Nos. 21-376, 21-377, 21-378, 21-380

IN THE
Supreme Court of the United States

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

Petitioners, Cross-Respondents,

v.

CHAD EVERET BRACKEEN, *et al.*,

Respondents, Cross-Petitioners.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR INDIVIDUAL PETITIONERS

ASHLEY E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue
Dallas, TX 75201
(214) 698-3100

MARK D. FIDDLER
FIDDLER OSBAND, LLC
5200 Willson Rd.
Ste. 150
Edina, MN 55424
(612) 822-4095

MATTHEW D. MCGILL
Counsel of Record
LOCHLAN F. SHELFER
DAVID W. CASAZZA
AARON SMITH
ROBERT A. BATISTA
TODD W. SHAW
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Individual Petitioners

Additional Captions Listed on Inside Cover

CHAD EVERET BRACKEEN, *et al.*,

Petitioners,

v.

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

CHEROKEE NATION, *et al.*,

Petitioners,

v.

CHAD EVERET BRACKEEN, *et al.*

THE STATE OF TEXAS,

Petitioner,

v.

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

QUESTIONS PRESENTED

Placement decisions in child-custody proceedings in state courts generally are 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 questions presented are:

1. Whether ICWA's placement preferences—which disfavor non-Indian adoptive families in child-placement proceedings involving "Indian children" and disadvantage those children by denying them the best-interests determination they otherwise would receive under state law—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—a subject that "belongs 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)—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 and Cross-Respondents Chad Everet Brackeen; Jennifer Kay Brackeen; Danielle Clifford; Jason Clifford; Altagracia Socorro Hernandez; Frank Nicholas Libretti; and Heather Lynn Libretti ("Individual Petitioners") were plaintiffs in the district court and appellees before the court of appeals.

Petitioners and Cross-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 and Cross-Petitioners Deb Haaland, in her official capacity as Secretary, United States Department of the Interior; Bryan Newland, in his official capacity as 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.[*]

---

[*] 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.

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.

Respondents and Cross-Petitioners 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 and Cross-Petitioner the Navajo Nation was an intervenor-appellant before the court of appeals.

2. Individual Petitioners are all individuals.

In the court of appeals, Secretary Becerra was automatically substituted for his predecessor under Federal Rule of Appellate Procedure 43(c)(2). Defendants-appellants below included Alex Azar.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Treaties

Regulations

Other Authorities

OPINIONS BELOW

The opinion of the en banc court of appeals, Tex. Pet. App. 1a,[1] is reported at 994 F.3d 249 (5th Cir. 2021). The opinion of the three-judge panel of the court of appeals, Tex. Pet. App. 400a, is reported at 937 F.3d 406 (5th Cir. 2019). The opinion of the district court, Tex. Pet. App. 468a, 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. Tex. Pet. App. 1a; JA 246. Individual Petitioners timely filed a petition for a writ of certiorari on September 3, 2021, which this Court granted on February 28, 2022, and consolidated with three other cases. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.* ("ICWA"), are reproduced at Tex. Pet. App. 581a. Relevant constitutional provisions are reproduced at Tex. Pet. App. 580a.

STATEMENT

In child-placement proceedings under state law, the "best interest of the child" generally is the "primary consideration" and requires courts to engage in an individualized consideration of a child's situation and needs. *See*, *e.g.*, Tex. Fam. Code §§ 153.002,

---

[1] All citations to "Tex. Pet. App." are to the Petition Appendix filed by Texas in No. 21-378.

162.016. This assessment focuses on factors such as the "health, safety, and/or protection of the child" and the child's "emotional ties." HHS, Children's Bureau, *Determining the Best Interests of the Child* at 2 (June 2020), https://bit.ly/3wKNr10. At all times, the individual "child's ultimate safety and well-being [is] the paramount concern." *Ibid*.

For "Indian children," however—which ICWA defines as any child who is a tribal member or is eligible for tribal membership and is the "biological" child of a member—the statute dictates that state courts subordinate the child's best interests to a "Federal policy that, where possible, an Indian child should remain in the Indian community." *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 95-1386, at 23 (1978)). ICWA channels these children into a regime that requires state courts to prefer placement with *any* "Indian family"—that is, any adult in any one of 574 federally recognized Indian tribes—over any non-Indian family. 25 U.S.C. § 1915(a). This regime reflects Congress's categorical determination that the "best interests of Indian children" are served by "the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." *Id*. § 1902.

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 classifications of "Native Americans" are racial classifications subject to strict scrutiny. *See Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 207–08, 214 (1995). It follows that a federal policy of directing Native American children to Native American families must be subject to strict scrutiny. The question here

is whether a different result obtains for ICWA's provisions, which are designed to direct "Indian children" to the "Indian community."

It should not. Under the "limited exception" of *Morton* v. *Mancari*, 417 U.S. 535 (1974), a classification limited to "members of 'federally recognized' tribes" may be regarded as "political rather than racial in nature" when it "further[s] Indian self-government," as when Congress enacts laws respecting "the internal affair of a quasi-sovereign" tribe. *Rice* v. *Cayetano*, 528 U.S. 495, 519–20 (2000) (quoting *Mancari*, 417 U.S. at 553 n.24). Yet ICWA's definition of "Indian child" is explicitly "biological" and includes children who are *not* members of any tribe. 25 U.S.C. § 1903(4). And, instead of being closely tethered to Indian lands or a tribe's internal affairs, ICWA's placement preferences apply only to Indian children who live *outside* of Indian country under state jurisdiction, and govern only state proceedings conducted by *state* courts and officials under state law.

Mancari's limited exception should not be enlarged so far as to include classifications that explicitly include non-tribal members, that regulate only affairs of the States, and that indisputably are designed to disadvantage non-Indians. ICWA classifies Indians as a racial group in furtherance of a clearly expressed racial objective that "Indian children" be routed to the "Indian community." H.R. Rep. No. 95-1386, at 23. ICWA's classifications are subject to strict scrutiny, and in any event cannot survive any standard of review.

In addition to that constitutional failing, ICWA's placement preferences exceed Congress's powers—Congress has no enumerated power to regulate a child's placement in foster or adoptive care. Congress

invoked its power to regulate "Commerce . . . with Indian tribes," 25 U.S.C. § 1901(1), but children and the families seeking to give them homes are not articles or instrumentalities of commerce. Congress of course has broad authority to regulate with respect to Indian tribes. But upholding preferences that apply to individual adoption proceedings involving non-tribal members outside of reservations—"an area that long has been regarded as a virtually exclusive province of the States," *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975)—would render Congress's power limitless.

And even if Congress had an enumerated power to regulate state child-placement proceedings, ICWA still would impermissibly commandeer state courts and state agencies to implement Congress's policy by altering *state-law* causes of action. Congress could not commandeer state legislatures by forcing them to graft its placement preferences onto state adoption law. And it cannot circumvent that restriction by directing its command to state judges applying state law. Congress may supply federal law for state courts to apply in federal causes of action, but it cannot rewrite state family codes and then require state officials to carry out that federal policy.

This Court should confirm that Congress's power to legislate—and discriminate—with respect to Indians is not unlimited, and hold ICWA unconstitutional.

1. Congress enacted ICWA in response to "abusive child welfare practices" in certain States that had "resulted in the separation of large numbers of Indian children from their families and tribes." *Holyfield*, 490 U.S. at 32. Congress found that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies

and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). To redress this situation, Congress declared that "it is the policy of this Nation to protect the best interests of Indian children . . . by the establishment of minimum Federal standards for . . . the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." *Id.* § 1902. As this Court has recognized, ICWA enacted a "Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23).

To accomplish this objective, ICWA defines "Indian child" broadly to include "any unmarried person who is under age eighteen and 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). As Congress was considering ICWA, the Department of Justice expressed concern that this definition—based on "blood connection"—"may constitute racial discrimination," and recommended "limiting the definition of Indian child" to tribal members to avoid constitutional problems. H.R. Rep. No. 95-1386, at 39 (May 23, 1978 Letter from Assistant Attorney General Patricia Wald to Rep. Morris Udall). The House Committee overseeing the bill "reject[ed]" the Department's concern, explaining 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." *Id.* at 20.

The linchpin of ICWA's federal policy of sending Indian children to Indian families is its system of placement preferences. 25 U.S.C. § 1915(a)–(b). In any case "under State law" for adoption of an "Indian

child," ICWA mandates that the state court prefer as the adoptive placement: "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families," which is to say placement with any adult that is a member of any one of 574 federally recognized Indian tribes. *Id.* § 1915(a); *see also id.* § 1915(b) (similar preferences for foster and pre-adoptive placement). State courts may deviate from these federally mandated preferences only when there is a showing of "good cause to the contrary." *Id.* § 1915(a); *see also id.* § 1915(b) (same).

ICWA also imposes numerous additional mandates on state courts and agencies. *See*, *e.g.*, 25 U.S.C. § 1912(d), (e), (f) (requiring both "active efforts" to prevent breakup of Indian family and "qualified expert witnesses" to show that the child is likely to be damaged prior to termination of parental rights or foster-care placement); *id.* § 1912(a) (requiring state courts to notify tribe associated with any child and to delay proceeding to allow tribe to intervene); *id.* § 1915(e) (requiring state courts to produce and maintain indefinitely records showing compliance with placement preferences); *id.* § 1951(a) (requiring state courts to provide Secretary of the Interior with information about adoptive placements under ICWA).

When Congress was considering ICWA, the Department of Justice also raised a "serious constitutional" concern with the "impos[ition]" of these "detailed procedures" on state courts for child-custody proceedings "involving nonreservation Indian children and parents." H.R. Rep. No. 95-1386, at 39–40. As the Department explained, "the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism

preclude the wholesale invasion of State power contemplated by" ICWA. *Ibid*.

Indeed, ICWA's placement preferences apply *only* to state-court proceedings. They do not apply in tribal courts, *see* 25 C.F.R. § 23.103(b)(1), which have "exclusive" jurisdiction over any proceeding involving an Indian child "who resides or is domiciled within the reservation," 25 U.S.C. § 1911(a). ICWA applies *only* to Indian children who reside under state jurisdiction, and their potential placements.

2. The year after ICWA was enacted, the Bureau of Indian Affairs ("BIA") published guidelines for state courts implementing ICWA. *Guidelines for State Courts; Indian Child Custody Proceedings* ("*Guidelines*"), 44 Fed. Reg. 67,584 (Nov. 26, 1979). The BIA recognized that it should not "exercise supervisory control over state . . . courts." *Id.* at 67,584. "For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step," fundamentally "at odds" with "federalism" and the "separation of powers." *Ibid.* As a result, the Guidelines provided the BIA's "interpretation" of certain ICWA provisions and "recommended" procedures for state courts to consider, but did not adopt "binding" regulations. *Ibid.*

In 2016, however, the BIA reversed course, issuing a new rule that promulgates "binding standards for Indian child-custody proceedings in State courts." *Indian Child Welfare Act Proceedings* ("*Final Rule*"), 81 Fed. Reg. 38,778, 38,785–86 (June 14, 2016) (codified at 25 C.F.R. pt. 23). The Final Rule implemented ICWA's placement preferences for adoptive proceedings, 25 C.F.R. § 23.130(a), and foster-care proceedings, *id.* § 23.131(b). The Final Rule also mandates that the "good cause" necessary to depart from ICWA's

placement preferences can be established exclusively by reference to five factors. *Id.* § 23.132(c). The Final Rule specifically provides that "ordinary bonding or attachment that flowed from time spent in a non-preferred placement" does not constitute good cause. *Id.* § 23.132(e). And it further prohibits any "free-ranging 'best interests' determination." *Final Rule*, 81 Fed. Reg. at 38,347.

3. Individual Petitioners sought to foster or adopt children with Indian ancestry. In each case, ICWA threatened to prevent—and in the case of the Cliffords succeeded in preventing—an adoption or placement that, absent ICWA, would have been put in place.

a. A.L.M. and Y.R.J. are siblings whose biological mother is a member of the Navajo Nation. Tex. Pet. App. 211a–12a. A.L.M. was born in 2015 and lived in Texas from two days after his birth. JA 197. When A.L.M. was ten months old, Texas officials removed him from his biological mother and placed him in the Brackeens' care. *Ibid.* 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. Tex. Pet. App. 209a. Even though A.L.M. was not a member of any tribe and was never domiciled on a reservation, the Navajo Nation unilaterally "designate[d] Navajo as A.L.M.'s tribe" in the adoption proceedings. *Ibid.*; *see also id.* at 274a ("[T]he 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." (internal quotation marks and ellipsis omitted)).

