32a, but split on the merits, with the majority finding no constitutional violations. *Compare* Pet. App. 441a–56a, *with* Pet. App. 475a–77a (Owen, J., concurring in part and dissenting in part).

5. The Fifth Circuit granted rehearing en banc, Pet. App. 547a–48a, and a 16-member en banc court reheard the case.[2]

In a 325-page decision with six separate opinions (none of which garnered a majority in full), the en banc Fifth Circuit affirmed the district court in part and reversed in part. The deeply divided en banc court: (1) held that ICWA's definition of "Indian child" and ICWA's first two placement preferences do not vi-

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[2] Senior Judge Wiener was on the original panel and participated in the en banc proceedings, but Judge Ho, who was recused, and Judge Wilson, who joined the court after the case was submitted, did not participate. *See* Pet. App. 5a n.*.

olate equal protection; (2) affirmed by an equally divided vote that the third placement preference *does* violate equal protection; (3) held that ICWA's placement preferences do not commandeer state courts, but affirmed by an equally divided court that they do commandeer state agencies; and (4) apart from the impermissible commandeering, Congress had Article I authority to enact ICWA. Pet. App. 5a–10a (per curiam).[3]

At the threshold, the en banc court agreed with the district court and the panel that Petitioners had standing to bring their constitutional claims. Pet. App. 6a–7a (per curiam).

Turning to the merits, a majority held that ICWA's "Indian child" definition was a "political classification" that survived rational-basis review. *See* Pet. App. 7a & n.3 (per curiam); Pet. App. 144a–71a (Dennis, J.); Pet. App. 363a (Owen, C.J.); Pet. App. 376a (Haynes, J.).

Judges Duncan, Smith, Elrod, Willett, Engelhardt, and Oldham sharply disagreed. Those judges recognized that "the fact that ICWA may apply depending on the degree of 'Indian blood' in a child's veins comes queasily close to a racial classification." Pet. App. 278a (Duncan, J.). But they saw no need to decide whether the "Indian child" classification was racial or political because they concluded that it fails even to rationally further Congress's avowed purpose of safeguarding the "existence and integrity of Indian tribes" and preventing the "br[eakup]" of "Indian families." 25 U.S.C. § 1901(3), (4). ICWA's separate standards for Indian children "extend beyond internal

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[3] Because no opinion garnered a majority vote in full, this petition will cite the separate opinions solely by the author's name.

tribal affairs and intrude into state proceedings," "cove[r] children only 'eligible' for tribal membership" (as happened to A.L.M., Y.R.J., and Child P.), and "overrid[e] the wishes of biological parents who support their child's adoption outside the tribe" (as happened to A.L.M., Y.R.J., and Baby O.). Pet. App. 279a–84a (Duncan, J.).

Next, eight judges concluded that ICWA's placement preferences were constitutional. *See* Pet. App. 161a–71a (Dennis, J.); Pet. App. 363a (Owen, C.J.). Six judges concluded that all three were unconstitutional. Pet. App. 286a & n.84, 287a–89a, 352a–53a & n.147 (Duncan, J.). Judge Jones expressed no view on the first two placement preferences, but agreed that the third placement preference was unconstitutional because "placing a tribal child with a *different* Indian tribe does not even conceivably advance the continued existence and integrity of the child's tribe." Pet. App. 206a n.†, 286a–87a. And Judge Haynes concluded that the first two placement preferences would survive strict scrutiny, but agreed that the third placement preference was unconstitutional. Pet. App. 376a (Haynes, J.). In sum, a narrow en banc majority upheld the first two placement preferences, and an equally divided court affirmed the district court's conclusion that the third placement preference is unconstitutional.

Addressing Petitioners' anti-commandeering argument, the en banc court struck down some provisions and upheld others. Judge Dennis took the view that ICWA's provisions do not unlawfully commandeer because they constitute "evenhanded regulation" of both state and private actors, and because congres-

sional commands to state courts can *never* be unconstitutional. Pet. App. 111a–16a, 123a–44a (Dennis, J.).

Judge Duncan's opinion, by contrast, reasoned that ICWA's multiple commands to state agencies were not "evenhanded regulation" of state and private activity because they (1) direct States to regulate their own citizens and (2) regulate States as sovereigns fulfilling their child-welfare duties. Pet. App. 307a–10a (Duncan, J.). His opinion also recognized that at least some congressional commands to state courts violate the Constitution, as "no authority supports the proposition that Congress may prescribe procedural rules for state-law claims in state courts." Pet. App. 321a. Finally, Judge Duncan concluded that ICWA's other "substantive child-custody standards applicable" to state courts are valid preemption provisions, although he acknowledged that ICWA "creates no federal cause of action" and thus does not "fi[t] neatly" into well-settled categories of preemption. Pet. App. 321a–22a.

