No. 21-376

In the Supreme Court of the United States

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

v.

CHAD EVERET BRACKEEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Miscellaneous:

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The decisions below held unconstitutional various provisions of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.*, as violations of the anti-commandeering doctrine and equal protection. The federal government and the Tribes seek review of those rulings as well as the en banc court of appeals' ruling that it had jurisdiction to reach the equal protection issue in the first place. All of those issues satisfy this Court's traditional criteria for review.

Texas and the individual plaintiffs nevertheless ask this Court to reformulate the questions presented by narrowing them in some respects and broadening them in others. Tex. Br. 7-8; Brackeen Br. 1-2.[1] The Court

[1] This brief refers to Texas's Consolidated Brief in Opposition as "Tex. Br." and to the Brief of Individual Respondents as "Brackeen Br."

should decline that request. In particular, it should decline to simply take for granted that the individual plaintiffs have standing to challenge the provisions invalidated on equal protection grounds. And it should decline to expand the questions presented to encompass issues that are not themselves worthy of certiorari and were correctly decided below. Instead, the Court should simply grant review of the questions as they are presented in the government's petition.

A. The Decisions Below Erred On Each Of The Questions Presented

On each of the three questions presented in the government's petition, the decisions below erred. Texas's and the individual plaintiffs' attempts to defend those rulings are unavailing.

1. ICWA does not impermissibly commandeer the States

As the government's petition explains (at 15-21), the decisions below erred in declaring various provisions of ICWA unconstitutional on the theory that they "issue direct orders to the governments of the States." *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018).

In response, Texas does not identify (Br. 17-19) any direct order to any state agency or official. To the contrary, Texas acknowledges—in its own certiorari petition—that 25 U.S.C. 1912's minimum standards govern child-custody proceedings in state court and apply only "if" a party seeks to "remove an Indian child" from his or her home. 21-378 Pet. 4-5, 25; see *id.* at 27 (similar). Section 1912 therefore does not impose any direct, freestanding order on any state agency or official; rather, it confers on Indian children "a federal right" to remain with their families "subject only to

certain (federal)" conditions. *Murphy*, 138 S. Ct. at 1480; see *Reno* v. *Condon*, 528 U.S. 141, 150-151 (2000) (distinguishing conditions from direct commands). And Texas does not dispute that those conditions apply "to state and private actors" alike, *Murphy*, 138 S. Ct. at 1479—that is, to "[*a*]*ny* party" who seeks the removal of an Indian child, 25 U.S.C. 1912(d) (emphasis added). That "evenhanded[ness]" confirms that the "anticommandeering doctrine does not apply." *Murphy*, 138 S. Ct. at 1478.

Texas may disagree with Congress's judgment of what is in "the best interests of Indian children." 25 U.S.C. 1902; see Tex. Br. 1. But that policy disagreement is beside the point. When, as here, Congress directly regulates Indian child welfare by conferring judicially enforceable rights on Indian children, families, and tribes, "federal law takes precedence and the state law is preempted." *Murphy*, 138 S. Ct. at 1480.

2. The individual plaintiffs lack standing to challenge ICWA's third-ranked placement preferences

As the government's petition explains (at 21-26), the en banc court erred in reaching the merits of whether ICWA's third-ranked placement preferences, 25 U.S.C. 1915(a)(3) and (b)(iii), violate equal protection. The individual plaintiffs lack standing to challenge those provisions, and their contrary arguments lack merit.

a. The individual plaintiffs do not dispute that they cannot demonstrate injury fairly traceable to enforcement of ICWA's third-ranked preferences. Brackeen Br. 18. Instead, they contend that so long as they can demonstrate injury from the "placement preferences as a whole," that is enough. *Ibid.* But this Court has repeatedly held that "[s]tanding is not dispensed in gross." *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (citation

omitted). Thus, even if the individual plaintiffs could demonstrate injury from some *other* placement preference, that would not give them standing to challenge the third-ranked preferences here.