After A.L.M. had lived with the Brackeens for more than a year, the Navajo Nation identified an alternative placement for him with tribal members who were not related to A.L.M. and who lived in a different State. Tex. Pet. App. 209a. Although placement with the Brackeens would have kept A.L.M. with the only parents he knew—and close to his biological parents and cousins, who also lived in Texas, JA 197—the state court concluded that ICWA required denial of the Brackeens' adoption petition. Tex. Pet. App. 209a–10a. A Texas official notified the Brackeens that A.L.M. would be imminently removed from their care, and only an emergency stay of A.L.M.'s removal prevented that from happening. JA 199–200. After this lawsuit was filed, the Navajo Nation's preferred placement withdrew, and the Texas court granted the Brackeens' then-uncontested adoption petition in January 2018. Tex. Pet. App. 217a, 483a.

When A.L.M. was nearly three years old, the Brackeens learned that his biological mother had given birth to another child, Y.R.J. Tex. Pet. App. 210a. Because Y.R.J.'s mother was unable to take care of her, the Brackeens sought to adopt Y.R.J. so that the siblings would be able to grow up in the same home. *Ibid*. Once again, Y.R.J.'s mother supports the Brackeens' efforts to adopt Y.R.J. *See In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728, at *4 (Tex. Ct. App. Dec. 19, 2019); Tex. Pet. App. 275a–76a. But the Navajo Nation opposed Y.R.J.'s placement with the Brackeens and sought 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. *See* Tex. Pet. App. 210a; *In re Y.J.*, 2019 WL 6904728, at *2. As with A.L.M., the Navajo Nation designated Y.R.J. as an "Indian child" under ICWA by certifying that she is one half "Navajo Indian

Blood" and then unilaterally enrolling her as a tribal member. Tex. Pet. App. 269a. Nearly four years later, these proceedings remain ongoing in state court.

b. Child P. has ancestors who are members of the White Earth Band of Ojibwe. Tex. Pet. App. 211a. When Child P. first entered foster care at three years old, the Band "notified the court that she was ineligible for membership." *Ibid.* She spent nearly two years moving from one placement to another, and she suffered extensive psychological harm due to this instability. *Ibid.*; JA 191. Child P. then was placed with the Cliffords, where she flourished. JA 192. Minnesota officials supported placing Child P. with the Cliffords. JA 193. They even "advised against any contact" with Child P.'s maternal grandmother, R.B., an enrolled member of the Band, *ibid.*, because R.B.'s "foster license had been previously revoked by the state" on account of a prior conviction, Tex. Pet. App. 274a.

But shortly after Child P. was placed with the Cliffords, the Band abruptly "changed its position," first notifying the court that Child P. *was* eligible for membership, and then on its own "announc[ing] that Child P. is a member." Tex. Pet. App. 211a. Minnesota officials reversed course, and "deferred to the Tribe" on Child P.'s "appropriate placement." JA 193. Child P.'s guardian ad litem continued to support Child P.'s placement with the Cliffords, *ibid.*, but Minnesota officials removed Child P. from the Cliffords and placed her with R.B. in 2018, Tex. Pet. App. 211a, notwithstanding the fact that R.B. had previously "been declared unfit to serve as a foster parent," *id.* at 468a. Child P. had "twenty minutes to say goodbye" to the Cliffords, and Child P. "cr[ied] uncontrollably"

the entire time. JA 194. Minnesota officials instructed R.B. "not to allow Child P. to contact" the Cliffords. JA 195. The state court concluded that the Cliffords failed to establish good cause to deviate from ICWA's placement preferences. Tex. Pet. App. 211a.

c. Baby O. was born in Nevada and has never lived on a reservation. JA 203. Her non-Indian biological mother, Altagracia Hernandez, decided to have the Librettis adopt Baby O., a decision that Baby O.'s biological father supported. Ms. Hernandez chose to have the Librettis adopt Baby O. because she had "found a home," and adoption would be "in her best interests." JA 209. Baby O. left the hospital in the care of the Librettis when she was three days old. Tex. Pet. App. 210a. Ms. Hernandez lives near the Librettis and regularly visits Baby O. *Ibid.*; *see also* JA 209–10.

Baby O.'s biological father is descended from members of the Ysleta del sur Pueblo Tribe and has visited Baby O. once. Tex. Pet. App. 210a; *see also* JA 209–10. When Baby O. was born, he was not a member of the Tribe. Tex. Pet. App. 484a. The Tribe nevertheless intervened in Baby O.'s custody proceedings to block the Librettis' adoption, asserting that it had unilaterally enrolled Baby O. as a member of the Tribe. JA 205. The Tribe then identified "more than forty" potential Indian-family placements, attempting to take Baby O. from the Librettis and move her to a State she had never visited. *Ibid.*; *see also* Tex. Pet. App. 210a. Ms. Hernandez "strongly oppose[d]" the effort to "relocate" Baby O. "to a strange place" to live with strangers who have no experience with the "level of care" that Baby O.'s "significant medical needs" demand. JA 210. Yet the Librettis' adoption of Baby O.

was delayed as Nevada officials were forced to "diligent[ly] search" for ICWA-preferred placements, 25 C.F.R. § 23.132(c)(5), and methodically study each of them, JA 205–06. After this lawsuit was filed, the Tribe relented, and the Librettis finalized their adoption of Baby O. in December 2018. Tex. Pet. App. 210a.

4. 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 is unconstitutional because it violates the Constitution's equal-protection guarantees and exceeds Congress's Article I powers, including by commandeering the States. JA 132–47. They also challenged the Final Rule under the Administrative Procedure Act on the basis that the Final Rule violated Equal Protection, Tenth Amendment, and Article I guarantees, and was promulgated pursuant to an unconstitutional statute. JA 125–32. They named federal agencies and officials as defendants, and several Indian tribes intervened as defendants.

After the district court denied a motion to dismiss that disputed Plaintiffs' Article III standing, *see* Tex. Pet. App. 212a, 492a n.6, the district court resolved the parties' cross-motions for summary judgment. The district court held that the challenged provisions of ICWA and the implementing regulations are unconstitutional. *Id*. at 493a–94a, 504a, 515a, 527a, 528a.

5. A panel of the Fifth Circuit agreed with the district court that Plaintiffs have standing to bring all of their claims, Tex. Pet. App. 418a–21a, but split on the merits, with the majority finding no constitutional violations, *compare id*. at 431a–46a, *with id.* at 465a–67a (Owen, J., concurring in part and dissenting in part).

The Fifth Circuit granted rehearing en banc, Tex. Pet. App. 398a–99a, and affirmed in part and reversed in part. A clear majority of the en banc court agreed with the district court and the unanimous panel that Plaintiffs have standing to bring their constitutional claims. *Id*. at 3a (per curiam).

Turning to the merits, the court rendered well over 300 pages of highly fractured opinions. The court split sharply over whether ICWA's "Indian child" definition was a "racial classification" and whether it could satisfy even rational-basis review. *See* Tex. Pet. App. 3a–4a & n.3 (per curiam); *id*. at 139a–66a (Dennis, J.); *id*. at 351a (Owen, C.J.); *id*. at 363a (Haynes, J.); *id*. at 269a (Duncan, J.). Similarly, the Court was deeply split over the equal-protection analysis applicable to the placement preferences. *See id*. at 155a–66a (Dennis, J.); *id*. at 352a (Owen, C.J.); *id*. at 277a & n.84, 278a–80a, 341a & n.147 (Duncan, J.); *id*. at 200a n.†, 277a–78a (Jones, J.); *id*. at 363a (Haynes, J.).

Addressing Petitioners' Article I arguments, the court narrowly held that Congress had Article I authority to enact ICWA. *See* Tex. Pet. App. 71a–105a (Dennis, J.); *id*. at 351a (Owen, C.J.); *id*. at 363a (Haynes, J.).

As for Petitioners' anti-commandeering argument, the en banc court equally divided over whether the placement preferences unconstitutionally commandeered state agencies, and therefore affirmed the lower court's holding in that respect. *See* Tex. Pet. App. 5a–6a (per curiam). A majority of the en banc court, however, held that the same placement preferences did not impermissibly commandeer state courts, and upheld those provisions as applied to state courts. *Id*. at 5a–6a & n.10 (per curiam). 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 record-keeping requirements, and Section 1951(a)'s placement-record provision unconstitutionally commandeer state actors. *See id.* at 4a–6a & nn.6, 10 & nn.5, 7–8 (per curiam); *id.* at 284a–302a, 307a–11a (Duncan, J.).

SUMMARY OF ARGUMENT

I. ICWA's separate child-placement scheme for "Indian children" violates the Constitution's guarantee of equal protection.

A. Laws that treat "tribal Indians" differently than other American citizens are generally racial classifications subject to strict scrutiny. *Rice* v. *Cayetano*, 528 U.S. 495, 520 (2000); *see also*, *e.g.*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 207–08, 214 (1995). This general rule is subject to a limited exception for laws that draw political classifications by promoting "Indian self-government" and apply only to members of Indian tribes on or near Indian lands. *Morton* v. *Mancari*, 417 U.S. 535, 552 (1974). But this exception does not apply outside of that limited context and does not extend to laws that regulate an "affair of the State." *Rice*, 528 U.S. at 522.

B. ICWA draws two classifications that are subject to strict scrutiny.

1. ICWA creates a separate child-placement scheme for "Indian children," a broadly defined term that, at root, turns on the child's biological ancestry. But ICWA's adoption regime does not draw political classifications. Its definition of "Indian child" is

not limited to enrolled tribal members; it includes children who are not and may never become tribal members but are merely "eligible" to become tribal members. And even its classification of tribal-member children is almost universally based on biology; it operates exclusively in state courts—with no application in tribal courts or on or near tribal lands; and it usurps the historically state-run affair of child placement. Given that "[a]ncestry can be a proxy for race," *Rice*, 528 U.S. at 514, and discrimination "solely because of ancestry" "is racial discrimination," *Saint Francis Coll.* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987), ICWA's definition of "Indian child" is subject to strict scrutiny.

2. ICWA also imposes a racial hierarchy of placement preferences. This system replaces the traditional best-interests-of-the-child analysis with Congress's determination that "Indian child[ren]" should be placed "in the Indian community." *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 37 (1989) (internal quotation marks omitted). In keeping with that objective, ICWA's preferences relegate non-Indian families to fourth-tier status behind any other Indian family, regardless of tribe. And non-Indian families that would like to adopt or foster an "Indian child" are precluded from qualifying as a preferred placement on account of their biological heritage. ICWA's preference for any Indian family of any tribe over all non-Indian families demonstrates that ICWA is untethered to promoting tribal self-government, and instead is suffused with a racial purpose.

C. ICWA cannot survive any level of scrutiny.

1. ICWA's racial classifications clearly fail strict scrutiny. The government did not assert any compelling interest in the district court, ICWA attempts to remedy an outdated problem, and its preference for any Indian family of any tribe over non-Indian families is in no way narrowly tailored.

2. ICWA fails even rational-basis review. ICWA's "Indian child" definition is immensely under- and overinclusive as a means of preserving a tribal community, excluding children raised on a reservation if they lack a sufficient blood quantum, while sweeping up children with no connection to a tribe other than their biology. ICWA's placement preferences, meanwhile, are entirely disconnected from Congress's stated interest in preventing the removal of children from tribal lands; rather, they apply only to children who do *not* live on a reservation. Nor do they prevent the breakup of Indian families, given that they apply only *after* the child has been removed from the custody of his or her biological parents, meaning there is no Indian family to "break up." And placing children with a different tribe cannot conceivably further a tribe's sovereignty interests.

II. ICWA's placement preferences also exceed Congress's enumerated powers.

A. The Indian Commerce Clause cannot justify ICWA's placement preferences. Congress has Article I authority to "regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. But children are not commodities that can be traded, *see id.* amend. XIII, and state-court adoption proceedings are not commercial interactions with Indian tribes, *United States* v. *Lopez*, 514 U.S. 549, 564 (1995). This Court

has confirmed that Congress cannot stretch its Commerce Clause power to regulate family law or child rearing issues, *United States* v. *Morrison*, 529 U.S. 598, 616 (2000), and it does not gain that power simply because the child is Indian. Although this Court has recognized Congress's broad authority to regulate with respect to Indian tribes, it has never suggested that Congress's power extends to individual adoption proceedings under state law involving non-tribal members outside of reservations.

B. ICWA also cannot be justified as an exercise of the power to aid or execute treaties. Congress ended the practice of entering into treaties with Indian tribes a century before it enacted ICWA, and the imposition on state courts of a parallel child-custody regime for Indian children is not remotely necessary or proper to aid or execute any earlier treaty.

