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

In the Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

CHAD EVERET BRACKEEN, ET AL.

CHEROKEE NATION, ET AL., PETITIONERS

v.

CHAD EVERET BRACKEEN, ET AL.

STATE OF TEXAS, PETITIONER

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

CHAD EVERET BRACKEEN, ET AL., PETITIONERS

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER THE STATE OF TEXAS

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QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63 (ICWA), creates a child-custody regime for "Indian child[ren]," a status defined by genetics and ancestry. To insulate Indian children from "white, middle-class standard[s],"[1] ICWA creates race-based hierarchies for Indian-child-custody proceedings that favor Indians over non-Indians. Tribes may unilaterally re-arrange these preferences, which bind state courts. ICWA further directs state actors to superintend over federal recordkeeping and related requirements in Indian-child-custody proceedings. The questions presented are:

1. Whether Congress has the power under the Indian Commerce Clause or otherwise to enact laws governing state child-custody proceedings merely because the child is or may be an Indian.
2. Whether the Indian classifications used in ICWA and its implementing regulations violate the Fifth Amendment's equal-protection guarantee.
3. Whether ICWA and its implementing regulations violate the anticommandeering doctrine by requiring States to implement Congress's child-custody regime.
4. Whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress.

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[1] H.R. Rep. No. 95-1386, at 24, *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7546. This brief uses the term "Indians" because ICWA does so.

PARTIES TO THE PROCEEDING

Petitioner-Cross-Respondent the State of Texas was a plaintiff-appellee in the court of appeals.

Petitioners-Cross-Respondents Chad Everet Brackeen, Jennifer Kay Brackeen, Altagracia Socorro Hernandez, Jason Clifford, Danielle Clifford, Frank Nicholas Libretti, and Heather Lynn Libretti were plaintiffs-appellees in the court of appeals.

Respondents-Cross-Petitioners Deb Haaland, in her official capacity as Secretary of the U.S. Department of the Interior; Bryan Newland, in his official capacity as Assistant Secretary for Indian Affairs; Xavier Becerra, in his official capacity as Secretary of the U.S. Department of Health and Human Services; the Bureau of Indian Affairs; the U.S. Department of the Interior; the U.S. Department of Health and Human Services; and the United States of America were defendants-appellants in the court of appeals.[2]

Respondents-Cross-Petitioners Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians were intervenors-defendants-appellants in the court of appeals.

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[2] 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 was automatically substituted for his predecessor under this Court's Rule 35.3. In the courts below, defendants-appellants included John Tahsuda III, Michael Black, Tara Sweeney, and Darryl LaCounte.

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

Respondent Navajo Nation intervened in support of appellants in the court of appeals but did not seek review in this Court.

Respondents the States of Indiana and Louisiana were plaintiffs-appellees in the court of appeals but did not seek review in this Court.

Bryan Rice, in his official capacity as Director of the Bureau of Indian Affairs, was a defendant in the district court but did not seek further review.

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OPINIONS BELOW

The en banc Fifth Circuit's opinion (Pet. App. 1a-396a) is reported at 994 F.3d 249, and the panel opinion (Pet. App. 400a-67a) is reported at 937 F.3d 406.[3] The district court's summary-judgment opinion (Pet. App. 468a-527a) is reported at 338 F. Supp. 3d 514. Its opinion on the motions to dismiss (Pet. App. 530a-79a) is unreported but available at 2018 WL 10561971.

JURISDICTION

The Fifth Circuit entered judgment on April 6, 2021. Texas timely filed its petition for a writ of certiorari on September 3, 2021, *see* Sup. Ct. Order of July 19, 2021, and this Court granted the petition on February 28, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional, statutory, and regulatory provisions are set forth in Texas's petition appendix. Pet. App. 580a-626a.

STATEMENT

I. Statutory and Regulatory Background

Asserting a "plenary power over Indian affairs," 25 U.S.C. § 1901(1), Congress enacted ICWA to impose a federal child-custody regime applicable only to "Indian child[ren]," a term defined by reference to a child's genetics and ancestry, *id.* § 1903(4). Congress did so because it viewed Indian children as a "vital" tribal "resource" that should be "protect[ed] and preserv[ed]" by

[3] All references to "Pet. App." are to the appendix filed with Texas's petition for a writ of certiorari.

the United States in its role as "trustee" of "Indian tribes and their resources." *Id.* § 1901(2)-(3).

ICWA's central child-custody provisions "protect[] and preserv[e]" Indian children, *id.* § 1901(2), by making it more difficult for States to (1) remove Indian children from dangerous situations, and (2) place Indian children in non-Indian foster and adoptive homes, *id.* §§ 1912(d)-(f), 1915(a)-(b); *see also id.* § 1902.

A. Adoption of ICWA

As this Court previously recognized, ICWA was "the product of rising concern in the mid-1970s" that xenophobic child-custody practices unnecessarily separated Indian children from their families, frequently placing them in non-Indian homes. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (detailing testimony and evidence from the early and mid-1970s). This "crisis flowed from multiple causes," Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,779 (June 14, 2016), including the United States' forced enrollment of Indian children at off-reservation Indian boarding schools run by the Bureau of Indian Affairs (BIA), Pet. App. 35a-39a (Dennis, J.). A 1920s report explained that the federal government's official attitude "toward Indian education had been premised 'on the theory that it is necessary to remove the Indian child[ren] as far as possible from [their] environment' so as to prepare them for 'life among the whites.'" *Id.* at 37a.

Federal policy toward Indian children shifted in the second quarter of the twentieth century, when the BIA charged "state public schools with assuming more responsibility for Indian education." *Id.* at 38a. BIA-run boarding schools declined in use, shutting down altogether by the 1970s. *Id.* In 2000, the Assistant Secretary for Indian Affairs apologized on behalf of the BIA for its

role in this scheme, admitting that these boarding schools "brutaliz[ed] [Indian children] emotionally, psychologically, physically, and spiritually." 146 Cong. Rec. E1453, E1454 (Sept. 12, 2000).

Although "federally run or financed schools sought to stamp out all vestiges of Indian culture," Pet. App. 35a (Dennis, J.), Congress blamed the breakup of Indian families on the States, accusing them of "fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families" when conducting child-custody proceedings, 25 U.S.C. § 1901(5). Congress therefore enacted ICWA to ensure that "Indian child-welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'" 81 Fed. Reg. at 38,829 (citing *Holyfield*, 490 U.S. at 36, and H.R. Rep. No. 95-1386, at 24); H.R. Rep. No. 95-1386, at 20 (criticizing "the imposition by [the] government" of "white suburbia's preference in patterns of family living").

B. ICWA's requirements

Relying on its power to "regulate Commerce . . . with the Indian tribes," U.S. CONST. art. I, § 8, cl. 3, and unspecified "other constitutional authority," 25 U.S.C. § 1901(1), Congress passed ICWA to create a child-custody regime aimed at Indian children. As the Department of the Interior later confirmed, "Congress's clear intent in ICWA [was] to displace State laws and procedures" that it deemed "less protective." 81 Fed. Reg. at 38,851.

Originally, Interior left "[p]rimary responsibility" for interpreting most of ICWA "with the courts that decide Indian child custody cases." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584,

67,584 (Nov. 26, 1979). Interior reversed this decades-old practice in 2016 due to its disagreement with how some state courts implemented ICWA, publishing a binding rule. 81 Fed. Reg. at 38,782 (the Final Rule).

ICWA and the Final Rule apply to every Texas state-court child-custody proceeding regarding an Indian child. And where ICWA applies, "almost every aspect of the social work and legal case is affected," as "the legal requirements change dramatically." J.A. 161, 166.

1. Scope

ICWA applies to any "child custody proceeding"—including foster-care, pre-adoptive, and adoptive placements as well as terminations of parental rights—regarding an "Indian child." 25 U.S.C. § 1903(1). ICWA reaches both members and non-members of Indian tribes, defining an Indian child as "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." *Id.* § 1903(4).

Although Congress premised the need for ICWA on preserving "the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," *id.* § 1901(5), ICWA applies regardless of whether a given child has any connection to Indian culture at all. The Final Rule expressly prohibits state courts from "consider[ing] factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum" when determining whether ICWA governs a state-court child-custody proceeding. 25 C.F.R. § 23.103(c).

ICWA does not apply to tribal-court child-custody proceedings. *Id.* § 23.103(b)(1). Instead, subject to limited exceptions, it applies only to proceedings where the Indian child does not "reside[]" and is not "domiciled within" a reservation. 25 U.S.C. § 1911(a). A child's parent, Indian custodian, or tribe may seek transfer of foster-care or parental-rights proceedings over that child to tribal court, to which a state court "shall transfer such proceeding" absent either good cause to the contrary or objection of a parent. *Id.* § 1911(b). Thus, when a State is required to apply ICWA in a child-custody proceeding, it generally does so only when the child does not reside on an Indian reservation and where no party requested the child's custody proceeding be transferred to tribal court.

Though the exact number of children to whom ICWA could apply is unknown, the information available suggests that most child-custody proceedings involving Indian children take place in state courts and are governed by ICWA. As of 2012, 78% of Indians lived outside of Indian country,[4] 81 Fed. Reg. at 38,782, placing many of these Americans' child-custody disputes within the jurisdiction of state courts.

2. Notification procedures

The Final Rule requires state courts to inquire at the beginning of every child-custody proceeding whether any participant "knows or has reason to know" that the child is an Indian child. 25 C.F.R. § 23.107(a). If this inquiry gives the court reason to believe the child *may* be an Indian child, the court must treat the child as an Indian child until proven otherwise. *Id.* § 23.107(b). ICWA directs state courts to confirm that the parties have

[4] *See generally McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020) (citing 18 U.S.C. § 1151) (defining "Indian country").

exercised due diligence in responding to the court's inquiry, and further orders state-court judges to "instruct the parties to inform the court" if they learn of a "reason to know the child is an Indian child." *Id.* § 23.107(a).

In foster-care and parental-rights proceedings, ICWA requires state courts to allow the Indian child, the child's Indian custodian, and the child's tribe to intervene at any point. 25 U.S.C. § 1911(c). By contrast, ICWA disadvantages parties seeking foster-care placement or termination of parental rights by requiring them to affirmatively notify, by registered mail with return receipt requested, the parent or Indian custodian and the Indian child's tribe of the proceedings and their right to intervene. *Id.* § 1912(a).[5] Interior estimated in 2016 that these notices cost parties seeking foster-care placements or the termination of parental rights approximately $260,000 annually. 81 Fed. Reg. at 38,864.

3. Removal proceedings

Beyond its notice requirements, ICWA imposes several obstacles to removing an Indian child from an unsafe environment and to terminating the rights of an Indian child's abusive or neglectful parents. First, a party attempting to remove an Indian child from an unsafe environment must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). Interior defines "active efforts" to mean "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family." 25 C.F.R. § 23.2 (listing eleven examples). These efforts are to be

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[5] Although Texas often initiates child-custody proceedings, private parties may do so as well. *Infra* at 51-53.

"provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe." *Id.* According to Interior, "Congress intended to require States to affirmatively provide Indian families with substantive services." 81 Fed. Reg. at 38,791. By contrast, Texas law requires only "reasonable efforts" to prevent an abused or neglected child's removal. Tex. Fam. Code § 262.201(g)(2).

Next, ICWA imposes a heightened standard of proof in foster-care proceedings involving Indian children. Under Texas law, removing a child from his home requires proof of "a danger to the physical health or safety of the child" and proof that leaving the child in the home is "contrary to the welfare of the child." *Id.* § 262.201(g)(1). But under ICWA, before ordering an Indian child's removal from an abusive home, a state court must determine by clear and convincing evidence, supported by the testimony of "qualified expert witnesses," that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e). To be "qualified," an expert witness must be able "to testify as to the prevailing social and cultural standards of the Indian child's Tribe" as well as to the "serious emotional or physical damage" an Indian child would suffer by remaining in his current dangerous environment. 25 C.F.R. § 23.122(a).

For parental-rights cases, ICWA imposes similar witness and serious-damage requirements, but elevates the burden of proof to "evidence beyond a reasonable doubt." 25 U.S.C. § 1912(f). Texas law requires only clear

and convincing evidence to terminate parental rights, Tex. Fam. Code § 161.206(a), and allows for the termination of parental rights in situations beyond those presenting serious emotional or physical damage, such as where a parent abandons or fails to support a child, *id.* § 161.001(b).

ICWA also sets standards that must be followed when a parent or Indian custodian voluntarily agrees to foster-care placement, termination of parental rights, or adoptive placement, mandating what is necessary for valid consent and when that consent can be withdrawn. 25 U.S.C. § 1913(a)-(c).

4. Placement preferences

"The 'most important substantive requirement imposed on state courts' by ICWA is the placement preference for any adoptive placement of an Indian child." 81 Fed. Reg. at 38,782 (quoting *Holyfield*, 490 U.S. at 36-37). Under Texas law, adoptive placements are made according to the best interests of the child. Tex. Fam. Code § 162.016(a)-(b).