The individual plaintiffs cannot reconcile their theory of standing with the principle that standing is not dispensed in gross. Nor can they evade that principle by challenging the 2016 Rule, 81 Fed. Reg. 38,778 (June 14, 2016), under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See Brackeen Br. 15-16. Plaintiffs "suing under the APA" must still satisfy "Article III's standing requirements," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224 (2012), including the requirement that they demonstrate "harm" from each "particular inadequacy" they seek to challenge, *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 353 (2006) (citation omitted). Thus, although certain provisions of the 2016 Rule implement ICWA's third-ranked preferences, see 25 C.F.R. 23.130(a)(3), 23.131(b)(3), the individual plaintiffs cannot challenge those regulatory provisions unless they are able to show injury fairly traceable to the provisions themselves—which they are not able to do.

In any event, the individual plaintiffs cannot demonstrate injury from *any* of the placement preferences. 21-380 Gov't Br. in Opp. 12-16. Thus, even if standing could be dispensed in gross, they would still lack standing to challenge the third-ranked preferences here.

b. The individual plaintiffs also cannot show that any injury fairly traceable to the third-ranked preferences is likely to be redressed by the relief requested: a declaratory judgment against the federal defendants.[2]

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[2] The individual plaintiffs observe that they also requested injunctive relief against the federal defendants. Brackeen Br. 19 n.3. But

As the government's petition explains (at 25-26), such relief would amount to nothing more than an advisory opinion that is beyond the jurisdiction of an Article III court to render. None of the individual plaintiffs' contrary arguments suggests otherwise.

The individual plaintiffs assert that the state judge presiding over the Brackeens' efforts to adopt Y.R.J. has stated that he "would look to" the Fifth Circuit's decision in this case. Brackeen Br. 20. But standing must be assessed "as of the time [the individual plaintiffs] brought this lawsuit," *Carney* v. *Adams*, 141 S. Ct. 493, 499 (2020), and the statement on which they rely did not even exist at that time. See *In re Interest of Y.J.*, No. 02-19-235, 2019 WL 6904728, at *3-*4 (Tex. Ct. App. Dec. 19, 2019) (attributing the statement to a March 2019 order). Moreover, the state judge stated merely that he would "refrain[] from ruling" on matters then-pending before the Fifth Circuit. *Id.* at *4. Even if that statement could be read as indicating that he "might, or even will, follow what the federal court decides," Pet. App. 375a (Costa, J., concurring in part and dissenting in part), it would suggest only that the Fifth Circuit's "opinion may *advise* him on how to decide the adoption case before him," *id.* at 373a—which cannot be sufficient to establish redressability, given that "advisory opinions" are "the very thing that the doctrine [of standing] was designed to prevent," *id.* at 375a. In any event,

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they abandoned any request for injunctive relief when they did not cross-appeal the district court's entry of final judgment, which did not grant any such relief. Pet. App. 463a. Given the entry of final judgment, moreover, the court is not "free to issue additional remedies at any time." Brackeen Br. 19 n.3. In any event, because the federal defendants have no role in state child-custody proceedings, injunctive relief against the federal defendants likewise would not redress any asserted injury from ICWA's enforcement in such proceedings.

whatever decision the state trial judge issues would likely be subject to review by state appellate judges who have not indicated that they would follow the Fifth Circuit's opinion—further undermining any reliance on the trial judge's statement to establish redressability.

The individual plaintiffs also assert that "a favorable ruling from *this* Court would bind *all* courts." Brackeen Br. 20. But that conflates the precedential effect of an opinion of this Court with the legal effect of the relief requested—namely, the declaratory judgment itself—which would not be binding in any state child-custody proceeding. Moreover, even if standing could turn on the possibility of a favorable precedential opinion from this Court, the individual plaintiffs would have to show that, at "the commencement of [this] suit," it was likely not only that "the suit would reach this Court," but also that this Court would rule in their favor. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992) (plurality opinion). The individual plaintiffs cannot make either showing.

Finally, the individual plaintiffs contend that a declaratory judgment would relieve state officials of their "obligations to implement the preferences" and bar the federal government from withholding funding from States for not complying with ICWA. Brackeen Br. 20 (citation omitted). But the individual plaintiffs have not asserted any ongoing injury from enforcement of the preferences by state officials, as distinguished from state courts; there is thus no such injury to redress. And to the extent the issue of funding could even be relevant here, the federal government does not condition any funding on compliance with ICWA. 21-378 Gov't Br. in Opp. 5 n.*.