C. Finally, ICWA's placement preferences unconstitutionally commandeer state courts and agencies.

1. The Constitution does not allow Congress "to require the States to govern according to Congress' instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992). This anti-commandeering principle prohibits Congress from commanding State legislatures to "regulat[e] pursuant to Congress's direction." *Id.* at 175. Nor can Congress "circumvent" the anti-commandeering principle by "conscripting the State's officers directly." *Printz* v. *United States*, 521 U.S. 898, 935 (1997).

2. ICWA's placement preferences violate this principle by commanding state courts to carry out a federal program of sending Indian children to Indian adults, forcing those courts to effectively amend their

own state-law causes of action and graft onto them ICWA's preferences. There is no loophole in the anti-commandeering doctrine that subjects the state judicial branch to the mercy of Congress. Congress is permitted to rely on state courts to adjudicate *federal* causes of action. *See Testa* v. *Katt*, 330 U.S. 386, 394 (1947). But it may not rewrite the substantive standards to be applied in *state* causes of action.

ICWA's placement preferences commandeer state agencies, too. State agencies must search for placements that satisfy Congress's preferences and certify their efforts. Congress cannot transfer the responsibility for administering ICWA's child-custody regime to the States.

3. ICWA's placement preferences cannot be saved as a form of preemption because they are not best read as regulating private actors. Neither children nor adults are prohibited from doing anything. Rather, ICWA dictates how state courts must adjudicate state-law child-custody claims.

ARGUMENT

Racial classifications in child-placement proceedings—such as a policy of placing children with parents of the same race—constitute race discrimination subject to "the most exacting scrutiny." *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984). And classifications of "tribal Indians" generally are racial classifications. *Rice* v. *Cayetano*, 528 U.S. 495, 520 (2000). It follows that the Indian Child Welfare Act's ("ICWA") federal policy of directing "Indian children" to "Indian families" is subject to strict scrutiny. But ICWA cannot survive ra-

tional-basis review, let alone strict scrutiny. The statute squarely violates the Constitution's guarantee of equal protection.

ICWA also exceeds Congress's Article I authority to regulate commerce with the Indian tribes. Children are not chattel, and a State's child-custody proceedings are not commercial interactions with Indian tribes. *See United States* v. *Lopez*, 514 U.S. 549, 564 (1995); *United States* v. *Morrison*, 529 U.S. 598, 616 (2000). And invocation of Congress's Article I authority is particularly misplaced in child-placement matters that have long been the exclusive province of the States. *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975). Nor can ICWA be justified by reference to the Treaty Power, as the lower court majority suggested. The United States has never entered into a treaty with any Indian tribe that plausibly could be said to call for ICWA's federal takeover of child-placement matters in state courts.

Finally, ICWA unconstitutionally commandeers state courts and state agencies. *See New York* v. *United States*, 505 U.S. 144, 149 (1992). In enacting ICWA, Congress did not regulate private persons. Instead, it demanded that state courts warp their family codes to implement the federal policy of placing Indian children with Indian families, and directed state courts and agencies to undertake a plethora of actions without any federal responsibility for enforcing the statute. This scheme violates the anti-commandeering doctrine. *See Murphy* v. *NCAA*, 138 S. Ct. 1461, 1475–76 (2018).

I. ICWA VIOLATES EQUAL PROTECTION.

Classifications of "Native Americans" generally are racial classifications subject to strict scrutiny. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 207–08, 214 (1995). This general rule is subject to a limited exception for laws that draw "political" classifications rather than racial ones. *Morton* v. *Mancari*, 417 U.S. 535, 552, 553 n.24 (1974). But this limited exception extends only to the regulation of tribes as political entities or of tribal lands, in matters pertaining to Indian self-government or internal tribal affairs. It has no application to laws that regulate Indians as a racial group, or to laws that regulate an "affair of the State." *Rice*, 528 U.S. at 520, 522.

ICWA draws two classifications that are race-based and subject to strict scrutiny. The first is its broad definition of "Indian child," which sweeps in children who are not even tribal members based solely on their ancestry. The second is its hierarchy of placement preferences, which relegates non-Indian adoptive families to fourth-tier status, behind any other Indian family from any tribe across the country. The adoption regime that ICWA establishes bears no resemblance to the classifications of Indians previously classified as "political" by this Court: ICWA is not limited to enrolled tribal members; it operates exclusively in state courts rather than on or near tribal lands; it treats all Indian tribes and children as fungible; it places non-Indian families on unequal footing because they are not the right race; and it usurps the historically state-run affair of child placement.

This race-based scheme violates the Constitution's guarantee of equal protection under any standard of scrutiny.[2]

A. Classifications Based On "Indian" Or Tribal Status Generally Constitute Racial Classifications Subject To Strict Scrutiny.

1. This Court has repeatedly instructed that classifications based on "Indian" or "Native American" status are racial classifications subject to strict scrutiny. *Adarand*, 515 U.S. at 207–08, 213, 223–24 (classification of "Native Americans" is a "classificatio[n] based explicitly on race"); *see also*, *e.g.*, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 476, 478, 493 (1989) (plurality) (preference for "Indians" is "race-based measur[e]"); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 271 n.2, 273–74 (1986) (plurality) (preferential scheme that "operate[d] against whites and in favor of certain minorities," including "American Indian[s]," was "a classification based on race"); *Loving* v. *Virginia*, 388 U.S. 1, 2, 5 & n.4 (1967) (statutes prohibiting marriage between "white persons" and

---

[2] As Individual Petitioners explained at the certiorari stage, *see* Br. of Individual Respondents 14–20, they have standing to challenge ICWA on equal-protection grounds because it places them on "[un]equal footing" in the child-custody process, *Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993). They also can challenge the regulations that have burdened and continue to burden their adoption efforts under the Administrative Procedure Act because they were promulgated pursuant to an unconstitutional statute. *See* Br. of Individual Respondents 15–16; *see also Fed. Election Comm'n* v. *Cruz*, No. 21-12, 2022 WL 1528348, *6–7 (U.S. May 16, 2022) (parties "may raise constitutional claims against" a regulation "and, in doing so, rais[e] arguments about the validity of the statute that authorized the regulation").

"Indians" were "racial classifications"). Such classifications treat Indians as a "discrete racial group" rather than "members of quasi-sovereign tribal entities." *Mancari*, 417 U.S. at 554.

Even where classifications are limited to members of federally recognized tribes, they still generally are racial in nature. This is because tribes have requirements of lineal descent for membership. 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); *see also United States* v. *Candelaria*, 271 U.S. 432, 442 (1926) (considering "Indian tribe" to be "a body of Indians of the same or a similar race"). Thus, when a law makes a classification based on tribal membership, it is often making a racial classification subject to strict scrutiny because it uses ancestry as "a proxy for race." *Rice*, 528 U.S. at 514.

Indeed, ancestry and race are so closely intertwined that "[d]istinctions between citizens solely because of their ancestry" are interchangeable with "discrimination based on race alone." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943); *see also Saint Francis Coll.* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that "discrimination solely because of . . . ancestry or ethnic characteristics . . . is racial discrimination"). As this Court explained in *Rice*, "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." 528 U.S. at 517. "Ancestral tracing . . . employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Ibid*. This Court accord-

ingly has recognized that discrimination "solely because of [a person's] ancestry or national origin" is unconstitutional. *Hernandez* v. *Texas*, 347 U.S. 475, 479 (1954); *see also Hirabayashi*, 320 U.S. at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

Consistent with this rule, the Court has held that a state law giving preferential voting rights "to a class of *tribal Indians*, to the exclusion of all *non-Indian* citizens," is an impermissible "racial classification." *Rice*, 528 U.S. at 520, 522 (emphases added). Under that law, only "descendants of people inhabiting the Hawaiian Islands in [or before] 1778" could vote in a "statewide election" for an agency that "administer[ed] programs designed for the benefit of" those descendants. *Id.* at 498–99. The Court assumed that it could "treat Hawaiians or native Hawaiians as [Indian] tribes," but nevertheless held that this ancestral classification still functioned as a "proxy" for race because it sought "to preserve th[e] commonality of [these] people." *Id.* at 514–17, 519–20.

2. The Court in *Mancari*, 417 U.S. 535, established a "limited exception" (*Rice*, 528 U.S. at 520) to the general rule that classifications based on tribal status are racial in nature. As part of a broader attempt to allow "Indian tribes" to "assume a greater degree of self-government, both politically and economically," Congress accorded preference in hiring and promotion at the BIA to "member[s] of a Federally-recognized tribe" who had "one-fourth or more degree Indian blood." *Mancari*, 417 U.S. at 542, 553 n.24.

The Court concluded that the classification was "political rather than racial in nature," and thus subject to a relaxed standard of scrutiny. *Id.* at 553 n.24.

The Court emphasized two distinct points leading to this conclusion. First, the Court noted that the preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Mancari*, 417 U.S. at 553 n.24, 554. Second, the Court emphasized the BIA's status as a "truly *sui generis*" agency responsible for "administer[ing] matters that affect Indian tribal life" and "the lives of tribal Indians." *Id.* at 542, 554. Like the requirement that members of Congress reside in the State they represent, *see* U.S. Const. art. I, § 2, cl. 2; *id.* § 3, cl. 3, the hiring preference for tribal members was "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups," *Mancari*, 417 U.S. at 553–54. Thus, this preference was a political, not a racial, classification. *Id.* at 554.[3]

---

[3] The *Mancari* Court did not attempt to justify the hiring preference's "racial component" (*Rice*, 528 U.S. at 519) of requiring at least "one-fourth or more degree Indian blood," *Mancari*, 417 U.S. at 554 n.24 (quoting BIA policy). Indeed, other than in the decision's twenty-fourth footnote, *Mancari* does not mention the BIA's blood-quantum requirement at all. That blood-quantum requirement manifestly discriminates on the basis of racial purity, which indisputably is a form of race discrimination. *See*, *e.g.*, *Loving*, 388 U.S. at 11. To the extent that *Mancari* stands for the proposition that a government classification that includes an explicit blood-quantum requirement is "not even a 'racial' preference," 417 U.S. at 554, it is clearly wrong and should be abrogated.

In the five years following *Mancari*, the Court issued six decisions applying this limited exception. *Mancari* had observed that "[l]iterally every piece of legislation dealing with Indian tribes and reservations" involved "tribal Indians *living on or near reservations*." 417 U.S. at 552 (emphasis added). Consistent with this observation, each of the statutes upheld in these cases made classifications based on tribal membership and tribal lands. Thus, the Court upheld:

- tribal-court jurisdiction over child-custody "dispute[s] arising on the reservation among reservation Indians." *Fisher* v. *Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 385, 387, 390–91 (1976) (per curiam);
- a federal law that "sought to protect . . . tribal self-government" by preventing States from taxing "on-reservation sales" by "members of the Tribe." *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 466, 468 n.7, 479–80 & n.16 (1976);
- a federal criminal code that applied "only" to "enrolled tribal members" who committed a crime "within the confines of Indian country." *United States* v. *Antelope*, 430 U.S. 641, 645–47 & n.7 (1977);
- a federal law distributing treaty funds from the sale of tribal lands—funds that were "tribal property"—based on tribal membership. *Del. Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 79–86 (1977);
- a federal law authorizing state jurisdiction over Indian lands where the "classifications [were] based on tribal status and land tenure" and the

law "allow[ed] scope for tribal self-government on trust or restricted lands." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–02 (1979); and

- a treaty preserving rights of "members of [particular] Indian tribes" to fish from "treaty area waters" in their "traditional tribal fishing grounds." *Washington* v. *Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20, 679, 688–89 (1979).

Because each of these cases involved a tight connection to Indian lands, each also is easily justified as involving internal tribal affairs or promoting tribal self-government, which was the touchstone of *Mancari*. That is because tribal sovereignty "centers on the land held by tribes and on tribal members within the reservation." *Plains Com. Bank* v. *Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327 (2008); *see also White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 151 (1980) ("This Court repeatedly has emphasized that there is a significant geographical component to tribal sovereignty."). Thus laws that operate only on or near a reservation—like a law allowing tribal-court jurisdiction over "adoptions involving tribal members residing on the reservation"—can be viewed as promoting tribal self-government. *Fisher*, 424 U.S. at 385.

As *Rice* observed, *Mancari* was an outlier in that the challenged provision applied outside of Indian country. But the provision was sustained because it was "confined to the authority of the BIA," which has a "*sui generis*" role in the governance of Indian affairs and Indian lands and thus was rationally tied to Indian self-government. *Rice*, 528 U.S. at 519–20.