The court thus reached an "intricate" alignment of votes on the anti-commandeering claims. Pet. App. 7a (per curiam). The en banc court upheld Section 1915's placement preferences as to *state courts*, but affirmed by an equally divided court that the preferences unconstitutionally commandeer *state agencies*. *See* Pet. App. 7a–9a & nn.6, 10. In addition, either a majority or an equally divided court concluded that Section 1912(a)'s notice provision, Section 1912(d)'s "active efforts" mandate, Section 1915(e)'s recordkeeping requirements, and Section 1951(a)'s placement-record provision unconstitutionally commandeer state actors. *See* Pet. App. 7a–8a & nn.5, 7–8 (per curiam); Pet. App. 294a–312a, 318a–19a (Duncan, J.). On the

other hand, a majority held that other ICWA provisions—Sections 1911(b), 1912(b)–(c), 1913(a)–(d), 1914, 1916(a), and 1917—validly preempt state law and do not commandeer state governments. *See* Pet. App. 8a–9a & n.9 (per curiam).

Finally, the court ruled 9-7 that Congress had authority under Article I to enact ICWA. *See* Pet. App. 75a–110a (Dennis, J.); Pet. App. 363a (Owen, C.J.); Pet. App. 376a (Haynes, J.). A plurality reasoned that ICWA was a lawful exercise of Congress's "plenary authority over all Indian affairs." Pet. App. 90a (Dennis, J.). The seven dissenting judges cautioned that "plenary" power is not "absolute," and concluded that ICWA's "intrusion on state child-custody proceedings" has no support in precedent, history, or founding-era congressional practice. Pet. App. 231a, 235a, 268a–69a (Duncan, J.).

REASONS FOR GRANTING THE PETITION

The Department of Justice, lower courts, and this Court all have indicated that ICWA's separate and unequal child-welfare system for "Indian children" raises equal-protection concerns. Indeed, this Court recognized eight years ago that ICWA raised "serious equal protection concerns," but construed the statutory provision at issue there so as to avoid the constitutional question. *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 656 (2013). Yet the issue remains unsettled, as the en banc Fifth Circuit's fractured opinion demonstrates.

That confusion now is amplified by the grave doubts surrounding Congress's power to enact ICWA's placement preferences. For more than a century this Court has recognized that child-placement matters "belong[] to the laws of the states and not to the laws

of the United States." *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890). Echoing the opinion of Justice Thomas in *Adoptive Couple*, 570 U.S. at 656–66 (Thomas, J., concurring), seven judges of the Fifth Circuit would have held that Congress lacks Article I power to regulate child-placement cases in state courts. Pet. App. 230a–69a. And even if Congress had such power to regulate child-welfare cases in state courts, the anti-commandeering principle forbids Congress from commanding States to effectuate Congress's federal child-welfare policy "under State law." 25 U.S.C. § 1915(a).

The time has come for the Court to resolve these issues. The uncertainty surrounding ICWA's constitutionality disrupts established family units. This tragedy is exemplified by Petitioners' experiences: Each of them wanted to give a child a loving home. Each of their adoption efforts was disrupted by ICWA. And these facts recur with alarming frequency across our nation. Only this Court can resolve the questions presented and provide stability and permanency in this sensitive area of family relations.

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER ICWA'S PLACEMENT PREFERENCES VIOLATE THE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION.

A. This case squarely presents the important, unsettled constitutional question of whether ICWA violates the Equal Protection Clause.

Whether ICWA draws unconstitutional, race-based classifications has haunted the statute from the beginning, with courts across the country splitting on the answer.

When ICWA was debated in Congress, the Department of Justice cautioned that applying ICWA based on "the blood connection between the child and a biological but noncustodial" tribal member "may constitute racial discrimination." H.R. Rep. No. 95-1386, at 38–39 (1978) (letter from Assistant Attorney Gen. Patricia Wald). Yet Congress nevertheless enacted a statute that sweeps within its grasp even children who are not tribal members, but are merely the "biological" children of tribal members. 25 U.S.C. § 1903(4). Justifying the legislation's focus on biology, a committee report observed that "[b]lood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe." H.R. Rep. No. 95-1386, at 20.

