No. 21-377

IN THE
Supreme Court of the United States

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

Petitioners,

v.

CHAD EVERET BRACKEEN, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Court should follow its normal practice by granting the petitions of the Tribes and the Solicitor General, which seek review of the decisions below declaring invalid aspects of the Indian Child Welfare Act ("ICWA"). It should also follow its normal practice by denying the petitions of Texas and the Individual Plaintiffs. Their arguments implicate no split, and the *en banc* Fifth Circuit roundly rejected their arguments, often unanimously.

Respondents would instead have this Court grant their blunderbuss petitions and vaguely consider whether ICWA *as a whole* violates "federalism" or "equal-protection" principles. Brackeen Br. 1-3. But that is not how this Court's certiorari docket works. And Respondents' invitation, if accepted, would undermine the focused presentation on which this Court's careful consideration depends. That is especially true given the significant standing issues this case raises, making this case even less appropriate for considering Respondents' unmoored challenges.

I. Respondents' Questions Presented Do Not Merit Review.

A. Respondents agree that the petitions of the Tribes and the United States should be granted, consistent with this Court's "'usual' practice 'when a lower court has invalidated a federal statute.'" Brackeen Br. 4; *see* Texas Br. 7. Here, that principle means granting certiorari to consider the six discrete sets of ICWA provisions that the decisions below found to violate the

anti-commandeering doctrine and to fail *Mancari*'s rational-basis test. Pet. 12-16.

Respondents claim that because they have also raised additional "federalism questions" and "equal-protection questions," the Court should grant their petitions too and consider "ICWA's constitutionality" writ large. Brackeen Br. 1-3. No appellate judge below, however, accepted most of Respondents' arguments: *No appellate judge* accepted their argument that ICWA draws racial classifications triggering strict scrutiny. Tribes' Opp. 14-15, *Brackeen v. Haaland*, No. 21-380 ("Tribes' *Brackeen* Opp."); Tribes' Opp. 18-19, *Texas v. Haaland*, No. 21-378 ("Tribes' *Texas* Opp."). *No appellate judge* accepted Respondents' argument that Congress's Indian-affairs powers should be interpreted *in pari materia* with the Interstate Commerce Clause. Tribes' *Brackeen* Opp. 23-25; Tribes' *Texas* Opp. 13-14. And *no appellate judge* accepted Respondents' argument that the anti-commandeering doctrine forbids Congress from requiring state courts to apply federal standards to state-created causes of action. Tribes' *Brackeen* Opp. 28-30; Tribes' *Texas* Opp. 25-26.

Respondents would nonetheless have this Court grant their petitions to consider every argument the *en banc* Fifth Circuit rejected. But that is not how this Court proceeds. The Court grants certiorari to consider focused issues that have divided federal appellate courts or state courts of last resort, or where due respect for Congress requires review of a statute that was invalidated. Sup. Ct. R. 10(a); *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992). The Court does not grant certiorari to opine broadly on the constitutionality of

statutory schemes in the ether. Indeed, as the Navajo Nation observes, *no* modern decision has considered an omnibus declaratory-judgment action against an entire piece of federal legislation (with the possible exception of *NFIB v. Sebelius*, 567 U.S. 519 (2012)).

That is for good reasons, both pragmatic and principled. Focused petitions beget focused presentation. This Court can readily consider whether the six discrete sets of ICWA provisions invalidated here are unconstitutional on the Tenth or Fourteenth Amendment grounds decided below. Respondents, by contrast, would turn this case into a circus, with many dozen statutory and regulatory provisions at issue under a slew of federalism and equal-protection theories never endorsed by any appellate court. That is no way to treat a foundational piece of federal legislation. Just like cases that are unripe, such actions threaten to "entangle [the Court] in abstract disagreements," *Abbott Laby's v. Gardner*, 387 U.S. 136, 148 (1967), and "involve[] too remote and abstract an inquiry for the proper exercise of the judicial function," *Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954).

That is all the more true given the breadth of the constitutional issues at stake. It is "an established part of [the Court's] constitutional jurisprudence that [it] do[es] not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues." *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 184 (1999). Rather, this Court waits until lower courts split, or invalidate a federal statute—demonstrating the existence of a

question that requires this Court's review. Any other approach violates "the cardinal principle of judicial restraint[:]if it is not necessary to decide [a question], it is necessary *not* to decide [it]." *PDK Laby's Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (emphasis added) (Roberts, J., concurring in part and concurring in the judgment).