ICWA abrogates that standard. Instead, ICWA requires that for any adoptive placement "under State law," preference "shall be given" to a placement with "(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). These preferences govern absent good cause to the contrary, *id.*, which the Final Rule required to be proven by clear and convincing evidence, 25 C.F.R. § 23.132(b).[6] Absent sufficient proof of good cause, any unrelated non-Indian who seeks to adopt

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[6] The Fifth Circuit affirmed the district court that this standard of proof violated the Administrative Procedure Act. Pet. App. 337a-38a (Duncan, J.). No party has sought review of that holding.

an Indian child is placed in line behind any member of any Indian tribe in America.

Similarly, in foster-care and pre-adoptive placements, ICWA gives preference (subject to the good-cause exception) to placement with (1) the child's extended family, (2) a foster home licensed, approved, or specified by the Indian child's tribe, (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority, or (4) an institution for children approved by an Indian tribe or operated by an Indian organization. 25 U.S.C. § 1915(b).

Although these preferences are binding on state courts, they are not binding on Indian tribes. Congress authorized individual Indian tribes to "establish a different order of preference by resolution" and required "the agency or court effecting the placement [to] follow such order" provided it meets the child's needs. *Id.* § 1915(c). For example, the Alabama-Coushatta Tribe of Texas has established a different order of preference. J.A. 189.

5. Post-placement provisions

Even after placement, ICWA creates additional ways to attack child-custody orders. In foster-care and parental-rights proceedings, the Indian child, as well as his parent, Indian custodian, or tribe "may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913" of ICWA. 25 U.S.C. § 1914. Further, a parent who consents to an adoption has two years after the entry of a final adoption decree to withdraw consent based on the grounds that it was obtained through fraud or duress. *Id.* § 1913(d).

Following an adoptive placement, state courts must send the Secretary of the Interior the adoption decree and other related information. *Id.* § 1951(a).

6. State compliance

ICWA requires States to maintain records "evidencing the efforts to comply with the order of preference" for each placement. *Id.* § 1915(e); *see also* 25 C.F.R. § 23.132(c)(5) (describing what efforts must be shown). Congress has given Interior access to those records and "tasked [Interior] with affirmatively monitoring State compliance with ICWA." 81 Fed. Reg. at 38,785 (citing 25 U.S.C. § 1915(e)). As Interior explained, "State efforts to identify and assist preferred placements are critical to the success of the statutory placement preferences." *Id.* at 38,839. Interior interprets ICWA to "require proactive efforts to comply with the placement preferences," not just a "simple back-end ranking of potential placements," *id.*, thus obligating the States to affirmatively seek potential adoptive parents of a superior rank in ICWA's race-based hierarchies relative to any applicants seeking to adopt a given Indian child.

As Texas child-custody policies warn, "[f]ailure to comply with . . . ICWA can result in a final order being reversed on appeal," which will hinder a "child's chance for a permanent home." J.A. 163. Children in Texas have had their placement decisions reversed for failure to comply with ICWA. *See, e.g.*, *In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728, at *16-17 (Tex. App.—Fort Worth Dec. 19, 2019, pet. denied) (mem. op.) (failure to meet ICWA's standard for deviating from placement preferences); *In re S.J.H.*, 594 S.W.3d 682 (Tex. App.—El Paso Dec. 9, 2019, no pet. h.) (failure to contact tribe to determine child's status); *N.M. v. Tex. Dep't of Family & Protective Servs.*, No. 03-19-00240-CV, 2019 WL 4678420 (Tex. App.—Austin Sept. 26, 2019, no pet.) (mem. op.) (failure to call ICWA-qualified expert witness).

In 1994, Congress also imposed monetary consequences on the States by amending the Social Security Act to make certain child-welfare payments to the States dependent on whether those States have a plan to comply with ICWA. 42 U.S.C. § 622(a), (b)(9).

C. Concerns with ICWA

Despite Congress's stated expectation that ICWA would "protect the best interests of Indian children and . . . promote the stability and security of Indian tribes and families," 25 U.S.C. § 1902, equal-protection and federalism problems with ICWA were apparent from its very beginning.

1. ICWA's racial purpose and overt race-preference regime could hardly have been more brazen. As a candid House Report acknowledged, ICWA's definition of "Indian child" depends on a child's "[b]lood relationship[s]," which that report described as "the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe." H.R. Rep. No. 95-1386, at 20. As Congress was considering versions of ICWA, the Department of Justice (DOJ) warned that several proposed provisions "raise serious constitutional problems because they provide for differing treatment of certain classes of persons based solely on race." *Hearings before the Subcomm. on Indian Affs. & Public Lands of the Comm. on Interior & Insular Affs. On S. 1214*, 95th Cong. 2d Sess. 1, 217 (1978) (ICWA Hearings).

Concerned about subjecting non-tribal members living off of a reservation to exclusive tribal-court jurisdiction, DOJ remained "firmly convinced that the Indian or possible non-Indian parent may not be invid[i]ously discriminated against under the Fifth Amendment and that the provisions of this bill would do so." *Id.* at 222. DOJ concluded that it was "unable to suggest" a "compelling

governmental interest [that] . . . justif[ies] this discrimination." *Id.* DOJ further expressed concerns that ICWA would require an individual with no connection to an Indian tribe to submit to tribal-court jurisdiction. Though DOJ acknowledged that ICWA applied only where an Indian child either was a member of a tribe or at least had a biological parent who was one, DOJ still doubted that "the blood connection between the child and a biological but non-custodial parent is a sufficient basis upon which to deny the present parents and the child access to State courts." *Id*. at 50.

2. DOJ likewise identified ICWA's grave federalism problems. DOJ was "not convinced that Congress' power to control the incidents of such litigation involving non-reservation Indian children and parents pursuant to the Indian Commerce Clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter." *Id.* at 51. As DOJ went on to explain, "[i]t seems to us that the federal interest in the off-reservation context is so attenuated that the Tenth Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by" the proposed provisions of ICWA. *Id.*

At least initially, Interior similarly recognized ICWA's inherent federalism problems. When Interior issued its original guidelines, it explained that "[n]othing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters." 44 Fed. Reg. at 67,584. Interior recognized that assigning an administrative agency "such supervisory control over courts" would be an "extraordinary step" and, absent an express

congressional declaration, "a measure . . . at odds with concepts of both federalism and separation of powers." *Id.*

In 2016, Interior switched positions, summarily concluding both that its rule "has no substantial direct effect on the States" but also that in ICWA, "Congress recognized a need to curtail certain state authority." 81 Fed. Reg. at 38,789.

D. ICWA's effects

Forty years of experience under ICWA have demonstrated that it has not achieved its stated ends of improving stability and security among Indian tribes.

Children subject to ICWA remain at greater risk for abuse and neglect than other children. An advisory committee to the Attorney General found in 2014 that the "vast majority of American Indian and Alaska Native children live in communities with alarmingly high rates of poverty, homelessness, drug abuse, alcoholism, suicide, and victimization." Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive viii (Nov. 2014). The Attorney General also found that "domestic violence in the homes of AI/AN children and physical abuse, sexual abuse, and neglect of children is more common than in the general population." *Id.* at 16.

This result was both predictable and predicted. Though poverty and its resulting effects on child welfare were already readily apparent, a representative from the Association on American Indian Affairs praised ICWA because it "created a reluctance to adopt Indian children," and acknowledged that the law was "not designed to make the adoption of Indian children easier." ICWA Hearings at 71. The Deputy Assistant Secretary for

Indian Affairs expressed concern when he testified before Congress, however, stating that "[a]nother serious problem we have with title I of the bill is that the interest of the tribe seems to be paramount, followed by the interest of the biological parents of the Indian child. Nowhere is the best interest of the child used as a standard." *Id.* at 54. Similarly, the Commissioner for the Administration for Children, Youth, and Families expressed concerns that placing a child in a tribal setting, when the child had never known that culture, would be "detrimental." *Id.* at 59.

The experiences of the individual petitioners bear out these concerns: ICWA prioritizes the interests of Indian tribes over Indian children. The Brackeens sought to adopt A.L.M., an Indian child that they had fostered for ten months. JA. 196-97. A.L.M.'s biological parents supported the adoption. *Id*. But after child-custody proceedings started, the Navajo and Cherokee Nations reached an agreement in the hallway of the courthouse where the proceedings were to take place that A.L.M. would be a member of the Navajo Nation. J.A. 199. The Navajo Nation then attempted to remove him from his home with the Brackeens so he could be adopted by unrelated members of the Navajo Nation in another State. J.A. 199-200. The Navajo Nation currently opposes the Brackeens' attempt to adopt A.L.M.'s half-sister, who is also an Indian child. Pet. App. 49a (Dennis, J.).

The Cliffords attempted to adopt Child P after she spent years being shuttled between foster homes. J.A. 190-91. Yet, when the White Earth Band of Ojibwe Indians changed its mind about whether Child P was a member, she was taken from the Cliffords and given to her grandmother, a tribal member whose foster license had been revoked. J.A. 192-94.

The Librettis raised Baby O from birth and had the support of her mother (also a petitioner here) to adopt her. J.A. 202-03, 205. Yet the Ysleta del Sur Pueblo tribe registered Baby O as a member without her mother's consent and sought to place her with an unrelated tribal member in another State. J.A. 205-06.

Nearly a decade ago, this Court expressed concern that "many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian," if an ICWA "trump card" could be played at the eleventh hour. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013). The experiences of the individual petitioners in this case bear this out too: their experiences with ICWA have made them reluctant to adopt again, potentially depriving Indian children of the loving, stable homes that would be in their best interests. J.A. 201, 207.

II. Procedural History

A. District court

1. Like all States, Texas has a family code that makes paramount the best interests of the children within its borders, as well as a state agency and employees dedicated to protecting children in the State. *See* Tex. Fam. Code tit. 5. Because of ICWA's effect on its child-custody proceedings, Texas, along with Louisiana, Indiana, and the seven individual petitioners, filed suit challenging ICWA's constitutionality on numerous grounds. J.A. 54-159. As relevant here, plaintiffs alleged that ICWA and its implementing regulations exceed Congress's powers under Article I, violate the equal-protection component of the Fifth Amendment, and run afoul of the anticommandeering and nondelegation doctrines. J.A. 132-56.

Defendants are the United States, several federal agencies, and several federal officers, as well as four Indian tribes who intervened to defend ICWA's constitutionality. Pet. App. 51a.

2. The district court denied defendants' motions to dismiss, *id.* at 530a, and largely granted plaintiffs' motions for summary judgment. The district court determined that ICWA violated the Fifth Amendment's equal-protection guarantee by establishing race-based preferences in domestic-relations proceedings, *id.* at 493a-504a; violated the nondelegation doctrine by allowing Indian tribes to reorder placement preferences that legally bind state courts, *id.* at 504a-08a; and violated the anti-commandeering doctrine by commanding the States to implement federal standards in child-custody proceedings, *id.* at 509a-16a. The court also found that the Commerce Clause did not give Congress the authority to enact ICWA. *Id.* at 526a-27a. The district court therefore declared portions of ICWA (25 U.S.C. §§ 1901-23, 1951-52) and the Final Rule (25 C.F.R. §§ 23.106-22, .124-32, .140-41) unconstitutional. Pet. App. 528a-29a.

B. Fifth Circuit

A panel of the Fifth Circuit stayed the district court's judgment pending appeal and permitted the Navajo Nation to intervene. *Id.* at 411a-12a.

1. Panel opinion

A divided panel of the Fifth Circuit affirmed the district court's finding that at least one plaintiff had standing for each count but reversed on the merits. *Id.* at 402a. Then-Judge Owen dissented in part, concluding that the active-efforts, expert-witness, and recordkeeping provisions of ICWA unconstitutionally commandeered the States, describing sections 1912(d), 1912(e), and 1915(e)

as a "transparent attempt to foist onto the States the obligation to execute a federal program and to bear the attendant costs." Pet. App. 460a; *see also id.* 461a-63a.