Since ICWA's adoption in 1978, courts have split over whether ICWA is constitutional. Some courts have concluded that ICWA "constitutes a violation of equal protection of the laws" because it makes distinctions "based on 'blood,'" and therefore "on its face invokes strict scrutiny," which it cannot survive. *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 730 (Cal. Ct. App. 2001); *see also In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (Cal. Ct. App. 1996) (recognizing ICWA's "serious constitutional flaws"); *cf. In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009) (declining to apply ICWA when it "will not result in the breakup of a Native American family" and noting that some courts have found such an interpretation "necessary to avoid serious constitutional flaws in the ICWA"); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at *16 (Tenn. Ct. App. Nov. 19, 1997) (interpreting ICWA not to apply to child that "has had no contact with the reservation" since birth and noting that "[s]ome courts have suggested that the ICWA would not be constitutional"

without such an interpretation). Others have disagreed. *See*, *e.g.*, *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003) ("We hold ICWA does not deny [the child's] right to equal protection."); *In re Baby Boy L.*, 103 P.3d 1099, 1107 (Okla. 2004); *In re N.B.*, 199 P.3d 16, 23 (Colo. App. 2007).

Eight years ago, this Court recognized ICWA's potential constitutional infirmity. It cautioned that if ICWA were interpreted to "put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian," it "would raise equal protection concerns." *Adoptive Couple*, 570 U.S. at 655–56. The Court thus interpreted ICWA narrowly to avoid those equal-protection concerns, holding that the preferences did not apply if no alternative party sought to adopt the child. *Ibid*.

This case, however, "squarely raises the 'equal protection concerns' forecast by [this] Court in *Adoptive Couple*." Pet. App. 284a (Duncan, J.). In the underlying child-custody proceedings, ICWA disadvantaged vulnerable children because of their ancestry. Tribes invoked ICWA to override application of the child's best interests under state law—and even to override the *biological parents' own placement wishes*—and state courts treated ICWA's strict placement preferences as dispositive. *See supra*, at 5–8.

The en banc Fifth Circuit's splintered decision underscores the confusion among lower courts over how equal-protection principles apply to ICWA. Given longstanding concerns about ICWA's compliance with the Constitution's guarantee of equal protection—as well as the life-altering consequences that the answer carries for the parents and children involved in custody proceedings across the country—this Court should grant review.

B. The decision below cannot be reconciled with this Court's precedents.

Review also is warranted because the equal-protection ruling that a narrow majority of the court below adopted flouts this Court's constitutional decisions.

1. Race discrimination in child-placement proceedings—including a policy of placing children with parents of the same race—is presumptively unconstitutional. *See Palmore* v. *Sidoti*, 466 U.S. 429 (1984). And this Court has repeatedly instructed that, generally, classifications based on "Indian" or "Native American" status are racial classifications subject to strict scrutiny. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 207–08, 213 (1995); *see also*, *e.g.*, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 476, 485 (1989) (plurality) (preference for "Indians" is "race-based measure" requiring "strict scrutiny"); *Loving* v. *Virginia*, 388 U.S. 1, 2, 5 (1967) (statutes prohibiting marriage between "white persons" and "Indians" are "racial classifications").

Indeed, federal law mandates that, for an Indian tribe to be recognized by the federal government, its membership must extend only to "individuals who descend from a historical Indian tribe," 25 C.F.R. § 83.11(e), and thus be based explicitly on "ancestry," which "*is* racial discrimination," *St. Francis Coll.* v. *Al-Khazraji*, 481 U.S. 604, 611, 613 (1987) (emphasis added) (observing that definitions of "race" include "tribe"). Thus, in *Rice* v. *Cayetano*, the Court indicated that a state "voting scheme that limits the electorate … to a class of tribal Indians" would be an impermissible racial classification. 528 U.S. 495, 520 (2000).

In a series of cases decided in the late 1970s, the Court carved out a "limited exception" (*Rice*, 528 U.S. at 520) to this general rule. Under this exception, a tribal classification may be regarded as "political rather than racial in nature"—and thus subject to a relaxed standard of review—if the classification identifies members of "quasi-sovereign" entities in furtherance of a "legitimate, nonracially based goal," such as laws providing for tribal "self-government" "on or near Indian lands." *Morton* v. *Mancari*, 417 U.S. 535, 552–54 & n.24 (1974).

In *Mancari*, the Court upheld a Bureau of Indian Affairs ("BIA") hiring preference for tribal members because "it applie[d] only to members of 'federally recognized' tribes" and it "further[ed] the cause of Indian self-government," and was therefore "political rather than racial in nature." 417 U.S. at 553–54 & n.24. As the Court noted, permissible classifications based on tribal status single out "tribal Indians living on or near reservations." *Id.* at 552.