These principles militate powerfully against granting Respondents' petitions. For forty years, courts have rejected similar facial challenges. *See* Tribes' *Brackeen* Opp. 14, 25; Tribes' *Texas* Opp. 12, 18-19, 31. Indeed, Texas elsewhere agrees (in the context of standing) that the Court should not grant certiorari on "broadly agreed-upon … questions." Texas Br. 8. That principle does not apply to standing questions, which this Court must address regardless. But it does apply to the broad challenges Respondents raise.

Here, moreover, granting Respondents' omnibus petitions would have the unfortunate effect of pushing this case into next Term. It would require a four-brief format incompatible with an April argument—whereas the streamlined petitions of the Tribes and the Solicitor General could be heard this Term.

B. Respondents' contrary arguments lack merit. First, they claim that the questions presented by the Tribes and the United States are "unnecessarily narrow" and that the Court should grant questions that "squarely present all of the relevant substantive issues that were before the en banc Fifth Circuit." Texas Br. 7; *see id.* at 11; Brackeen Br. 7, 11. In this Court, however, narrowness is a feature, not a bug. The *whole point* of this Court's certiorari jurisdiction is that it

typically *does not* address every argument raised below. *Yee*, 503 U.S. at 535-36.

Second, Respondents claim the decisions below leave constitutional questions "irreparably unsettled within the Fifth Circuit" and yield "confusion." Texas Br. 11-12; *see* Brackeen Br. 1. But on every argument Respondents raise that is outside the questions presented of the Tribes and the United States, Fifth Circuit law is clear: Respondents lost, often unanimously. And regardless, a "fractured outcome" in the Fifth Circuit, Brackeen Br. 1, is of no more consequence than a division among law-review articles. ICWA cases are not litigated in federal court. And the decisions below do not bind the state courts that actually decide ICWA cases.

Third, Respondents say the Court should grant their questions presented because they intend to raise their broad arguments anyway, based on the rule that they may "defend their judgment on any ground properly raised below." Brackeen Br. 8 (quoting *Reno v. Flores*, 507 U.S. 292, 300 n.3 (1993)); *see id.* at 7-8, 12. If Respondents want to waste pages of their merits briefs on arguments that no appellate court has ever accepted, that is their business. But again, this Court is not in the habit of crafting questions presented to accommodate such threats.[1] And again, if Respondents are going to raise those arguments, they are better considered in the

[1] That is especially true here because many of Respondents' arguments are foreclosed by this Court's precedent, which Respondents have not asked this Court to overrule. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 n.4 (2020) (Kavanaugh, J., concurring in part).

context of the discrete ICWA provisions addressed in the petitions of the Tribes and the United States, which lend themselves to a focused presentation.

Fourth, regardless, there is nothing to Respondents' claims that the questions they pose are inseparable from the questions presented by the Tribes and the United States. Whether aspects of ICWA violate the Tenth Amendment by commandeering States, for example, is separate from whether ICWA exceeds Congress's enumerated powers. Proof positive is that those issues received separate treatment both in the opinions below, *see* Pet. App. 107a (Dennis J.); *id.* at 238a-278a, 299a-339a (Duncan, J.), and Respondents' own petitions, *see* Pet. 27-32, *Brackeen v. Haaland*, No. 21-380; Pet. I, *Texas v. Haaland*, No. 21-378. *Accord* U.S. Opp. 31, *Brackeen v. Haaland*, No. 21-380; U.S. Opp. 19-20, *Texas v. Haaland*, No. 21-378.

Likewise on equal protection, whether ICWA's tertiary preferences for "other Indian families" and "Indian foster homes" satisfy *Mancari*'s rational-basis test—the only equal-protection issue any appellate judge resolved against the Tribes below—is separate from Respondents' (meritless) claims that ICWA facially discriminates based on race. Indeed, this Court is a "court of review, not of first view," *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017), making it even more inappropriate to grant petitions asking this Court to decide questions no appellate judge reached. *Accord* U.S. *Brackeen* Opp. 23.