3. ICWA's third-ranked placement preferences are rationally related to legitimate governmental objectives

On the merits, Texas and the individual plaintiffs say nothing to refute the rational justifications for the third-ranked preferences that the government's petition identifies. They do not dispute, for example, that many tribes share political, social, cultural, and religious traditions; that fostering an Indian child's connection to those traditions is a legitimate governmental objective; or that placing Indian children with Indian families or foster homes that share those traditions is rationally related to that objective, including in appropriate circumstances when those families or homes belong to tribes other than the child's own. Pet. 26-30.

The individual plaintiffs contend that even if ICWA's placement preferences are not "facially unconstitutional," the preferences are unconstitutional "as applied to them." Brackeen Br. 14 n.1. But the individual plaintiffs have not identified any proceeding in which the third-ranked preferences are being, or will be, applied to them—which simply underscores their lack of standing to challenge those preferences in the first place. See pp. 3-6, *supra*.

B. The Court Should Grant Review Of The Questions Presented By The Government

As the government explains (Pet. 30-32), each of the questions presented in its petition warrants this Court's review. The Court "usual[ly]" grants certiorari "when a lower court has invalidated a federal statute." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019). And because "declar[ing] an Act of Congress unconstitutional" is "the gravest and most delicate duty that th[e] Court is called on to perform," *Blodgett* v. *Holden*, 275 U.S. 142,

147-148 (1927) (opinion of Holmes, J.), the Court should also grant review of whether the individual plaintiffs have standing to challenge ICWA's third-ranked preferences in the first place. The Tribes seek review of the same questions, and their petition should likewise be granted. 21-377 Pet. 16-38.

Although Texas and the individual plaintiffs agree that the federal government's and the Tribes' petitions should be granted, they ask this Court to reformulate the questions presented. Tex. Br. 21; Brackeen Br. 20-21. The Court should decline to do so. Reformulating the questions as Texas and the individual plaintiffs suggest would both narrow and broaden this Court's review in unwarranted ways.

1. The Court should decline to narrow the questions presented

Texas and the individual plaintiffs suggest excluding from the questions presented the issue of the individual plaintiffs' standing to challenge ICWA's third-ranked preferences. Tex. Br. 8-11; Brackeen Br. 14-20. The Court should reject that suggestion.

The individual plaintiffs contend that they so clearly have standing to challenge ICWA's third-ranked preferences that further review of the issue is unnecessary. See Brackeen Br. 4, 6. But as explained above and in the government's petition, the individual plaintiffs' theory of standing cannot be squared with either the principle that standing is not dispensed in gross or the prohibition on advisory opinions. See pp. 3-6, *supra*; Pet. 21-26. Given those well-established Article III principles, the Court should not simply assume or take for granted that the lower courts had Article III jurisdiction to declare IWCA's third-ranked preferences unconstitutional.

The individual plaintiffs observe that the lower courts have consistently upheld their standing to challenge ICWA's placement preferences throughout this litigation. Brackeen Br. 15. But none of the judges who concluded that the individual plaintiffs have standing addressed whether their asserted injuries could fairly be traced to ICWA's third-ranked preferences. Pet. 24-25. And this Court often grants review of whether plaintiffs have standing even when both courts below have held that they do. See, *e.g.*, *California* v. *Texas*, 141 S. Ct. 2104, 2113 (2021) (finding no standing despite the lower courts' contrary view); *Carney*, 141 S. Ct. at 497-498 (same). The Court should follow the same course here.

Texas asserts (Br. 8-11) that even if the individual plaintiffs lack standing to challenge ICWA's third-ranked preferences on equal protection grounds, the State has standing to press the claim on a *parens patriae* theory. But no member of the en banc court accepted that theory, Pet. 22 n.3, and for good reason. Although a State may bring a *parens patriae* action against another State, a State does not "have standing as the parent of its citizens to invoke [the Fifth Amendment] against the Federal Government, the ultimate *parens patriae* of every American citizen." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966). That rule forecloses Texas's ability to bring an equal protection challenge to either ICWA or the 2016 Rule against the federal government. See *Government of Manitoba* v. *Bernhardt*, 923 F.3d 173, 181 (D.C. Cir. 2019).