Over the following five years, this Court issued six decisions applying the *Mancari* exception, in each case upholding Indian classifications that were limited to tribal membership and that advanced tribal self-government on or near Indian lands. *See Fisher* v. *Dist. Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 385, 390–91 (1976) (per curiam) (upholding federal law giving tribal courts exclusive jurisdiction "over adoptions involving tribal members residing on the reservation"); *United States* v. *Antelope*, 430 U.S. 641, 645–47 & n.7 (1977) (upholding federal criminal code that applied "only" to "enrolled tribal members" who committed a crime "within the confines of Indian country"); *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reserv.*, 425 U.S. 463, 466, 479–80

& n.16 (1976) (upholding federal law preventing States from taxing "on-reservation sales" by "members of the Tribe"); *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979) (upholding federal law authorizing state jurisdiction over Indian lands because the "classifications [were] based on tribal status and land tenure"); *Washington* v. *Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20, 688–89 (1979) (upholding treaty preserving rights of "members of [particular] Indian tribes" to fish in their "traditional tribal fishing grounds"); *Del. Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 79–86 (1977) (upholding federal law distributing treaty funds from sale of tribal lands based on tribal membership).

Crucially, *Mancari* and its progeny emphasized the limitations of their holdings, tying them closely to tribal membership and tribal self-government over Indian lands. *Mancari* likened the BIA's hiring preference to residency requirements for elected officials. 417 U.S. at 554. It then noted that "the BIA is truly *sui generis*," and the preference "d[id] not cover any other Government agency or activity," and so did not raise "the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations." *Ibid.*; *see also Moe*, 425 U.S. at 480 n.16 (declining to decide whether prohibition of cigarette sales to non-member Indians or Indians that had "left the reservation and become assimilated into the general community" would violate equal protection); *Antelope*, 430 U.S. at 649 n.11 (declining to decide whether subjecting Indians "to differing penalties and burdens of proof from those applicable to non-Indians" in criminal cases would violate equal protection).

Indeed, the Court has not upheld a statute under *Mancari* in over 40 years. To the contrary, in more recent years, this Court has confirmed that *Mancari* established a "limited exception," "confined to the authority of the BIA, an agency described as '*sui generis*.'" *Rice*, 528 U.S. at 520. *Rice* invalidated as an impermissible racial classification a special voting system allowing only Native Hawaiians to vote in elections for members of the State's Office of Hawaiian Affairs, which administered special programs for those with native Hawaiian ancestry. *Ibid.* The Court held that, *even assuming* it could "treat Hawaiians or native Hawaiians as tribes," it "does not follow from *Mancari* … that Congress may authorize … a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens." *Id.* at 519–20. Rather than "the internal affair of a quasi-sovereign," the elections at issue in *Rice* "are the affair of the State of Hawaii." *Ibid*. "To extend *Mancari* to this context," the Court concluded, "would be to permit a State, *by racial classification*, to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id.* at 522 (emphasis added).

Most recently, as noted above, this Court in *Adoptive Couple* observed that allowing a tribal member to invoke ICWA "to override the mother's decision and the child's best interests" "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian" and thus "raise equal protection concerns." 570 U.S. at 655–56.

In sum, this Court has permitted Indian classifications when they are based on tribal status and connected to tribal self-government and tribal lands. But

those classifications constitute racial discrimination "when deployed outside the tribal context," Pet. App. 277a (Duncan, J.), particularly in critical state affairs.

2. ICWA presents two distinct equal-protection problems. The first is its requirement that States administer a separate child-placement regime for "Indian children." 25 U.S.C. § 1903(4). The second is the placement preference accorded to Indian families over non-Indian families. *Id.* § 1915(a)–(b). The Fifth Circuit's decision, which upheld ICWA's segregated regime for "Indian children" and all but the most egregious placement preference, cannot be squared with this Court's precedents.

i. ICWA's capacious definition of "Indian child"—any minor that 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," 25 U.S.C. § 1903(4)—cannot be characterized as a "political classification subject to rational basis review," contrary to the holding of a majority of the court below. Pet. App. 160a.

First, ICWA subjects children who are not tribal members to ICWA's regime, sweeping within its grasp non-member children who are merely eligible for membership and are the "biological" children of tribal members. 25 U.S.C. § 1903(4)(b). Under Congress's regime, "biology" is the touchstone. So, for example, if a couple enrolled in a tribe had one adopted child and one biological child, neither of whom was enrolled in the Tribe, *only* the biological child—and *not* the adopted child—would be an "Indian child" under ICWA. ICWA's definition thus is expressly based on lineal descent, which is to say it is based on race. In fact, ICWA's definition would apply even in spite of the biological parent's wish *not* to enroll their child in

a tribe. This allows Indian tribes to "claim[]" any "children who are related by blood to such a tribe … solely on the basis of their biological heritage," *Bridget R.*, 49 Cal. Rptr. 2d at 527—as happened here, *see supra* at 5–8. By defining its applicability based on "biolog[y]," 25 U.S.C. § 1903(4), ICWA expressly draws "[d]istinctions between citizens solely because of their ancestry"—distinctions that "are by their very nature odious to a free people," *Rice*, 528 U.S. at 517.

