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.
Respondents.

CHEROKEE NATION, ET AL.,
Petitioners,

v.

CHAD EVERET BRACKEEN, ET AL.
Respondents.

STATE OF TEXAS,
Petitioner,

v.

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

CHAD EVERET BRACKEEN, ET AL.
Petitioners,

v.

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

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

BRIEF FOR TRIBAL DEFENDANTS

KATHRYN E. FORT
MICHIGAN STATE UNIV.
COLLEGE OF LAW,
INDIAN LAW CLINIC
648 N. Shaw Lane
East Lansing, MI 48823

IAN HEATH GERSHENGORN
Counsel of Record
KEITH M. HARPER
MATTHEW S. HELLMAN
ZACHARY C. SCHAUF
LEONARD R. POWELL
VICTORIA HALL-PALERM
KEVIN J. KENNEDY
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

Counsel for Cherokee Nation, Oneida Nation, and Morongo Band of Mission Indians
Additional Counsel on Inside Cover

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th St.
Chicago, IL 60637

Counsel for Cherokee Nation, Oneida Nation, and Morongo Band of Mission Indians

ADAM H. CHARNES
KILPATRICK TOWNSEND &
STOCKTON LLP
2001 ROSS AVE., SUITE 4400
DALLAS, TX 75201

ROB ROY SMITH
KILPATRICK TOWNSEND &
STOCKTON LLP
1420 FIFTH AVE., SUITE 3700
SEATTLE, WA 98101

Counsel for Quinault Indian Nation

JEFFREY L. FISHER
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

EPHRAIM A. MCDOWELL
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006

DOREEN N. MCPAUL
ATTORNEY GENERAL
PAUL SPRUHAN
ASSISTANT ATTORNEY
GENERAL
LOUIS MALLETTE
COLLEEN SILVERSMITH
SAGE METOXEN
AIDAN GRAYBILL
NAVAJO NATION
DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, AZ 86515

Counsel for Navajo Nation

QUESTIONS PRESENTED

The United States owes a "general trust" duty to "all Indian tribes," which since the Founding all three Branches have recognized as "'moral obligations of the highest responsibility.'" *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 182-83 (2011). Pursuant to that duty, Congress in 1978 enacted the Indian Child Welfare Act ("ICWA"). ICWA aims to remedy the "alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children by nontribal public and private agencies"—removals that Congress found threatened the very survival of Indian Tribes and families. 25 U.S.C. §1901(3)-(4). The questions presented are:

1. Whether Congress had authority to fulfill its trust duty by enacting ICWA.
2. Whether Plaintiffs have standing to press their Fifth Amendment and nondelegation challenges.
3. Whether ICWA—which classifies based on tribal affiliation—comports with the Fifth Amendment under *Morton v. Mancari*, 417 U.S. 535, 553 n.24, 555 (1974), which holds that such "political" classifications "will not be disturbed" if the "special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."
4. Whether ICWA violates Tenth Amendment anti-commandeering principles.
5. Whether §1915(c) violates nondelegation principles.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

In 1978, Tribes and their members faced a crisis. Congress found that Tribes were being ripped apart, via the operation of state family law though state courts. More than a quarter of Indian children were torn from their families and Tribes, often due to the ignorance and contempt of case workers and courts who did not understand Indian Tribes and families and believed Indian children should be raised elsewhere. This crisis, Congress concluded, harmed Indian children and posed an existential threat to Tribes: If the wholesale removal of the next generation of tribal members continued, Tribes' ability to continue as self-governing bodies—indeed, their survival—was at risk. That threatened not just Tribes but also the United States' trust duty, which dates from the Founding and has been recognized ever since by all three Branches.

To fulfill that trust duty, Congress enacted the Indian Child Welfare Act ("ICWA"). ICWA is based on a simple idea: When Indian children can stay with their families and communities, Tribes and children alike are better off. By implementing that simple idea, ICWA "promote[s] the stability and security of Indian tribes and families" and "protect[s] the best interests of Indian children." §1902.[1] And because ICWA implements that simple idea, it has become the "gold standard" for child

[1] Statutory citations are to Title 25 of the U.S. Code unless otherwise noted.

welfare, Pet. App. 10a,[2] and staunched the flood of unwarranted removals.

ICWA is constitutional. The *en banc* Fifth Circuit upheld the vast majority of ICWA, and *no* judge endorsed the principal arguments Plaintiffs press. For good reason: They conflict with the Constitution's text, its original understanding, and centuries of precedent.

First, Congress had authority to enact ICWA. "[F]ederal power to … protect the Indians … against interference even by a state has been recognized" from "almost the beginning." *Bd. of Comm'rs of Creek Cnty. v. Seber*, 318 U.S. 705, 715 (1943). Even as the United States absorbed Indian lands, it promised Tribes—since before the Founding—protection. The Framers crafted the Constitution (unlike the Articles of Confederation) to ensure the nation could keep its promises. They conferred "powers of war and peace; of making treaties, and of regulating commerce"—powers they understood to "comprehend all that is required" to fulfill the nation's duties. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

Congress's power to carry out its trust responsibility thus has never been limited (as Plaintiffs urge) to "buying, selling, and transporting goods" or implementing discrete treaty provisions. Texas Br. 23. The Indian Commerce Clause authorizes Congress to regulate all "intercourse" between non-Indians and Indians. *Worcester*, 31 U.S. at 560-61. And this Court has long held that Congress has independent authority,

---

[2] "Pet. App." refers to the appendix filed with Texas's petition.

grounded in treaty, war, and other powers, to uphold its trust duties. The first Congress exercised those mutually reinforcing powers in the 1790 Trade and Intercourse Act, which protected Indians' lands from improvident transfers and Indians' persons from violence by non-Indians. Ever since, Congress has continued to enact an unbroken line of statutes—carried forward to today—that seek to protect Indians, including from States. Accepting Plaintiffs' invitation to narrowly limit Congress's authority would rewrite history, break the United States' promises, and wreak havoc across the U.S. Code.

ICWA operates at the core of the trust obligation. It protects tribal sovereignty and self-governance by safeguarding children against unwarranted removals by non-Indians and States. Nor would it surprise the Framers, or the many Congresses that legislated under the Constitution they crafted, that Tribes' fate would be bound up with their children's. The Founding-era law of nations (as expressed by de Vattel) recognized children as "belonging" to sovereigns and entitled to the protection that one sovereign owes another under its control. And in a sorrier era of our history, when the United States sought to *destroy* tribal sovereignty, it did so through a systematic and brutal campaign to remove Indian children from their families.