Moreover, *Mancari* and its progeny recognized the limits of their holdings. *Mancari* itself stressed that "a blanket exemption for Indians from all civil service examinations" would present an "obviously more difficult question" than a preference limited to the BIA. 417 U.S. at 554. Likewise, *Moe* made clear that it was *not* deciding whether prohibiting cigarette sales to non-member Indians or Indians that had "'left the reservation'" would violate "equal protection." 425 U.S. at 480 n.16. And *Antelope* reserved the broader question whether subjecting Indians "to differing penalties and burdens of proof from those applicable to non-Indians" in criminal cases would violate equal protection. *Antelope*, 430 U.S. at 649 n.11.

The Department of Justice summarized the doctrine four years after *Mancari* while commenting on an early draft of ICWA: "The class of persons whose rights under the bill may, in our opinion, constitutionally be circumscribed by this legislation are the members of a tribe, whether living on or near a reservation." H.R. Rep. No. 95-1386, at 36 (Feb. 9, 1978 Letter) (citing *Fisher*, 424 U.S. 382).

The Court has not upheld a statute under *Mancari* in 40 years. Indeed, more than two decades ago, the Court confirmed that *Mancari* represents a "limited exception" to the general rule that classifications based on tribal status are racial classifications. *Rice*, 528 U.S. at 520. In *Rice*, Hawaii had defended the law by pointing to the *Mancari* line of cases, but the Court rejected that argument. *Id.* at 518–20. Even assuming that it should "treat Hawaiians or native Hawaiians as tribes," the Court held, *Mancari* was "confined to the authority of the BIA." *Id.* at 519–20. While the laws upheld by *Mancari* and its progeny

regulate a "quasi-sovereign" tribe's "internal affair[s]," the state-run elections at issue in *Rice* were "the affair of the State of Hawaii." *Id.* at 520, 522. The Court declined to "extend the limited exception of *Mancari*" to this "new and larger dimension." *Id.* at 520. Doing so, the Court held, would "permit a State, *by racial classification*, to fence out whole classes of its citizens"—that is, "all non-Indian citizens"—from "decisionmaking in critical state affairs." *Ibid.* (emphasis added).

B. ICWA's Classifications Fall Far Outside *Mancari*'s Limited Exception And Are Subject To Strict Scrutiny.

To further its racially expressed policy of routing Indian children to the Indian community, ICWA utilizes two distinct racial classifications. The first is its imposition of a separate child-placement regime applicable only to "Indian child[ren]." 25 U.S.C. § 1903(4). The second is the disadvantage that ICWA imposes on non-Indian placements in every contested case, forcing them to demonstrate "good cause" to depart from ICWA's preferred placements. *Id.* § 1915(a)–(b). Neither of these classifications is sheltered by *Mancari*'s limited exception. They are racial classifications subject to strict scrutiny. *See Adarand*, 515 U.S. at 207–08.

1. ICWA's "Indian Child" Classification Is Subject To Strict Scrutiny.

ICWA defines "Indian child" broadly. 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" is covered. 25 U.S.C. § 1903(4). Both of these categories

are racial—not political—classifications subject to strict scrutiny.

a. ICWA's definition of "Indian child" racially discriminates on its face by reaching beyond tribal members to include non-member children who are only "eligible" for membership, based on their "biolog[y]." 25 U.S.C. § 1903(4)(b). This explicit lineal-descent requirement sharply distinguishes ICWA from the BIA hiring preference in *Mancari*, which was upheld because it "applie[d] only to members of 'federally recognized' tribes." 417 U.S. at 553 n.24, 554. Instead, like the classification in *Rice*, the definition looks to biological descent. If a couple enrolled in a tribe had two non-member children, one biological and one adopted, *only* the biological child—*not* the adopted child—would be an "Indian child" under ICWA. ICWA's definition thus is expressly based on lineal descent—that is, on race—and is therefore subject to strict scrutiny. *See Hirabayashi*, 320 U.S. at 100; *Saint Francis Coll.*, 481 U.S. at 613.

During ICWA's enactment, the Department of Justice criticized the bill on this very basis, warning that defining "Indian child" based on this "blood connection" "may constitute racial discrimination." H.R. Rep. No. 95-1386, at 39. The Department recommended "limiting the definition of Indian child" to avoid constitutional problems. *Ibid.* The committee, however, "reject[ed]" the Department's concern, explaining 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." *Id.* at 20. ICWA thus "reflect[s] [Congress's] effort to preserve the commonality of people"—a sure sign of a "racial" classification. *Rice*, 528 U.S. at 515.

ICWA's inclusion of those who are "eligible" for membership as "Indian child[ren]" cannot be excused as a proxy for a child's "not-yet-formalized" tribal affiliation. *Contra* Tex. Pet. App. 153a (Dennis, J.). The regulation of tribal members is justified by their affiliation with "quasi-sovereign tribal entities." *Mancari*, 417 U.S. at 554. But this affiliation is nonexistent and speculative here. "ICWA applies to a child who is not . . . a tribal member," "may never become a member, and may have no other tangible connection to a tribe." Tex. Pet. App. 273a (Duncan, J.). A child's "eligibility" is thus based on ancestry, not on any political affinity or voluntary decision. *See* 25 U.S.C. § 1903(4)(b). For these children, ICWA "permits a child's inchoate tribal membership to override her placement in state proceedings." Tex. Pet. App. 274a (Duncan, J.). In this way, ICWA "put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian," thereby raising "equal protection concerns." *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 655–56 (2013).

ICWA even imposes its constraints on children despite a biological parent's wish *not* to enroll her child in a tribe, and despite the parent's express wish for the child to be adopted by a non-preferred family. A.L.M., for example, was subject to ICWA solely because he was eligible for membership in his parents' tribes—until, at least, the tribes reached a hallway agreement and unilaterally enrolled him. JA 95, 199. "A.L.M.'s only tie to the Navajo is that his mother is a member, . . . [b]ut neither A.L.M. nor his birth parents have ever lived on the Navajo reservation during A.L.M.'s life, except for the 'day he was born and the next day.'" Tex. Pet. App. 274a (Duncan, J.). Similarly, Child P. "is linked to the White Earth Band

through her maternal grandmother," which allowed the Band—after previously considering Child P. ineligible for membership—to suddenly "change[] its position and declare[] Child P. eligible," before later unilaterally enrolling her. *Ibid.*; JA 193. And the child at issue in *Adoptive Couple* was "classified as an Indian because she [was] 1.2% (3/256) Cherokee." 570 U.S. at 641.

Because this definition of "Indian child" is based on the child's lineal descent rather than tribal status, it cannot be political. Nor can a classification based on eligibility to someday become a tribal member possibly relate to tribal self-government or a tribe's internal affairs, a necessary condition of the *Mancari* exception. *See Rice*, 528 U.S. at 520. The child at issue is *not in* the tribe (and may never be), and therefore allowing the tribe to control the placement or adoption of the child is not "rationally designed to further Indian self-government." *Ibid.*

b. The definition of "Indian child" that applies ICWA to all tribal-member children is also a racial classification subject to strict scrutiny. Membership in a tribe is based on lineal descent. 25 C.F.R. § 83.11(e); *see also*, *e.g.*, Navajo Nation Code, tit. I, § 701(b) (membership requires 25% Navajo blood); Pub. L. No. 112-157, 126 Stat. 1213 (2012) (membership in the Ysleta del sur Pueblo Tribe is based on "Indian blood"); Gila River Indian Cmty. Const. art. III, § 1(b) (requiring 25% Indian blood and biological descent from a tribal member); Tex. Pet. App. 498a–99a. For example, Y.R.J. was "eligible for membership in the Navajo Tribe because she is one-half 'Navajo Indian Blood.'" *Id.* at 269a (Duncan, J.). Whether a child qualifies as a tribal member thus is based explic-

itly on "ancestry," and a federal law that discriminates on that basis "is racial discrimination" unless it falls within the narrow exception adopted in *Mancari*. *Saint Francis Coll.*, 481 U.S. at 611, 613 (observing that definitions of "race" include "tribe").

Moreover, ICWA's "Indian child" classification does not further tribal self-governance or the "internal affair[s]" of tribes, as necessary to fall under *Mancari*, but instead regulates the "critical state affairs" of state-court child-custody proceedings. *Rice*, 528 U.S. at 520, 522. In fact, ICWA does not apply at all in the tribes' "internal affair" of the tribal-court proceedings for children residing or domiciled on Indian lands. *See* 25 U.S.C. § 1911(a); 25 C.F.R. § 23.103(b)(1). This "severs any connection to internal tribal concerns." Tex. Pet. App. 271a (Duncan, J.). ICWA instead applies only in state proceedings, conducted "under State law," 25 U.S.C. § 1915(a), in an area at the core of the States' retained sovereignty. Indeed, the "whole subject of the domestic relations of . . . parent and child[] belongs 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). And from that constitutional assignment of responsibility to the States arises a "duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore*, 466 U.S. at 433. Yet it is precisely within these undeniably critical state affairs that ICWA overrides the States' "duty of the highest order to protect the interests of minor children" and compels the States instead to deny Indian children the best-interests determination they would receive under state law.

Indeed, ICWA is far less connected to the internal affairs of a tribe than the election law that this Court struck down in *Rice*. That law—which governed the

election of officials in the Office of Hawaiian Affairs—was designed to give Native Hawaiians a voice in selecting the body responsible for administering programs dedicated to their needs, just as the BIA preference upheld in *Mancari* sought to give tribal Indians a voice in the agency responsible for governing their affairs. In contrast, ICWA does not afford tribes any similar "measure of *self*-governance." *Rice*, 528 U.S. at 520 (emphasis added). In this context of the "critical state affairs" of proceedings for the placement of children who are under state jurisdiction, ICWA's tribal classification does not identify the members of a quasi-sovereign polity for purposes relating to the operation of that polity. Rather, it identifies children of a particular race for the purpose of routing them to placements of the same race and "fenc[ing] out" prospective non-Indian placements. *Id*. at 522. Equal protection "forbids that result." *Ibid.*

c. In the en banc decision below, Judge Dennis argued that ICWA does not draw racial lines because there exist some small number of children without Indian ancestry who are tribal members and can therefore qualify as an "Indian child." Tex. Pet. App. 149a–50a n.50 (Dennis, J.). Specifically, the Cherokee Nation enrolls as members those who are descendants of persons formerly enslaved by the tribe or adopted by the tribe. *Ibid.* But *Rice* squarely rejected the argument that a somewhat overinclusive or underinclusive definition "suffice[d] to make [an ancestral] classification race neutral." 528 U.S. at 514, 516–17.

In any event, the context surrounding this narrow category of individuals demonstrates just how strongly tribal membership is ordinarily tied to blood. For years, the Cherokee Nation *denied* membership status to descendants of those who had been enslaved

by Cherokees because those individuals lacked the required "proof of Cherokee blood." *Cherokee Nation* v. *Nash*, 267 F. Supp. 3d 86, 94–95, 100–01, 110–11 (D.D.C. 2017). Long *after* ICWA was enacted, the Cherokee Nation Council passed an act in 1992 specifically providing that "Tribal Membership is derived only through proof of Cherokee blood." *Id.* at 110. The Cherokee Nation refused to enroll the descendants of the Cherokee Freedmen until a few years ago, when a federal court forced them to do so on the basis that Freedmen have "a present right to citizenship in the Cherokee Nation" by virtue of Cherokee treaties. *Id.* at 140. Thus, this minimally "overinclusive" nature of ICWA, Tex. Pet. App. 150a n.50 (Dennis, J.), stems in large part from a court's decision in 2017 to *override* the Cherokee nation's exclusion of descendants of formerly enslaved individuals who did not share the required blood relationship from tribal membership.

Notably, the inclusion of Cherokee Freedmen as tribal members is unique; the Cherokee Nation "is the only tribe that fully recognizes the Freedmen as full citizens."[4] And the tribes that continue to deny Freedmen citizenship do so on the basis of race. Seminole Freedmen, for example, "are classified as having no 'Indian blood,' segregating them from blood citizens of the tribe who can be elected to senior leadership positions and are eligible for financial assistance."[5] But tribes continue to define membership by strict biological descent—"the context of tribal rules that condition membership on the existence of tribal

---

[4] Sean Murphy, *Black Freedmen Struggle for Recognition as Tribal Citizens*, Associated Press (May 1, 2021).

[5] Mark Walker & Chris Cameron, *After Denying Care to Black Natives, Indian Health Service Reverses Policy*, N.Y. Times (Oct. 8, 2021).

blood . . . shows that biology, above all else, makes a person Indian under ICWA." Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 Colum. J. Gender & L. 1, 27 (2008).