Respondents' argument that a different approach is warranted here because ICWA is an "interlocking scheme," Brackeen Br. 12, is pure rhetoric. For

example, the "other Indian families" preference applies only in the rare cases where (1) no member of the child's "extended family" or "the Indian child's tribe" comes forward; and (2) another family from a federally recognized Indian Tribe *does* come forward. This Court can easily consider the rationality of that preference without wading into Respondents' meritless arguments that the other preferences are irrational or constitute racial discrimination.

Finally, Respondents urge that plenary review is necessary now because ICWA is important. *E.g.*, Brackeen Br. 7, 10; Texas Br. 1. "[B]ut the importance of [a] question does not justify [the Court] rushing to decide it." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009). That is especially true because ICWA has been the law of the land for 40 years and has succeeded so thoroughly that it has become the "gold standard" for child-welfare practices nationwide, not just for Indians. Pet. 2. The urgency Respondents try to create is entirely manufactured.

II. Texas And The Individual Plaintiffs Lack Article III Standing.

The Tribes' petition showed that Texas and the Individual Plaintiffs lacked standing to press the equal-protection challenge on which they prevailed below. Pet. 30-34. First, the Fifth Circuit's redressability theory—that state-court judges might choose to follow the decisions below—would upend Article III's case-or-controversy requirement by blessing "advisory opinions." Pet. App. 398a; *see* Pet. 32-33. Second, the Fifth Circuit should not even have reached that revolutionary theory because no Individual Plaintiff had

injury-in-fact: None of their adoptions implicated the "other Indian families" or "Indian foster homes" preferences the decisions below invalidated. Pet. 33-34. Indeed, no Individual Plaintiff had a live adoption proceeding that implicated *any* aspect of ICWA. *Id.*; *see* Tribes' *Brackeen* Opp. 34-36.

A. Respondents' arguments that the standing issues do not merit a separate question presented, Brackeen Br. 14-15; Texas Br. 7-8, 11, are low stakes. Because standing is a question this Court "is bound to ask and answer for itself," standing will be in the case regardless. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).[2] And anyway, it is eminently cert-worthy whether—as the *en banc* Fifth Circuit held—litigants may ground redressability on a judicial opinion's potential to persuade (read: advise) other judges. Pet. 32-33.

B. On the merits, Respondents' arguments fail to justify the errors in the Fifth Circuit's standing theories. Respondents contend that redressability exists because it is "substantially likely" that state courts in child-welfare cases would "consider" a favorable decision to be "authoritative," even if not binding. Brackeen Br. 19; Texas Br. 10–11. That claim is empirically dubious: The only state-court cases post-dating the decision below declined to treat it as controlling. *See Ronald H. v. Dep't of Health & Soc. Servs.*, 490 P.3d 357, 360 n.1 (Alaska

[2] Indeed, as the Tribes explained in their briefs in opposition, standing is also absent as to Respondents' anti-commandeering and Article I theories. Tribes' *Brackeen* Opp. 31-36; Tribes' *Texas* Opp. 33-37.

2021); *In re F.K.*, No. 21-0901, 2021 WL 4592828, at *3 n.4 (Iowa Ct. App. Oct. 6, 2021). More important, the Fifth Circuit relied on the *wrong type* of effect. "Redressability 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).

There is nothing to the contrary in *Utah v. Evans*, 536 U.S. 452, 459–60 (2002), from which Respondents borrow the "substantially likely" standard. There, the federal judgment would have commanded concrete action: "an injunction ordering the Secretary of Commerce to recalculate the [census] numbers and recertify the official result," which in turn would have been substantially likely to redress the plaintiff's injury (by yielding a "more favorable[] apportionment of Representatives"). *Id.* at 460-61.

Texas (but not the Brackeens) argues that redressability is present because state courts, though not bound by the decisions below, would be bound by *this Court's* judgment. Texas Br. 11. This Court, however, has already rejected that argument: Standing is "determined as of the commencement of [the] suit … [and] at that point it could certainly not be known that the suit would reach this Court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992).