2. En banc opinion

The Fifth Circuit granted rehearing en banc and issued eight opinions—a per curiam opinion that summarized the Court's holdings and seven other opinions, two of which garnered majority support only in part. After again affirming that at least one plaintiff had standing for each claim, *id.* at 3a, the Court splintered on the merits of plaintiffs' constitutional challenges.

a. By a 9-7 vote, a majority held that Congress had Article I authority to enact ICWA. *Id.* at 104a-05a (Dennis, J.), 351a (Owen, C.J.), 363a (Haynes, J.). The lead opinion conducted a "holistic reading of the Constitution" and concluded that the historical development of Congress's Indian-affairs power demonstrated that the Framers intended the Constitution to give the national government "exclusive, plenary power in regulating Indian affairs." *Id.* at 72a (Dennis, J.). By contrast, the lead dissent determined that "no founding-era treaty, statute, or practice features anything like ICWA's foisting federal standards on state governments" and that "[n]either judicial nor congressional precedent supports ICWA's trespass on state-court child-custody proceedings." *Id.* at 251a, 260a (Duncan, J.).

b. A majority also held that ICWA's differential treatment of Indian children (25 U.S.C. § 1903(4)) did not violate equal protection because it distinguished between children based on tribal membership, which the majority concluded was a political, not racial, distinction. Pet. App. 139a-66a (Dennis, J.). But an equally divided court affirmed the district court's ruling that the adoption preference for "other Indian families" and the foster-

care preference for a licensed "Indian foster home" violated equal protection under the rational-basis test. *Id.* at 261a-80a (Duncan, J.) (regarding 25 U.S.C. § 1915(a)(3), (b)(iii)).

c. The court's anticommandeering holdings were "more intricate." *Id.* at 4a. A majority held that ICWA's active-efforts, expert-witness, and recordkeeping requirements unconstitutionally commandeered state actors. *Id.* at 4a-5a, 285a-97a (Duncan, J.) (regarding 25 U.S.C. §§ 1912(d)-(f), 1915(e)). The equally divided court affirmed the district court's ruling that the placement preferences as applied to state executive officials, notice provisions, and placement-record provisions also unconstitutionally commandeered state actors. *Id.* at 5a, 290a-97a (Duncan, J.) (regarding 25 U.S.C. §§ 1912(a), 1915(a)-(d)). But a majority held that when applied to state courts, the foster-care standards, parental-rights standards, and placement preferences validly preempted state law and did not unlawfully commandeer those courts. *Id.* at 5a-6a, 309a-16a (Duncan, J.) (regarding 25 U.S.C. §§ 1912(e)-(f), 1915(a)-(b)).

d. Finally, a majority held that section 1915(c), which allows Indian tribes to change the order of the placement preferences, did not violate the nondelegation doctrine, but instead permissibly incorporated the laws of a separate sovereign. *Id.* at 166a-79a (Dennis, J.).

The en banc ruling resulted in four petitions for writs of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

I. Congress lacks Article I authority to regulate state-court child-custody proceedings, and that result does not change merely because the child is, or may be, a member of an Indian tribe. Children are not articles of commerce under the Indian Commerce Clause, and

ICWA does not implement any treaty obligations the United States has assumed. And although the Court has described Congress as having plenary power over Indian affairs, that authority has never applied so broadly as to include ICWA. Because a broad view of plenary power in this area lacks a basis in constitutional text or history, this Court should not apply such an expansive notion to justify ICWA. Instead, the Court should recognize that Congress's powers relating toIndian affairs have limits, just like any other Article I power. ICWA contravenes those limits by intruding into domestic relations, which have always been the province of the States.

II. ICWA violates the Constitution's equal-protection guarantee by categorizing children based on genetics and ancestry and potential adoptive parents based on their race. ICWA makes racial and not political distinctions: it applies even when a child is not a member of an Indian tribe and does not live on a reservation. ICWA's racially discriminatory treatment violates the constitutional rights of not only the Indian child but also his biological parents and any non-Indian family whose preferences and rights must be subordinated to those of Indian tribes. The entire purpose of the statute—to treat Indian children, parents, and potential adoptive families differently from non-Indians in order to shore up tribes' numbers—is unconstitutional, as is the means the federal government has employed to achieve it.

III. ICWA compounds its constitutional faults by commandeering state actors to participate in its unlawful scheme, requiring them to fulfill a variety of tasks—ranging from notice requirements to extensive record-keeping obligations—in any child-custody proceeding involving an Indian child. Congress cannot compel Texas to administer what is effectively a federal child-custody

regime. It is no defense that Congress enforces its commands through state courts and in part by threatening state-court judgments with collateral attack for noncompliance: Texas must comply with Congress's directives or leave vulnerable children in dangerous situations. That choice unconstitutionally commands Texas regardless of how it is enforced.

IV. Congress also may not delegate to Indian tribes the ability to alter ICWA's placement preferences. Section 1915(c) provides tribes with no intelligible principle for reordering those preferences. And that delegation allows the tribes—who are both private parties for this purpose and parties to child-custody proceedings in which the preferences will be implemented—to determine with whom state courts should attempt to place Indian children and under what circumstsances. That Congress may not constitutionally do.

ARGUMENT

I. Congress Lacked Article I Authority to Enact ICWA.

Although the Constitution mentions Indians only with respect to commerce and apportionment, U.S. CONST. art. I, § 8, cl. 3; *id.* art. I, § 2, cl. 3; *id.* amend. XIV, this Court has sometimes described Congress as possessing a "plenary power" over "Indian affairs." *United States v. Lara*, 541 U.S. 193, 200 (2004). And believing this Court has "characterized the federal government's Indian affairs power in the broadest possible terms," the Fifth Circuit concluded that Congress may regulate state-court child-custody proceedings merely because a child is a member or may be eligible for future membership in an Indian tribe. Pet App. 72a (Dennis, J.).

The Fifth Circuit was wrong to conclude that Congress has authority over state-court child-custody proceedings. Article I does not confer power on the federal government to govern domestic relations. To the contrary, this Court has long recognized that "the whole subject of the domestic relations of . . . parent and child[] belongs to the laws of the States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). And nothing in the Constitution, historical practice, or this Court's decisions demonstrates that Congress's powers relating to Indian affairs permit Congress to regulate state-court child-custody proceedings involving an Indian child. The Court should conclude that Congress lacked the authority to enact ICWA.

A. Congress's authority to legislate regarding Indians does not include the authority to enact ICWA.

"The Federal Government 'is acknowledged by all to be one of enumerated powers.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)). Even in the realm of interstate commerce, where Congress's powers are among their broadest, this Court has held that "[t]he Constitution confers on Congress not plenary legislative power but only certain enumerated powers." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018).

Congress possesses no enumerated power authorizing it to generally legislate regarding Indians. The lead plurality opinion in the Fifth Circuit erred when it nonetheless found that "the Constitution was intended to confer on the federal government unimpeded authority vis-à-vis Indian relations" from a mélange of constitutional provisions, historical narrative, and broad but inapposite

language from this Court's precedents. Pet. App. 24a (Dennis J.).

1. The Constitution does not give Congress plenary power to enact ICWA.

Because the enumeration of Congress's powers "'presupposes something not enumerated,' the Constitution's express conferral of some powers makes clear that it does not grant others." *Sebelius*, 567 U.S. at 534 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)). And Congress "can exercise only the powers granted to it." *Id.* at 534-35. The Constitution does not empower Congress to regulate domestic relations just because an Indian may be involved.

The Court previously recognized that "[t]he source of federal authority over Indian matters has been the subject of some confusion." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 n.7 (1973). But the Court has since identified the Indian Commerce and Treaty Clauses as the primary sources of Congress's authority to legislate regarding Indian affairs. *Id.* Rather than examine the text and history of those clauses, however, the Fifth Circuit engaged in a "holistic reading" of the Constitution, concluding the Indian Commerce, Treaty, Property, Supremacy, and Necessary and Proper Clauses, "among other provisions, operate to bestow upon the federal government supreme power to deal with the Indian tribes," including by enacting ICWA. Pet. App. 72a (Dennis, J.). But none of those clauses provides Congress with a "supreme power to deal with the Indian tribes," *id.*, let alone to enact ICWA.

a. Indian Commerce Clause

This Court has repeatedly cited the Indian Commerce Clause as a primary source of Congress's

authority over Indian affairs. *Lara*, 541 U.S. at 200; *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

The Indian Commerce Clause provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3, which "means commerce with the individuals composing those tribes." *United States v. Holliday*, 70 U.S. 407, 417 (1865). As originally understood, "commerce" with Indian tribes meant buying, selling, and transporting goods. *Adoptive Couple*, 570 U.S. at 659-66 (Thomas, J., concurring); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER U.L. REV. 201, 210-17 (2007). "Commerce" in the late 1700s was understood as "Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick." 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 361 (4th rev. ed. 1773) (reprint 1978). Thus "commerce with Indian tribes" meant "trade with Indians." *See, e.g.*, Natelson, *supra* at 215-16 & n.97 (citing 18th-century sources). Child-custody proceedings regarding Indian children do not constitute trade with Indians.

But child-custody proceedings fall outside even more expansive definitions of "commerce." For example, in the Interstate Commerce Clause context, this Court understands "commerce" to include (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *United States v. Morrison*, 529 U.S. 598, 608-09 (2000). Child-custody proceedings fit none of these: children are not commodities, and child-custody disputes are not matters of commerce. This Court rejected the United States' proffered "national productivity" theory of the Commerce Clause in *United States v. Lopez* because that

understanding of the Interstate Commerce Clause would have allowed the United States to regulate, among other things, "child custody." 514 U.S. 549, 564 (1995). An Indian child is no more an article in commerce than any other person. U.S. CONST. amend. XIII.

b. Treaty Clause

Nor does the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2, authorize ICWA. As this Court has recognized, the Treaty Clause "does not literally authorize Congress to act legislatively"—particularly in the domestic sphere. *Lara*, 541 U.S. at 201. At most, the Treaty Clause permits Congress to enact legislation to implement treaties—and ICWA does not purport to implement any treaty.

1. The United States cannot reconcile ICWA with Article I's limits on Congress's power by gesturing at hundreds of varying treaties with as many Indian tribes. This Court has previously suggested that the Necessary and Proper Clause permits legislation necessary to implement a valid treaty, even if that legislation would otherwise exceed the scope of Article I. *Missouri v. Holland*, 252 U.S. 416, 432-33 (1920). But that portion of *Holland* has drawn criticism. *Bond v. United States*, 572 U.S. 844, 876-81 (2014) (Scalia, J., concurring in the judgment). And a plurality of the Court has stated that "no agreement with a foreign nation can confer power on the Congress . . . which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality op.).

Historically, treaties addressed international matters—those of war and peace between nation-states—rather than matters of domestic law. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 393-96 (James B. Scott & Francis W. Kelsey trans., Bobbs-Merrill 1925)

(1646). While international treaties have expanded in their number and scope to cover matters traditionally understood as domestic affairs, that expansion should not broaden Congress's power to legislate under Article I. This Court has already held that treaties, which are ultimately creatures of international law, cannot change the horizontal allocation of power among the different branches of our government. *Medellin v. Texas*, 552 U.S. 491, 504 (2008). It should conclude the same for the vertical allocation between the federal and state governments. To do otherwise would be to "allow the treatymakers the ability to circumvent federalism limitations otherwise applicable to the national government's exercise of lawmaking power." Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 99 (2000).

It would be particularly dangerous to adopt a broad view of the treaty power here because "American treaties with Indians varied among the tribes and evolved over time." Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 792 (2006). Thus, to "assert[] that the treaty power helps justify federal plenary power over all Indian tribes" is to "assume[] the existence of treaties and treaty provisions that do not actually exist." Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1097 (2004) (footnote omitted).

2. No treaty justifying ICWA exists in part because ICWA long post-dates when Congress organized the Nation's affairs through treaty. Such a practice functionally "ceased in 1871 in response to demands from the House of Representatives for a role in the making of federal Indian policy." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 152 (2010); *see*

also 25 U.S.C. § 71. As of 1871, there were 348 treaties with Indian tribes. Nathan Speed, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. REV. 467, 471 (2007). Hence why, despite extensive briefing and more than a year's worth of deliberations, the en banc court could not identify any treaty that ICWA implements. The closest—a treaty in which the United States "assum[ed] the duty of protection" of the Cherokee Nation, as well as a treaty with the Northern Cheyenne and Northern Arapaho tribes in which the United States promised to arrest and punish anyone who "commit[s] any wrong upon the person or property of the Indians," Pet. App. 29a-30a (Dennis, J.)—have nothing to do with child-custody proceedings, let alone anything to do with ICWA's numerous ancillary provisions. And they would not allow Congress to completely rewrite every State's domestic-relations law merely because a child could become a member of a specific tribe with which the United States had formed a treaty, much less a potential member of one of the other 571 federally recognized tribes.

As a result, this Court would have to far exceed its previous high-water mark in *Holland* to uphold ICWA under the Treaty Clause. The law in *Holland* was limited to the capturing and killing of certain migratory birds and was enacted pursuant to a specific treaty designed to protect those birds. Act of July 3, 1918, c. 128, 40 Stat. 755. ICWA has no similar pedigree. The only connection between it and the Treaty Clause is that the United States has previously made *other* treaties with Indian tribes, and it *could* make additional treaties with those tribes. Upholding ICWA on so contingent an exercise of the treaty power would effectively eliminate any limits

on Article I—a result this Court has avoided in other contexts.

c. Other constitutional provisions

Beyond the Commerce and Treaty Clauses, respondents and the Fifth Circuit plurality attempted to justify Congress's enactment of ICWA by reference to a grab-bag of constitutional powers and preconstitutional principles. *E.g.*, Pet. App. 72a (Dennis, J.). None is up to the task.