Second, Plaintiffs' equal-protection challenges fail. To start, Article III should have stopped them at the gate. The provisions at issue here apply exclusively in state courts, and no state court *anywhere* was bound by the decisions of the federal courts below. Because those decisions would never have determined the outcome of a

single child-welfare proceeding, Judge Costa was right that they are legally indistinguishable from "a law review article." Pet. App. 373a-374a.

Plaintiffs fare no better on the merits. This Court has long held that when Congress legislates based on affiliation with "federally recognized tribes," those classifications are "political rather than racial" and "will not be disturbed" "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 553 n.24, 555 (1974). That rule is correct: Tribes are separate sovereigns, and the Constitution expressly authorizes Congress to legislate specifically for Indians. From the Founding forward, Congress has thus passed statutes that legislate specifically for Indians—protecting their lands, regulating their trade, punishing crimes against them, managing their resources, and providing education, housing, and healthcare.

Plaintiffs disparage *Mancari* as applying only to laws that "promot[e] 'Indian self-government' and … only … on or near Indian lands." Brackeen Br. 14. But to begin, ICWA furthers Indian self-government in the most fundamental way—by preventing Tribes' very destruction. And anyway, nothing in constitutional text, principle, or precedent supports Plaintiffs' gerrymandered limits: Distinctions based on tribal membership, for example, do not become "racial" rather than "political" the farther one moves from Indian lands.

Third, ICWA poses no anti-commandeering problem. ICWA "set[s] procedural and substantive standards for those child custody proceedings … in state court." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36

(1989). When Congress exercises its enumerated powers to create rights and duties in state court, that is not commandeering. It is preemption. Under the Supremacy Clause, "the Judges in every State shall be bound" by valid federal law. U.S. Const. art. VI, cl. 2. If such rules of decision constituted impermissible commandeering, myriad statutes would fall.

With all their broad arguments so unsustainable, Plaintiffs retreat to cutting an ICWA-shaped hole in the Constitution: They aver that ICWA is suspect because it governs "state-court child-custody proceedings," Texas Br. 18, which they call "a virtually exclusive province of the States," Brackeen Br. 46 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). But no text supports these narrower arguments either. Nor does any Founding-era principle supply what the text does not. Since the Founding, ICWA's subject—Indian children—has been a tribal and federal province.

In truth, Plaintiffs blue-pencil the Constitution with their own policy views. Plaintiffs do not represent Indian Tribes, families, or children but fill their briefs with claims about Indians' best interests. They trumpet that they know best; that Congress, Indian Tribes, and Indian families are all benighted; and that if only this Court returns Indian children to States, all will be well. But even if this Court sat to arbitrate policy disputes, a mountain of evidence—from 1978 to today—shows that ICWA provides an essential buffer against practices that continue to yield the unwarranted removal of Indian children.

STATEMENT

A. Legal Background.

1. Protecting Indian Children Is At The Core Of The United States' Trust Duty To Tribes.

Among the United States' most solemn duties, and its most longstanding, is to protect Tribes. When Tribes made peace with the United States and ceded lands that today constitute the United States, treaties promised "protection" in return. *Cohen's Handbook of Federal Indian Law*, §1.02[3], at 20-21 (Newton et al. eds., 2012); *infra* 29-30. And by taking Indian lands via conquest, the United States assumed a duty "to … protect[]" the Indian occupants. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823). Today we call that duty the "general trust relationship" between the United States and Indians, encompassing "a fiduciary obligation … owed to *all* Indian tribes." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 182-83 (2011). This relationship represents "'moral obligations of the highest responsibility and trust,' obligations to 'the fulfillment of which the national honor has been committed.'" *Id.* at 176.

From the start, Indian children have been central to the United States' relationship with Tribes—sometimes to their benefit, and sometimes not. The first treaty that the United States ratified committed it to ensure the "security of the … children of the" Delaware.[3] In peacetime, Tribes looked to federal officials to secure the

[3] Treaty with the Delawares, Art. III, 1778, 7 Stat. 13.

return of captured Indian children.[4] In war, federal officials often took Indian children.[5] To achieve "civilization," the United States funded Indian education: 110 Indian treaties provided for Indian education,[6] Congress in 1802 appropriated $15,000 per year to educate Indian children,[7] and Congress thereafter launched a "Civilization Fund" aimed at educating Indian children in schools run by private organizations.[8] Many treaties singled out orphans for

---

[4] *E.g.*, Christina Snyder, *Andrew Jackson's Indian Son: Native Captives and American Empire*, *in* The Native South: New Histories and Enduring Legacies 90, 93-94 (Tim Alan Garrison & Greg O'Brien eds., 2017); The United States of America in Account with William Blount (Dec. 31, 1791), *William Blount Papers, 1783-1823* (on file with Manuscript Division, Library of Congress at Folder 3: 1791) (recovery of "Indian boy" "kept as a slave").

[5] John Grenier, *The First Way of War: American War Making on the Frontier, 1607-1814* 197, 219 (2005).

[6] Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. Ark. Little Rock L. Rev. 941, 950 (1999); *e.g.*, Treaty with the Navajo, Art. VI, 1868, 15 Stat. 667.

[7] Act of Mar. 30, 1802, ch. 13, §13, 2 Stat. 139, 143.

[8] Act of Mar. 3, 1819, ch. 85, 3 Stat. 516.

protection, such as by providing property or funds[9] and specifying who would appoint guardians.[10]

When federal policy turned toward assimilation, *see Solem v. Bartlett*, 465 U.S. 463, 466-68 (1984), the United States again carried out its relationship with Tribes through children. For decades, it forcibly removed Indian children to boarding schools—408 schools in total, across 37 States—with the philosophy "'Kill the Indian and Save the Man.'" *Cohen*'s §1.04 at 76-77; *see* Bryan Newland, U.S. Dep't of Interior, *Federal Indian Boarding School Initiative Investigative Report* 6 (May 2022), https://on.doi.gov/3JyObfB. Likewise, during the "termination era" of the 1950s, when "the Federal Government endeavored to terminate its supervisory responsibilities for Indian tribes," *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986), federal policy again operated through Indian children. The government closed most boarding schools and sought to transfer responsibility for Indian children to States—only to find that States did not view Indian children as their problem. All but two refused to "accept[] responsibility," or to provide "child welfare

---

[9] *E.g.*, Treaty with the Stockbridge and Munsee, Art. III, 1856, 11 Stat. 663; Treaty with the Ottawa, etc., Art. VI, 1836, 7 Stat. 491; Treaty with the Creeks, Art. II, 1832, 7 Stat. 366.