2. The Court should decline to broaden the questions presented

Texas and the individual plaintiffs also suggest broadening the questions presented so as to encompass the

issues raised in their own certiorari petitions. The Court should likewise reject that suggestion. As the government's briefs in opposition to those petitions explain, the issues raised by Texas and the individual plaintiffs do not satisfy this Court's traditional criteria for review and were correctly decided below. See 21-378 Gov't Br. in Opp. 11-32; 21-380 Gov't Br. in Opp. 11-33. None of the reasons that they now offer for granting review of those issues suggests otherwise.

First, Texas asserts (Br. 12) that if the Court grants review of only the questions presented by the government, "questions that would determine ICWA's constitutionality in the Fifth Circuit would remain undecided and undecidable." That assertion is unfounded. A majority of the en banc Fifth Circuit *upheld* the constitutionality of ICWA on each of the issues on which Texas now seeks review—rejecting Texas's contentions that ICWA exceeds Congress's Indian affairs power, that ICWA discriminates on the basis of race, that various of ICWA's provisions impermissibly commandeer state judges, and that 25 U.S.C. 1915(c) violates the nondelegation doctrine. See Pet. App. 3a-7a; 21-378 Gov't Br. in Opp. 6-11. Indeed, Texas's contentions that ICWA discriminates based on race and impermissibly commandeers state judges did not attract a single vote on the en banc court. See Pet. App. 142a, 305a-307a, 309a-313a. There is thus no basis for Texas's assertion (Br. 12) that declining review of the issues that Texas seeks to raise would "leave significant confusion over the legality of ICWA"—particularly when the en banc majority's rejection of Texas's arguments does not conflict with any decision of this Court, another court of appeals, or any state court of last resort.

Second, Texas and the individual plaintiffs assert that the Article I and equal protection issues on which they seek review are intertwined with the questions presented in the government's petition. Tex. Br. 12-13; Brackeen Br. 7-8. But under this Court's precedents, whether ICWA falls within Congress's Indian affairs power is an issue distinct from whether ICWA violates the anticommandeering doctrine—as evidenced by the parties' and the en banc court's separate treatment of the two issues. 21-380 Gov't Br. in Opp. 31. Indeed, this Court has previously granted review of anticommandeering issues by themselves, see, *e.g.*, *Murphy*, 138 S. Ct. at 1475-1482, and it should follow the same course here, where the separate Article I issue that Texas and the individual plaintiffs seek to raise is not itself worthy of certiorari.

Nor must this Court revisit the en banc court's determination that ICWA does not discriminate based on race—a determination that no member of the en banc court contested—in order to resolve whether ICWA's third-ranked preferences violate equal protection. 21-380 Gov't Br. in Opp. 23. This Court is unlikely to reach the merits of that equal protection issue in any event, given the plaintiffs' lack of standing to challenge ICWA's third-ranked preferences. See pp. 3-6, *supra*. And granting certiorari on additional equal protection issues would only exacerbate the jurisdictional problem because no plaintiff has standing to raise those issues either. 21-378 Gov't Br. in Opp. 26-27; 21-380 Gov't Br. in Opp. 12-17.

Finally, the individual plaintiffs contend that the Court might as well grant review of the additional Article I and equal protection issues that they identify because, if the Court grants the government's petition,

they could raise those issues as alternative grounds for affirmance anyway. Brackeen Br. 8, 12. But the Court may, in its discretion, "decline to entertain" alternative grounds for affirmance "[i]n the absence of * * * an indication that the issues are of sufficient general importance to justify the grant of certiorari." *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975). Because the additional Article I and equal protection issues that Texas and the individual plaintiffs identify do not "justify the grant of certiorari," *ibid.*, the Court should neither grant review of those issues now nor entertain them as alternative grounds for affirmance in the future.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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