First, the plurality referred (at *id.*) to Article IV's Territory Clause, which gives Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. But Indian children are neither "Territory" nor "Property belonging to the United States" any more than they are articles in commerce. And ICWA is not limited to child-custody proceedings that take place within "Territory ... belonging to the United States." *See, e.g.*, *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022) (listing five territories).

Second, the plurality referred (at Pet. App. 72a (Dennis, J.)) to the Supremacy Clause. But that clause "is not an independent grant of legislative powers to Congress." *Murphy*, 138 S. Ct. at 1480; *see* U.S. CONST. art. VI, cl. 2. It provides only a rule of decision for when state and federal law conflict. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015). It does not expand the scope of Congress's power under Article I. *See Murphy*, 138 S. Ct. at 1479.

Third, the plurality referred (at Pet. App. 72a (Dennis, J.)) to the Necessary and Proper Clause. That too does not expand the substantive areas in which Congress may legislate. U.S. CONST. art. I, § 8, cl. 18. It instead

permits legislation "for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* Thus, absent a preexisting Article I power to legislate regarding Indian child-custody disputes, the Necessary and Proper Clause has no role to play. *See Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234, 247 (1960); *see also Bond*, 572 U.S. at 854.

Fourth, respondents cited the "preconstitutional powers" described in *Lara*—those which this Court described as "necessary concomitants of nationality"—and suggested that these powers could give Congress the necessary authority to enact ICWA. 541 U.S. at 201. But *Lara* referred to a particularly sweeping view of the war powers, *Lara*, 541 U.S. at 201 (citing *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 318 (1936)), which has not been applied since the World War II era and has since been called into serious question, *cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling an executive-power case of similar vintage).

Assuming such atextual powers exist, they extend, at most, to matters of war and peace—not to core domestic matters such as state-court child-custody proceedings. After all, as described in *Lara*, these powers depend on the United States' previous dealings with Indian tribes through military and foreign policy, rather than through domestic legislation. 541 U.S. at 201. ICWA is not the result of foreign or military policy, nor is it a "necessary concomitant of nationality," *id.* Preconstitutional powers—if they can coexist with a Constitution of enumerated powers—do not authorize ICWA.

2. A historical understanding of Congress's Indian authority does not include ICWA.

Just as Article I's text provides no power broad enough to justify Congress's enactment of ICWA, history offers no reason to believe the Founders would have understood federal authority vis-à-vis the Indian tribes to include the power to federally superintend over state-court child-custody proceedings.

The two lead opinions below surveyed the same historical sources, but drew vastly different conclusions. Judge Dennis determined that "the Founding Generation understood federal Indian authority . . . as a bundle of interrelated powers that functioned synergistically to give the federal government supreme authority over Indian affairs." Pet. App. 26a (Dennis, J.). But Judge Duncan found no "historical evidence justifying the modern use of Congress's power here." Pet. App. 231a (Duncan, J.). Judge Duncan was correct.

a. The Articles of Confederation originally gave the federal government authority over "regulating the trade and managing all affairs with the Indians." Articles of Confederation of 1781, art. IX. The Constitution, however, narrowed Congress's authority over Indians to regulating "Commerce" with the "Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. In exchange, the Constitution gave the federal government more tools for accomplishing this narrower permissible constitutional end, including by guaranteeing the supremacy of federal law, barring state treaties with the tribes, and providing exclusive federal power over unadmitted territories. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 999-1000 (2014). But none of these constitutional features expand the Indian Commerce Clause's scope such that child-custody cases regarding Indian children living off

reservations within the various States would have been understood as commerce with an Indian tribe.

Judge Dennis's plurality opinion rests on the propositions that the Constitution made authority over Indians "exclusive" to the federal government, and that this exclusive federal authority authorizes ICWA. Pet. App. 71a-72a. But this proves too much. If Congress possessed such a truly exclusive authority over Indian child-custody cases, States could not conduct any child-custody proceedings involving Indian children in the first place—only the federal government could. Not even the United States has claimed such an expansive federal power.

b. Early legislation also demonstrates that the Founders did not consider the United States' authority over Indian tribes to include the power to interfere in state-court proceedings. The Trade and Intercourse Act of 1790 regulated trade with Indian tribes and the sale of Indian land. Act of July 22, 1790, 1 Cong. Ch. 33, 1 Stat. 137. But it also extended federal criminal jurisdiction to crimes committed by non-Indians against Indians. *Id.* So though the Founding generation may not have strictly limited the United States' authority to contemporary definitions of "commerce," it also did not require States to apply different rules to Indians in state-court proceedings. The Founders reconsidered and reenacted the Trade and Intercourse Act multiple times, but they rarely expanded its scope beyond trade, land, and criminal matters involving Indians—and even then only to provide horses and send temporary agents to live among the tribes. Speed, *supra* at 474-76.

Another historical example suggests that early Congresses did not view the Indian Commerce Clause as a plenary source of federal authority over Indian affairs. In 1834, Congress considered a bill that would have

formed a confederated government of Indian tribes in the Western Territory. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03 (2019 ed.). Then-Representative John Quincy Adams objected to the bill as exceeding Congress's powers. Speed, *supra* at 476-77. One proponent of the bill raised in passing the Indian Commerce Clause as a justification for the exercise of federal authority, but no one ever returned to it. *Id.* Instead, the debate predominantly focused on Article IV's Territory Clause. *Id.* If that Congress viewed the Indian Commerce Clause as conferring on it a plenary power over Indian affairs, one would have expected a discussion of that power to have featured prominently in this 1834 debate. But it did not, and the bill failed. *Id.*

B. This Court's precedents do not require a contrary result.

The Fifth Circuit's plurality also upheld ICWA because it understood this Court as casting the "government's Indian affairs power in the broadest possible terms." Pet. App. 72a (Dennis, J.). Justice Thomas's observation that Congress's putative plenary power over Indian affairs rests on "shak[y] foundations" was generous. *United States v. Bryant*, 579 U.S. 140, 160 (2016) (Thomas, J., concurring). Such a power is without textual basis, has been inconsistently described, and should not be extended to allow Congress to legislate regarding Indian children under the guise of regulating Indian commerce.

1. This Court's references to a "plenary power" over Indians are of dubious origin.

a. Because its plenary-power precedents are untethered from specific constitutional language, this Court

has never been consistent in describing it—let alone applying it.

This Court originally hewed to the Indian Commerce Clause's text, understanding that it did not give Congress plenary power over Indian affairs. Considering whether the clause authorized the exercise of federal criminal jurisdiction over acts committed by Indians on a reservation, the Court stated

> [W]e think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

United States v. Kagama, 118 U.S. 375, 378-79 (1886). While the Court ultimately upheld the law under a guardian/ward theory that one scholar has called "a tour de force in judicial constitutional creativity," it did not rest its holding on either the Indian Commerce Clause or an all-encompassing plenary power over Indians. *See* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 172 (2002).

The earliest reference to a plenary power over Indians appears to be from when the Court, discussing Congress's creation of a legislative court to hear certain cases arising in Indian territory, "assum[ed] that [C]ongress possesses plenary power of legislation in regard to" Indian tribes. *Stephens v. Cherokee Nation*, 174 U.S.

445, 478 (1899). Since then, the Court has varied in how broadly it has described this purported power. For example, it has frequently referred to Congress as having a plenary power to oversee "tribal property" and "tribal relations." *Winton v. Amos*, 255 U.S. 373, 391 (1921); *Williams v. Johnson*, 239 U.S. 414, 420 (1915); *Sizemore v. Brady*, 235 U.S. 441, 449 (1914); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). But it has also occasionally referred to a plenary power to legislate regarding "Indian tribes." *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306 (1902). Likewise, this Court has described "[t]he plenary character of this legislative power" as applying during "various phases of Indian affairs," *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 716 (1943), but also spoken of a "plenary power over Indian affairs," *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979).

b. Seeking a textual hook for such a broad power, the Court departed from its earlier, more textually faithful interpretation of the Indian Commerce Clause beginning in the last quarter of the Twentieth Century. In 1989, it declared that "the central function of [the clause] is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The Court cited only its prior opinion in *Mancari* for this assertion. *Id.* (citing *Mancari*, 417 U.S. at 551-52). *Mancari*, in turn, claimed such a plenary power derived from the Indian Commerce Clause, Treaty Clause, and the Court's view that a plenary power was "implicit[]" in the Constitution. 417 U.S. at 551-52.

Mancari appears to be the first time this Court linked a "plenary" power over Indians to the Indian

Commerce Clause, although earlier cases recognized that the clause was a source of federal power to legislate regarding Indian tribes. *McClanahan*, 411 U.S. at 172 n.7; *Williams v. Lee*, 358 U.S. 217, 220 n.4 (1959); *Perrin v. United States*, 232 U.S. 478, 482 (1914). But the transformation of the Indian Commerce Clause from one source of federal power to a repository of plenary federal power was supported by nothing more than this Court's *ipse dixit*. It was also unnecessary the Court's conclusion: *Mancari* considered the federal government's power to prefer Indians in federal hiring. 417 U.S. at 537; *infra* at 43-46. Congress does not depend on the Indian Commerce Clause to regulate how the federal government hires federal employees.

2. Even a "plenary power" over "Indian affairs" would not justify ICWA.

Even if this Court's precedents squarely recognized a plenary congressional power to legislate regarding "Indian affairs," that would not resolve the scope of such a power—and whatever that power's scope, it does not include the power to enact ICWA.

This Court has referred to several powers as "plenary" while nonetheless recognizing limits on Congress's authority to legislate under those powers. For example, the Court has stated that Congress has "plenary power" under the Interstate Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1, 29 (2005); *Hodel v. Indiana*, 452 U.S. 314, 324 (1981); *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939). Yet that description has not stopped the Court from holding that various laws exceeded Congress's interstate-commerce authority. *See, e.g.*, *Sebelius*, 567 U.S. at 552 (Roberts, C.J., concurring); *Morrison*, 529 U.S. at 617; *Lopez*, 524 U.S. at 551. Similarly, the Court has described Congress's power to enforce the Fourteenth

Amendment as "plenary," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), but has held that multiple laws enacted pursuant to that enforcement authority exceed Congress's power, *see, e.g.*, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

If Congress has a plenary power regarding Indian affairs, it is as limited as these other "plenary" powers. As this Court has already recognized, "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality op.). Thus, the Court has analyzed Indian-specific laws under the Fifth Amendment's Takings Clause. *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935). It has applied the due-process and equal-protection guarantees of the Fifth Amendment to congressional enactments regarding Indians. *Weeks*, 430 U.S. at 84. And it has held that Congress's power under the Indian Commerce Clause does not extend to abrogating state sovereign immunity. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996). "Plenary" or not, Congress's power to legislate regarding Indians is limited.

Nothing in this Court's precedents regarding plenary power requires the Court to uphold ICWA as within Congress's legislative authority. Indeed, a modern treatment of "plenary power" found it far from dispositive. *Lara*, 541 U.S. at 200-07. When examining whether Congress could confer on Indian tribes an independent criminal prosecutorial power, the Court did not rest its analysis solely on any purported "plenary power" of Congress. *Id.* Instead, it considered prior congressional practice, textual limitations within the Constitution, and

consistency with prior precedents to determine whether Congress exceeded its authority. *Id.* The Court also found it significant that the law at issue "involve[d] no interference with the power or authority of any State," *id.* at 204-05, and that it was not an "unusual legislative objective," *id.* at 203. By contrast, ICWA's purpose is to interfere with the authority of States, and its objectives are unusual: the subject of domestic relations is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Indeed, "[t]he whole subject of the domestic relations of . . . parent and child[] belongs to the laws of the [S]tates and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. at 593-94; *see also Moore v. Sims*, 442 U.S. 415, 435 (1979).

Nor do this Court's other Indian-affairs precedents require otherwise. Each of those is far afield from core matters of state concern. For example, the Court has recognized Congress's authority to define the contours of Indian tribal sovereignty, *Lara*, 541 U.S. at 202, and approved of Congress's power to specify that activities taking place on Indian lands remain subject to federal or state criminal laws in the same way they would be elsewhere, *United States v. Antelope*, 430 U.S. 641, 648 (1977). This Court has likewise confirmed Congress's power to make and abrogate treaties with Indian tribes, *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684-85 (1979), and, of course, Congress's power to regulate commerce with Indian tribes, *Perrin*, 232 U.S. at 480. But ICWA is none of these. It is neither a federal preservation of criminal jurisdiction over acts on tribal lands, nor an attempt to enable a treaty, nor a regulation of commerce with Indians.

Indeed, upholding ICWA would require the most expansive understanding of Congress's Indian authority to date.