For their part, the Tribes, in their certiorari-stage briefs, contended that ICWA's "Indian child" definition is no different from laws that grant U.S. citizenship to children born abroad to U.S. parents. *See*, *e.g.*, Navajo Br. in Opp. 28, No. 21-380 (citing 8 U.S.C. § 1433). But the problem is not the method by which tribes confer tribal membership on certain American citizens—the problem is a federal law that discriminates on the basis of that tribal status. As this Court has explained, classifications based on "national origin," just like ancestral classifications, are subject to strict scrutiny. *Hernandez*, 347 U.S. at 479; *see also Korematsu* v. *United States*, 323 U.S. 214, 237 (1944) (Murphy, J., dissenting) (noting that one of the chief reasons the government targeted Japanese Americans was their "dual citizenship"), *abrogated by Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018). Thus, even if the Tribes are correct that tribal membership is no different than citizenship, that would simply confirm that ICWA's "Indian child" definition is subject to strict scrutiny. Treating children differently simply because they are members of an Indian tribe—in addition to being American citizens—constitutes national-origin discrimination.

This Court has long rejected laws that subject an American citizen child to a different legal regime simply because of the national origin of his parents. In *Oyama* v. *California*, the Court held that California's Alien Land Law violated the Constitution's equal-protection guarantees by seizing the property of

a child with American citizenship because that child's parent held Japanese citizenship. 332 U.S. 633, 640 (1948). That legal regime impermissibly "points in one direction for minor citizens" whose "parents' country of origin" is disfavored, "and in another for all other children." *Id.* at 640–41. So too here. Indian children "are American citizens," *McClanahan* v. *State Tax Comm'n of Ariz.*, 411 U.S. 164, 172–73 (1973), entitled to equal treatment on the same footing as citizens of all other races. Surely Congress would be required to satisfy strict scrutiny if it sought to impose a separate adoption regime for American citizen children who are also eligible for Swedish citizenship and require state courts to implement a preference for placements with Swedish citizens. Similar scrutiny would apply to legislation ordering state courts to treat American citizen children differently if there was reason to believe that they were eligible for dual Israeli citizenship. That is precisely what ICWA does with respect to eligibility for tribal membership, and it too must be subjected to strict scrutiny.

Finally, Judge Dennis's opinion below expressed concern that holding ICWA's classifications to be racial would effectively erase all of Title 25. Tex. Pet. App. 140a (Dennis, J.). But ICWA stands far apart from other statutes involving Indians. As *Mancari* itself recognized, before ICWA was enacted, "[l]iterally every piece of legislation dealing with Indian tribes and reservations . . . singled out for special treatment a constituency of tribal Indians *living on or near reservations*." 417 U.S. at 552 (emphasis added). Such laws operate on tribes' internal affairs, on tribal lands, and on enrolled members. They therefore fit comfortably in the heartland of what *Rice* described as "legislation dedicated to [tribes'] circumstances and

needs." 528 U.S. at 519. In contrast, ICWA's preference regime applies only *off* tribal land and extends to children who may never become tribal members. And of the "[f]ew provisions" in Title 25 that also include persons eligible for tribal membership, "[n]one" has "any impact on state proceedings as ICWA does," so "none is affected by" a ruling holding ICWA's "Indian child" definition unconstitutional. Tex. Pet. App. 275a n.83 (Duncan, J.). Even ICWA's defenders admit that it is "the most far-reaching congressional legislation" regarding Indian affairs that Congress has ever enacted. Alex T. Skibine, *Using the New Equal Protection to Challenge Federal Control Over Indian Lands*, 36 Pub. Land & Resources L. Rev. 3, 28 (2015). Because ICWA departs from traditional links to tribal self-government in so many different ways, any concerns that declaring it unconstitutional would create a domino effect are misplaced.

2. ICWA's Placement Preferences Are Subject To Strict Scrutiny.

ICWA's placement preferences, too, classify American citizens on the basis of race. In any case for adoption of an "Indian child," ICWA mandates that the state court prefer as the adoptive placement: "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families," 25 U.S.C. § 1915(a); *see also id.* § 1915(b) (similar preferences for foster and pre-adoptive placement)—which is to say placement with any adult that is a member of any one of 574 federally recognized Indian tribes. *See id.* § 1901(3); *Indian Entities Recognized*, 86 Fed. Reg. 18,552 (Apr. 9, 2021). Instead of receiving an individualized determination of their best interests in adoption proceedings, "Indian children" are subjected to a categorical scheme of race-

based presumptions that have remained unchanged for half a century. And non-Indian prospective adoptive and foster parents are relegated to the back of the line.

a. ICWA's placement regime works as a coordinated, interlocking scheme. The three preferences were designed to operate "as a whole" (Tex. Pet. App. 277a (Duncan, J.)) to ensure that Indian children are placed in an "Indian community," H.R. Rep. No. 95-1386, at 23; *see also Adoptive Couple*, 570 U.S. at 652 (ICWA must be analyzed as a "holistic endeavor" (internal quotation marks omitted)). The placement preferences work together to systematically favor placement within Indian "society," H.R. Rep. No. 95-1386, at 23, and to disadvantage non-Indian families, all of whom must show "good cause" to depart from the placement preferences unless no "other Indian famil[y]" from any of the 574 federally recognized tribes is identified as a potential placement. 25 U.S.C. § 1915(a).

Because the Brackeens, Cliffords, and Librettis are not and 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*, 508 U.S. at 666. And they cannot qualify as "Indian" because they cannot meet the blood-quantum or lineal-descent requirements for tribal membership—that is, because of their non-Indian race. Like the descendancy requirement in *Rice*, ICWA uses the ancestry of parents "as a racial definition and for a racial purpose." 528 U.S. at 515. Thus, under ICWA, "the race, not the person, dictates" the parents' placement rank. *Palmore*, 466 U.S. at 432. That classification demands strict scrutiny.

In fact, federal law itself implicitly recognizes that ICWA engages in race discrimination. While federal law strips certain funding from States if they "deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or the child, involved," 42 U.S.C. §§ 671(a)(18)(A), 674(d)(1), Congress exempted ICWA from this prohibition, *id.* § 674(d)(4). Similarly, while it is a violation of the Civil Rights Act of 1964 to "delay or deny" adoptive placements "on the basis of the race, color, or national origin" of the child or adoptive parent, Congress added a proviso that this command "shall not be construed to affect the application of [ICWA]." *Id.* § 1996b. Congress's exemption of ICWA from these general prohibitions against racial discrimination in adoptive proceedings confirms its recognition that ICWA creates the kind of divergent legal standards between Indians and non-Indians that the Court has identified as problematic. *See*, *e.g.*, *Antelope*, 430 U.S. at 649 n.11.

b. ICWA's "naked" preference for Indian over non-Indian families is "most evident" in its third placement preference. Tex. Pet. App. 277a, 279a (Duncan, J.). The third preference favors *any* "Indian famil[y]" from *any* tribe over any non-Indian family. 25 U.S.C. § 1915(a)(3). This placement preference makes pellucid that ICWA is not about tribal self-government. Placing a child with a *different* Indian tribe does not even conceivably advance the "continued existence and integrity of the [child's] tribe." *Id.* § 1901(3). Rather, this preference treats Indian tribes *and* Indian children as fungible, "regardless of cultural, political, economic, or religious differences between [them]." Maldonado, *supra*, at 25. The third preference confirms that when Congress invoked a

policy of placing Indian children in an "Indian community," H.R. Rep. No. 95-1386, at 23, it was referring to the "Indian community" as a *race*.

Although ICWA's third preference is the most egregious—the "smoking gun" evidence of Congress's intent to racially discriminate—all of the preferences discriminate on the basis of race. The second preference favors "other members of the Indian child's tribe." 25 U.S.C. § 1915(a)(2). It can be *any* member of the tribe, wherever that tribal member may live, regardless of whether the child has a cultural connection to that tribe, or even if the tribal member and the child are complete strangers. Indeed, ICWA foists preferred placements on Indian children even if the placement has no intention of passing along tribal culture or traditions, enrolling the child, or having anything to do with a tribe at all. The second preference thus does not further tribal self-government or a tribe's internal affairs. Instead, this preference was intended to "mak[e] it possible for our Indian children to associate themselves with their own race." *Indian Child Welfare Program: Hearings Before the S. Subcomm. on Indian Affairs*, 93d Cong., 2d Sess. 100 (1974) ("ICWA Hrg's"). Baby O.'s tribe put forward dozens of potential placements that lived in Texas—even though Baby O. had always lived in Nevada and knew none of these placement families—before acceding to her placement with the Librettis, with whom she had lived her entire life. And in Y.R.J.'s case, the Navajo Nation sought to send her away from the Brackeens—and from her half-brother A.L.M.—to a different State so that she could live with an unrelated Navajo couple. *See* Tex. Pet. App. 210a; *In re Y.J.*, 2019 WL 6904728, at *2. ICWA's second preference thus illustrates that ICWA deems children little more than chattel, a "resource" to be gathered up by a tribe,

25 U.S.C. § 1901(3), rather than human beings with individual interests and needs that transcend their racial make-up.

Even ICWA's first preference for any "member of the child's extended family" puts a thumb on the scale against non-Indian placements. 25 U.S.C. § 1915(a)(1). While state law frequently prefers placement with a family member, ICWA requires States to accord preference to anyone designated as "family" by "the law or custom of the Indian child's tribe." *Id.* § 1903(2) (defining "extended family member"). And many tribes' laws and customs have sweeping definitions of "extended families," including, in some cases, all "clan relationships." *Davis* v. *Means*, 7 Nav. Rptr. 100, 103 (Nav. Sup. Ct. 1994). Thus, even in the absence of the second and third placement preferences, ICWA still would discriminate against non-Indian families by allowing Indian tribes to define "extended family" to include numerous tribal members that would not otherwise enjoy a preference under state law.[6]

Under a system without racial classifications, Individual Petitioners and similarly situated parents would not always secure adoption of Indian children. But they would have an equal opportunity to adopt the vulnerable children whom they love based on the same standards that apply to all other children—rooted in an individualized assessment of the child's best interests. Under that system, alternate placements supported by a tribe could come forward

---

[6] ICWA also delegates to tribes the power to "establish a different order of preference by resolution." 25 U.S.C. § 1915(c). Individual Petitioners join Texas's arguments that this provision violates the non-delegation doctrine.

and lodge competing petitions for adoption. The state court would then make its decision based on an individualized determination of the child's best interests, rather than being forced to weight the scale in favor of families that share the child's ancestry.

C. ICWA's Classifications Cannot Survive Any Standard Of Review.

ICWA's classifications fail whether analyzed under strict scrutiny or rational-basis review.

1. "[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227. To survive strict scrutiny, "[f]ederal racial classifications . . . must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 235. ICWA cannot survive this "most searching examination." *Id.* at 223 (internal quotation marks omitted).

As an initial matter, the government did not even "attempt to prove" a compelling interest in the district court. Tex. Pet. App. 501a (emphasis omitted). Nor could it. ICWA's ancestry-based distinctions are not compelling; they are "odious to a free people whose institutions are founded upon the doctrine of equality." *Rice*, 528 U.S. at 517.

Moreover, neither Congress nor Respondents have made an effort to justify ICWA's intrusive regime with evidence of circumstances that exist today, or offered a basis to believe States today would return to the severe abuses of 50 years ago. Congress cannot wield such a drastic remedy based solely on historical problems; those needs must persist in the present. *See Shelby Cnty.* v. *Holder*, 570 U.S. 529, 553 (2013); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–21 (2007).

Even accepting that the government continues to have a compelling interest in safeguarding "the continued existence and integrity of Indian tribes," 25 U.S.C. § 1901(3), ICWA is not remotely tailored to Congress's asserted interest. There is no suggestion that Congress considered race-neutral alternatives to redress the problems identified by Congress. *See Parents Involved*, 551 U.S. at 735. In any event, preferences favoring non-Indian extended family members or members of *other* tribes in no way advance the "integrity" of a different Indian tribe. Because an Indian family "from anywhere in the country enjoys an absolute preference over other citizens based solely on their race," it is "obvious that [the] program is not narrowly tailored." *City of Richmond*, 488 U.S. at 508.

ICWA's provision for departure from its placement preferences upon a showing of "good cause" does nothing to salvage the regime. 25 U.S.C. § 1915(a), (b). The remote possibility of "individualized" consideration of good cause "is of little comfort under [the Court's] strict scrutiny analysis." *Gratz* v. *Bollinger*, 539 U.S. 244, 274 (2003). And it is no comfort at all here, when the BIA's regulations so sharply limit what may be considered as "good cause" to depart from the placement preferences. *See* 25 C.F.R. § 23.132(c), (e) (preventing state courts from considering "ordinary bonding or attachment"). Disregarding the well-being and best interests of Indian children is not a narrowly tailored solution to the unwarranted breakup of Indian families or the historical abuses of state agencies.

