NO. 21-376, 21-377, 21-378, 21-380

In the Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL., *Petitioners*
v.
CHAD EVERET BRACKEEN, ET AL., *Respondents*

CHEROKEE NATION, ET AL., *Petitioners*
v.
CHAD EVERET BRACKEEN, ET AL., *Respondents*

THE STATE OF TEXAS, *Petitioner*
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL., *Respondents*

CHAD EVERET BRACKEEN, ET AL., *Petitioners*
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL., *Respondents*

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

BRIEF OF AMICI CURIAE ADMINISTRATIVE LAW AND CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL., AND CHEROKEE NATION, ET AL.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are professors of administrative law, constitutional law, and related public law subjects at institutions around the United States. They have extensive experience studying and teaching the text, history, and structure of the Constitution, as well Supreme Court decisions relating to Congress's legislative powers and the supremacy of federal law. Their legal expertise thus bears directly on the constitutional issues in this case. *Amici* share an interest in the proper application of constitutional limits on Congress's authority to enact supreme federal law and state courts' obligations to decide properly presented federal questions.

A full list of *amici*, who submit this brief in their individual capacities and not on behalf of their institutions, appears in the Appendix.

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[1] Counsel of record for all parties received timely advance notice of the intent to file this brief and consented to the filing of the brief. Sup. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Indian Child Welfare Act (ICWA or the Act) is a valid exercise of Congress's authority to enact supreme federal law that applies in state court proceedings by virtue of the Supremacy Clause. Four structural principles—each longstanding, and each relied upon by the political branches—should be uncontroversial in this case.

First, Congress has the constitutional authority to enact a statute that implements treaties with Native Nations and fulfills the U.S.'s unique responsibility to them. ICWA is just such a statute. In enacting ICWA, Congress found that its provisions would implement the "Federal responsibility to Indian people," including responsibilities arising under treaties between Indian Tribes and the United States. 25 U.S.C. § 1901. Thus, Congress exercised what this Court has called its "broad" constitutional authority over Indian affairs, which stems from multiple sources and includes the power to implement Indian treaties. *See United States v. Lara*, 541 U.S. 193 (2004).

Since the Founding, Congress has enacted statutes to implement Indian treaties. This Court has confirmed Congress's authority to do so. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-62 (1832). Nothing in this Court's jurisprudence concerning treaties with foreign nations calls this constitutional authority to implement Indian treaties into question. To the contrary, this Court has held that Congress may imple-

ment a treaty by enacting legislation "as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power." *Neely v. Henkel*, 180 U.S. 109, 121 (1901); *accord Missouri v. Holland*, 252 U.S. 416 (1920). *Amici* State of Ohio and State of Oklahoma call for this Court to overrule its precedents concerning foreign treaties and hold that the Necessary and Proper Clause does not afford Congress the authority to enact legislation implementing treaties. Ohio & Okla. *Amici* Br. 29. Because, however, Congress relied upon the full scope of its authority in Indian affairs when enacting ICWA, this case does not present that question. Even if it did, this Court has never adopted their crabbed reading of the Necessary and Proper Clause, and for good reason: It would radically restrict Congress's exercise of all of its enumerated powers and hobble the President's ability to negotiate treaties with foreign nations.

Second, Congress has the authority to enact supreme federal law that state judges must apply when adjudicating state law causes of action. To hold otherwise would threaten not only federal statutory protections for Indian children, but also well-settled principles of our federal system that stem from the Supremacy Clause. That Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art.VI, cl. 2. Congress's constitutional authority over Indian affairs authorizes it to enact federal law regulating Indians that preempts state laws. *See Oklahoma v. Castro-*

Huerta, 142 S.Ct. 2486, 2503 (2022). Yet ICWA's challengers and their *amici* argue that Congress's decision to do so through ICWA violates the anticommandeering doctrine.

The anticommandeering doctrine does not exempt state judges from the Supremacy Clause. In *Murphy v. NCAA*, this Court reaffirmed that "federal law is supreme in case of a conflict with state law." 138 S.Ct. 1461, 1479 (2018); *see New York v. United States*, 505 U.S. 144, 178 (1992) (anticommandeering doctrine does not prohibit Congress from enacting federal "laws enforceable in state courts"). Where ICWA's federal standards concerning the adoption or placement of Indian children apply, they are binding on state court judges in child custody proceedings and preempt conflicting state laws. Contrary to arguments of the individual plaintiffs and their *amici*, the anticommandeering doctrine does not extend so far as to permit state judges to ignore binding federal law when they adjudicate state law causes of action.

Third, Congress has the authority to regulate state actors through evenhanded laws that confer rights and impose the same responsibilities on state actors and private parties alike. In *Murphy*, this Court reaffirmed first that a statute does not violate the anticommandeering doctrine when it "imposes restrictions or confers rights on private actors," and, second, that the anticommandeering doctrine does not prohibit Congress from regulating state actors through "evenhanded" regulations that apply to states and private parties. 138 S.Ct. at 1461, 1480. Under those principles, ICWA's rights-conferring, generally applicable provisions may apply to state child welfare agencies and private organizations alike.