[10] *E.g.*, Treaty with the Wyandotts, Arts. III, VI, 1855, 10 Stat. 1159; Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, etc., Art. XXIII, 1867, 15 Stat. 513; Treaty with the Pawnee, Art. III, 1857, 11 Stat. 729; Treaty with the Potawatomi, Art. VIII, 1867, 15 Stat. 531; Treaty with the Ottawa of Blanchard's Fork and Roche De Bouef, Art. VIII, 1862, 12 Stat. 1237; *cf.* Treaty with the Choctaw and Chickasaw, Art. XV, 1866, 14 Stat. 769.

services including foster care and consultation on family problems," unless the federal government paid them.[11] They considered Indians, both on-reservation and off, "the exclusive responsibility of the federal government."[12]

2. When States In The 1950s Began To Address Indian Children, They Devastated Tribes And Families.

When States finally accepted the federal government's invitation, the consequences for Indian Tribes and families were devastating. Because placing Indian children with wealthy (usually non-Indian) families was cheaper, and to satisfy escalating non-Indian demand for Indian adoptees, States changed their laws to facilitate the removal of Indian children to non-Indian homes.[13] The result was a "wholesale removal of Indian children" that, by 1970, became "the

---

[11] Letter from Robert W. Beasley, Chief, Bureau of Indian Affairs Branch of Welfare, to Bureau of Indian Affairs Branch of Relocation, at 1 (Apr. 5, 1955) (on file with National Archives and Records Admin.).

[12] Letter from Lewis & Clark County, Mont., to Lee Metcalf, House of Representatives (Jan. 28, 1957) (on file with Mudd Manuscript Library, Princeton University); *see also id.* (emphasizing that Montana law allowed counties to deny general assistance to any Indian who "is a member of a tribe or nation accorded certain rights and privileges by treaty or by federal statutes").

[13] *E.g.*, Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 Am. Indian Q. 136, 141-42, 148-50 (2013); Ellen Slaughter, Univ. of Denver Rsch. Inst., *Indian Child Welfare: A Review of the Literature* 61 (1976), https://bit.ly/3SJXcH1.

most tragic aspect of Indian life." *Holyfield*, 490 U.S. at 32. "[A]busive child welfare practices," *id.*, meant that in many States one-third of Indian children were separated from families in what "almost amount[ed] to … callous raid[s]," 124 Cong. Rec. 12,532 (1978) (statement of Rep. Udall); *see* Pet. App. 41a-42a.

Those who removed Indian children often had "no basis for intelligently evaluating the cultural and social premises underlying Indian home life"; many were "at best ignorant of [Indian] cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." *Holyfield*, 490 U.S. at 34-35. The result was "wholly inappropriate" decisions finding neglect or abandonment where none existed. *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 18 (1974) (statement of William Byler) ("1974 Hearings"); H.R. Rep. No. 95-1386, at 9-10 (1978). "Approximately 90% of … placements were in non-Indian homes." *Holyfield*, 490 U.S. at 33.

When federal policy in the 1970s swung back toward supporting tribal self-determination, Congress convened hearings to investigate the crisis. The hearings detailed "the impact on the tribes themselves of the massive removal of their children." *Id.* at 34. They showed that "the continued wholesale removal of their children by nontribal government and private agencies constitute[d] a serious threat to [Tribes'] existence,"[14]

[14] 124 Cong. Rec. 38,103 (statement of Rep. Lagomarsino).

and "seriously undercut the tribes' ability to continue as self-governing communities."[15] "[M]uch of the testimony" Congress heard also "focused on the harm to Indian parents and their children who were involuntarily separated." *Holyfield*, 490 U.S. at 34.

3. Congress Enacted ICWA To Fulfill Its Trust Duties To Indian Tribes And Families.

Congress thus enacted ICWA to "protect the best interests of Indian children and to promote the safety and security of Indian tribes and families." §1902.

This case concerns ICWA's application in state courts, where ICWA establishes "minimum Federal standards" governing "child-custody proceedings" involving an "Indian child." §§1902, 1903(1), 1903(4). State courts decide child-welfare cases arising outside Indian country, where millions of Indians live—often because their Tribes have been rendered landless or because the federal government encouraged or forced Indians to leave Indian country. *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778, 38,783 (June 14, 2016) ("*2016 Preamble*"); *Cohen's* §1.06, at 84-93. State courts also sometimes have concurrent jurisdiction over on-reservation cases, where statutes like Public Law 280 or jurisdictional agreements apply. *Holyfield*, 490 U.S. at 42 n.16; §1919(a).

---

[15] *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 157 (1977) (Statement of Calvin Isaac) ("1977 Hearings"); *accord* 124 Cong. Rec. at 38,102 (statement of Rep. Udall).

Procedurally, ICWA's notice provision, §1912(a), drives its application. It applies only to "involuntary proceeding[s] … seeking the foster care placement of, or termination of parental rights to, an Indian child." In such cases, the parties seeking that relief must provide notice to parents, custodians, and Tribes, which have intervention rights.

Substantively, ICWA combats the ignorance and contempt that spurred its enactment. The "active efforts" provision requires "[a]ny party" seeking a foster-care placement or termination of parental rights to "satisfy the court that active efforts have been made … to prevent" those steps. §1912(d). Those steps may not be ordered "absen[t] … a determination" supported by "testimony of qualified expert witnesses, that … continued custody … is likely to result in serious emotional or physical damage." §1912(e), (f). These standards protect all parents of Indian children, Indian and non-Indian. *E.g.*, *Matter of Adoption of T.A.W.*, 383 P.3d 492, 494 (Wash. 2016).

ICWA grants an adoptive preference to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." §1915(a). These preferences, however, apply only when an "alternative party has formally sought to adopt." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 654 (2013). In practice, this means that in voluntary proceedings, where no tribal notice is required, the preferences are all but irrelevant. ICWA also sets preferences for foster-care placements. §1915(b).

Courts may depart from these preferences for "good cause." §1915(a)-(b). Contrary to Plaintiffs' claims,

ICWA "does not change the cardinal rule that the best interests of the child are paramount" in placement decisions. *In re Interest of Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983). ICWA merely structures the "focus" of that inquiry by combining preferences "with flexibility" to depart. *Id.*[16]

ICWA's approach—creating a "structured, transparent, and objective framework" while empowering courts to depart—is now regarded as the "gold standard … for *all* children and families." Casey 5th Cir. Br. 3. Indeed, Congress has embraced similar requirements for States' foster-care systems generally. Congress conditioned federal funding on changing state-law placement preferences, *see* 42 U.S.C. §671(a)(19); making "reasonable efforts … to preserve and reunify families," *id.* §671(a)(15)(B); and providing notice, *id.* §675(5)(G).