2. ICWA cannot stand even under a relaxed standard of review, as eight judges concluded below. Under *Mancari*, the government still must show that the legislation "can be tied rationally to the *fulfillment*

of Congress' unique obligation toward the Indians." 417 U.S. at 555 (emphasis added). That review is not a rubber stamp. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985). The government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446.

To start, ICWA's placement preferences are massively overinclusive and underinclusive in ways that preclude them from "rationally further[ing] tribal interests." Tex. Pet. App. 270a (Duncan, J.). The Act "excludes some children who have been raised as Indians"—like a child whose blood quantum is not sufficient for tribal membership, but who has been raised on a reservation—while "including some who have had no prior contact with Indian society"—for example, children who (like A.L.M.) were intentionally raised off tribal lands. Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe*, 66 Univ. of Detroit L. Rev. 451, 459 (1989).

Moreover, the placement preferences have nothing to do with Congress's goal of preventing the breakup of Indian families and removal of children from tribal lands. 25 U.S.C. § 1901(3), (4). When Congress enacted ICWA, tribal leaders testified that the "continued removal of children from the reservation contributes to destruction of the family," ICWA Hrg's, *supra*, at 254 (statement of Pueblo Gov. Robert Lewis), and organization leaders testified about tribes for whom 25% of the children "born on the reservation are eventually taken from their parents," *id.* at 95; *see also* H.R. Rep. No. 95-1386, at 35 (Department of Justice noting that ICWA "is designed to remedy" the problem of state agencies "ignor[ing]" that "tribal governments have exclusive jurisdiction . . . of tribal

members located on reservations"). Yet ICWA's placement preferences do not apply to children that live on a reservation, so they cannot even conceivably rectify that abuse.

ICWA also applies in situations where no Indian family is being broken up—for example, where the tribal-member parent is completely absent from the child's life. ICWA's adoption placement preferences apply only *after* the child has been removed from the custody of his or her biological parents—and thus where there is no family whose breakup could be prevented. *See* 25 U.S.C. § 1912(e), (f) (discussing termination of parental rights). Even more egregiously, "ICWA overrides the wishes of biological parents who support their child's adoption outside the tribe"—which is exactly what happened with A.L.M., Y.R.J., and Baby O. Tex. Pet. App. 275a (Duncan, J.). This "makes nonsense of ICWA's key goal of preventing the *break-up* of Indian families" and "does nothing to further" that aim. *Id*. at 275a n.82, 277a (Duncan, J.).

Furthermore, 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 applies to children who might never become a tribal member, and it grants a preference to placements with any Indian tribal family, *id.* § 1915(a)(3). But placing a child with a *different* Indian tribe cannot possibly advance the continued existence and integrity of the child's potential tribe.

ICWA's "Indian child" definition and placement preferences unconstitutionally discriminate on the basis of race in violation of the Constitution's guarantee of equal protection.

II. ICWA EXCEEDS CONGRESS'S ENUMERATED POWERS.

ICWA's placement preferences are also unconstitutional because they exceed Congress's enumerated powers, trenching on "an area that long has been regarded as a virtually exclusive province of the States." *Sosna*, 419 U.S. at 404. The Constitution confers upon Congress "not all governmental powers, but only discrete, enumerated ones." *Printz* v. *United States*, 521 U.S. 898, 919 (1997). And "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607.

ICWA relies on Congress's power to "regulate Commerce . . . with Indian tribes." 25 U.S.C. § 1901(1) (quoting U.S. Const. art. I, § 8, cl. 3). But the placement preferences regulate the adoption of *children*, not anything that can be described as "commerce." And they operate on individual adoption proceedings involving non-tribal members outside of reservations, not conduct involving Indian "tribes." Nor are ICWA's placement preferences grounded in any other power conferred on Congress by the Constitution.

And even if Congress had the power to enact ICWA's placement preferences, it could not exercise that power by directing state courts how to administer *state-law* causes of action. The Constitution "confers upon Congress the power to regulate individuals, not States," and thus "withhold[s] from Congress the power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475–76. Just as this anti-commandeering principle would prevent Congress from compelling state legislatures to enact its placement preferences into state law, it prohibits Congress from forcing state

judges to apply its placement preferences when considering a state-law cause of action.[7]

A. The Indian Commerce Clause Cannot Sustain ICWA's Placement Preferences.

Congress has authority to "regulate *Commerce* with foreign Nations, and among the several States, and with the *Indian Tribes*." U.S. Const. art. I, § 8, cl. 3 (emphases added). ICWA's placement preferences do not regulate commerce with Indian tribes. Instead, they govern the placement of individual children with prospective adoptive parents—including non-tribal members—in state proceedings outside of reservations.

1. The Constitution's plain text authorizes Congress to regulate commerce and trade with Indian tribes, not all affairs that happen to involve an individual Indian. At the time of the Founding, "commerce" was understood to mean an "exchange of one thing for another," "Intercour[s]e," "trade," or "traffick." 1 S. Johnson, A Dictionary of the English Language 361 (4th ed. 1773) (defining "commerce"); *see also* T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick."). And "tribe" referred to a "distinct body of the people," not the individual peo-

---

[7] Individual Petitioners' standing to press their Article I claims was unquestioned at the certiorari stage. "[I]ndividual[s]" may "challenge a law as enacted in contravention of constitutional principles of federalism." *Bond* v. *United States*, 564 U.S. 211, 223–24 (2011). In any event, Texas indisputably has Article III standing to bring this claim, and the "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld* v. *Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

ple themselves. 2 S. Johnson, A Dictionary of the English Language at 980. The Constitution's grant of authority to regulate commerce with Indian "Tribes" is thus, along with "States" and "foreign Nations," a reference to trade with three distinct "classes" of governmental bodies. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831).

The Articles of Confederation and its influence on the Constitution's drafting confirm that the Indian Commerce Clause cannot be understood to grant Congress unlimited authority over any matter that involves an Indian. Under the Articles, the Continental Congress had the "sole and exclusive right and power of . . . regulating the trade *and managing all affairs* with *the Indians*." Articles of Confederation art. IX, cl. 5 (emphases added). At the Constitutional Convention, James Madison proposed giving Congress this same broad power to "regulate *affairs* with *the Indians* as well within as without the limits of the U[nited] States." 2 Records of the Federal Convention of 1787, at 324 (M. Farrand rev. 1966) (emphases added). The Convention, however, adopted a much narrower provision: "Commerce . . . with the Indian Tribes." Congress thereby "lost a power upon the Constitution's ratification"—specifically, the broader power to "manage all affairs with Indians." Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1089–90 (2004).

The ratification debates and historical practice reflect the Constitution's textual limitations. The power over commerce with Indian tribes enabled Congress to regulate "the *trade* with Indians." *The Federalist* No. 42, at 265 (C. Rossiter ed. 1961) (Madison) (emphasis added). Such "trade" would be "with the Indian *na-*

tions." *The Federalist* No. 24, at 158 (Hamilton) (emphasis added). For the first 100 years of the country, whenever the federal government "dealt with [Indians], it [was] in their collective capacity as a state, and not with their individual members." S. Rep. No. 41-268, at 10 (1870). In 1790, for example, Congress passed "an Act to regulate trade and intercourse with the Indian Tribes," which required American citizens to obtain a federal license in order to "carry on any trade or intercourse"—such as trading "merchandise . . . usually vended to the Indians"—with "the Indian tribes." Act of July 22, 1790, ch. 33, §§ 1, 3–4, 1 Stat. 137 ("Trade and Intercourse Act"). The Act also prohibited U.S. citizens from committing certain crimes against Indians. *Id.* § 5. But this prohibition applied only in Indian country, where Indian *tribes* were located, rather than within state boundaries. *Ibid.*

The Constitution's text, context, and history thus demonstrate that Congress's Indian Commerce Clause power confers only authority to regulate trade with tribes, and that the power is at its zenith on tribal lands.

2. ICWA's placement preferences far exceed Congress's Indian Commerce power. They regulate the adoption of children, not commerce; they govern relations between individual "Indian children" (including non-tribal members) and prospective adoptive parents, not tribes; and they operate in state-court proceedings outside of reservations.

First, ICWA's child-placement system does not regulate trade, the exchange of commodities, or "commercial intercourse." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824). "[G]oods are the subject of commerce," but "persons are not." *Mayor, Alderman &*

Commonalty of City of N.Y. v. *Miln*, 36 U.S. (11 Pet.) 102, 136 (1837); *cf.* U.S. Const. amend. XIII. Nor do ICWA's placement preferences regulate the "channels" or "instrumentalities" of commerce—or any economic "activities having a substantial relationship" to commerce. *Lopez*, 514 U.S. at 558–59. Indeed, this Court has observed that the regulation of "child custody" (*id.* at 564) and "childrearing" (*Morrison*, 529 U.S. at 616) is *not* the regulation of "commerce."

Second, ICWA's placement preferences do not deal with tribes as such, or even simply with tribal members. To the contrary, those preferences dictate how individual children, including those who are *not* and may *never become* tribal members, are placed with foster or adoptive parents. *See* 25 U.S.C. §§ 1903(4)(b), 1915(a)–(b). And they subject families seeking to adopt a child to a federal preference regime, whether those prospective parents are members of an Indian tribe or not. *See id.* § 1915(a)–(b).

The power to regulate commerce "with Indian tribes" "does not give Congress the power to regulate commerce with 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). ICWA's regulation of "Indian *families*," 25 U.S.C. § 1901(4) (emphasis added), and, crucially, of the *non*-Indian families who seek to foster or adopt individual Indian children, stretches far beyond any regulation of commerce "with Indian tribes," U.S. Const. art. II, § 8.

Third, instead of applying where the Indian Commerce power is at its apex—on Indian lands—ICWA's placement preferences regulate *only* the organs of state government outside of Indian country. In this

exclusively "off-reservation context," the Department of Justice explained, the "Federal interest" is "attenuated" and the state interest is "significant." H.R. Rep. No. 95-1386, at 40. Unlike the first Congress's criminal prohibition against trading or committing certain crimes against Indians in Indian country, where Indian tribes were located—a prohibition that left undisturbed the States' authority to regulate crimes committed within state borders—ICWA's placement preferences apply only within state boundaries, and only to state government branches.

Nothing from the Founding era, including the Trade and Intercourse Act, "pretend[ed] to enact standards for state courts or officials," as ICWA does. Tex. Pet. App. 255a (Duncan, J.). Nor is there a "single example" from the country's entire "history" in which the United States used "its Indian power to legislate for state governments." *Id.* at 257a–58a. ICWA's placement preferences are simply "unprecedented." *Id.* at 259a. That "lack of historical precedent" is a "telling indication" of the "severe constitutional problem" here. *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 505 (2010).

3. This Court's Interstate Commerce Clause precedents confirm that ICWA's placement preferences exceed the limits of Congress's enumerated powers. "[H]owever broadly one might define" the term "commerce," this Court held in *Lopez* that it cannot be interpreted in a way that erases "any limitation on federal power, even in areas . . . where States historically have been sovereign." 514 U.S. at 561, 564.

As a result, the Court in *Lopez* unanimously rejected the notion that Congress's power to regulate "commerce" among the States gives it the power to regulate "family law (including marriage, divorce, and

child custody)." 514 U.S. at 564 (emphasis added); *see also id.* at 624 (Breyer, J., dissenting) ("To hold this statute constitutional is not to . . . hold that the Commerce Clause permits the Federal Government . . . to regulate 'marriage, divorce, and child custody.'"). And in *Morrison*, the Court reaffirmed that Congress's power to regulate commerce among the States does not give it power to regulate "family law and other areas of traditional state regulation," including "childrearing." 529 U.S. at 615–16.

The en banc majority below refused to engage with *Lopez* or *Morrison*, asserting that "Indian 'commerce' has meant something different than interstate 'commerce.'" Tex. Pet. App. 86a (Dennis, J.) (citation and alterations omitted). That assertion is implausible as a matter of plain text; not only do both provisions use the term commerce, but that word is used only a single time in Article I, Section 8. *See* U.S. Const. art. I, § 8. And this Court has held only that the Interstate Commerce and Indian Commerce Clauses have different "applications." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989). The power to regulate commerce with tribes is "exclusive" to the federal government, while the power to regulate commerce among States is a "concurrent" power. *Ibid.* This Court has not suggested that it was revisiting Chief Justice Marshall's pronouncement that the "meaning of the word" commerce in the Commerce Clause "must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it." *Gibbons*, 22 U.S. at 194. As Justice McLean riding circuit put it: Congress's "power to regulate commerce with the Indian tribes" is "the same power, given in the same words" as the rest of the Commerce Clause; thus, Congress's lack of a "general power" to regulate

Indian affairs "is a proposition too clear for demonstration." *United States* v. *Bailey*, 24 F. Cas. 937, 940 (C.C.D. Tenn. 1834) (McLean, J.).