Fourth, the nondelegation doctrine does not prohibit Congress from incorporating another sovereign's policy judgments into a federal regulatory scheme. *United States v. Sharpnack*, 355 U.S. 286 (1958). Under this principle, Section 1915(c) of ICWA, which incorporates Native Nations' sovereign policy judgments concerning Indian child welfare, is constitutional. And even if Section 1915(c) were understood to delegate federal authority, the Supreme Court has unanimously held that Congress may delegate such authority to Tribes when, as here, it involves a Tribe's "internal and social relations." *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

ARGUMENT

I. CONGRESS HAS THE POWER TO ENACT STATUTES THAT IMPLEMENT TREATIES WITH NATIVE NATIONS AND FULFILL ITS UNIQUE RESPONSIBILITY TO THEM

The United States and federally recognized Native Nations have a unique "government-to-government" relationship under federal law. *See Lara*, 541 U.S. at 202. This unique relationship is reflected in the sources and limits on federal authority in Indian affairs. Federal authority, while broad, "is subject to limitations," including "pertinent constitutional restrictions" as well as the trust responsibility that the federal government owes to Native Nations. *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935); *see* Nell Jessup Newton et al., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[2][a] (2012)

("although congressional power is broad, it is subject to constitutional limitations"). Congress's constitutional authority in Indian affairs arises from a constellation of explicit constitutional provisions and structural principles implicit in the Constitution. *See Lara*, 541 U.S. at 200, 204; *Morton v. Mancari*, 417 U.S. 535, 552 (1974). Congress may exercise its legislative authority in order to fulfill its "unique obligation toward the Indians." *Mancari*, 417 U.S. at 541-42, 555; *cf. Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83–84 (1977) (explaining that "the legislative judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians'" (quoting *Mancari*, 417 U.S. at 555)).

Just as it had done in countless laws stretching back to the first Trade and Intercourse Act of 1790, Congress enacted ICWA based upon its constitutional authority in Indian affairs and acted to fulfill the unique "Federal responsibility to Indian people," which, it found, is based upon federal "statutes, *treaties*, and the general course of dealing with Indian tribes." *See* 25 U.S.C. § 1901 (emphasis added). The States of Ohio and Oklahoma, appearing as *amici*, suggest that ICWA's reference to Indian treaties presents an opportunity for this Court to overrule its precedent concerning Congress's authority to enact statutes that implement treaties with *foreign* nations. Ohio & Okla. *Amici* Br. 29. But this case does not present that question.

A. Congress Enacted ICWA Against the Backdrop of Its Longstanding Practice of Implementing Indian Treaties and Fulfilling Its Unique Responsibility to Indians as Well as This Court's Repeated Reaffirmations of Its Authority to Do So

As a matter of history and tradition, there should be no doubt that Congress has the power to enact a statute that implements treaties with Native Nations, fulfills the U.S.'s unique responsibilities to them, and preempts conflicting state law. Indeed, "for much of the Nation's history, treaties, *and legislation made pursuant to those treaties*, governed relations between the Federal Government and the Indian Tribes." *Lara*, 541 U.S. at 201 (emphasis added).

The established practice, beginning with the first Trade and Intercourse Act of 1790, was for Congress to enact laws "to effectuate treaty promises of protection" made by the United States to Indian Tribes. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 201 (1984). Congress did not confine itself to implementing specific treaty promises when implementing its duty of protection to Tribes. Instead, the Trade and Intercourse Acts implemented the unique federal responsibility owed to all Native Nations, just as ICWA did two centuries later. As implementing legislation, the Trade and Intercourse Acts "were not controversial exercises of congressional power." *Id.* Rather, the Treaty and Necessary Proper Clauses, together with the Indian Commerce Clause, provided congressional authority to enact the Trade and Intercourse Acts. *See id.*; *see also United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 196–197 (1876) (holding

that Congress had authority to implement treaty by enacting statute criminalizing introduction of liquor into Indian Country and referring to the treaty power and the commerce power).

In *Worcester v. Georgia*, this Court confirmed that Indian treaties and implementing legislation are supreme federal law. *See* 31 U.S. (6 Pet.) at 562. *Worcester* held that laws of the State of Georgia were "void" because they conflicted with federal constitutional law, treaties between the Cherokee Nation and the U.S., and federal statutes. *Id.* In particular, the State's laws were "in direct hostility with treaties" between the Cherokee Nation and the U.S., *and* "in equal hostility with the acts of congress for regulating this intercourse, and giving effect to the treaties." *Id.* at 562; *see also Castro-Huerta*, 142 S.Ct. at 2503 ("a State's jurisdiction in Indian country may be preempted . . . by federal law").

This Court has repeatedly held that Congress has authority to enact supreme federal law that implements agreements between Native Nations and the United States. Even though the U.S. ended the practice of entering into formal treaties with Native Nations in 1871, Congress has continued to ratify agreements with them. And this Court has held that such agreement-implementing legislation is supreme federal law under the Supremacy Clause. *See Antoine v. Washington*, 420 U.S. 194, 204-05 (1975) (holding that Congress may "legislate . . . federally protected rights into law" by "enacting . . . implementing statutes that ratified an Agreement" between Native Nations and the U.S.).

Against this backdrop, ICWA's references to Indian treaties and the unique "Federal responsibility to Indian people" are unexceptional. 25 U.S.C. § 1901.