If this Court can uphold ICWA only by extending its plenary-power precedents, it should refuse to do so. As discussed above (at 31-34), this Court's observations regarding a plenary congressional power over Indian affairs rest on dubious assertions divorced from constitutional text and history. If child-custody proceedings are "Indian affairs" simply because they involve Indian children, then Congress could create different rules for any state-court proceeding involving an Indian. As Justice Thomas has noted, such an interpretation would create "absurd possibilities," *Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring), including a power to create Indian-specific rules for state prosecutions or for the enforcement of contracts, *id*. This Court should not countenance that result: "the Constitution does not grant Congress power to override state law whenever that law happens to be applied to Indians." *Id.*

II. ICWA Violates the Equal-Protection Rights of Everyone Involved in Child-Custody Proceedings.

In addition to exceeding the scope of Congress's Article I powers, ICWA violates the Constitution's fundamental guarantees that neither the federal government nor the States may discriminate based on race. U.S. CONST. amends. V, XIV. The Fifth Circuit did not address Texas's standing to challenge ICWA's placement preferences because that court held that at least one of the individual petitioners had standing to do so.[7] Pet.

[7] As the Fifth Circuit correctly concluded, Texas also has standing to challenge the Final Rule and its implementation of ICWA's racially discriminatory placement preferences because that regime

App. 59a (Dennis, J.), 218a n.13 (Duncan, J.). Texas has standing to challenge ICWA's placement preferences because those preferences require Texas either to violate the binding equal-protection obligations the Constitution imposes upon it, or otherwise risk losing federal funds. On the merits, the Fifth Circuit erred because far from being comparatively benign political classifications, *id.* at 139a-66a (Dennis, J.), ICWA establishes an overt and unapologetic race-discrimination regime.

A. Texas has standing to raise an equal-protection challenge.

ICWA forces Texas into an impossible choice: violate the Constitution's Equal Protection Clause or lose federal funds. This dilemma injures Texas and establishes its standing.

So long as a State "has an interest independent of" its citizens, it may litigate in its own capacity to vindicate its sovereign and quasi-sovereign interests, even against the United States. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 518-22 (2007); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982). Even if the alleged injury "possibly overlap[s] with individual citizens' injuries," a State still has standing so long as it claims "an additional injury to the [S]tate *itself*." *Kentucky v. Biden*, 23 F.4th 585, 599 (6th Cir. 2022).

Like individuals, States may sue when they suffer pocketbook or proprietary harms. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019). Because they are sovereigns, States may also sue when the federal government's actions intrude upon areas traditionally within their control. *See Alfred L. Snapp*, 458 U.S. at 601. Both

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invades Texas's sovereign interest in regulating its domestic affairs. Pet. App. 63a-64a (Dennis, J.).

Texas's proprietary and sovereign interests are implicated here.

1. As for Texas's proprietary interests, section 1915's placement preferences put Texas in a fiscal trap. Congress conditioned federal funding in Subtitles IV-B and E of the Social Security Act on States' compliance with ICWA. Pet. App. 69a-70a & n.20 (Dennis, J.). If Texas complies with ICWA, it will have discriminated based on race and exposed its employees (and through indemnification, itself) to liability under 42 U.S.C. § 1983. But if Texas refuses to discriminate among its citizens, it will lose federal funding. 42 U.S.C. §§ 622(b)(9), 624(a), 677(b)(3)(G).

In addition, ICWA imposes recurring costs on States. Texas must shoulder the financial burdens of the record-keeping and reporting requirements ICWA imposes to help assure Interior that Texas is complying with ICWA's requirements. *See* 81 Fed. Reg. at 38,863. Texas must likewise pay other additional costs under ICWA: for example, if Texas wishes to remove an Indian child from a dangerous environment, it must pay the cost of an expert witness, as ICWA requires such expert testimony before placing a child in foster care or terminating parental rights. Pet. App. 290a (Duncan, J.); *id.* at 345a (Owen, C.J.); *see also id.* at 461a (citing the "qualified expert witness" requirement); 81 Fed. Reg. at 38,864 (discussing the cost of the notice requirement).

2. Even apart from its financial costs, Texas is injured when it is forced to participate in a racially discriminatory scheme. Although Texas is not the prototypical equal-protection plaintiff, this Court has allowed a third party to raise an equal-protection challenge when a legal scheme requires one party to discriminate against another. For example, it allowed a white homeowner to

raise the equal-protection rights of the non-whites discriminated against under a restrictive covenant. *Barrows v. Jackson*, 346 U.S. 249, 259 (1953). And the Court allowed a beer vendor to challenge the unequal treatment of his customers on the basis of sex because "[t]he legal duties created by the statutory sections under challenge"—and thereby any injury-in-fact—"are addressed directly to vendors." *Craig v. Boren*, 429 U.S. 190, 194 (1976).

Texas has standing to challenge ICWA for the same reason. That is, Texas, like the vendor, is "obliged either to heed the statutory discrimination," thereby incurring a direct injury from having to discriminate against its own citizens, "or to disobey the statutory command and suffer . . . sanctions" in the form of lost federal funding. *Id.* And as the States have standing to challenge the statute, they are "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [the] constitutional challenge fail and the statutes remain in force." *Id.* at 195 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965)).

3. The placement preferences in ICWA also intrude upon Texas's sovereign interest in regulating domestic relations within the State. States have always enjoyed a largely uninterrupted power over domestic-relations law within their borders. *Ex parte Burrus*, 136 U.S. at 593-94. Indeed, this Court has recognized that States "ha[ve] a duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). By interfering with States' traditional control over the parent-child relationship, ICWA has injured Texas's sovereign interests in this area.

ICWA is not only an intrusion into, but a direct attack on, Texas's domestic affairs. Texas's Constitution prohibits the State from denying or abridging "[e]quality under the law . . . because of sex, race, color, creed, or national origin." TEX. CONST. art. I, § 3a. More specifically, Texas forbids its courts from denying or delaying an adoption "on the basis of race or ethnicity of the child or the prospective adoptive parents." Tex. Fam. Code § 162.015(a). ICWA's placement preferences prevent Texas from enforcing that fundamental law when Indian children—or non-Indians seeking to foster or adopt such children—are involved in those proceedings. Instead, ICWA forces Texas to create a specific, race-based exception for Indian children. *Id.* § 162.015(b). That is a paradigmatic sovereign injury—and that, too, establishes Texas's standing.

B. ICWA racially discriminates against both Indian children and adoptive families.

In theory, Congress passed ICWA to remedy wrongs inflicted by bad actors—including federal bad actors—more than half a century ago. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 378 (2003) (Thomas, J., dissenting). In practice, it replicates those wrongs. A classic example of so-called "benign" discrimination, ICWA creates a government-imposed and government-funded discriminatory regime sorting children, their biological parents, and potential non-Indian adoptive parents based on race and ancestry. Because this Court has recognized that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," such methods violate equal protection. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

1. Indian children

a. ICWA classifies children based on their blood ties to a recognized Indian tribe. Specifically, Congress has classified as an Indian child any minor who is "(a) a member of an Indian tribe" or "(b) [] 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). Although some Indian tribes once admitted certain members for reasons unrelated to their blood connection to the tribe, today "a person generally must possess a threshold amount of Indian or tribal 'blood,' expressed as one-half, one-quarter, or some other fractional amount" to establish Indian ancestry. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 1 (2006); *see also Adoptive Couple*, 570 U.S. at 641 (describing claim premised on child's possession of 3/256ths Cherokee blood).[8] In this context, tribal membership, ancestry, and descent are simply proxies for race. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000).

b. Congress emphasized the racial nature of its definition of "Indian child" by extending ICWA's scope to children who are not members of a tribe but simply *eligible* for tribal membership, so long as one *biological* parent is a member of an Indian tribe. 25 U.S.C. § 1903(4). As Interior has explained, "membership in an Indian tribe is generally not conferred automatically upon birth," but requires "affirmative steps" by parents or guardians. 81 Fed. Reg. at 38,783. Thus, Congress wrote ICWA to include children who would be eligible for membership in a tribe by blood, but whose parents have chosen not to affiliate their child with that tribe.

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[8] *See also, e.g.*, 81 Fed. Reg. at 38,783; 1 Navajo Nation Code tit. 1, § 701 (2014); Cherokee Nation Br. in Opp. 24.

ICWA's inclusion of non-tribal members demonstrates why this Court's decision in *Mancari* does not transform ICWA into a political classification. 417 U.S. at 538-39. *Mancari* involved section 12 of the Indian Reorganization Act, 48 Stat. 986, which created a preference for employing Indians in certain BIA positions relating to the "administration of functions or services affecting any Indian tribe." 25 U.S.C. § 472. The Court found that section 12 distinguished among applicants based on political affiliation, not race. *Mancari*, 417 U.S. at 538-30.

But the statutes at issue in *Mancari* are a far cry from ICWA's "Indian child" definition. As an initial matter, *Mancari* did *not* recognize an Indian exception to the Constitution's equal-protection guarantee. To the contrary, the Court reiterated that a federal employment preference based on race or national origin would "constitute[] invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment." *Id.* at 551. At the same time, the Court recognized that the United States had a "policy of encouraging Indian employment," *id.* at 546 (quoting 110 Cong. Rec. 12723 (1964)), which it advanced through various statutory exemptions to federal antidiscrimination laws, allowing discrimination in favor of Indians for "tribal employment" or for hiring "by a business or enterprise on or near a reservation," *id.* at 547-49. Indeed, the Court observed that "[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations." *Id.* at 552.

Rather than "deem[] invidious racial discrimination[] an entire Title of the United States Code (25 U.S.C.),"

Mancari instructed courts that certain laws derived from "historical relationships" with Indian tribes could be upheld as consistent with a historical understanding of "the solemn commitment of the Government toward the Indians." *Id.* Applying that approach, the Court concluded that section 12's BIA-specific preference did not favor members of "a discrete racial group, but, rather, members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554; *see also Rice*, 528 U.S. at 514 (distinguishing *Mancari*). The Court reached that conclusion based on three primary facts—none of which is present in ICWA.

First, in *Mancari*, the hiring preference "applie[d] only to *members* of 'federally recognized' tribes," and thus it "exclude[d] many individuals who [were] racially . . . classified as 'Indians.'" 417 U.S. at 554 n.24 (emphasis added). Specifically, the BIA's definition required not just "one-fourth or more degree Indian blood" but that the potential appointee also actually "be a member of a Federally-recognized tribe." *Id.* at 553 n.24. The Court also found significant that the preference in *Mancari* was consistent with a "unique legal status [for] Indians in matters concerning tribal or 'on or near' reservation employment," *id.* at 548, and that this unique status rested against a backdrop of a general federal prohibition on discriminatory hiring. In that context, the Court interpreted the tribal-membership requirement as an indicator that the preference was "political rather than racial in nature." *Id*. at 523 n.24.

Second, the Court emphasized the connection between this unique legal status and geographic presence on Indian lands. The Court analogized the "various services on the Indian reservations" the BIA provided with

"local municipal and county services." *Id.* at 544. And, viewing it in that light, the Court interpreted the hiring preference as a sort of geographic-presence requirement, comparing it to "the constitutional requirement that a United States Senator, when elected, be 'an Inhabitant of that State for which he shall be chosen,' Art. I, § 3, cl. 3, or that a member of a city council reside within the city governed by the council." *Id.* at 554. That is, because the preferences applied to positions "directly and primarily related to the providing of services to Indians," *id.* 549 n.23, those positions acted effectively as a substitute for (or complement to) local government on Indian reservations, *id.* at 554. And a preference available only to individuals seeking a role in a local government that governs them is far closer to a political, rather than racial, preference.

Third, the Court relied heavily on the fact that the preference "[wa]s designed not to prevent the absorption of Indians in white communities, but rather to provide" reservation Indians "some measures of self-government in their own affairs." *Id.* at 542 n.12 (quoting *Hearing on S. 2755 before the Senate Committee on Indian Affairs*, 73d Cong., 2d Sess., pt. 1, p. 26 (1934)). The Court concluded that "[a]s long as the special treatment" tribal members received was "reasonable and rationally designed to further Indian self-government" and thereby "fulfill[] Congress' unique obligation toward the Indians," that differential treatment did not violate the Fifth Amendment's equal-protection guarantee. *Id.* at 555.

ICWA has none of these features. As an initial matter, ICWA was designed to prevent Indian children from being raised according to "white, middle-class standard[s]." 81 Fed. Reg. at 38,829 (citing *Holyfield*, 490 U.S. at 36 and H.R. Rep. No. 95-1386, at 24). Indeed, as the

Fifth Circuit acknowledged, that was ICWA's point. Pet. App. 35a-39a (Dennis, J.).

Additionally, unlike in *Mancari*, neither a child nor a proposed adoptive family must be a member of an Indian tribe for ICWA to apply. 25 U.S.C. § 1903(4). To be sure, ICWA can apply if a biological parent is a member of an Indian tribe, *id.*, but this stands in stark contrast to virtually every other context, where parentage alone does not typically confer tribal membership or benefits on a child, 81 Fed. Reg. at 38,783. At most, therefore, ICWA's tribal connection constitutes an ancestry requirement, which is often "a proxy for race." *Rice*, 528 U.S. at 514. That does not change merely because ICWA's definition of "Indian child" "exclude[s] many individuals who are racially to be classified as 'Indians,'" Pet. App. 142a (Dennis, J.). "Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Rice*, 528 U.S. at 526-27. Unlike *Mancari*, where the BIA ensured a political affiliation by requiring tribal membership, ICWA discards that requirement for one based on parentage. 25 U.S.C. § 1903(4).