Today, removals of Indian children are far less common. Indian children have the highest rate of kinship placements for foster care, the lowest rate of institutional placements, and one of the lowest rates of aging out of foster care without adoption. Casey 5th Cir. Br. 21-22; *see* States 5th Cir. Br. 26-27. So successful has ICWA been that 10 States have enacted comprehensive

[16] ICWA also does "not prohibit … removing a child under State law on an emergency basis," as Plaintiffs incorrectly claim. *2016 Preamble*, 81 Fed. Reg. at 38,809; *see* Texas Br. 56. ICWA always allows removal of children "subject … to a substantial and immediate danger or threat of such danger" and never allows return to such circumstances. §§1920, 1922.

state analogs.[17] Another 23 have incorporated aspects of ICWA.[18]

ICWA often provides a buffer against dysfunctional state child-welfare systems. That includes in Texas, where judges have found that foster care is "broken" and that "children … almost uniformly leave State custody more damaged than when they entered." *M.D. v. Abbott*, 152 F. Supp. 3d 684, 828 (S.D. Tex. 2015).

4. ICWA Remains Necessary.

In 2016, Interior found that ICWA "helped stem the widespread removal of Indian children" but that "implementation and interpretation" have been "inconsistent." 81 Fed. Reg. at 38,779. That yielded "significant gaps" and underscored the continuing "need for consistent minimum Federal standards." *Id.* "Indian families continue to be broken up by the removal of their children by non-Tribal public and private agencies." *Id.* at 38,784.

That conclusion was well-supported. Despite the significant progress ICWA has wrought, some courts still routinely order the removal of Indian children without implementing ICWA's protections, and Indian children remain four times more likely to be placed in

---

[17] Cal. Stats. 2006, ch. 838 (S.B. 678); Iowa Code §232B.1–.14; Mich. Comp. Laws Ann. §§712B.1–.41; Minn. Stat. §§260.751–.835; Neb. Rev. Stat. §§43-1501 through -1517; N.M. Stat. Ann. §§32a-28-1 through -42; Okla. Stat. tit. 10, §§40.1–.9; Or. Rev. Stat. §§419B.600–.654; Wash. Rev. Code §§13.38.010–.190; Wis. Stat. §48.028.

[18] Nat'l Conf. State Legislatures, *State Statutes Related to the Indian Child Welfare Act* (Nov. 12, 2019), https://bit.ly/3SqfT2e.

foster care at their first encounter with the court system.[19] In 2013, "Native American children [we]re represented in State foster care at a rate 2.5 times their presence in the general population." 81 Fed. Reg. at 38,784.

In 2016, Interior promulgated regulations providing specific guidance on aspects of ICWA. 25 C.F.R. pt. 23.[20]

B. Factual And Procedural Background.

Tribal Defendants refer the Court to the Federal Defendants' factual and procedural background.

SUMMARY OF ARGUMENT

I.A. Congress had authority to enact ICWA. This Court has long held that Congress has broad—indeed, plenary—authority to legislate concerning Indians. This authority derives "explicitly" from myriad enumerated powers, including the Indian Commerce Clause and treaty and war powers. *Mancari*, 417 U.S. at 551. At the Founding, the Constitution's supporters and opponents alike recognized those powers' breadth.

B. ICWA does not test the boundaries of this Court's plenary-power holdings. Multiple enumerated powers confirm that Congress may legislate to fulfill its trust duties to Indians by protecting them from harm. The Indian Commerce Clause—as originally understood—

---

[19] Robert B. Hill, *An Analysis of Racial/Ethnic Disproportionality & Disparity at the National, State, and County Levels*, Casey-CSSP Alliance for Racial Equity in Child Welfare 10 (2007), https://bit.ly/3PSjzrH.

[20] Plaintiffs have also challenged these regulations. The arguments in this brief apply equally to those challenges.

authorizes Congress to regulate all "intercourse" between Indians and non-Indians, including to protect Indians from harm. And this Court has long held that Congress has "the power," "[i]n the exercise of [its] war and treaty powers," among others, to fulfill its "duty of protection" to Indians. *Seber*, 318 U.S. at 715. Congress from the start has exercised those enumerated powers to protect Indians. And for centuries, Congress has legislated in reliance on this Court's holdings that it may do so, both within and outside Indian country.

C. This power extends to protecting Indian children. With their broad arguments foreclosed, Plaintiffs argue that ICWA is invalid because it intrudes on a traditional state sphere. But ICWA's subject—Indian children—has always been a federal (and tribal) sphere. This Court, moreover, has properly rejected identical requests to rewrite the Constitution's enumerated powers with unenumerated exceptions.

II.A. Plaintiffs lack standing to press their equal-protection claims. The Individual Plaintiffs cannot establish redressability because the lower federal courts' judgments would never have bound the state courts adjudicating their child-welfare cases. The decisions below were advisory opinions. Nor, indeed, do the Individual Plaintiffs have injury-in-fact: The child-welfare cases that supported their complaint have ended. Those cases, moreover, certainly cannot support Plaintiffs' *across-the-board* challenge—including to the "other Indian families" preference, which had no application at all to their child-welfare cases. Nor can Texas remedy these defects: Texas has no equal-

protection rights to assert and cannot sue the federal government as *parens patriae*.

B.1-2. ICWA comports with equal protection. Classifications defined by tribal affiliation are "political rather than racial" and "will not be disturbed" "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 553 n.24, 555. Nor is there anything to Plaintiffs' attempts to narrowly limit this principle based on whether laws further tribal self-government, operate on Indian lands, or affect state proceedings. ICWA furthers tribal self-government in the most fundamental way—by protecting the next generation of tribal members. Plaintiffs' ad hoc distinctions, moreover, at most relate to whether statutes satisfy *Mancari*, not whether classifications are racial.

3. ICWA uniformly draws political classifications. The Indian child definition encompasses tribal members and certain membership-eligible children. Both classifications are political because they turn on affiliation with federally recognized Tribes. The second prong's limit to membership-eligible children with a "biological parent" who is a member, §1903(4), is not racial either. It relies on parentage—as citizenship laws have done from the Founding to today—and does so to ensure a close, voluntary connection between child and Tribe. ICWA's placement preferences likewise are nonracial: They extend to family members and members of the child's Tribe or other Tribes.