ICWA protects the rights of children and parents by allocating jurisdiction over child custody proceedings among Indian Tribes and the states, providing procedures for custody proceedings in state courts, and providing for a system of preferences for the placement of Indian children. *See, e.g.*, 25 U.S.C. §§ 1911, 1912, 1915. These federal rights and procedures were necessary, Congress found, to address widespread bias in state and private welfare agencies and violations of the due process rights of Indian children and parents in state courts, which had led to the "'wholesale removal of Indian children from their homes.'" *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-33 (1989); *see* 25 U.S.C. §§ 1901-1902; H.R. Rep. No. 95-1386, at 10-12 (1978) (explaining that prior to ICWA, Indian child welfare decisions in "most cases, [were] carried out without due process of law"). Redressing these systemic rights violations, Congress concluded, would fulfill the federal "responsibility for the protection and preservation of Indian tribes and their resources[,]" which Congress had "assumed" "through statutes, treaties, and the general course of dealing with Indian tribes." 25 U.S.C. § 1901(2).

B. ICWA Does Not Present an Opportunity for This Court to Revisit Its Precedent Concerning Congress's Authority to Implement Treaties with Foreign Nations

Seizing upon ICWA's reference to treaties, *amici* Ohio and Oklahoma suggest that this Court should overrule its precedent concerning Congress's authority under the Necessary and Proper Clause to implement treaties with foreign nations. In particular, the *amici* argue that this Court should overrule *Missouri v. Holland* to the extent it held that "[i]f the treaty [with

a foreign nation] is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. 416, 432 (1920); *see* Ohio & Okla. *Amici* Br. 29. But this is not a case in which the validity of a federal statute rests solely upon a treaty and Congress's authority to implement it under the Necessary and Proper Clause. And, therefore, this case does not present the question that *amici* Ohio and Oklahoma raise.

The Treaty and Necessary and Proper Clauses together are a source—but not the only source—of congressional authority to enact statutes addressing Indian affairs. The Treaty Clause affords the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties," including treaties with Indian Tribes. U.S. Const. art. II, § 2, cl. 2. And the Necessary and Proper Clause, in turn, is one source of Congress's power to implement treaties with Native Nations and fulfill its trust responsibility to them. *See* U.S. Const., art. I, § 8, cl. 18; *Lara*, 541 U.S. at 204. But so too is the Indian Commerce Clause, to name but another source of Congress's authority in Indian affairs. *See 43 Gallons of Whiskey*, 93 U.S. at 196-97.

Congress's constitutional authority in Indian affairs arises from both constitutional text and structure. In *Mancari*, this Court explained, Congress's power to legislate with respect to Indian affairs "is drawn both explicitly and implicitly from the Constitution," including the Indian Commerce Clause, the treaty power, and the war power, and may be exercised to "fulfill[] . . . Congress' unique obligation toward the Indians." 417 U.S. at 551, 555. And in *Lara*, this Court reaffirmed that "[t]he Constitution grants Congress

broad general powers to legislate in respect to Indian Tribes" through the Indian Commerce Clause, the Treaty Clause, and the Necessary and Proper Clause, not to mention the Property Clause. 541 U.S. at 200, 204.

In enacting ICWA to fulfill the "Federal responsibility to Indian people," Congress did not rely solely upon Indian treaties as the source of its constitutional authority. 25 U.S.C. § 1901. To the contrary, Congress was explicit in its reliance upon the full scope of its constitutional authority. It cited the Indian Commerce Clause as well as "other constitutional authority" to legislate with respect to Indian affairs. *Id.* § 1901(1). And Congress pointed to Indian treaties as well as statutes and the longstanding "course of dealing" between Tribes and the U.S. as sources of "the responsibility for the protection and preservation of Indian tribes and their resources" that it aimed to fulfill with ICWA. *Id.* § 1901(2). The U.S. government made treaty promises to multiple Native Nations to protect the welfare of Indian children. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and Federal-Trust Trust Relationship*, 95 NEBRASKA L. REV. 885, 890 (2017) (discussing the "numerous ratified treaties" in which the U.S. promised "to guarantee the safety, education, welfare, and land rights of Indian children"). Unsurprisingly, therefore, Congress cited Indian treaties as one—but not the only—basis for ICWA. 25 U.S.C. § 1901(2).

ICWA thus does not present an opportunity for this Court to revisit *Holland*. To reach the question that Ohio and Oklahoma raise, this Court would have to ignore (or reject) all the other "constitutional authority" that Congress cited when enacting ICWA.

See 25 U.S.C. § 1901(1). And not just that: this Court would also have to assume that Congress's authority to implement Indian treaties has precisely the same scope (and limits) as its authority to implement foreign treaties under the Necessary and Proper Clause, notwithstanding the government-to-government relationship and unique "Federal responsibility" that Congress owes "Indian people." *Id.* § 1901.

In any event, "it has long been assumed"—and was explicitly stated by this Court prior to *Holland*—"that Congress can use [its] Necessary and Proper Clause authority to implement treaties." Curtis A. Bradley, *Federalism, Treaty Implementation, and Political Process: Bond v. United States*, 108 AM. J. INT'L L. 486, 488 & n.16 (2014) (citing *Neely*, 180 U.S. at 121). In *amici*'s view, however, the Necessary and Proper Clause does not furnish Congress with the authority to implement the U.S.'s commitments under valid treaties, but only to support the making of treaties. Ohio & Okla. *Amici* Br. 30. If adopted, this rule would hobble the President's ability to make credible promises and negotiate treaties with foreign nations.