4. Interpreting the Indian Commerce Clause to permit Congress to impose placement preferences for children in state adoption proceedings based on their eligibility for or membership in an Indian tribe cannot be sustained under the plain meaning of the Clause or this Court's interpretation of "commerce" in the interstate context. Nor did the en banc court make any attempt to do so. Rather, the court below concluded that ICWA's placement preferences are consistent with Congress's "'*plenary* power to legislate in the field of Indian affairs.'" Tex. Pet. App. 88a (Dennis, J.) (quoting *Cotton Petroleum*, 490 U.S. at 192).

Congress's power under the Indian Commerce Clause may be "plenary"—as is its interstate-commerce power, *United States* v. *Darby*, 312 U.S. 100, 115 (1941)—but it "is not absolute," *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality); *see also Del. Tribal Bus. Comm.*, 430 U.S. at 84 (same). Congress's power remains "subject to . . . pertinent constitutional restrictions," *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935), including the structural restriction that Congress possesses only limited, enumerated powers, while the States retain the rest.

This Court has accordingly warned that Congress would go too far if it used its Indian Commerce Clause power to interfere with the power or authority of States. When the Court upheld a federal law affirming a tribe's authority to criminally prosecute a nontribal member for "events that occur upon the tribe's own land," it relied in particular on the fact that the

law "involve[d] no interference with the power or authority of any State." *United States* v. *Lara*, 541 U.S. 193, 203–05 (2004). Moreover, the Tenth Amendment's reservation of powers to the States provides "explicit language" setting a limitation on Congress's authority. Tex. Pet. App. 236a (Duncan, J.) (quoting *Lara*, 541 U.S. at 204). Few powers are as clearly reserved to the States as the "whole subject of the domestic relations of . . . parent and child[]," which "belongs to the laws of the states, and not to the laws of the United States." *Burrus*, 136 U.S. at 593–94. So deeply embedded is this principle that federal courts recognize a "domestic relations" exception to diversity jurisdiction, *Ankenbrandt* v. *Richards*, 504 U.S. 689, 693 (1992), and exclude child-custody decisions from federal habeas challenges because of the "special solicitude for state interests in the field," *Lehman* v. *Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 511–12 (1982) (internal quotation marks omitted).

The en banc court did not identify any law upheld by this Court that regulated family law involving nontribal members in state proceedings. *See* Tex. Pet. App. 96a (Dennis, J.) (declining to identify "a Supreme Court decision blessing a statute that operates just like ICWA or a Founding-era federal law that regulates Indian children and applies within state child welfare proceedings"). Far from a well-established practice with a rich historical pedigree, *see Lara*, 541 U.S. at 203–04, the imposition of federal standards on family matters "long . . . regarded as a virtually exclusive province of the states," *Sosna*, 419 U.S. at 404, is something "no federal Indian law has ever tried," Tex. Pet. App. 201a (Duncan, J.). And the "main effect" of ICWA's placement preferences is precisely "to curtail state authority." *Holyfield*, 490 U.S. at 45 n.17. They do not apply on "land that is Indian country," where

federal and tribal law have "primary jurisdiction." *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). Rather, they apply to arms of the state governments in state jurisdictions.

Nor would holding that ICWA's placement preferences exceed Congress's authority under the Indian Commerce Clause call into question any of this Court's prior precedents. Many of this Court's cases on which the en banc court relied regulate commerce directly. *See*, *e.g.*, *United States* v. *Mazurie*, 419 U.S. 544, 556–58 (1975) ("This Court has repeatedly held that this clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country.") (collecting cases). Others reference the Indian Commerce Clause in upholding Congress's power "to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority," including the authority to prosecute criminal violations. *Lara*, 541 U.S. at 202. None involved state-court adoption proceedings involving non-tribal members, much less held that such proceedings constituted "commerce . . . with Indian Tribes" merely because they concerned an Indian child.

B. Neither The Treaty Clause Nor Other Constitutional Powers Authorize Congress To Enact ICWA's Placement Preferences.

In enacting ICWA, Congress obliquely referenced "other constitutional authority" besides the Indian Commerce Clause, 25 U.S.C. § 1901(1). But this vague reference is "not illuminating," and there is "no

other enumerated power . . . [that] could even arguably support" ICWA's placement preferences. *Adoptive Couple*, 570 U.S. at 658 (Thomas, J., concurring).

Nevertheless, a narrow majority below would have sustained ICWA's placement preferences on the basis of an undifferentiated plenary power and the "federal government's continuing trust relationship with the tribes." Tex. Pet. App. 72a, 79a–81a (Dennis, J.). That decision exemplified the same "confusion" about the "source of federal authority over Indian matters" that existed before the Court clarified that Congress's power "derives" from two enumerated powers: "responsibility for regulating commerce with Indian tribes and for treaty making." *McClanahan*, 411 U.S. at 172 n.7; *see Lara*, 541 U.S. at 200 (similar). As explained above, the Indian Commerce Clause does not give Congress the power to enact ICWA's placement preferences. Neither does the Treaty Clause.

The Treaty Clause provides that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." U.S. Const. art. II, § 2, cl. 2. The "treaty power does not literally authorize Congress to act legislatively, for it is an Article II power." *Lara*, 541 U.S. at 201. But Congress may enact legislation "in aid or execution" of a specific treaty when it is "necessary and proper" to do so. *Neely* v. *Henkel*, 180 U.S. 109, 121 (1901).

ICWA is not an exercise of Congress's powers under the Treaty Clause. To start, Congress ended the practice of entering into treaties with Indian tribes in 1871, more than a century before it enacted ICWA. *See* 25 U.S.C. § 71. There is no reason to conclude that Congress enacted legislation to "aid or execut[e]" 100-year-old unidentified treaties without saying so.

Neely, 180 U.S. at 121. And it would be "ironic" to conclude that Congress enacted legislation to aid treaties that Congress long ago prohibited. *Lara*, 541 U.S. at 225 (Thomas, J., concurring in the judgment).

Moreover, traditional exercises of "treaty" powers "totally displace" state governments in favor of exclusive federal regulation, while ICWA "does the opposite." Tex. Pet. App. 252a (Duncan, J.) (alteration omitted). When the federal government wanted to guarantee tribes the right to fish, for example, it entered into a treaty that could not be invalidated by state law. *See, e.g.*, *Wash. State Com. Passenger*, 443 U.S. at 684–85, 693–95 (discussing 1854 and 1855 treaties). ICWA works the other way around. It forces States to implement ICWA's placement preferences. 25 U.S.C. § 1915(a). And it purports to do so in proceedings "under State law." *Ibid.*

Even if ICWA could be connected in the abstract to the President's power to make treaties, Congress could act only in furtherance of a *specific* treaty with signatory tribes. *Neely*, 180 U.S. at 122 (upholding legislation "to enforce or give efficacy to the provisions of *the treaty*" (emphasis added)). ICWA goes far beyond that. Some treaties with tribes promised to give "food" or "blankets" to "women and children" of a tribe that had just ceded land to the United States. Treaty with the Sauk and Foxes (Sept. 21, 1832); Treaty with the Seminole (May 9, 1832). Other treaties provided that the federal government may raise funds for "orphans" of Indian tribes, Treaty with the Choctaw § XIX (Sept. 27, 1830), confirmed that probate courts "may" appoint guardians for orphans of Indians who had been allotted Kansas land under previous treaties, Treaty with the Potawatomi § VIII (Feb. 27, 1867), or established that the tribe would remain

"guardian[s]" of orphans already within the tribe after the tribe was "removed" to "new homes in the Indian country," Treaty with the Seneca § XXIII (Feb. 23, 1867).

None of these "treaties," however, "speaks to whether Congress may regulate state government proceedings involving Indian children" by imposing a separate child-custody regime on state courts. Tex. Pet. App. 249–50a (Duncan, J.). If the Treaty Clause authorizes ICWA, then the Treaty Power could "lodge in the Federal Government the potential for 'a police power over all aspects of American life,'" including "every conceivable domestic subject matter." *Bond* v. *United States*, 572 U.S. 844, 883 (2014) (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 584 (Thomas, J. concurring)). And even if any of the foregoing specific treaties could support such legislation, none could authorize Congress to make a *nationwide* law that gives a placement preference to *every one* of the 574 federally recognized tribes. To the contrary, the Framers "denied that 'the President and Senate hav[e] it in their power, by forming Treaties with an Indian tribe or a foreign nation, to *legislate over the United States*.'" *Id.* at 891 (alteration in original) (quoting 5 Annals of Cong. 663 (1796) (remarks of Rep. Hillhouse)).[8]

---

[8] This Court in *Bond* left open the questions whether *Missouri* v. *Holland*, 252 U.S. 416 (1920), could be read to "remove all limits on federal authority, so long as the Federal Government ratifies a treaty first" and, if so, whether that case should be "limited or overruled," *Bond*, 572 U.S. at 855 (majority opinion). Because there is no connection between ICWA and any treaty, this Court need not address those questions here either. But if the Court concludes otherwise, it should hold that Congress's "power to help the President *make* treaties is not a power to *implement*

* * *

In upholding ICWA's placement preferences, the en banc court endorsed a limitless congressional power to "override state law whenever that law happens to be applied to Indians." *Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring). It made no difference below that those preferences concern family law, an area that has always been subject to the authority of the States, not the federal government. It made no difference that those preferences regulate non-tribal members. And it made no difference that those preferences must be applied within state-court adoption proceedings. That reasoning cannot be squared with the limited and enumerated powers granted by the Constitution.

C. ICWA's Placement Preferences Impermissibly Commandeer State Courts And State Agencies.

Even if Congress had authority to regulate state child-custody proceedings involving Indian children, ICWA's placement preferences would still violate the Constitution for a separate reason: They unlawfully commandeer state courts and state agencies in service of federal policy.

In *Murphy*, this Court reaffirmed a "simple and basic" principle central to our system of government: The Constitution "withhold[s] from Congress the power to issue orders directly to the States." 138 S. Ct. at 1475–76. That anti-commandeering principle is fundamental to the structure of our dual-sovereign system, in which Congress has "not plenary legislative

---

treaties already made," regardless of the "unreasoned and citation-less sentence" from *Holland* purporting to say otherwise. *Id.* at 873–76 (Scalia, J., concurring in the judgment).

power but only certain enumerated powers," with "all other legislative power . . . reserved for the States, as the Tenth Amendment confirms." *Id.* at 1476. Thus, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York*, 505 U.S. at 166.

When Congress ordained a hierarchy of placement preferences for Indian children, it did not provide a federal cause of action, supply a federal forum, or ask federal officials to implement its mandates. Instead, Congress directed state courts to modify *state-law* causes of action and mold them to Congress's liking. Moreover, Congress conscripted state agencies to carry out the federal government's bespoke child-custody regime for certain children. The Constitution does not leave the "division of authority between the Federal Government and the States" that vulnerable. *New York*, 505 U.S. at 149. ICWA's placement preferences are unconstitutional.

1. Congress May Not Compel The States To Regulate.

The anti-commandeering principle can be traced to the Framers' conception of the scope of federal power. Under the Articles of Confederation, the federal government had acted "only upon the States," rather than "directly upon the citizens." *New York*, 505 U.S. at 162 (emphasis omitted). This system was both "ineffectual and provocative of federal-state conflict." *Printz*, 521 U.S. at 919; *see The Federalist* No. 15, at 103 (Hamilton).

The Constitutional Convention altered that governmental structure. Rather than a system of "sovereignty over sovereigns," the Convention adopted a Constitution that calls for Congress to "exercise its legislative authority directly over individuals rather than over States." *New York*, 505 U.S. at 165, 180. By adopting this entirely different system, the Convention ensured that the federal government "does not attempt to coerce sovereign bodies, states, in their political capacity." 2 Elliot's Debates 197 (statement of Oliver Ellsworth).

This Court "has consistently respected this choice." *New York*, 505 U.S. at 166; *see id.* at 178 ("[N]o member of the Court has ever suggested that" even a "particularly strong federal interest" "would enable Congress to command a state government to enact *state* regulation."). "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *Id.* at 178. For that reason, this Court held in *New York* that Congress could not command State legislatures either to "regulat[e] pursuant to Congress' direction" or to "tak[e] title to and possession of . . . low level radiation waste." *Id.* at 175-76. A few years later, this Court held in *Printz* that Congress could not "circumvent" the anti-commandeering doctrine by "conscripting the State's officers directly." 521 U.S. at 935. And in *Murphy*, the Court held that the anti-commandeering principle precludes Congress from prohibiting a State from enacting new laws. 138 S. Ct. at 1478.