Alternatively, Texas avers that a favorable result holding "that the placement preferences violate equal protection" would allow Texas to "ceas[e] enforcing" the placement preferences "without risking federal

funding." Texas Br. 10-11. But first, that argument skates over the fact that Texas has no equal-protection rights *to assert*: "The word 'person' in the context of the Due Process Clause … cannot, by any reasonable mode of interpretation, be expanded to encompass the States." *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966).[3] Second, Texas officials do not "enforce" the placement placements; courts do (and as the Tribes have explained, no victory below would have bound Texas courts). Tribes' *Texas* Opp. 35; *cf. Whole Woman's Health v. Jackson*, No. 21-463, 2021 WL 5855551, at *6 (U.S. Dec. 10, 2021) ("no case or controversy" exists "between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute").

C. Respondents also have no persuasive answer to their lack of injury-in-fact from the only placement preferences invalidated below—for "other Indian families" and "Indian foster homes." Pet. 33-34. Principally, the Individual Plaintiffs contend that "their Administrative Procedure Act ('APA') claim, which asks the Court to set aside ICWA's implementing regulations," gives them a free pass to challenge every aspect of ICWA. Brackeen Br. 15. APA claims, however, are no such magic bullet. Instead, this "Court has long held that a person suing under the APA must

[3] This same point answers Texas's argument that it is "an object" of the Final Rule and therefore has "standing to challenge it on any grounds." Texas Br. 9-10. Texas cannot challenge the Final Rule or ICWA based on constitutional provisions that grant it no rights. Nor may Texas assert *parens patriae* standing against the federal government. Tribes' *Texas* Opp. 33.

satisfy … Article III's standing requirements." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012); *see*, *e.g.*, *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019); *Bennett v. Spear*, 520 U.S. 154 (1997); *Franklin*, 505 U.S. 788. The Individual Plaintiffs do not try to show that they have any more standing to challenge the constitutionality of the Final Rule than ICWA itself.[4]

As to ICWA itself, the Individual Plaintiffs aver that they "face impediments and delays" and that "ICWA's placement preferences treat them unequally." Brackeen Br. 16-17. But again, they do not and cannot claim that the sole placement preferences *invalidated below* had any such effect. Respondents invoke this Court's statements that plaintiffs may have standing when "the government erects a barrier that makes it more difficult for members of one group to obtain a benefit," regardless of whether they would ultimately have gotten the benefit. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *accord Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (cited at Texas Br. 9). That principle, however, is irrelevant here—because the placement preferences at issue impose no such "barrier."

Regardless, while the Individual Plaintiffs describe their injuries in the present tense, they occurred years

[4] The Individual Plaintiffs incorrectly contend that Judge Costa "conceded" that they "have standing to assert their APA challenge." Brackeen Br. 15–16. The relevant part of Judge Costa's dissent was not addressing injury-in-fact. Pet. App. 408a.

ago. Tribes' Pet. 31, 33–34. *Past* injuries cannot establish standing for *prospective* relief. Instead, to obtain prospective relief, plaintiffs must show that the future injury alleged in their complaint is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

The Individual Plaintiffs cannot do so. As the Tribes have explained, the Individual Plaintiffs' child-welfare cases that supported the pleadings in this case have all ended. Tribes' *Brackeen* Opp. 34-36. The Individual Plaintiffs rely entirely on the Brackeens to establish injury-in-fact. Brackeen Br. 17. But the Brackeens had completed A.L.M.'s adoption before the Individual Plaintiffs filed their operative complaint. Tribes' *Brackeen* Opp. 34. And their effort to adopt Y.R.J. began *after* final judgment in the district court. *Id.* at 34-35.

The Individual Plaintiffs never answer this Court's square holding that if plaintiffs cannot meet "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). Instead, the Individual Plaintiffs cite *Davis v. FEC*, 554 U.S. 724, 736 (2008). But that case involved *mootness*—that is, it is a case where the plaintiff initially had standing. *Summers* explains that such post-judgment evidence, while perhaps evidence of a continuing live case or

controversy, cannot be used to establish standing *ab initio*. 555 U.S. at 495 n.*

CONCLUSION

The Court should grant the Tribes' and the United States' petitions but deny the petitions filed by Texas and the Individual Plaintiffs.

Respectfully submitted,

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December 21, 2021