A majority of the court below brushed aside the statute's explicit tie to ancestry as a "recogni[tion] that some Indian children have an imperfect or inchoate tribal membership." Pet. App. 152a, 159a (Dennis, J.). But this "is just a complicated way of saying that a child only *eligible* for membership may never become a member, and may have no other tangible connection to a tribe." Pet. App. 282a (Duncan, J.). Because ICWA governs the custody proceedings even for children who are not tribal members, it cannot fit within *Mancari*'s limited exception for certain classifications that "appl[y] only to members of 'federally recognized' tribes." 417 U.S. at 553 n.24.

Moreover, even if ICWA's application were limited to tribal members, it still would not fall within *Mancari*'s narrow exception because it operates in the "critical state affair[]" of state-court child-custody proceedings, rather than tribes' internal affairs. *Rice*, 528 U.S. at 522. "*Rice* said an Indian class could not be used 'in critical state affairs.'" Pet. App. 281a (Duncan, J.). State-court child-custody proceedings are indisputably a critical state affair. The relationship between "parent and child" is a subject that "belongs to the laws of the states and not to the laws of the United States." *Burrus*, 136 U.S. at 593–94. Thus, ICWA's race-based thumb on the scale extends "far beyond

Mancari … and infiltrates the kind of 'critical state affairs' that *Rice* forbade." Pet. App. 288a (Duncan, J.). In fact, ICWA's placement preferences apply *only* in state-court proceedings; they have no application *at all* in tribal courts. *See* 25 C.F.R. § 23.103(b)(1). As six judges below recognized, *Mancari*'s "limited exception" cannot be extended to this "new and larger dimension." *Rice*, 528 U.S. at 520; *see* Pet. App. 280a (Duncan, J.) ("By exporting a blanket Indian exception into state proceedings, ICWA violates *Rice* and severs any connection to internal tribal concerns.").

ii. ICWA racially discriminates for the additional reason that it places all non-Indian families trying to adopt an "Indian child" fourth in line, behind any member of the child's extended family, behind any member of the child's tribe, and even behind any "other Indian families" from any tribe whatsoever. 25 U.S.C. § 1915(a). This demonstrates that when Congress invoked a policy of keeping Indian children "in the Indian community," H.R. Rep. No. 95-1386, at 23, it was referring to the "Indian community" as a *race*.

As Judge Duncan noted, ICWA's "naked preference for Indian over non-Indian families" "violates the equal protection" guarantees of the Constitution. Pet. App. 288a–89a (Duncan, J.). A statutorily conferred contracting preference for "Native Americans" is subject to strict scrutiny, *Adarand*, 515 U.S. at 207–08, 227, and ICWA works the same way in the adoption context: Indian parents receive a preference. Because the Brackeens, Cliffords, and Librettis cannot be "'[Indian]' in terms of the statute," *Rice*, 528 U.S. at 499, ICWA denies them the ability to "compete on an equal footing" in the adoption process, *Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jackson-*

ville, 508 U.S. 656, 666 (1993). And the reason Petitioners cannot compete on equal footing is because they do not meet the preferred tribes' blood-quantum or ancestral requirements for membership—which is to say because of *their* non-Indian race. Under ICWA, "the race, not the person, dictates" the parents' placement rank. *Palmore*, 466 U.S. at 432.

iii. ICWA's placement preferences cannot survive any level of scrutiny. *See* Pet. App. 279a–89a (Duncan, J.) (concluding that ICWA violates even rational-basis review). When Congress enacted ICWA, it asserted an interest in safeguarding "the continued existence and integrity of Indian tribes" and "protecting Indian children." 25 U.S.C. § 1901(3). Yet for children who reside on Indian land, over whom tribal courts have exclusive jurisdiction, *see* 25 U.S.C. § 1911, the placement preferences have *no application at all*, 25 C.F.R. § 23.103. The preferences are thus massively underinclusive with respect to the stated objective of protecting Indian children.

Meanwhile, though ICWA cites an interest in safeguarding a tribe's children as a "resource … vital to the continued existence and integrity of Indian tribes," 25 U.S.C. § 1901(3), ICWA grants a preference to placements with other Indian tribes. But placing a tribal child with a *different* Indian tribe does not even conceivably advance the continued existence and integrity of the child's tribe.

Finally, "ICWA overrides the wishes of biological parents who support their child's adoption outside the tribe"—the very situation at issue here. Pet. App. 284a (Duncan, J.). "In other words, ICWA applies in circumstances entirely unlike those that gave rise to the law—situations where no Indian family is being 'broken up' by state authorities." *Ibid.* (quoting 25

U.S.C. § 1901(4)). This "makes nonsense of ICWA's key goal of preventing the break-up of Indian families" and "does nothing to further" that aim. Pet. App. 283a n.82, 285a.