Amici's reading of the Necessary and Proper Clause also would radically restrict Congress's exercise of its enumerated powers. As this Court put it in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, Congress's "power to 'make all Laws which shall be necessary and proper for carrying into Execution' the powers enumerated in the Constitution, Art. I, § 8, cl. 18, vests Congress with authority to enact provisions 'incidental to the [enumerated] power, and conducive to its beneficial exercise.'" 567 U.S. 519, 559 (2012) (quoting *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 418 (1819)). *McCulloch* provided a pertinent example to illustrate

what it means for Congress to enact laws "incidental" to an enumerated power and "conducive to its beneficial exercise": Congress has the enumerated power "to Establish Post Offices and post Roads." U.S. Const. art. I, § 8, cl. 7. As Chief Justice Marshall pointed out in *McCulloch*, strictly speaking, "[t]his power is executed, by the single act of making the establishment." 17 U.S. (4 Wheat.) at 417. But, Chief Justice Marshall continued, "from [the power of establishing post offices and post roads] has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail." *Id*. Those powers might not be "indispensably necessary to the establishment of a post-office and post-road." *Id.* But, this Court concluded, they were "indeed essential to the beneficial exercise of the power." *Id.*; *see also United States v. Comstock*, 560 U.S. 126, 144-45 (2010) (citing this example); *id.* at 169 & n.8 (Thomas, J., dissenting) (same). Congress's authority to enact statutes implementing valid foreign treaties is similarly "essential to the beneficial exercise of the power" of the President, with the advice and consent of the Senate, to make treaties. Thus, *amici* have provided no good reason to revisit this Court's precedent confirming Congress's authority to implement treaties.

II. THE ANTICOMMANDEERING DOCTRINE DOES NOT EXEMPT STATE COURT JUDGES OR STATE AGENCIES FROM APPLYING FEDERAL LAW THAT CONFERS RIGHTS AND IMPOSES EVENHANDED REGULATIONS

With ICWA, Congress enacted preemptive federal law that state court judges must apply and imposed the same responsibilities upon both state and private actors when they seek to remove Indian children from their families. That is not unconstitutional commandeering.

A. Congress Has the Authority to Enact Supreme Federal Law That State Judges Must Apply When Adjudicating State Law Causes of Action

ICWA is a federal law enforceable in state court child welfare proceedings involving Indian children. To the extent that it affects the adjudication of a state law cause of action, ICWA is indistinguishable from countless federal statutes that this Court and the lower federal courts have applied in cases involving state causes of action. On this point, the Supremacy Clause's text is clear and admits of no "state law cause of action" exception to the obligation it imposes on state judges to apply "the supreme Law of the Land," U.S. Const. art. VI, cl. 2. There is no merit to the individual plaintiffs' argument (Br. 62-68) that the anticommandeering doctrine shields state court judges from their clear duty under the Supremacy Clause to apply federal law whenever it applies, including in cases arising under state law causes of action.

This Court has held that the prohibition on commandeering is implicit in the Tenth Amendment and

the federal structure of the Constitution. In *New York v. United States*, 505 U.S. at 144, this Court held that Congress may not command state legislatures to enact specific legislation. In *Murphy*, this Court held that Congress may not command state legislatures to refrain from enacting legislation either. 138 S.Ct. at 1479. And in *Printz v. United States*, 521 U.S. 898, 935 (1997), this Court held that state executives are not bound by federal commands that they administer federal regulatory programs.

This Court has never held that the anticommandeering doctrine exempts state court judges from their obligation under the Supremacy Clause to apply federal laws that may be relevant to the adjudication of state law causes of action. In the area of family law, for example, this Court has held that federal law may modify the relief available under state law causes of action. *See McCarty v. McCarty*, 453 U.S. 210, 235-36 (1981) (holding that federal law preempted state courts from allocating military retirement pay pursuant to state community property laws upon divorce); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979) (holding that federal law preempted state law's definition of community property subject to division with respect to federal pension benefits). In myriad other areas of law, moreover, federal law may affect state law causes of action, including by preempting claims altogether and by requiring specific procedures before a court may award a particular form of relief. *See, e.g.*, *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

The Supremacy Clause leaves no doubt that state judges have the obligation to apply federal law when

such application affects adjudication of a state law cause of action. Writing for the Court in *Printz*, Justice Scalia explained that "the Constitution was originally understood to permit the imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907 (emphasis in original). This obligation of state judges was implicit in the Madisonian Compromise, which "made the creation of lower federal courts optional with Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States." *Id.* As the *Printz* Court explained, *Testa v. Katt*, 330 U.S. 386 (1947), spelled out the implication of this Compromise: "state courts cannot refuse to apply federal law." *Id.* (citing *Testa*, 330 U.S. at 393). This scheme, which preserves federal supremacy while permitting Congress to defer matters of federal law to state courts of competent jurisdiction, has been a feature of federalism since the Founding.