Nor is ICWA's "Indian child" classification comparable to the geographic connection alluded to in *Mancari*, such as a Senator's or councilperson's residence qualification. ICWA's "Indian child" definition does not promote direct and voluntary "participation by the governed in the governing agency." *Mancari*, 417 U.S. at 554. It applies instead to children given no choice in the matter, whose families chose to have them live away from any relevant tribal lands (or else a child-custody proceeding regarding them would be adjudicated in tribal courts, 25 U.S.C. § 1911(a)), and whose families chose not to enroll

them as members of Indian tribes or subject them to tribal governance.

And ICWA's application to a child is often entirely involuntary: as the Librettis' experience amply demonstrates, the tribes can force an Indian child's participation in ICWA even without consent of her parents, J.A. 205-06; Pet. App. 276a (Duncan, J.). In any other context, it would violate the First Amendment to force an individual to associate with a political group—based on a blood relationship with that group or otherwise. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) ("The right to eschew association for expressive purposes is likewise protected."). And because an infant cannot in any meaningful sense be involved in tribal government, ICWA's treatment of Indian children can only be seen as a racial classification. *Accord* H.R. Rep. No. 95-1386, at 17 (acknowledging that a "minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe").

2. Indian children's current or potential families

Through its placement preferences, ICWA also discriminates based on race against the other parties to child-custody proceedings—including both the child's biological parents and any potential foster or adoptive parents. "Long ago," this Court "described Indian tribes as 'distinct, independent political communities.'" *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)). Yet ICWA's placement preferences amalgamate Indian tribes into an undifferentiated mass, requiring state courts to place an "Indian child" with any "other Indian families" and any "Indian foster home[s]" before placing

such a child with any non-Indian potential adoptive and foster families. 25 U.S.C. § 1915(a)(3), (b)(iii). This preference applies regardless of whether any given Indian family or Indian foster home in which a child may be placed shares a connection to the tribe to which either the Indian child or one of his parents belongs. *Id.* In other words, ICWA creates a regime preferring any Indian to any unrelated non-Indian, regardless of tribe.

There may be cultural overlap between tribes. But the Fifth Circuit was wrong to assume that shared "linguistic, cultural, and religious traditions" among the tribes are a factor in determining a placement. Pet. App. 164a (Dennis, J.). To the contrary, in determining whether ICWA applies, state courts expressly "may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities." 25 C.F.R. § 23.103(c). And once ICWA applies, the only criteria that matters in ICWA's placement preferences is whether the individual taking custody of the child is an Indian or has approval of the Indian child's assigned tribe. 25 U.S.C. § 1915(a)-(b).

In this way, ICWA "t[akes] away personal liberties of men and women who have a child with Indian blood." Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543, 563 (1996). Through ICWA, "Congress effectively created two classes of parents: parents of children with Indian blood and all other parents." *Id.* "[A] parent's rights vary depending upon the class to which they belong." *Id.* For parents of Indian children, ICWA gives a third party—an Indian tribe—"rights over the child equal to or greater than their own." Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection*

for Indian Children, 37 CHILD. LEGAL RTS. J. 1, 14 (2017). The biological parents of an Indian child cannot choose the adoptive parents of their child, ensure that their child will be treated well by the receiving tribe, or put any conditions on the adoption of their child, such as by placing their child with a family that shares their religion. Bakeis, *supra* at 563-65.

Potential non-Indian adoptive and foster families are also victims of ICWA's racial discrimination. They are "forced to compete in a race-based system" when seeking to adopt or foster an Indian child. *Parents Involved*, 551 U.S. at 719. "Non-Native adults seeking to adopt Indian children face a far greater burden in court," must make "a greater investment of time and money," and accept they are "more likely to lose" for no reason other than "ICWA presumes . . . that the Indian child's best interests are served" by placing her with an Indian family. Sandefur, *supra* at 14 (quotation marks omitted). Non-Indians' race and ancestry raise the specter of losing a child if such ties are discovered later—or a tribe suddenly takes an interest in the child, as happened with the Cliffords and Child P. J.A. 193. At minimum, those immutable characteristics guarantee that non-Indians are last in line to adopt Indian children. 25 U.S.C. § 1915(a).

C. ICWA's racial-discrimination mandates violate the Fifth Amendment.

Because ICWA classifies citizens by race and ancestry, it must face "the most rigid scrutiny." *Fisher v. Univ. of Tex.*, 570 U.S. 297, 309-10 (2013). As "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Parents Involved*, 551 U.S. at 720, this Court subjects them to the strictest scrutiny. Respondents must therefore prove that each of ICWA's racial

classifications is the least restrictive means to achieve a compelling government interest furthered by that specific classification. *Johnson v. California*, 543 U.S. 499, 505 (2005). This rule applies to both malicious and "benign" racial classifications. *Id.* And even if respondents could somehow cross this incredibly high bar, they would further have to account for ICWA's expressly racial purpose—to avoid "imposition by [the] government" of "white suburbia's preference[s] in patterns of family living," H.R. Rep. No. 95-1386, at 20. ICWA violates the Fifth Amendment because of this discriminatory purpose as well.

1. Strict scrutiny applies whether ICWA benefits or burdens Indians.

This Court has consistently treated "[r]acial discrimination [as] invidious in all contexts," *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991), and "by [its] very nature odious to a free people," *Rice*, 528 U.S. at 517. The Equal Protection Clause, "[p]urchased at the price of immeasurable human suffering," *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring), codifies our belief that race discrimination "demeans us all," *Grutter*, 539 U.S. at 353 (Thomas, J., dissenting). The Fifth Amendment requires no less. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

ICWA amply demonstrates why racial classifications, even if imposed with stated good intentions, "ultimately have a destructive impact on the individual and our society," *Adarand*, 515 U.S. at 240 (Thomas, J., concurring). ICWA empowers Indian *tribes* at the cost of Indian *children*. As one commentator has noted, evidence suggests that ICWA's provisions "harm Indian children, deprive them of the protection of the 'best interests of the child' standard, move them beyond the reach of state protective

services, curtail their rights to due process and equal protection, subordinate their interests to those of tribal governments, and cripple efforts" to remove them from dangerous situations. Sandefur, *supra* at 5.

These harms are precisely why this Court applies strict scrutiny: to discern whether present racial discrimination is the only way to resolve a truly compelling problem, *Parents Involved*, 551 U.S. at 736, or if it merely reflects the "acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable," *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting).

2. ICWA does not advance even a legitimate government interest—let alone a compelling one.

ICWA fails strict scrutiny at the outset because from the beginning, it advanced an avowedly racial purpose. Such a purpose is not even legitimate, let alone compelling.

a. ICWA is, in effect, a numbers game. The more children sent to Indian tribes, the rationale goes, the greater the chance of ensuring "the continued existence and integrity of Indian tribes," 25 U.S.C. § 1901(3). Although Congress ostensibly sought to "promote the stability and security of Indian tribes and families," *id.* § 1902, it did so by tethering an Indian child's identity exclusively to his race- or ancestry-based connection to an Indian tribe, and then exploiting that manufactured connection to place such child with that tribe to increase its numbers.

In *Rice*, this Court rejected a similar scheme by Hawaii that prohibited individuals who did not meet certain ancestry requirements—and thus were not considered "native Hawaiians"—from voting for leaders of a state

agency charged with protecting and preserving that portion of the population. 528 U.S. at 498-99. The Court held that Hawaii's purpose—to "treat the early Hawaiians as a distinct people"—"used ancestry as a racial definition and for a racial purpose." *Id.* at 515. Laws that create an identifiable class using racial definitions—like the definition of "Indian child" and placement preferences in ICWA—are no more constitutional when passed by Congress than by Hawaii.

Although the Fifth Circuit insisted that ICWA was intended to preserve a tribe's culture and traditions for the next generation, *e.g.*, Pet. App. 164a (Dennis, J.), Congress made neither culture nor traditions an operative part of any of ICWA's provisions. *Cf.* 25 U.S.C. § 1915(a)(2)-(3). Indeed, Interior has expressly excluded both culture and tradition from ICWA's purposes: the Final Rule directs state courts not to consider the child's or parent's participation in "Tribal cultural, social, religious, or political activities," 25 C.F.R. § 23.103(c), when determining whether ICWA applies in the first place.

b. In addition, although addressing *current* discrimination and the "lingering effects of racial discrimination" may be compelling state interests, *Adarand*, 515 U.S. at 237, the use of racial discrimination to "'make up' for past racial discrimination in the opposite direction" is not even a legitimate interest, *id.* at 239 (Scalia, J., concurring in part and concurring in the judgment); *e.g.*, *Parents Involved*, 551 U.S. at 731. Respondents and ICWA's proponents rely on discrimination from events of the 1970s, but "[o]ur country has changed, and while any racial discrimination" in public life is "too much, Congress must ensure that the legislation it passes to remedy that [discrimination] speaks to current conditions." *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). A history of

discrimination will not continue to justify a racially discriminatory legislative scheme such as ICWA without a continued showing of a compelling need to redress current or "lingering effects" of racial discrimination. *Id.* at 554 (holding section 5 of the Voting Rights Act unconstitutional because "no one can fairly say that [the record] shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965"). Respondents have not even attempted such a showing—and thus ICWA cannot stand.

3. ICWA is not narrowly tailored.

Assuming, *arguendo*, that ICWA was intended to promote a compelling interest in tribal self-governance—and not to reflect disapproval of "white suburbia's preference[s] in patterns of family living," H.R. Rep. No. 95-1386, at 20—it would fail strict scrutiny because it is insufficiently tailored. ICWA is and has always been a blunt instrument: its overbroad scope, lack of exceptions, nationwide application, and indefinite duration doom it under any tailoring analysis. ICWA addresses only a symptom, rather than the cause, of the malady it seeks to eradicate—namely, the deterioration of Indian communities. That mismatch is fatal.

First, ICWA's "Indian child" definition is overbroad. It sweeps into the Act's ambit children who are not even members of Indian tribes on the ground that these children are nonetheless a necessary "resource" for tribal self-governance. *See* 25 U.S.C. § 1901(3). But children are not resources: they are human beings. Moreover, this sweeping definition makes no allowances for children of mixed ancestry. *See* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 593 (2002). A child who qualifies as an Indian child

but who has been or could be raised in a different culture based on another facet of his identity is instead forced into "one monolithic classification" regardless of whether the child has or will have an identity apart from as an Indian. *Id.*

To make matters worse, there is no support for Congress's apparent assumption that a child raised by a non-Indian cannot learn and carry on Indian tribal traditions and culture. Studies conducted in the intervening decades suggest that "children can learn and appreciate their Native American cultures through exposure to Native Americans while living with their non-Native American families." Michele K. Bennett, *Native American Children: Caught in the Web of the Indian Child Welfare Act*, 16 HAMLINE L. REV. 953, 972 (1993). These studies belie claims that preserving Indian culture requires ICWA's redistribution of children under the guise of preserving tribal "resources"—a regime that allows even children who have developed close ties to a non-Indian family to be snatched from that family at a tribe's or Indian parent's request.

Second, Congress made no effort to limit ICWA's requirements to States whose race-based child-custody practices supposedly incited the Act. The House Report accompanying the final proposed bill stated only that in "States with large Indian populations," such as Minnesota, Montana, South Dakota, Washington, and Wisconsin, "approximately 25-35 percent of all Indian children are separated from their families." H.R. Rep. No. 95-1386, at 9-10. Leaving aside that the "federally run or financed schools" were likely the primary culprits behind this statistic, Pet. App. 35a (Dennis, J.), the House imposed race-based classifications on all 50 States based on evidence of

the practices of (at most) five. H.R. Rep. No. 95-1386, at 9-10.[9]

Third, unlike the roughly contemporaneous Voting Rights Act, there is no "bail out" option if States demonstrate lower rates of removal of Indian children from their homes, or an end date for ICWA's application at all. Because even so-called "benign" discrimination is a "deviation from the norm of equal treatment of all racial and ethnic groups," this Court has required that it be "a temporary matter," to ensure that it is "in the service of the goal of equality itself"—not an end to itself, which will inevitably contribute to the harm it was meant to remedy. *See Grutter*, 539 U.S. at 342 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality op.)); *id.* at 343 (giving racial preferences in school admissions at most 25 years as of 2003). As a result, a race-based program will fail strict scrutiny unless it is "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Adarand*, 515 U.S. at 238 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)).

ICWA has no such limitation. Instead, supporters of ICWA, including respondents, justify sending children against their will to Indian tribes based on practices that ended 44 years ago at a minimum. Pet. App. 38a (Dennis, J.). Even if Congress faced a nationwide and extraordinary problem that justified such "extraordinary measures" in 1978, the fact of that past problem would not justify such trans-generational corrective action. *Shelby*

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[9] A review of legislative debates reveals that certain legislators also mentioned other States; however, that debate similarly fails to show a nationwide pattern of state-sponsored abuse. 124 Cong. Rec. 38101-02 (Oct. 14, 1978); *see also* 124 Cong. Rec. 12532-34 (May 3, 1978).