Nevertheless, the en banc Fifth Circuit divided over how to evaluate ICWA's placement preferences. A 9-7 majority of the court below read *Mancari*'s limited exception as establishing a "broader proposition" that *any* Indian or Native American classification is a political classification subject to rational-basis review, even if it extends beyond tribal members and tribal lands, and even if it intrudes on the critical state affair of child-custody proceedings. Pet. App. 148a (Dennis, J.). That reasoning dramatically expands one of this Court's precedents (*Mancari*), misconstrues a second (*Rice*), and ignores a third (*Adoptive Couple*). *See* Pet. App. 283a n.82 (Duncan, J.) (criticizing the majority's analysis for "disregard[ing] what *Mancari*, *Rice*, and *Adoptive Couple* teach"). Still, eight of those judges concluded that ICWA's placement preferences were *constitutional* in their entirety, Pet. App. 160a–71a (Dennis, J.); Pet. App. 363a (Owen, C.J.), while six judges concluded that the preferences were *unconstitutional* in their entirety, Pet. App. 286a & n.84, 287a–89a, 352a–53a & n.147 (Duncan, J.), and two other judges concluded that at least the third placement preference—for "other Indian families"—violated the constitution, Pet. App. 376a (Haynes, J.); Pet. App. 206a n.† (Duncan, J.) (joined in relevant part by Judge Jones).[4]

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[4] Judge Dennis also feared that striking down ICWA's placement preferences could jeopardize the rest of Title 25, Pet. App. 146a, 157a n.52, but ICWA stands apart from most laws involving tribal Indians, and a judgment in Petitioners' favor would

This Court should provide much-needed clarity to child-custody proceedings occurring across the country, and reaffirm the principle it announced in *Rice*, *Adarand*, *Croson*, and countless other cases: "Distinctions between citizens solely because of their ancestry" are "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

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have little impact outside this context. Before Congress enacted ICWA, the *Mancari* Court noted that "[l]iterally every piece of legislation dealing with Indian tribes and reservations … single[s] out for special treatment a constituency of *tribal Indians living on or near reservations*." 417 U.S. at 552 (emphasis added). As noted above, this description applies to every statute that this Court has upheld under *Mancari*. *See supra* at 18–19. ICWA's placement preferences, by contrast, apply *only* outside of Indian lands, are not limited to tribal members, and bear no relationship to Indian self-government. To be sure, some courts have worried that applying equal-protection principles in this context may undermine a few nineteenth-century federal laws that are still on the books, such as the "[l]imitation of rights of white men marrying Indian women," or the provision forcibly "[p]lacing Indian pupils in Indian Reform School." *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 n.13 (E.D. Wash. 1965), *aff'd sub nom. Simmons* v. *Chief Eagle Seelatsee*, 384 U.S. 209 (1966). Indeed, to this day the U.S. Code forbids payments "to Indians while they are under the influence of intoxicating liquor," 25 U.S.C. § 130, and provides for pressing Indians into forced labor, *id.* § 137. But these statutes, like ICWA—and unlike the vast majority of Title 25—apply across the country to any "Indian," without regard to tribal land or tribal authority.

II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER CONGRESS EXCEEDED ITS ENUMERATED POWERS AND COMMANDEERED STATES BY ENACTING THE PLACEMENT PREFERENCES.

The confusion playing out in state-court child-custody proceedings throughout the country is compounded by persistent uncertainty over whether Congress had the power to enact ICWA's placement preferences in the first place. As seven judges below would have held, Congress does not possess the authority to regulate state-court child-placement proceedings. Pet. App. 230a–69a. Additionally, Congress cannot commandeer the States to carry out a federal child-welfare regime "under State law." 25 U.S.C. § 1915(a). This Court has exercised special care to ensure a proper balance in federal-state relations, and should do so again here.

A. Congress has no power to regulate child placements in state-court custody proceedings.

As seven judges of the Fifth Circuit concluded, ICWA is an "unheard-of exercise of" Congress's power that exceeds Article I's limits. Pet. App. 207a (Duncan, J.). Congress invoked its power to "regulate Commerce … with Indian tribes" as the source of its authority to enact ICWA. 25 U.S.C. § 1901(1). But because ICWA "involve[s] neither 'commerce' nor 'Indian tribes,' there is simply no constitutional basis for Congress' assertion of authority over such proceedings." *Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring).

ICWA does not regulate commerce. Under Article I, "commerce" means "instrumentalities, channels, or

goods involved in" trade. *United States* v. *Morrison*, 529 U.S. 598, 618 (2000). So, for example, a statute "relat[ing] to buying and selling and exchanging commodities" involves the "precise kind of traffic or commerce" covered by Congress's power to regulate "commerce with the Indian tribes." *United States* v. *Holliday*, 70 U.S. 407, 417 (1865). But children are not commodities or objects of commerce. *Cf.* U.S. Const. amend. XIII.