ICWA contains various federal-law provisions that the Supremacy Clause requires state court judges to apply when adjudicating child custody proceedings. These preemptive federal rules include rights to petition state courts for relief, *see* 25 U.S.C. §§ 1914, 1916, 1917; jurisdictional and procedural rules for adjudicating child custody questions, *see id.* § 1911, 1912, 1920, 1923; and substantive standards concerning the best interests of Indian children in placement proceedings, *see id.* § 1913, 1915, 1921, 1922. The anticommandeering doctrine does not exempt state court judges from their constitutional obligation to apply these federal rules in cases where they apply.

This principle—that the Supremacy Clause requires state court judges to apply federal law—should go without saying. Nevertheless, the individual plaintiffs argue that state court judges are free to ignore the placement preferences in Section 1915 of ICWA. *See* Ind. Pls.' Br. 62-68; *see also* Goldwater Inst. et al. *Amici* Br. 29-30.

The implications of their proposed rule—that the Supremacy Clause does not require state court judges to apply federal law when considering a state law cause of action—are mind-boggling. What would this rule mean for the Fourteenth Amendment Due Process Clause's procedural requirements and limits on punitive damages awards in state law cases? *See Philip Morris*, 549 U.S. at 353. That is federal law, and by the logic of the individual plaintiffs' reading of the Constitution, a state court judge is free to ignore federal law when adjudicating a state cause of action. What about federal statutes that preempt state tort causes of action? *See PLIVA,* 564 U.S. at 604. Again, as individual plaintiffs put it, the Supremacy Clause "does not suggest that a state court considering a state cause of action must apply federal law." Ind. Pls.' Br. 66 (emphasis omitted).[2]

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[2] The individual plaintiffs and their *amici* identify no principled distinction between these examples and ICWA, which *amici* insist "dictates" to state judges how to enforce state law. Goldwater Inst. Et al. *Amici* Br. 29. Yet when federal constitutional law limits punitive damages—which aim to ensure adequate enforcement of state law when compensatory damages might be inadequate to deter future violations—that too "dictates" a decision about enforcement. So too, federal statutory law "dictates" a decision about enforcement when it preempts a state law cause of action.

Indeed, the individual plaintiffs doubt that Congress can enact federal law that would affect the adjudication of state law medical malpractice cases by imposing a particular standard of proof. Ind. Pls.' Br. 66-67. Yet, in fact, Congress has legislated extensively with respect to state tort law. To pick but one pertinent example, in the Biomaterials Access Assurance Act of 1998, Congress enacted a set of procedural rules enforceable in state court designed to allow the suppliers of biomaterials and medical implant component parts to be dismissed from state law products liability actions. *See* 21 U.S.C. § 1603 (1998). Or consider the Y2K Act, an even more pertinent example, which required a "clear and convincing evidence" standard of proof for punitive damages claims in actions stemming from the anticipated year 2000 computer crashes. 15 U.S.C. §§ 6601-17 (1999); *see* Perry H. Apelbaum & Samara T. Ryder, *Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope*, 8 CORNELL J.L. & PUB. POL'Y. 592, 620-627 (1999). Thankfully, the Y2K disaster did not come to pass, leaving to another day, or perhaps another millennium, the question of whether Congress may enact federal law for tort cases involving systemic computer glitches. This much is clear, however: the anticommandeering doctrine does not exempt state judges from their constitutional obligation to apply valid federal law when it

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As Judge Dennis discussed below, and the Tribes argue in their briefing to this Court, the individual plaintiffs' reading of the Constitution would eviscerate the enforcement of "a host of federal statutes," including the Servicemembers Civil Relief Act, 50 U.S.C. § 3911 *et seq*. *See Brackeen v. Haaland*, 994 F.3d 249, 318 (5th Cir. 2021). Here, too, the individual plaintiffs have identified no principled distinction that would limit their sweeping, proposed exception to the clear dictates of the Supremacy Clause.

applies in a case arising under a state law cause of action.[3]

B. Congress Has Authority to Regulate State Actors Through Evenhanded Regulations That Confer Rights and Impose Corresponding Responsibilities on State and Private Actors Alike

A statute does not violate the anticommandeering doctrine when it "imposes restrictions or confers rights on private actors." *Murphy*, 138 S.Ct. at 1480. Moreover, "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Id.* Thus, the anticommandeering doctrine does not shield state agencies from rights-conferring, generally-applicable provisions that impose the same responsibilities on state actors and private parties when they engage in the same activity.

Several of ICWA's provisions—including Sections 1912(d), (e), and (f), which the court of appeals majority struck down on anticommandeering grounds—meet this criterion. That is, they are generally applicable provisions that confer rights on Indian children and parents and impose corresponding responsibilities upon state agencies and private actors alike. Texas

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[3] The individual plaintiffs cite Professor Evan Caminker's work in support of their proposed rule, *see* Ind. Pls.' Br. 64-65, but omit his most relevant conclusion: "a state court may not entertain and adjudicate causes of action arising under state law in a manner that would conflict with applicable federal law." Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commander State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1023 (1995).

concedes (Br. 68) that "several of ICWA's provisions apply to any party initiating a child-custody proceeding, *see, e.g.*, 25 U.S.C. §§ 1912, 1915"—that is, these provisions are generally applicable regulations of an activity that both state and private actors engage in, namely, petitioning for the removal of Indian children from their families. Nevertheless, Texas argues, these statutory provisions are unconstitutional commandeering because the state has a sovereign interest at stake in that activity and because the activity does not involve marketplace competition. Texas Br. 65-69; *see also* Academy & NCFA Amici Br. 9. This proposed "marketplace-competition-only" rule supposedly stems from this Court's opinions in *Murphy* and *Reno v. Condon*. *See* Texas Br. 68-69; Academy & NCFA *Amici* Br. 11-12.