2. ICWA's Placement Preferences Commandeer State Courts And State Agencies.

a. Under the anti-commandeering doctrine, Congress lacks "the power to issue direct orders to the governments of the States." *Murphy*, 138 S. Ct. at 1475–76. "Congress cannot compel the States to enact or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. And just as "Congress cannot circumvent that prohibition by conscripting the State's officers directly," *ibid*., it cannot circumvent that prohibition by dictating to state courts the law to apply in *state-law* causes of action.

Yet that is precisely what ICWA's placement preferences do. Congress instructed state judges to implement Congress's placement preferences "[i]n any adoptive placement of an Indian child" taking place "*under State law*." 25 U.S.C. § 1915(a) (emphasis added). In child-placement proceedings involving an Indian child under state law, state courts must disregard the preferences that the state legislature adopted—which typically make the "best interest[s] of the child" paramount, *e.g.*, Tex. Fam. Code §§ 153.002, 162.016—in favor of Congress's placement preferences. The effect is precisely the same, and just as impermissible, as if Congress had commanded state legislatures to enact its placement preferences directly. Either way, the forcible application of Congress's own placement preferences to state-law adoption petitions unlawfully "reduc[es]" States to "puppets of a ventriloquist Congress." *Printz*, 521 U.S. at 928. And it does so in an area—child-custody proceedings—that lies at the core of state sovereignty. *See Burrus*, 136 U.S. at 593.

"Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly." *Murphy*, 138 S. Ct. at 1477 (quoting *New York*, 505 U.S. at 178). But ICWA's placement preferences disclaim federal involvement entirely. There is no federal official who administers ICWA or carries out its mandates. Nor did Congress establish a federal cause of action. Proceedings for adoption of an Indian child may in certain circumstances be transferred to tribal court, 25 U.S.C. § 1911, but are not removable to federal court. ICWA instead puts state courts "under the direct control of Congress," "as if federal officers were installed in state [judicial] chambers," "armed with the authority to stop" courts from conducting the ordinary, individualized best-interests analysis. *Murphy*, S. Ct. at 1478.

ICWA's placement preferences thus undermine the "political accountability" that the anti-commandeering principle promotes. *Murphy*, 138 S. Ct. at 1477. Because state courts superimpose federal standards "under State law," 25 U.S.C. § 1915(a), "responsibility is blurred" and accountability is lost. *Murphy*, 138 S. Ct. at 1477. If an Indian child requests a copy of a judgment that directed her placement with "other Indian families," rather than a non-tribal family, she will see a state-court judgment directing her placement "under State law." 25 U.S.C. § 1915(a). If she either likes or dislikes the separate child-custody system into which she was forced as a child, she would either credit or blame the state actors involved—even though Congress was responsible for her fate.

b. The decision below, however, concluded that ICWA's placement preferences do not violate the anti-

commandeering doctrine on the theory that the doctrine excludes state *courts* from its protection. Tex. Pet. App. 107a (Dennis, J.). The categorical decision to separate "a state's courts and its political branches," *ibid.*, has no basis in text, history, or this Court's precedent. It is the nature of the command, not of the state official impressed into service, that is of constitutional significance.

The anti-commandeering doctrine's protection of "[r]esidual state sovereignty" is traceable to the "Tenth Amendment's" text. *Printz*, 521 U.S. at 919. The Tenth Amendment confirms that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The amendment thus reserves powers "to the States" in full—not to its executive and legislative branches alone. *Ibid.*

The Framers understood that state sovereignty must be preserved in full, not in part. During the Constitutional Convention, the Founders rejected the New Jersey Plan, under which the "laws of the United States ought . . . to be carried into execution *by the judiciary* and executive officers of the respective states, wherein the execution thereof is required." *New York*, 505 U.S. at 164–65 (emphasis added) (quoting 3 Records of the Federal Convention at 616 (M. Farrand ed. 1911)). The Founders instead adopted the Virginia Plan, under which the federal government would legislate "directly upon individuals, without employing the States as intermediaries." *Ibid.*

Moreover, "at the time of the Founding, the distinctions between judges and executive magistrates, and between judicial and executive functions, were

quite blurred." Evan Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 Sup. Ct. Rev. 199, 216. For example, state judges laid city streets and ensured the seaworthiness of vessels—tasks that today would be performed by executive officers, *id.* at 216 n.52, who unambiguously cannot be commandeered, *see Printz*, 521 U.S. at 928. This historical evidence makes it "unlikely that the Framers would have sharply discriminated between judicial and almost-identical executive functions for purposes of commandeering." Caminker, *supra*, at 216; *see also* Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 Brandeis L.J. 319, 366 (1998) ("[I]t makes little sense to conclude that Congress can commandeer the state courts but not the other branches of state government.").

The Supremacy Clause, of course, specifies that "the Judges in every State shall be bound" by "the Laws of the United States which shall be made in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 2. This clause does not, however, say that Congress may "order state judges to do anything." Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 Yale L.J. 947, 976 (2001). Rather, it recognizes that—unlike state executive or legislative branches—the judiciary "applie[s] the law of other sovereigns all the time," and laws that operate in other jurisdictions create "obligations in justice that courts of the forum state would enforce." *Printz*, 521 U.S. at 907; *see also* Ellen Katz, *State Judges, State Officers, and Federal Commands After* Seminole Tribe *and* Printz, 1998 Wis. L. Rev. 1465, 1469 (the "Judges Clause is best understood not as support for the commandeering of state judges, but as a choice of law rule"). Thus, when a state court considers a cause of action arising under federal law, it is necessarily bound to apply federal

law. But that does not suggest that a state court considering a *state* cause of action must apply federal law.

Moreover, this Court has held that state courts of competent jurisdiction are not "free to decline jurisdiction" to hear federal causes of action. *Testa* v. *Katt*, 330 U.S. 386, 394 (1947). That requirement does not violate the Tenth Amendment because "state tribunals with ordinary jurisdiction over tort litigation can be required to hear cases *arising under*" federal law. *Printz*, 521 U.S. at 944 (Stevens, J., dissenting) (emphasis added); *see also FERC* v. *Mississippi*, 456 U.S. 742, 760 (1982) (holding that a federal law requiring state authorities "to adjudicate disputes *arising under*" the federal law was not unconstitutional). Article III, after all, "describes the judicial power as extending to all cases, among others, arising under the laws of the United States." *Palmore* v. *United States*, 411 U.S. 389, 400 (1973). And although that power "is vested 'in such inferior Courts as the Congress may from time to time ordain and establish,'" Congress "was not constitutionally required to create inferior Art. III courts." *Id.* at 400–01. Of necessity, Congress is permitted to rely on state courts to adjudicate federal causes of action.

But it does not follow that Congress can rewrite the substantive standards to be applied in state-law causes of action. Otherwise, Congress would have a surprising loophole to exploit: Simply issue commands to state courts, and Congress could do indirectly what it cannot do directly. Congress could order state courts to impose mandatory minimum sentences or "specific rules of criminal procedure" for state criminal laws. *Adoptive Couple*, 570 U.S. 637 at 666 (Thomas, J., concurring). It could require state courts to apply a heightened standard of proof in state-law

medical malpractice cases. Or it could "substitute federal law for state law" in resolving "contract disputes." *Ibid*.

There is no such loophole. Congress's decision to force state courts "to govern according to Congress's 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, *Printz*, 521 U.S. at 932. There is "simply no way to understand [ICWA] as anything other than a direct command to the States. That is exactly what the anticommandeering rule does not allow." *Murphy*, 138 S. Ct. at 1481.

c. In addition to commandeering state *courts*, ICWA's placement preferences "independently demand efforts by state *agencies and officials*," unconstitutionally commandeering them. Tex. Pet. App. 291a (Duncan, J.) (emphasis added); *id*. at 5a (per curiam) (affirming that placement preferences, as applied to state executive agencies and officials, violate anti-commandeering doctrine).

Simply determining whether children in child-custody proceedings qualify as "Indian" under ICWA takes a total of 156,000 hours every year. *Final Rule*, 81 Fed. Reg. at 38,863. If a child is subject to ICWA, then state agencies must take steps to implement Section 1915's placement preferences—as expressly contemplated by Section 1915(e), which requires States to maintain records evidencing the "efforts" it took "to comply" with the preferences. 25 U.S.C. § 1915(e).

ICWA thus "effectively transfers th[e] responsibility" to administer ICWA's placement preferences to state agencies. *Printz*, 521 U.S. at 922. As the BIA

explained, the "language" of Section 1915's preferences "creates an obligation on *State agencies* and courts to implement the policy outlined in the statute" through "affirmative steps." *Final Rule*, 81 Fed. Reg. at 38,839 (emphasis added). For example, if a state agency "determines that any of the preferences cannot be met" and wishes to deviate from them, the "agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Fed. Reg. 10,146, 10,157 (Feb. 25, 2015). Compelling States "to identify and assist preferred placements" may be "critical to the success of the statutory placement preferences," *Final Rule*, 81 Fed. Reg. at 38,839, but it is indistinguishable from compelling state officials to "make a reasonable effort to ascertain" whether a handgun purchase was lawful, *Printz*, 521 U.S. at 933 (finding such requirement "unconstitutional").

These commands not only disturb the "division of power between State and Federal Governments," but also disturb the "separation and equilibration of powers between the three branches of the Federal Government itself." *Printz*, 521 U.S. at 922. The Constitution requires "the President" to execute the laws enacted by Congress. U.S. Const. art. II, § 3. ICWA "effectively transfers this responsibility to thousands of" state child-welfare officials "in the 50 States, who are left to implement the program without meaningful Presidential control." *Printz*, 521 U.S. at 922.

3. ICWA's Placement Preferences Cannot Be Viewed As A Form Of Preemption.

ICWA's placement preferences also cannot be justified as a form of federal preemption.

For federal law "to preempt state law, it . . . must be best read as one that regulates private actors." *Murphy*, 138 S. Ct. at 1479. ICWA's placement preferences are best read as regulating state officials, not private actors.

A law that regulates "the conduct of private actors" is one that "imposes restrictions or confers rights" on private actors. *Murphy*, 138 S. Ct. at 1480–81. ICWA's placement preferences do neither. Children are sorted into ICWA's child-custody scheme, and potential adoptive parents are sorted into a ranked hierarchy according to Congress's preferences. 25 U.S.C. § 1915(a), (b). But, unlike a drug manufacturer who cannot supplement an agency-approved label because of preemptive federal law, *Murphy*, 138 S. Ct. at 1479, neither children nor parents are *prohibited* from doing anything in the real world. And unlike an airline carrier who gains the federal right to establish "rates, routes, or services" free of state interference, *id.* at 1480, neither children nor parents are suddenly able to do anything in the real world because of ICWA's placement preferences.

On the contrary, ICWA's placement preferences dictate how *state courts* must adjudicate state-law child-custody claims by giving "preference" to certain placements. 25 U.S.C. § 1915(a). 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" because nobody gained

or lost the ability to gamble as a result of the federal law, *Murphy*, 138 S. Ct. 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. And that means Congress is instead regulating States. The "Constitution simply does not give Congress the authority to require the States to regulate" their citizens. *New York*, 505 U.S. at 178.[9]

[9] Individual Petitioners agree with Texas that the active-efforts, expert-witness, recordkeeping, and notice requirements also violate the anti-commandeering doctrine.

CONCLUSION

ICWA's separate regime for "Indian children" violates the Constitution's guarantee of equal protection, exceeds Congress's constitutional authority, and impermissibly commandeers state governments. This Court should hold that ICWA's placement preferences, definition of Indian child, and mandates to state courts and state agencies are unconstitutional, *see* 25 U.S.C. §§ 1903(4), 1912(a), (d)–(f), 1915(a)–(b), (e), 1951(a), and reverse in relevant part the judgment below.

Respectfully submitted.

ASHLEY E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue
Dallas, TX 75201
(214) 698-3100

MARK D. FIDDLER
FIDDLER OSBAND, LLC
5200 Willson Rd.
Ste. 150
Edina, MN 55424
(612) 822-4095

MATTHEW D. MCGILL
Counsel of Record
LOCHLAN F. SHELFER
DAVID W. CASAZZA
AARON SMITH
ROBERT A. BATISTA
TODD W. SHAW
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Individual Petitioners

May 26, 2022