4. ICWA readily satisfies the deferential rational-basis standard. Congress enacted ICWA to stem a crisis

of unwarranted removals that threatened the survival of Indian Tribes and families. Via the "Indian child" definition, Congress rationally covered both tribal members and certain membership-eligible children, recognizing that minors often lack "capacity to initiate the formal, mechanical procedure necessary" for enrollment. H.R. Rep. No. 95-1386 at 17. Congress also reasonably decided that ICWA's placement preferences—when combined with broad authority to depart for "good cause"—simultaneously further Indian children's best interests and protect the integrity of Indian Tribes and families. Plaintiffs' counterarguments simply relitigate Congress's policy judgments and fall far short of the extraordinary showing necessary to invalidate ICWA's preferences in a facial challenge.

III. ICWA complies with the Tenth Amendment. Nearly all of ICWA's provisions simply provide procedural and substantive rules that state courts must follow in adjudicating private rights. That is not commandeering but preemption that the Supremacy Clause expressly contemplates. ICWA's modest records requirements also accord with Congress's unbroken practice imposing similar ministerial duties.

IV. Section 1915(c) does not unconstitutionally delegate Congress's legislative power. It prospectively incorporates Tribes' own preferences into federal law.

ARGUMENT

I. Congress Had Authority To Enact ICWA.

This Court has long held that Congress has broad Indian-affairs powers—indeed, "plenary authority to legislate for the Indian tribes in all matters." *United*

States v. Wheeler, 435 U.S. 313, 319 (1978). At those powers' core is authority to "protect the Indians … against interference even by a state." *Seber*, 318 U.S. at 715. Congress's multiple Indian-affairs powers—the Indian Commerce Clause, Treaty Clause, and others—all confirm that Congress may regulate intercourse between Indians and non-Indians to protect Indians from harm.

A. This Court Has Held That Congress Has Broad Power Over Indian Affairs.

1. "[A]n unbroken current of judicial decisions," based on "long continued legislative and executive usage," have recognized Congress's broad "power and the duty" to "exercis[e] a fostering care and protection over" Indians, "whether within or without the limits of a state." *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Jicarilla Apache*, 564 U.S. at 175; *United States v. Lara*, 541 U.S. 193, 200 (2004); *Seber*, 318 U.S. at 715-16; *Winton v. Amos*, 255 U.S. 373, 391-92 (1921).

This "plenary power" derives "explicitly" from the Constitution. *Mancari*, 417 U.S. at 551-52. The Constitution confers "powers of war and peace; of making treaties, and of regulating commerce … with the Indian tribes," which "comprehend all that is required for the regulation of … intercourse with the Indians." *Worcester*, 31 U.S. at 559; *see Lara*, 541 U.S. at 200-02. Indeed, this Court has held the Indian Commerce Clause itself "provide[s] Congress with plenary power" in "Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The Court has also emphasized the Founding-era understanding that

"Indian affairs were … an aspect of military and foreign policy" and that authority to address such matters is "inherent in any Federal Government" as a "'necessary concomitant[] of nationality.'" *Lara*, 541 U.S. at 201 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936)).

2. The Framers understood Congress's Indian-affairs powers just that broadly. Centralization of Indian-affairs authority preceded even Independence. "[A]uthority to regulate trade and intercourse with the Indian tribes … was … the prerogative of the British crown." 2 Joseph Story, *Commentaries on the Constitution of the United States* §1094 (1833). The United States "succeeded to all the[se] claims," *Worcester*, 31 U.S. at 544; *see id.* at 555, and the Framers embedded centralized Indian-affairs authority in the Constitution.

The Articles of Confederation had experimented with divided authority: Congress could "regulat[e] the trade and manag[e] all affairs with the Indians"—but only with Indians who were "not members of any of the States" and "provided that the legislative right of any State within its own limits be not infringed." *Articles of Confederation of 1781*, art. IX, para. 4.

The experiment failed. The Articles' limits, Madison observed, were "obscure and contradictory." *The Federalist No. 42*, at 268 (James Madison) (Clinton Rossiter ed., 1961). They proved dangerous too: "[H]ostilities [were] provoked by the improper conduct of … States, who, either unable or unwilling to restrain or punish offenses, ha[d] given occasion to the slaughter of many innocent inhabitants." *The Federalist No. 3*, at

44 (John Jay). The Secretary of War told Congress that "unless the United States do in reality possess the power 'to manage all affairs with the independent tribes of Indians,'" "a general Indian war may be expected." H. Knox, *Report of the Secretary of War* (July 18, 1787), *reprinted in* 32 *Journals of the Continental Congress 1774-1789*, at 368 (Roscoe R. Hill ed., 1936).

The Constitution removed the Articles' "shackles," *Worcester*, 31 U.S. at 559, and "[w]ith [its] adoption" restored "Indian relations" as "the exclusive province of federal law," *Oneida County v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985). It gave "congress, as the only safe and proper depositary, the exclusive power, which belonged to the crown." 2 Story, *supra*, §1094.

Opponents and supporters alike recognized that fact. Anti-Federalist Abraham Yates argued against ratification because the Constitution would "totally surrender into the hands of Congress the management and regulation of the Indian affairs."[21] Madison on the same understanding argued *for* ratification, trumpeting that Congress's authority was "properly unfettered from [the] two limitations in the Articles." *The Federalist No. 42*, at 268 (James Madison).

After ratification, President Washington confirmed that the federal government "posses[es] the only authority of regulating an intercourse with [the

---

[21] Abraham Yates, Jr. (Sydney), To the Citizens of the State of New York (June 13-14, 1788), *reprinted in The Documentary History of the Ratification of the Constitution* 1153, 1156-67 (Merrill Jensen ed., 1976). The scholarship on which Justice Thomas relied in his *Adoptive Couple* concurrence omitted this key statement.

Indians], and redressing their grievances."[22] Secretary of War Henry Knox agreed that "the United States have … the sole regulation of Indian affairs, in all matters."[23] Likewise, South Carolina Governor Charles Pinckney emphasized that "sole management of India[n] affairs is now committed" to "the general Government."[24]

The first Congress also understood its Indian-affairs power to encompass all relations with Indians. It passed the 1790 Trade and Intercourse Act, which protected Indians' lands from improvident sales, within Indian country and outside, and imposed criminal punishment on non-Indians who harmed "the person or property of any peaceable and friendly Indian." Act of July 22, 1790, ch. 33, §§4-5, 1 Stat. 137; *accord Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 621, 626 (2d Cir. 1980). In 1796, Congress provided that non-Indians wronged by Indians who "c[a]me over or across the … boundary line, into any state" had a "duty" to apply to the federal government for remedy. Act of May 19, 1796, ch. 30, §14, 1 Stat. 469. In 1802, Congress regulated "enter[ing] into the Indian lands … for any … purpose," trade or other. *Worcester*, 31 U.S. at 576 (M'Lean, J., concurring); *see* Act of Mar. 30, 1802, ch. 13, §3, 2 Stat. 139. In 1817,

---

[22] Letter to T. Mifflin (Sept. 4, 1790), in 6 *Papers of George Washington: Presidential Series* 396 (D. Twohig ed., 1996).