Under those precedents, however, Congress may enact rights-conferring provisions that preempt state law and impose evenhanded regulations on state and private actors alike. ICWA is *both* a rights-conferring provision *and* an evenhanded regulation. As to the evenhanded-regulation rule, *Murphy* said that it "formed the basis for the Court's decision" in *Reno v. Condon*, "which concerned a federal law restricting the disclosure and dissemination of personal information provided in applications for driver's licenses." *Murphy*, 138 S.Ct. at 1478-79. As this Court explained, "[t]he law applied equally to state and private actors. It did not regulate the States' sovereign authority to 'regulate their own citizens.'" 138 S.Ct. at 79 (quoting *Reno*, 528 U.S. at 151). The Court did not say that marketplace competition is the only type of activity in which both States and private actors may engage. Nor did it say that Congress commandeers the States

whenever it regulates an activity in which the states have a sovereign interest. Instead, this Court implied that a law "regulated[ing] the States' sovereign authority to 'regulate their own citizens'" would not be an evenhanded regulation. *Id.*

ICWA does not commandeer the States by regulating their sovereign authority to regulate their own citizens. Sections 1912 and 1915 of ICWA contain rights-conferring provisions that validly preempt conflicting state law. Moreover, these rights-conferring provisions impose corresponding and evenhanded responsibilities upon state and private actors. Sections 1912 and 1915 do not "commandeer[] the state legislative process." *Murphy*, 138 S.Ct. at 1479. They do not "direct[] the States either to enact or to refrain from enacting a regulation of activities occurring within their borders." *Id.* Nor do they "command" a state actor "to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. Thus, these provisions do not "regulate the States' sovereign authority to 'regulate their own citizens.'" *Murphy*, 138 S.Ct. at 1479.

1. Sections 1912 and 1915 of ICWA contain rights-conferring provisions that do not commandeer the States

In *Murphy*, this Court held that the Professional and Amateur Sports Protection Act (PASPA) unconstitutionally commandeered the states by making it unlawful for a state to "authorize" sports gambling. *See* 138 S.Ct. at 1468 (quoting PASPA, 28 U.S.C. § 3702(1)); *id.* at 1478 (holding that PASPA's prohibition violated the anticommandeering rule). Prohibiting a state from enacting new legislation authorizing sports gambling

was indistinguishable from requiring a state to enact legislation, which *New York* held was unconstitutional commandeering. *See id.* at 1478; *New York*, 505 U.S. at 176-177. Thus, *Murphy* was concerned with limiting Congress's power to compel state governments to maintain existing laws on the books, not with upsetting the longstanding principle that state governments may not enforce state policies that conflict with (and thus are preempted by) federal law.

Murphy distinguished PASPA's bare command to state governments from federal statutes that regulate and confer rights upon private parties. This Court explained that "every form of preemption is based upon a federal law that regulates the conduct of private actors, not the States." 138 S.Ct. at 1481. The challenged provision of PASPA was "not a preemption provision because there [was] no way in which this provision [could] be understood as a regulation of private actors." *Id.* It did not "confer any federal rights on private actors," nor did "it impose any federal restrictions on private actors." *Id.* A private actor could open a gambling business without violating the PASPA provision because that provision was directed only at the states. *See id.* As a result, "there [was] simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States." *Id.*

Unlike PASPA, ICWA is not a direct command to a state legislature to refrain from legislating or to maintain existing laws. Nor is it a command to state agencies. Rather, Sections 1912 and 1915, which the court of appeals majority struck down in part on anticommandeering grounds, contain various provisions conferring rights on Indian children and parents and

imposing corresponding responsibilities on state *and* private actors. Section 1912(a), for example, requires "the party seeking the foster care placement of, or termination of parental rights to, an Indian child [to] notify the parent or Indian custodian and the Indian child's Tribe," thus guaranteeing a federal right to notice. 25 U.S.C. § 1912(a). Section 1912(d) similarly confers rights by specifying that *any* party—whether a state agency or private organization—must "satisfy the court that active efforts have been made . . . to prevent the breakup of the Indian family" before the court may order a foster care placement or terminate parental rights at that party's request. *Id.* § 1912(d). Section 1912(e) and (f) confer rights to "continued custody" of an Indian child unless the opposing party produces evidence, "including testimony of qualified expert witnesses," sufficient to show it is "likely" that "continued custody" would "result in serious emotional or physical damage to the child." *Id.* § 1912(e)-(f). And Section 1915(a)-(b) confers rights by establishing a default set of placement preferences, which, when they apply, must be followed in the absence of a showing of "good cause to the contrary." *Id.* § 1915(a)-(b). These provisions are not direct commands "to administer or enforce a federal program." *Printz*, 521 U.S. at 935. There is simply no way to understand these provisions as anything other than rights-creating, which, presumably, is why Section 1921 of ICWA refers to "the rights provided under this subchapter." 25 U.S.C. § 1921.