Nor does ICWA regulate commerce "with the Indian *Tribes*." U.S. Const. art. I, § 8, cl. 3 (emphasis added). Rather, the placement preferences govern the relationship between prospective parents (including non-tribal members) and "Indian children" (including non-tribal members). The Indian Commerce Clause "does not give Congress the power to regulate commerce with all Indian *persons* any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States." *Adoptive Couple*, 570 U.S. at 660 (Thomas, J., concurring).

What is more, Congress's departure from Article I's express limitations here occurs in an area that this Court long has recognized to be reserved to the States. The adoption of children is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975). Congress has no Commerce Clause power to regulate activities that have "always been the province of the States." *Morrison*, 529 U.S. at 618. Accordingly, Congress cannot regulate "family law (including marriage, divorce, and *child custody*)" under the Interstate Commerce Clause, *United States* v. *Lopez*, 514 U.S. 549, 564 (1995) (emphasis added), and it does not

gain that power simply because the child is an "Indian child."

ICWA is a "jarring" attempt to do what "no federal Indian law has ever tried": Require states to prefer Indian placements in "states' own administrative and judicial proceedings." Pet. App. 207a (Duncan, J.); *see also* H.R. Rep. No. 95-1386, at 39–40 (letter from Assistant Attorney Gen. Patricia Wald) (noting that ICWA raises a constitutional question because Congress likely lacks the "power to control" state-court custody proceedings and "override the significant State interest in regulating . . . what is a traditionally State matter"). Because "neither Supreme Court precedent nor founding-era practice justifies" Congress's intrusion of state child-placement proceedings, Pet. App. 207a (Duncan, J.), this Court should grant review to confirm that Congress still "possesses only limited powers," *Bond* v. *United States*, 572 U.S. 844, 854 (2014).

B. ICWA also commandeers states to carry out a federal child-placement program.

This Court's anti-commandeering precedents set forth a "simple and basic" principle that is "fundamental" to our federalist system of dual sovereignty: Congress lacks "the power to issue direct orders to the governments of the States." *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1475–76 (2018). Yet ICWA directly orders state courts to—"under State law," 25 U.S.C. § 1915(a)—carry out a federal program of routing Indian children to Indian adults. The en banc Fifth Circuit's conclusion that the Constitution permits such federal prescription of state law—at least as to state courts—cannot be squared with this Court's anti-commandeering cases and infringes state sovereignty. Given the significant federalism principles raised by the decision

below, this Court should grant the petition to ensure that the anti-commandeering doctrine, a bedrock of federalism, is not eroded.

1. ICWA's placement preferences rewrite the substantive standards to be applied "under State law" in state-law causes of action, 25 U.S.C. § 1915(a), which is tantamount to rewriting state family codes. In child-placement proceedings that do not involve an Indian child, state law makes the "best interests of the child" the "primary consideration." *E.g.*, Tex. Fam. Code §§ 153.002, 162.016; Minn. Stat. § 259.57(2)(a). ICWA supplants that standard—not through a federal cause of action, which state courts are obliged to hear, *Testa* v. *Katt*, 330 U.S. 386, 394 (1947), but rather by ordering state courts to graft onto state-law causes of action a strict hierarchical preference for Indian adoptive parents over non-Indian adoptive parents, 25 U.S.C. § 1915(a). The forcible application of Congress's own placement preferences to state-law adoption petitions unlawfully "reduc[es]" state courts "to puppets of a ventriloquist Congress." *Printz* v. *United States*, 521 U.S. 898, 928 (1997). There is "simply no way to understand [ICWA's placement preferences] as anything other than a direct command to the States," which "is exactly what the anticommandeering rule does not allow." *Murphy*, 138 S. Ct. at 1481.

The en banc Fifth Circuit, however, drew a sharp "distinction" between state legislatures and executive officers on the one hand, and state courts on the other. Pet. App. 111a (Dennis, J.). It held that "the anticommandeering principle … does not apply to properly enacted federal laws that state courts are bound to enforce." *Ibid.* The court below acknowledged that the placement preferences do not "fit[] neatly into" this

Court's precedents, Pet. App. 321a (Duncan, J.), but nevertheless concluded that the preferences are unconstitutional as applied to *state executive agencies*, but *not* as to *state courts*, *see* Pet. App. 9a (per curiam).