[23] Letter from Henry Knox to Israel Chapin (Apr. 28, 1792), *in* 1 *American State Papers: Indian Affairs* 231-32 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

[24] Letter from Charles Pinckney to George Washington (Dec. 14, 1789), *in* 4 *Papers of George Washington: Presidential Series* 401, 404 (D. Twohig ed., 1993).

Congress created federal jurisdiction over crimes by Indians against non-Indians. Act of Mar. 3, 1817, ch. 92, §§1-2, 3 Stat. 383.

Congress continued to enact similar statutes, still in effect. The 1834 General Crimes Act reaches all crimes by or against Indians in Indian country except Indian-against-Indian crimes. Act of June 30, 1834, ch. 161, §25, 4 Stat. 729. The 1885 Major Crimes Act punishes certain crimes by Indians (including against other Indians). Act of Mar. 3, 1885, ch. 341, §9, 23 Stat. 362, 385. Meanwhile, this Court has understood Congress to have exercised its "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-58 (1978). Later, Congress "relaxe[d]" some "restrictions." *Lara*, 541 U.S. at 200. This Court upheld both the limits, *Santa Clara Pueblo*, 436 U.S. at 56-58, and their relaxation, *Lara*, 541 U.S. at 200—all relying on Congress's "plenary power."

B. Congress's Broad Indian-Affairs Powers Include Protecting Indian Tribes, Families, And Children From Unwarranted Removals.

ICWA does not test the boundaries of this Court's plenary-power holdings. Since before ratification, the United States paired its absorption of Indian lands with promises of protection. From "almost the beginning" and continuing "whenever the question has arisen," the "existence of federal power to … protect the Indians … against interference even by a state has been recognized"—"by the executive, and by congress, and by this court." *Seber*, 318 U.S. at 715. Text, structure, and

history confirm that Congress has the power to do so via ICWA.

1. Multiple Enumerated Powers Confirm That Congress Has Power To Fulfill Its Trust Duties.

a. Congress's power to protect Indians flows, first, from the Indian Commerce Clause, which authorizes Congress to regulate interactions between non-Indians and Indians and protect Indians from harm.

i. The text, as originally understood, makes that clear. "[C]ommerce" at the Founding often meant not just trade but "intercourse." 1 Samuel Johnson, *A Dictionary of the English Language* 361 (4th ed. 1773); *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824) ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."). Consistent with that understanding, *Worcester* held—citing the Indian Commerce Clause—that the "whole intercourse between the United States and [the Cherokee] nation, is … vested in the [federal] government." 31 U.S. at 561. And *United States v. Holliday* held that "commerce" with Indians included not just "buying and selling" but all "intercourse between the citizens of the United States and those tribes." 70 U.S. 407, 417 (1865).

Those holdings accord with Founding-era usage in the Indian-affairs context. This meaning of "commerce"—as "intercourse"—was the "predominant diplomatic and legal term of art to describe relations between Natives and white[s]." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1028-29 (2015). Early treaties, for example,

described their intent to promote "a friendly intercourse" between the United States and Tribes and discussed cessions to allow for "convenient intercourse." Treaty with the Wyandot, Arts. I, III, 1795, 7 Stat. 49.

When Article I authorized Congress to "regulat[e] commerce … with the Indian tribes," it thus empowered Congress to govern Indian/non-Indian relations. Indeed, Justice McLean's opinion in *United States v. Bailey*, 24 F. Cas. 937 (C.C.D. Tenn. 1834) (McLean, J.), which Plaintiffs cite, read the Indian Commerce Clause just that way. He explained that "the word 'commerce' … is not necessarily limited to … trade; but may well be construed to embrace every species of intercourse … with our Indian nations." *Id.* at 940.

ICWA fits comfortably within Congress's Indian Commerce authority. It regulates "intercourse" with Indians by enacting rules protecting against the removal of Indian children from Indian Tribes and families. If in the 1790s Congress had found that States and non-Indians were "br[ea]k[ing] … up" "Indian families" via "unwarranted" "removal[s]," §1901(4), no one would have doubted Congress's authority to act. Such removals would have been part of "our intercourse with the Indian[s]," 31 U.S. at 559, and if unaddressed, would have been cause for war—exactly what the Constitution sought to prevent. *Supra* 20-21.

ii. Structure and history confirm what text provides. The Indian Commerce Clause treats Tribes as separate sovereigns, parallel to "foreign nations," U.S. Const. art. I, §8, cl. 3, consistent with the Founding-era understanding that "Indian affairs were … an aspect of military and foreign policy." *Lara*, 541 U.S. at 201. The

Indian Commerce Clause is thus properly read to give Congress full powers to manage the nation's varied "intercourse" with these sovereigns, especially to protect Tribes from depredations that, unredressed, could disrupt peaceful commerce. *Accord Chy v. Freeman*, 92 U.S. 275, 280 (1875) (invoking Foreign Commerce Clause to authorize Congress to create an immigration system, whether or not involving trade); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (same).

We know that the Framers set out to give the federal government power: They crafted the Constitution to remedy the national government's lack of authority, under the Articles, to protect Tribes. *Supra* 20-21. We know, too, that the Framers aimed to ensure the new government could exercise the powers "inherent in any Federal Government" as "necessary concomitants of nationality," including managing relations with other sovereigns. *Lara*, 541 U.S. at 201. And we know, finally, that the Founding generation understood the Framers to have *succeeded*: Federalists (Madison and Knox), Anti-Federalists (Yates), and governors (Pinckney) all affirmed that Congress possessed that broad authority. *Supra* 21-22.