2. Sections 1912 and 1915 of ICWA contain evenhanded regulations that do not commandeer the States

Congress imposed responsibilities upon both state and private actors in Section 1912 and Section 1915

because both may engage in the same activity: seeking to initiate child-custody proceedings involving Indian children. *See generally Matter of Adoption of B.B.*, 417 P.3d 1, 28 (Utah 2017) (concluding that Indian parent had rights under ICWA in case involving private agency). To the extent that it creates rights and imposes corresponding responsibilities upon state agencies and private organizations alike, ICWA is analogous to the Driver's Privacy Protection Act (DPPA), which this Court unanimously upheld in *Reno v. Condon*, *see* 528 U.S. 141 (2000), a decision reaffirmed by this Court in *Murphy*, 138 U.S. at 1478. The DPPA prohibited state departments of motor vehicles from releasing a driver's personal information without the driver's consent. This prohibition also applied to private entities. This Court concluded that the DPPA's "generally applicable" regulations did not commandeer state activities. *Id.* at 1478 (citing *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)).

Like the DPPA, subchapter I of ICWA includes provisions that regulate both state agencies and private entities. For example, Section 1912(a) requires "the party seeking the foster care placement of, or termination of parental rights to, an Indian child [to] notify the parent or Indian custodian and the Indian child's Tribe." 25 U.S.C. § 1912(a). Section 1912(d) similarly regulates *any* party—whether a state agency or private organization—by requiring them to "satisfy the court that active efforts have been made . . . to prevent the breakup of the Indian family" before the court may order a foster care placement or terminate parental rights at that party's request. *Id.* § 1912(d). Subsections (e) & (f) of Section 1912 similarly apply evenhandedly, as do the placement preferences of

Section 1915(a)-(b). These are valid preconditions to a state court's issuing an order concerning the placement of an Indian child. And they are valid, generally applicable regulations of a state's activities. Just as Congress could constitutionally regulate state departments of motor vehicles through the DPPA, so too may it regulate state child welfare agencies through the generally applicable provisions of ICWA. ICWA, in other words, is not commandeering but rather an evenhanded regulation of "an activity in which both States and private actors engage." *Murphy*, 138 S.Ct. at 1478.

III. CONGRESS HAS THE AUTHORITY TO INCORPORATE ANOTHER SOVEREIGN'S POLICY JUDGMENTS INTO THE IMPLEMENTATION OF A FEDERAL REGULATORY SCHEME

One of Congress's goals in enacting ICWA was the "placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902. To accomplish this goal, Congress prospectively incorporated Native Nation's policy judgments into implementation of ICWA's placement preferences. Sections 1915(a)-(b) contain default placement preferences. *Id.* § 1915(a)-(b). Section 1915(c) provides that if "the Indian child's tribe" establishes placement preferences, "the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* § 1915(c). It also provides that "[w]here appropriate, the preference of the Indian child or parent shall be considered." *Id.*

The Fifth Circuit correctly held that Section 1915(c) "validly integrates tribal sovereigns' decision-making

into federal law" and thus "does not violate the non-delegation doctrine." *Brackeen v. Haaland*, 994 F.3d 249, 352 (5th Cir. 2021).

A. Congress's Incorporation of Another Sovereign's Laws into Federal Law Is Not an Unconstitutional Delegation of Congress's Legislative Authority

ICWA's prospective incorporation of Tribal policymaking into federal law is not unusual. Congress has enacted various federal statutes that adopt state law not only as it is at the time of enactment, but also as it may be in the future at the time of the statute's application in a particular case. *See* Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 138-143 (2020) (providing examples); Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 125-26 (2008) (same).

This Court has held Congress does not unconstitutionally delegate legislative power simply by incorporating state law into federal law. In *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 207 (1824), this Court stated that "Congress may adopt the provisions of a State on any subject." And in *United States v. Sharpnack*, this Court held that Congress has the authority prospectively to incorporate state law. 355 U.S. 286 (1958). In *Sharpnack*, the Supreme Court upheld the Assimilative Crimes Act (ACA), a federal statute that incorporated states' criminal laws "in force at the time" of the alleged crime and made them applicable in federal enclaves within each state. *Id.* The Court held that the law was a "deliberate continuing adoption by Congress" of state law as binding federal law, with Congress retaining the legislative authority "to exclude

a particular state law from the assimilative effect of the Act." *Id*. at 294; *see also Gibbons*, 9 U.S. (Wheat.) at 207. Rather than an impermissible delegation of Congress's legislative power, the prospective adoption of state law as federal law was viewed as a "practical accommodation of the mechanics of the legislative functions of State and Nation." *Sharpnack*, 355 U.S. at 294.

In this respect, Section 1915(c) of ICWA is indistinguishable from the ACA. Just as the ACA incorporates state criminal laws, so too does Section 1915(c) incorporate Tribal laws concerning Indian children, a matter in which Tribes have sovereign authority. *See Holyfield*, 490 U.S. at 42 (tribal authority "over Indian child custody proceedings is not a novelty of the ICWA," but a component of tribal sovereignty); *cf. Denezpi v. United States*, 142 S.Ct. 1838, 1850 (2022) (Gorsuch, J., dissenting) (recognizing that federal law might "assimilate tribal crimes"). And like the ACA, ICWA does not purport to preclude Congress from withdrawing its adoption of another sovereign's law if it decides to do so. As such, Section 1915(c) is a "deliberate continuing adoption by Congress" of tribal law into federal law. *See Sharpnack*, 355 U.S. at 293-94.