The court of appeals' decision to separate the state judicial branch from the other branches has no basis in text, history, or this Court's precedent. The Tenth Amendment reserves powers not delegated to the United States "to the States" in full—not to two-thirds of each State's branches of government. U.S. Const. amend. X. If the anti-commandeering principle allowed Congress to circumvent its dictates by simply placing the obligation to enforce federal policy on the state *court* rather than the legislature or executive, it would provide little protection at all. As the Court explained more than a century ago, Congress may not impose duties "on state tribunals" without "the consent of the states." *United States* v. *Jones*, 109 U.S. 513, 520 (1883). Otherwise, Congress could command state *courts* to conduct background checks of handgun purchasers, *see Printz*, 521 U.S. at 928, or take title to radioactive waste, *New York* v. *United States*, 505 U.S. 144, 162 (1992), or (for example) impose strict liability for tort claims or life sentences on certain criminal defendants—all "under State law," 25 U.S.C. § 1915(a); *see also The Federalist No. 33*, at 206 (C. Rossiter ed. 1961) (A. Hamilton) (Congress would "exceed[] its jurisdiction and infringe[] upon that of the State" if "by some forced constructions of its authority" it "should attempt to vary the law of descent in any State").

2. ICWA's placement preferences cannot be justified as a form of federal preemption, contrary to the en banc Fifth Circuit's conclusion. Pet. App. 8a–9a (per curiam).

For federal law "to preempt state law, it … must be best read as one that regulates private actors." *Murphy*, 138 S. Ct. at 1479 (cleaned up). ICWA is not best read as regulating private actors. Unlike federal laws prohibiting drug manufacturers from altering labels or granting airlines the right to engage in certain conduct, *see id.* at 1480 (collecting examples of laws that regulate private actors), ICWA's placement preferences do not tell individual adoptive parents or children what they can or cannot do. On the contrary, ICWA dictates how state courts and state agencies must administer and adjudicate state-law child-custody claims. Just as "there is no way in which" a federal law telling a state legislature not to revise its gambling laws "can be understood as a regulation of private actors," *id.* at 1481, there is no way in which a federal law telling a state court to adjudicate state-law causes of action so as to implement federally prescribed adoptive preferences can be understood as a regulation of private actors.

Congress's decision to enact a child-custody program and then walk away, leaving state courts and agencies "to govern according to Congress' instructions," *New York*, 505 U.S. at 162, yet still "under State law," 25 U.S.C. § 1915(a), infuses the statute with a "fundamental defect" that cannot be remedied and deserves this Court's review, *Printz*, 521 U.S. at 932.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT.

This case presents issues that carry profound, life-altering consequences for parents and children, and implicate fundamental rights. As the splintered en banc Fifth Circuit decision underscores, this Court's

guidance is desperately needed to resolve the confusion and uncertainty that lingers over every custody proceeding involving an "Indian child" across the Nation.

Each year, tens of thousands of American Indian children are adopted. *See* Nat'l Council for Adoption, Adoption Factbook V 109 (2011). The issues presented in this petition are critical to each of these children and the parents—both biological and adoptive—that are trying to provide a nurturing home for them. As Petitioners know all too well, ICWA's constitutionality can be the difference between adopting a child they love or seeing that child wrenched away from them.

Petitioners are not alone. Families across the country share similar stories of "hitting roadblocks while trying to adopt Native American" children because of the color of their skin. Jan Hoffman, *Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes*, N.Y. Times (June 5, 2019), https://nyti.ms/37giGEX. ICWA often engenders "[c]onfusion" for "non-Indian foster parents" who are "asked to give up the Indian child in their care to an adoption placement chosen—sometimes very late in the process—by the child's tribe," even if the placement was "a Native family with no relation to the child." Gabby Deutch, *A Court Battle Over a Dallas Toddler Could Decide the Future of Native American Law*, The Atlantic (Feb. 21, 2019), https://bit.ly/2TRlbKC.

Given the recurring and important nature of the issues presented, there is a pressing need for this Court to resolve whether ICWA, and particularly its placement preferences, violate the Constitution.

The fundamental rights at stake in this case further highlight the need for immediate review. "[F]ar more precious … than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953), the right to raise children is a liberty "essential to the orderly pursuit of happiness," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). This Court has "long recognized that freedom of personal choice in matters of family life is a fundamental liberty interest," *Bowen* v. *Gilliard*, 483 U.S. 587, 611–12 (1987) (cleaned up), and parents therefore have a "fundamental right" to "make decisions concerning the care, custody, and control of their children," *Troxel* v. *Granville*, 530 U.S. 57, 66–67 (2000) (plurality). Similarly, the right to custody of a child has occupied a special place in this Court's jurisprudence because a "deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." *Smith* v. *Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977).

The en banc Fifth Circuit's fractured opinion shows that legal uncertainty permeates child-custody proceedings under ICWA. Only this Court can definitively resolve what law applies to "Indian" children—ICWA, or an individualized consideration of the child's best interests under state law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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