Congress and the President, moreover, promptly embedded that understanding in statute. The 1790 Act "pervasively regulated commercial and social exchanges among Indians and non-Indians." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2506 (2022) (Gorsuch J., dissenting); *supra* 22. Indeed, the Act's title—the Trade *and Intercourse* Act—manifests the first Congress's understanding that it had broad power to regulate intercourse with Tribes, including protecting Indians

from harm by non-Indians. Ever since, Congress has enacted statutes that comprehensively protect Indians from non-Indians and vice-versa, including the General and Major Crimes Acts and—just this year—in reauthorizing and expanding the Violence Against Women Act to give Tribes jurisdiction over certain crimes by non-Indians.[25] "[W]here a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2137 (2022).[26]

b. i. The Indian Commerce Clause is only the start. This Court has often understood multiple mutually reinforcing powers to confirm Congress's broad Indian-affairs authority. *E.g.*, *Lara*, 541 U.S. at 201. And especially relevant here, *Seber* and *Kagama* hold that Congress's treaty, war, and other powers confer ample authority to fulfill the United States' trust duties by protecting Indians. "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands" and "le[ft] them …

---

[25] Violence Against Women Act Reauthorization Act of 2022, tit. V, div. W, §811(a)(4), Pub. L. No. 117-103, 136 Stat. 49, 905.

[26] The Founding generation thus rejected Plaintiffs' view that, because the Articles granted power over "all affairs with the Indians," Congress "lost a power" in the Constitution. Texas Br. 48; *see* Brackeen Br. 29. This Founding-era understanding accords with the text: While the Articles conferred powers of "regulating *the trade* and managing all affairs with the Indians," *Articles of Confederation of 1781*, art. IX, para. 4 (emphasis added), the Constitution substituted a more expansive word—"commerce"—that encompassed regulating all relations with Indians, *supra* 24-25.

needing protection." *Seber*, 318 U.S. at 715. Thus, from "the treaties in which it has been promised," and "the course of dealing of the federal government with" Tribes, there "there ar[o]s[e] the duty of protection and with it the power." *Id.* (quoting *United States v. Kagama*, 118 U.S. 375, 384 (1886)).

These holdings sustain powers Congress has long exercised. *Kagama* addressed whether Congress had power to enact aspects of the Major Crimes Act. *Kagama* started by affirming that Congress had "justly enacted" under the Indian Commerce Clause "the entire code of trade and intercourse laws" then in force. *United States v. Kagama*, 118 U.S. 375, 378-79 (1886). Those laws governed all aspects of non-Indian/Indian crimes, and *Kagama*'s approval of them contradicts Plaintiffs' narrow reading of that Clause. But the Major Crimes Act also punished crimes by Indians against *other Indians* "living peaceably in their reservations." *Id.* at 378. *Kagama* questioned whether the power to regulate "intercourse" with Indians stretched that far and upheld those provisions based solely on Congress's treaty-grounded power to "protect[]" Indians. *Id.* at 378-79, 384. *Seber* relied on that power to approve statutes lifting state taxes from allotments. *Seber*, 318 U.S. at 715.

ii. That power, consistently reaffirmed,[27] sustains ICWA. If Congress may carry out its trust duties by

---

[27] *E.g.*, *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *Mancari*, 417 U.S. at 552; *United States v. Ramsey*, 271 U.S. 467, 469 (1926); *Cramer v. United States*, 261 U.S. 219, 232 (1923); *United*

protecting individual Indians from crimes by other Indians, Congress assuredly may protect Tribes' *very existence* by guarding against unwarranted removals of Indian children by States, spurred on by the federal government's own misguided policies. *Supra* 8-9.

1. As in *Kagama* and *Seber*, the Treaty Clause supports Congress's power to protect Tribes and Indians, including via ICWA. Although that clause "does not literally authorize Congress to act legislatively," *Lara*, 541 U.S. at 201, the Necessary and Proper Clause authorizes Congress to enact "such legislation as is appropriate to give efficacy to … treat[ies]" and give them "aid," *Neely v. Henkel*, 180 U.S. 109, 121 (1901); *see Lara*, 541 U.S. at 201. The Treaty Clause thus "has often been the source of the Government's power to deal with the Indian tribes," *Mancari*, 417 U.S. at 551-52, and carries special force in sustaining Congress's authority to fulfill trust duties.

Since before the Founding, broad promises of protection have been a near-universal feature of Indian treaties. The United States' 1784 treaty with the Six Nations "shape[d] the character of Indian relations" by "receiv[ing] the Indian tribes 'into [the United States'] protection.'" *Cohen's* §1.02[3], at 20 (quoting Treaty with the Six Nations, Preamble, Oct. 22, 1784, 7 Stat. 15). The Treaty of Hopewell contained the same "promise[]" of "'protection.'" *Id.* at 21 (quoting Treaty of Hopewell, Preamble).

States v. Nice, 241 U.S. 591, 597 (1916); *Perrin v. United States*, 232 U.S. 478, 482 (1914).

The Constitution confirmed that the federal government could keep those promises. It rendered "all Treaties *made, or which shall be made*, under the Authority of the United States, … the supreme Law of the Land." U.S. Const. art. VI, cl. 2 (emphasis added). The Framers thus understood that the Constitution authorized and required the new government to fulfill the promises it had already made—and those similar promises it would make. *Reid v. Covert*, 354 U.S. 1, 15-17 (1957); *Worcester*, 31 U.S. at 559. The United States reaffirmed the Treaty of Hopewell after ratification, *see* Treaty with the Cherokee, Art. II, 1798, 7 Stat. 62, and many others followed, *e.g.*, Treaty with the Osage, Art. X, 1865, 14 Stat. 687. Those treaties extended "protection against all persons whatsoever,"[28] "from depredations and injuries of every kind."[29] They also promised "care,"[30] encompassing "every assistance in [the United States'] power."[31]

---

[28] Treaty with the Florida Tribes of Indians, Art. III, 1823, 7 Stat. 224.

[29] Treaty with the Delawares, Art. XIV, 1854, 10 Stat. 1048; *see also, e.g.*, Treaty of Fort Laramie with Sioux, Art. III, 1851, 11 Stat. 749.

[30] Treaty with the Osage, Art. X; *accord* Treaty with the Shawnee, Art. XIV, 1854, 10 Stat. 1053; Treaty with the Florida Tribes of Indians, Art. III; Treaty with the Kickapoo, Art. IX, 1819, 7 Stat. 200; Treaty with the Ottawa, Art. IX, 1831, 7 Stat. 359; Treaty with the Shawnee, Art. X, 1831, 7 Stat. 355.

[31] Treaty with the Osage, Art. I, 1808, 7 Stat. 107; *see, e.g.*, Treaty with the Creeks, Art. I, 1833, 7 Stat. 417; Treaty with the Menominee, First Stipulation, 1831, 7 Stat. 342; Treaty with the Winnebago, Art. I, 1846, 9 Stat. 878; Treaty with the Potawatomi

These promises made explicit duties that existed independently. Under the Founding-era law of nations, when one sovereign came under the sway of a "more powerful" nation, the "very common" custom was that the stronger undertook duties of "protection." Emer de Vattel, *The Law of Nations* bk. I, ch. I, §7 (New York trans. 1796). *Worcester* identified the United States' relationship with Tribes as an "[e]xample[] of this kind," in which under "the settled doctrine of the law of nations" Tribes had "tak[en] [the] protection" of the United States. 31 U.S. at 560-61.