B. ICWA Contains Intelligible Principles to Guide the Implementation of Placement Preferences by States and Tribes

Even if Section 1915(c) constituted a delegation of federal authority to Tribes, Congress can make (and repeatedly has made) such delegations, limited only by the requirement that the statute in question set forth an "intelligible principle" governing the delegee's discretion. *See Whitman v. Am. Trucking Ass'ns*, 531

U.S. 457, 474 (2001). So long as Congress provides an "intelligible principle" to govern its delegation of authority, the recipient of the delegated power is not exercising "legislative power." *J.W. Hampton, Jr. & Co.*, 276 U.S. 394, 409 (1928).

Section 1915 plainly specifies intelligible principles to govern the placement of an Indian child. Section 1915(c) merely recognizes tribal authority to change the order of a congressionally established list of child placement preferences already outlined in Sections 1915(a)-(b). And though Section 1915(c) provides that an Indian Tribe's decision may reorder the placement preferences, a state agency or court must also consider additional statutory factors bearing upon the placement decision. If a Tribe "establish[es] a different order" of placement preferences, then Section 1915(c) directs a court in a child custody proceeding to follow that reordered list, but only if the placement would be "the least restrictive setting appropriate to the particular needs of the child." 25 U.S.C. § 1915(c). The statute further specifies that, "[w]here appropriate, the preference of the Indian child or parent shall be considered." *Id.* The guidance to Tribes and States in Section 1915 is more than enough to satisfy the nondelegation doctrine's intelligible principle requirement. *See Whitman*, 531 U.S. at 474 (direction to regulate in the "public interest" suffices).

C. The Private Nondelegation Doctrine Does Not Apply in This Case

Texas and *amicus* New Civil Liberties Alliance ("NCLA") contend that Section 1915's incorporation of Indian Tribal placement preferences violates the *private* nondelegation doctrine because Indian Tribes

are not part of the federal government. *See* Texas Br. 72-73; NCLA Br. 20-23 (both citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). This argument is squarely foreclosed by this Court's precedent and would radically undermine a variety of cooperative regulatory schemes that include both Tribes and States in their implementation. *See, e.g.*, *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1288 (D.C. Cir. 2000) (noting that the Clean Air Act expressly delegates regulation of air quality to Tribes); *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996) (holding that EPA had authority to require upstream dischargers to comply with Pueblo of Isleta's limitations even if those limitations were more stringent than federal standards); *Wisconsin v. EPA*, 266 F.3d 741, 748 (7th Cir. 2001) (concluding that under the Clean Water Act, EPA may authorize Tribes to regulate off-reservation discharges).

Native Nations are sovereign governments with authority to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). One of the fundamental attributes of a Native Nation's sovereignty is the authority to preside over internal relations and matters involving tribal members, especially in the areas of family law and the welfare of Indian children. *See, e.g.*, *Holyfield*, 480 U.S. at 42. Tribes' exercise of these core self-governance functions "has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority." *United States v. Wheeler*, 435 U.S. 313, 328 (1978). To hold that Indian Tribes are subject to the private nondelegation doctrine would be to ignore two centuries of federal practice and this Court's precedent. *See, e.g.*, *Worcester*

31 U.S. (6 Pet.) at 542-43; *Williams*, 358 U.S. at 220; *Holyfield*, 480 U.S at 42.

In *Mazurie*, this Court expressly rejected the argument that an Indian Tribe is indistinguishable from a private entity and therefore cannot exercise governmental power in implementing a federal regulatory scheme. Writing for a unanimous Court, Justice Rehnquist rejected a constitutional challenge to 18 U.S.C. § 1161, which authorized Indian Tribes to regulate the introduction of liquor into Indian country. *Mazurie*, 419 U.S. at 547; *Rice v. Rehner*, 463 U.S. 713, 728-29 (1983) (reaffirming *Mazurie*). In particular, this Court rejected the court of appeals' conclusion that the private nondelegation doctrine applied to delegations to Native Nations. *See Mazurie*, 419 U.S. at 556 (internal quotation marks omitted). As the Court reasoned, "it is an important aspect of this case that Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" and thus "possess[] independent authority over the subject matter." *Id.* at 556-57.

Like 18 U.S.C. § 1161, Section 1915(c) of ICWA is constitutional. ICWA concerns the "internal and social relations of tribal life," namely the rights of Indian children and parents. *See Mazurie*, 419 U.S. at 557; *Fisher v. District Court*, 424 U.S. 382, 388 (1976). Section 1915(c) recognizes that Native Nations have "independent authority over" child custody matters and the rights of Indian children and includes them to in a federal scheme addressing matters of Tribal concern. *See Mazurie*, 419 U.S. at 556-57. It does not violate the nondelegation doctrine.

CONCLUSION

ICWA is supreme federal law that applies in state court proceedings under longstanding and uncontroversial principles of structural constitutional law.

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APPENDIX
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Amici curiae, whose affiliations are listed for descriptive purposes only, are:

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