County, 570 U.S. at 552-54. "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment). Reallocating children from this generation to Indian tribes does not mend the removal of children from tribes in past generations. And absent evidence of continued, severe, and extensive racial discrimination *by the States*, ICWA cannot be justified as a prophylactic against such discrimination. *Shelby County.,* 570 U.S. at 552-54.

Fourth, ICWA's selected means for remedying past discrimination impose severe harms on Indian children based on their race. ICWA prevents state authorities from removing Indian children from harmful environments even when a child is in significant danger—"put[ting] certain vulnerable children at a great disadvantage solely because an ancestor . . . was an Indian." *Adoptive Couple*, 570 U.S. at 655. For example, in cases of actual physical abuse—rather than neglect—ICWA's high bar to terminating parental rights, 25 U.S.C. § 1912(f), makes little sense. Though passed as a putative effort to ensure that Western racial mores are not used to breakup an Indian household, those provisions often prevent the removal of a child from a dangerous environment, excusing physical abuse that would suffice for removal of a non-Indian child. Ashley E. Brennan, *Child Abuse Is Color Blind: Why the Involuntary Termination of Parental Rights Provision of the Indian Child Welfare Act Should Be Reformed*, 89 U. DET. MERCY L. REV. 257, 258-59, 265-67 (2012).

These heightened removal requirements likely contribute to the alarming statistics surrounding Indian child

welfare: for example, "Indian children die almost three times more often of accidents than other children," and "the leading cause of death for Indian children under the age of 14 is accidents," the "majority" of which "are alcohol-related." *Id.* at 267. Indian children also suffer the second-highest rate of physical abuse of any ethnic group (after African-American children). *Id.* at 268. Though these statistics were not available to Congress in 1978, they are strong indicators that ICWA's exception-free, race-based classification is *not* the least restrictive means of accomplishing Congress's goal of ensuring Indian children are raised in Indian homes (even if that were an adequate interest for strict-scrutiny purposes—which it is not).

4. ICWA does not promote "tribal self-governance."

a. Respondents contended below that ICWA drew constitutionally permissible political distinctions, rather than racial ones. That is incorrect: ICWA's application does not depend on a preexisting relationship with an Indian tribe, nor do its placement preferences apply only in favor of a tribe to which a parent or child belongs. 25 U.S.C. § 1915(a)(3), (b)(iii). But even if ICWA drew only political designations, it would still have to be "rationally related to a legitimate governmental purpose." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Because ICWA's purpose of preventing the integration of Indian children into non-Indian families is not a legitimate government purpose, ICWA fails even this more deferential standard of review. Nor does ICWA bear a rational relationship to discharging "Congress' unique obligation toward the Indians," *Mancari*, 417 U.S. at 555, for at least three reasons.

First, ICWA depends on the dubious assumption that, in *all* child-custody cases, the best interest of an Indian child is to serve as an instrument for tribal growth. In

Mancari, the link between the federal employment preference and tribal self-government was straightforward: the federal preference for hiring tribal members for roles concerning the administration of programs for tribes on reservations enabled interested Indians to have a more active role in the governance of those tribes. By contrast, ICWA treats children who may or may not be members of an Indian tribe as part of an undifferentiated mass of Indians, divorcing ICWA's differential treatment from any possible attempt at advancing individual tribes' self-governance. And ICWA does so in the hopes that those children will learn and pass down to later generations the customs and traditions of *some* tribe—without specifying which one: the child's or that of the custodial family—even though ICWA does not require that the children it affects be taught any Indian customs, cannot force the child to carry on those unspecified traditions in the future, and thus cannot guarantee the continuation of those cultural and traditional practices, let alone that such continuation will ultimately assist in tribal self-governance (and thus justify ICWA's extensive interference in the first place).

This implausible chain of inferences subordinates the actual needs of individual children to the theoretical interests of Indian tribes as a group. That is not a rational strategy for Congress to fulfill any obligation—perceived or actual—to the Indian tribes. Although the United States asserts a trust obligation to respect and protect tribal sovereignty, "[t]he preservation of tribes as political and cultural units"—putting aside the fact ICWA's treatment of children plays no part in achieving that goal at all—"is simply not [an] adequate justification for imposing legal presumptions that deprive children of their constitutional rights," Sandefur, *supra* at 18, including their right to equal protection by state authorities against

domestic abuse. *See generally Rice*, 528 U.S. at 514. Such differential protection of Indian children as a group "is alien to the Constitution's focus upon the individual" in its equal-protection guarantee. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

Second, ICWA's intrusion into what should be an individualized proceeding before a state-court judge results in chaotic and often tragic outcomes. As discussed above (at 13-14, 56-57), ICWA can lead to a vulnerable child remaining in an unsafe environment, but its effects extend much further. For example, it is a "distressingly common" phenomenon "when the parents of an Indian child separate," for one ex-spouse "to use ICWA to block what would otherwise be the formation of a stable new family" among the child, the other parent, and a new spouse. Sandefur, *supra* at 44.

Third, any connection between ICWA's statutory text and its stated goals rely on race-based assumptions, unsubstantiated declarations, and data about Indian children's treatment that is nearly 50 years old. But "history did not end" in 1978. *Shelby County*, 570 U.S. at 552. ICWA's current application is irrationally based on "decades-old data relevant to decades-old problems." *Id.* at 553. The government cannot reasonably rely on facts from the 1960s and 1970s to show that ICWA's "Indian child" classification and placement preferences are rationally related to promoting Indian self-governance today. *See id.* at 557. And respondents did not even attempt before the district court to create the substantial factual record that would be necessary to establish an ongoing justification for ICWA.

b. Unsurprisingly, the assumptions connecting ICWA's statutory requirements to its stated goal of

promoting tribal self-governance have been disproven over time. Current studies show with "astounding uniformity" that "transracial adoption is working well," in terms of a child's "adjustment, self-esteem, racial identity, and integration into the adoptive family as well as the community." Bakeis, *supra* at 548. These studies also show that "Indian children raised in non-Indian homes had secure Indian cultural identities when they had relationships with other Indian children." *Id.* at 549.

The director of the Indian Law Unit of Idaho Legal Aid Services has also reported that "ICWA is not having the impact Congress desired." *Id.* at 554. Far from "reduc[ing] the flow of Indian children into foster or adoptive homes," BIA data reflects "the number of Indian children in care increased by 25 percent since the 1980s"—even though the overall numbers of children in care have fallen in that period. *Id.* In addition, in "a surprisingly high number of reported cases, although the tribe was given notice [of a child's Indian ancestry], the tribe chose not to intervene." *Id.* at 555. These results are not consistent with any relationship between ICWA and tribal self-governance—and so ICWA fails even rational-basis scrutiny.

III. ICWA Violates the Anticommandeering Doctrine.

ICWA unconstitutionally commandeers state actors by "turn[ing] state governments into federal adoption agencies." Pet. App. 258a (Duncan, J.). ICWA forces States to provide notices, keep records, locate and retain expert witnesses, and track down Indian families. Respondents' insistence that ICWA merely preempts state law—which the Fifth Circuit accepted in part, *id.* at 4a-6a—does not account for the reality that Texas officials must take extensive affirmative steps to comply with

ICWA well beyond merely applying federal rules of decision in state-court child-custody proceedings.

A. Congress may not commandeer Texas officials to enforce ICWA.

This Court has repeatedly held that Congress may not "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992). This principle is not limited to state legislatures: other state officials similarly may not be "dragooned . . . into administering federal laws." *Printz v. United States*, 521 U.S. 898, 928 (1997); *see also Murphy*, 138 S. Ct. at 1477.

And this Court has explained, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. Thus, "where . . . it is the whole *object* of the law to direct the functioning of the state executive," "the very *principle* of separate state sovereignty" is offended. *Id.* at 932. The violation of state sovereignty is particularly dangerous because "the Constitution . . . divides power among sovereigns and among branches of government precisely" to protect citizens, "so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187. By forcing States to implement Congress's racially discriminatory child-custody scheme, ICWA offends the principles of state sovereignty protected by the anticommandeering doctrine.

B. ICWA commandeers state actors to administer Congress's child-custody regime.

1. There is no question that "[s]everal ICWA provisions do apply, either directly or indirectly, to State . . . agencies." 81 Fed. Reg. at 38,780. Indeed, from beginning to end, Texas must follow federal commands at every step of the process in a child-custody proceeding involving an Indian child.

First—Notice. When Texas brings a foster-care or parental-rights proceeding, it must provide notice by certified mail to the child's parent or custodian and tribe. 25 U.S.C. § 1912(a). Interior estimates that nationally this requirement costs hundreds of thousands of dollars annually. 81 Fed. Reg. at 38,864.

Second—Active efforts. Before removing an Indian child from an unsafe environment, Texas must make "affirmative, active, thorough, and timely efforts" to maintain the Indian family. 25 C.F.R. § 23.2 (interpreting 25 U.S.C. § 1912(d)). Texas must provide Indian families with substantive services not otherwise required under state law, not merely make such services available. 81 Fed. Reg. at 38,791.

Third—Expert witnesses. When Texas seeks foster-care placement or to terminate parental rights, Texas must find and retain an expert witness who is qualified to testify to the "damage to the child," and the "prevailing social and cultural standards of the Indian child's tribe." 25 C.F.R. § 23.122(a). Failure to provide such evidence can lead to a child being removed from her placement. *E.g.*, *Doty-Jabbaar v. Dall. Cnty. Child Protective Servs.*, 19 S.W.3d 870, 877 (Tex. App.—Dallas 2000, pet. denied).

Fourth—Foster-care and parental-rights standards. When Texas seeks foster-care placement or to terminate

parental rights, it must locate and present proof that complies with Congress's standard that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e)-(f).

Fifth—Placement preferences. When attempting to place an Indian child in an adoptive or foster-care home, Texas must seek out placements that conform to ICWA's racial placement-preference hierarchies. 25 U.S.C. § 1915(a)-(b). This requires a "proactive effort[] to comply with the placement preferences," which Interior is empowered to supervise, and which Interior sees as "critical to the success" of these race-based preferences. 81 Fed. Reg. at 38,839.

Perhaps recognizing that this requirement is quite burdensome, the federal respondents noted in a footnote in their petition (at 20 n.2) that after this Court's decision in *Adoptive Couple*, States are no longer required to affirmatively seek out placements that comply with the preferences. That putative concession is inconsistent with Interior's own guidelines, however, which require States to "conduct an[] investigation of whether placements that conform to ICWA's placement preferences are available." Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,149 (Feb. 25, 2015). It is also inconsistent with the experiences of the Librettis, where the Ysleta del Sur Pueblo demanded the county search for potential adoptive placements with the tribe. J.A. 205-06.

Sixth—Recordkeeping. Texas must create and maintain records for each placement of an Indian child "evidencing the efforts to comply with the order of preference." 25 U.S.C. § 1915(e). State courts must also provide the Secretary with a copy of adoptive-placement decrees,

including the names of the child, biological parents, adoptive parents, and any agency having information related to a child's placement. *Id.* § 1951(a).

In short, any time Texas brings a child-custody proceeding involving an Indian child, Texas employees must obey Congress's commands, under Interior's supervision. 81 Fed. Reg. at 38,785. But "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162. Because ICWA requires Texas to govern according to Congress's instructions and subject to a federal agency's supervision, it is unconstitutional.

2. ICWA is unlike any other statute that the Court has upheld against a commandeering challenge. For example, ICWA does not ask that States merely consider federal standards when taking state action, as did the statute in *FERC v. Mississippi*, 456 U.S. 742, 746 (1982). Instead, ICWA issues commands to state actors and even creates an avenue for private parties to collaterally attack state-court judgments if state actors fail to abide by ICWA's terms. 25 U.S.C. § 1914.

Nor does ICWA offer Texas a choice between "implement[ing] [ICWA] itself or else yield[ing] to a federally administered regulatory program." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). Texas cannot choose to leave ICWA to the federal government; if Texas attempts not to implement ICWA itself, the federal government will sanction Texas by withholding federal funding. 42 U.S.C. § 622(a), (b)(9). In any event, vulnerable Indian children will remain in dangerous situations or without permanent homes. Congress cannot thus compel Texas to administer ICWA.

3. ICWA's constitutional faults are particularly obvious when considered in the light of the purposes of the anticommandeering doctrine. The doctrine promotes "political accountability" so that "[v]oters who like or dislike the effects of the regulation know who to credit or blame." *Murphy*, 138 S. Ct. at 1477. But with ICWA, "responsibility is blurred," *id.* "For citizens that encounter the palpable consequences of this law, Congress is nowhere to be found. Congress does not employ the [state child-welfare employee], supervise his work or pay his salary; the nameplate of no federal office is on the door." *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996). Indeed, no federal actor took part in the child-custody proceedings involving the individual petitioners—just state and local government actors.

The anticommandeering doctrine also "prevents Congress from shifting the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1477. ICWA unabashedly foists its compliance costs on the States. As the Final Rule details, ICWA costs the States hundreds of thousands of dollars to comply with its notice requirements alone. 81 Fed. Reg. at 38,864. Its other requirements—such as its expert-witness requirements—cost States yet more money and innumerable employee hours. The anticommandeering doctrine prohibits Congress from forcing States to bear these burdens.

C. ICWA's unconstitutional commands cannot be excused under any other doctrine.

Below, respondents defended ICWA's commands as either (1) mere federal preemption of state child-custody laws, or (2) the regulation of States as market participants.

Respondents are wrong on both counts. Congress has commandeered state actors, even if child-custody

proceedings must be conducted through state courts. And because ICWA regulates States in the performance of their core sovereign function of protecting the health and safety of children within its borders, ICWA's commands cannot be justified merely because private parties can likewise sometimes initiate child-custody proceedings.

1. ICWA does not merely preempt state law.

Texas courts adjudicate child-custody cases. Based on that uncontroversial arrangement alone, respondents recast ICWA as merely the permissible preemption of Texas law. Pet. App. 106a-17a (Dennis, J.). It is not. After all, the Supremacy Clause—and thus federal preemption—provides only that where federal and state rules of decision conflict, state courts must apply the federal ones. *Armstrong*, 575 U.S. at 324. When determining whether an ambiguous federal provision impermissibly commandeers States or permissibly preempts state law, the Court determines whether the provision (1) "represent[s] the exercise of a power conferred on Congress by the Constitution," and whether it is (2) "best read as [a law] that regulates private actors." *Murphy*, 138 S. Ct. at 1479. ICWA satisfies neither.

First, ICWA does not "represent the exercise of a power conferred on Congress by the Constitution." *See supra* at 20-37. Congress lacks the Article I authority to enact ICWA, so ICWA is not "made in [p]ursuance" of the Constitution. U.S. CONST. art. VI, cl. 2. A law made outside of Congress's constitutional authority is not the "supreme Law of the Land," *id.*, and cannot preempt state law.

Second, ICWA is not "best read" as a law regulating private parties. Even though ICWA certainly affects private parties, it does so by controlling state actors. The

same was true in *Printz*: the Brady Act regulated the sale of firearms by private parties, but it did so by obligating state officials to run background checks. 521 U.S. at 902-03. The Court held those obligations were unconstitutional commandeering. *Id.* at 933. Because ICWA regulates Texas's regulation of private parties, namely Indian children, their parents, and their potential adoptive families, it is unconstitutional commandeering.

Judge Duncan's opinion attempted to draw a finer line, concluding that the expert-witness requirement and placement preferences were unconstitutional commandeering as applied to state agencies, Pet. App. 289a-93a (Duncan. J.), but that the parental-rights standards and placement preferences were valid provisions merely preempting state law when applied by state courts. *Id.* at 312a-14a (discussing 25 U.S.C. §§ 1912(e)-(f), 1915). But requiring state courts to enforce federal commands to state agencies and employees—and holding open those courts' judgments to collateral attack in the event of noncompliance—violates the anticommandeering doctrine just as ordering those agencies and employees to obey those commands does. A hypothetical illustrates the point: if ICWA required state-court employees to run background checks on all adoptive parents as a condition of adoption, that requirement would squarely contradict *Printz*'s holding. But per the Fifth Circuit, a requirement that state courts must deny all adoption petitions unless other state actors performed a prior background check would pass constitutional muster.

The protections of the anticommandeering doctrine should not turn on such a formalistic distinction. Texas actors have been commandeered even if the order is enforced through state courts. Unless Texas actors send notice, make active efforts, find expert witnesses, meet

federal burdens of proof, and seek out federally preferred placements, Texas courts cannot approve those state actors' child-custody actions. Even if the courts did, such rulings would be subject to collateral attack for years after. 25 U.S.C. § 1914. Because the safety and welfare of children is at stake, ICWA gives States no choice but to comply with Congress's commands. *Accord New York*, 505 U.S. at 176.

For similar reasons, the Court should also reject the view that ICWA is permissible because it creates "an array of rights" that are enforceable in state court. Pet. App. 131a (Dennis, J.). ICWA was designed to "curtail State authority in certain respects," 81 Fed. Reg. at 38,789—not to create a "right" for Indian children to be left in dangerous situations absent active efforts, a qualified expert witness, and proof of emotional or physical damage, 25 U.S.C. § 1912(d)-(f). Nor is it a "right" for Indian children to be treated according to their ancestry rather than their best interests. *Id.* § 1915(a).

2. ICWA cannot be justified as a regulation of States as market participants.

The Court should also reject the assertion that ICWA is permissible because "Congress evenhandedly regulate[d] an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478.; *contra* Pet. App. 118a-39a (Dennis, J.). That rule applies only when Congress regulates the States as market participants. But child-custody proceedings are not a marketplace, and ICWA regulates the States as sovereigns. Thus, even though several of ICWA's provisions apply to any party initiating a child-custody proceeding, *see, e.g.*, 25 U.S.C. §§ 1912, 1915, ICWA does not fit within the evenhanded-regulation rule.

For example, in *Reno v. Condon*, this Court examined a federal law that regulated the sale or release of information originally collected in state motor-vehicle databases. 528 U.S. 141, 143 (2000). Because the law applied to States only as owners of data, the Court held that it did not violate the anticommandeering doctrine, as it "d[id] not require the States in their sovereign capacity to regulate their own citizens" or "to assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151. Similarly, in *South Carolina v. Baker*, the tax treatment of certain bonds did not apply to the States as sovereigns, but as participants in the bond market. 485 U.S. 505, 514-15 (1988). In other words, these laws regulated the States as market participants—not as sovereigns regulating their citizens.

But ICWA regulates States in their capacity as sovereigns regulating their citizens. Child-custody proceedings are not a marketplace in which the States are mere participants. Rather, as Interior admits, States "have a sovereign interest in protecting the welfare of the child[ren]" within their borders. 81 Fed. Reg. at 38,832. The Fifth Circuit even based Texas's standing in part on its "sovereign interest in creating and enforcing a legal code to govern child custody proceedings in state courts." Pet. App. 65a (Dennis, J.). ICWA directs how States in their sovereign capacities must regulate their citizens in child-custody cases.

IV. Section 1915(c) Violates the Nondelegation Doctrine.

Even if ICWA's racially discriminatory and state-commandeering placement preferences otherwise satisfied the Constitution, ICWA's delegation to private entities the power to rearrange those preferences in a binding way would violate the nondelegation doctrine. It is a

"fundamental precept" of our system of government "that the lawmaking function belongs to Congress and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996) (citation omitted); *see also Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). This prohibition "is rooted in the principle of separation of powers," *Mistretta v. United States*, 488 U.S. 361, 371 (1989), and it serves as a bulwark of our liberty, *see Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Congress violated that principle when it delegated its lawmaking authority to Indian tribes.

A. Section 1915 includes ICWA's racially discriminatory placement preferences—the "most important substantive requirement [ICWA] impose[s] on state courts," *Holyfield*, 490 U.S. at 36. As discussed above (at 8-9), when an "Indian child" cannot be placed with members of his own family, state courts are required to prefer *any* other Indian placement before non-Indians may be considered. *See* 25 U.S.C. § 1915(a)-(b). Because a court may depart from these preferences only for good cause, these provisions are essential to accomplishing ICWA's racially discriminatory purpose. *Id.*

Yet section 1915(c) empowers Indian tribes to alter the default racial hierarchies that sections 1915(a) and (b) impose. Individual tribes may reorder them "so long as the placement is the least restrictive setting appropriate to the particular needs of the child"—in other words, the environment "which most approximates a family and in which [the child's] special needs, if any, may be met." *Id.* § 1915(b)-(c). And though Congress would need to pass a new law to change the hierarchies listed in sections 1915(a) and (b)—which would require bicameralism and presentment—an Indian tribe need only adopt a

"resolution" to effect a change. *Id.* § 1915(c). Because "resolution" is not defined, Interior requires the States to defer to Indian tribes' determinations of whether they have passed such a resolution. *See id.*; *see also* 25 C.F.R. § 23.130(b). And some tribes create new categories of placements in their modified hierarchies which have no analogue to those listed in sections 1915(a) or (b): for example, the Alabama-Coushatta have prioritized family members, tribal members, and then "[o]ther Indian families, which shall be approved only by the Alabama-Coushatta Tribal Council." Alabama-Coushatta Children's Code tit. 5, § 412(B)(3) (2016).

B. The Fifth Circuit reasoned that section 1915(c) nonetheless does not run afoul of the nondelegation doctrine because "Congress may incorporate the laws of another sovereign into federal law." Pet. App. 168a-70a (Dennis, J.). But Indian tribes are not sovereigns for these purposes.

In *United States v. Mazurie*, this Court explained that the limits on delegation are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." 419 U.S. 544, 556-57 (1975). For example, in *United States v. Sharpnack*, this Court approved a federal statute that adopted as surrogate federal law in federal enclaves "unpre-empted [state-law] offenses and punishments as shall have been already put in effect by the respective States for their own government." 355 U.S. 286, 293-94 (1958). This makes sense: under such circumstances, courts must determine how to reconcile the interests of two sovereigns with an interest in the same physical territory. Congress is simply explaining how it wishes courts to do so.

That principle, however, does not save ICWA's placement preferences. Tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327 (2008). But ICWA does not apply to Indian children residing on reservations, who fall within the exclusive jurisdiction of tribal courts. 25 U.S.C. § 1911(a); 25 C.F.R. § 23.103(b)(1). It applies to children residing outside the reservation and to non-members of the tribe who seek to foster or adopt Indian children in state proceedings. As this Court has recognized, tribes lack sovereignty over non-members who are not on Indian land—so a tribe's efforts to exercise control over such individuals are "presumptively invalid." *Plains Com. Bank*, 554 U.S. at 330. Consequently, Indian tribes are not sovereigns whose laws Congress may adopt as to individuals who neither reside on a tribe's lands nor are members of such tribe. A tribe attempting to change the contents of federal law through section 1915(c) as to those individuals acts as a private party, not a sovereign—and so any attempt to incorporate that change as federal law fails.

C. Private parties cannot make laws, because "[w]hen it comes to private entities, however, there is not even a fig leaf of constitutional justification." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 61-62 (2015) (Alito, J., concurring). Voters elect congresspeople, not Indian tribes, and the public has no special insight into tribal resolutions. Conversely, Indian tribes are not accountable to the general public in any way. Allowing tribes to set the law that applies in state courts is the "most obnoxious form" of delegation. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *see also Gundy*, 139 S.

Ct. at 2135 (Gorsuch, J., dissenting) (explaining the accountability problems presented by delegation).

If anything, allowing Indian tribes to determine ICWA's placement preferences is even *more* "obnoxious" than the typical private delegation because it effectively allows a party in litigation to set or alter the rule that will apply in that litigation. An Indian child's tribe may intervene as of right in a child-custody action. 25 U.S.C. § 1911(c). Allowing it simultaneously to rewrite the rules governing the outcome of the proceeding carries grave due-process concerns. Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Nondelegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 974 (2014). The Fifth Circuit erred in holding otherwise.

D. But even if Congress could appropriately delegate lawmaking authority to an Indian tribe, ICWA's placement-preferences delegation would be impermissible. There are three permissible forms of delegation; section 1915(c) does not fall within any of them.

First, Congress may authorize the Executive or Legislative branch to "fill up the details" of a generally worded statute. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). Thus, Congress may authorize members of the Executive branch to adopt rules pursuant to Congress's broad instructions, so long as it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Id.* at 2123 (plurality op.) (quoting *Mistretta*, 488 U.S. at 372).

Second, Congress may allow the executive branch to engage in fact-finding to determine how a congressional rule applies to a particular situation. *Id.* at 2136 (Gorsuch, J., dissenting). For example, "Congress . . . made

the construction of the Brooklyn Bridge depend on a finding by the Secretary of War that the bridge wouldn't interfere with navigation of the East River." *Id.*

Third, Congress can delegate "non-legislative responsibilities" to the executive and judicial branches, such as allowing them broad discretion over a matter over which they already have authority. *Id.* at 2137.

Section 1915(c) does not fall within any of these categories of permissible delegation. Indian tribes have no independent authority over child-custody proceedings held in state court; section 1915(c) requires no fact-finding by courts or Indian tribes; and Congress provided no "intelligible principle" tribes could follow to "fill up" the "details" about how the preferences should apply. *See id.* at 2136-37 (Gorsuch, J., dissenting). Congress has already laid out a detailed scheme of child-placement preferences in sections 1915(a) and (b). Section 1915(c) empowered the tribes to *change* ICWA's preference scheme without any intelligible principle to guide how or on what grounds to do so. That type of open-ended delegation is never permissible.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part.

Respectfully submitted.

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