Those duties extended to children. De Vattel explained that a "sovereign 'ought not to suffer his subjects to molest the subjects of others, or to do them an injury.'" *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1416 n.3 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (quoting de Vattel, *supra*, bk. II, ch. VI, §76); *accord* de Vattel, *supra*, bk. III, ch. XVII, §268. The Founding-era law of nations recognized children as "belong[ing]" to sovereigns and likewise entitled to that protection.[32] That is why so many early treaties and statutes addressed the care and protection of Indian children. *Supra* 6-7. Indeed, when treaties

---

Nation, Art. I, 1846, 9 Stat. 853; Treaty with the Stockbridge and Munsee, Preamble; *accord, e.g.*, Treaty with the Navajo, Art. I, 1849, 9 Stat. 974; 1865 Treaty with the Osage, Art. X; 1849 Treaty with the Navajo, Art. IX (promising United States would "pass and execute … such laws as may be deemed conducive to the prosperity and happiness of [the Navajo Nation]").

[32] De Vattel, *supra*, bk III, ch. VIII, §145; *see generally id.* bk I, ch. XIX, §§212, 215-20; bk. III, ch. V, §§72-73; bk. III, ch. VIII, §148; bk. III, ch. XVII, §271.

vested authority over Indian children in non-Indian courts, they—like ICWA—established standards to apply.[33]

2. *Seber* and *Kagama* also make clear that Congress's war powers—the Treaty Clause's flip side—support Congress's power to protect Indians via ICWA. *Seber*, 318 U.S. at 715; *Kagama*, 118 U.S. at 384; *Worcester*, 31 U.S. at 559. When agreements did not succeed, wars often followed. And when wars ended, Congress maintained its relationship with tribal nations as sovereigns. With that choice came the "inevitable consequence" that "Indian inhabitants" were "to be protected." *Johnson*, 21 U.S. at 590-91. This Court has held that Congress's war powers authorize it not just to wage war but "to remedy the evils which have arisen from" it. *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919); *accord Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 143 (1948). Many Tribes found themselves vulnerable to wholesale removals of their children *precisely because* wars and their aftermath limited Tribes' power to protect themselves. Congress could properly restore, through ICWA, protections war had removed.

The Property Clause—which this Court has also invoked, *Lara*, 541 U.S. at 201—reinforces that conclusion. Under the Property Clause, Congress had full power over the territories where the United States often relocated Tribes. *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976). And when Congress exercised that

---

[33] *E.g.*, Treaty with the Choctaw and Chickasaw, Art. XV; 1867 Treaty with the Potawatomi, art. VIII.

power to bring Indian lands within state boundaries, it "insisted that tribal lands 'shall be and remain subject to the jurisdiction, disposal, and control of the United States.'" *Castro-Huerta*, 142 S. Ct. at 2515 (Gorsuch, J., dissenting). Congress had authority to condition this transfer on retaining power to protect Tribes from the States in which they found themselves. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 198 (1876).

2. Plaintiffs' Counterarguments Lack Merit.

Text, history, and precedent foreclose Plaintiffs' attempts to narrowly limit the broad powers of protection this Court has recognized.

a. As to the Indian Commerce Clause, the Individual Plaintiff first argue (at 47-48) that it authorizes Congress to legislate only for Tribes as "governmental bodies," not for "individual[s]." Texas concedes (at 23) that Congress may legislate for individuals.

Texas is correct. Congress since the 1790 Act has legislated for individual Indians, and *Holliday* held that "commerce with the Indian tribes[] means commerce with the individuals composing those tribes." 70 U.S. at 417; *see Forty-Three Gallons of Whiskey*, 93 U.S. at 194-95; *United States v. Mazurie*, 419 U.S. 544, 554 (1975).

Second, Plaintiffs argue that the Indian Commerce Clause is limited to trade and the like, analogizing to the Interstate Commerce Clause. Brackeen Br. 17, 50; Texas Br. 24. As Judge Duncan recognized, however, these arguments again contradict "binding … precedent," on which Congress has long relied to legislate in "non-commercial fields like criminal law, education, probate, health care, and housing." Pet. App.

225a-226a. The word "commerce" may stretch across multiple grants of power. *Gibbons*, 22 U.S. at 194. But it is "well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." *Cotton Petroleum*, 490 U.S. at 192. And in particular, "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996); *accord Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 448 (1979) (explaining that despite the "parallel phrases," "the Founders intended the scope of the foreign commerce power to be … greater" than the interstate commerce power).

United States v. Morrison, 529 U.S. 598 (2000)—on which Plaintiffs rely for the proposition that Congress's commerce powers cannot reach "child-custody" proceedings, Brackeen Br. 17, 50—illustrates why Plaintiffs' wooden equivalence goes wrong. *Morrison* was about the edges of Congress's interstate commerce power: *intrastate* activity that, though not literally commerce "among the several States," "substantially affect[s]" such commerce. 529 U.S. at 610, 618. But ICWA is not "intra": It concerns intercourse between non-Indians and Indians. We know such intercourse falls within the original public meaning of "commerce … with Indian Tribes" because the first Congress (and many successors) enacted statutes punishing noneconomic crimes by non-Indians against Indians that *Morrison* would invalidate (if they did not concern Indians).

Indeed, even Plaintiffs acknowledge that "the Founding generation" "may not have strictly limited [federal] authority to … 'commerce'" as they define it. Texas Br. 30; *see* Brackeen Br. 49. So instead of defending their arguments based on original understanding, Plaintiffs fall back on scattershot distinctions. But text, history, and precedent foreclose these arguments too.

Contra Texas, nothing in the Constitution limits federal authority to "trade, land, and criminal matters involving Indians." Texas Br. 30. If Congress can protect Indians from non-Indians via criminal sanctions, it may do so via ICWA. Nor does Article I preclude Congress from "apply[ing] different rules … in state-court proceedings." Texas Br. 30. The Indian Trade and Intercourse Act imposed requirements on, and set standards for, state courts. *See* Act of Mar. 3, 1799, ch. 46, §16, 1 Stat. 743 (requiring state courts to "take proper bail" for individuals detained by federal officials within Indian country). And this Court in *United States v. Hellard*, 322 U.S. 363, 364-65 (1944), held that Congress acted within its "plenary" power in directing "Oklahoma state courts" to hear "partition proceeding[s]" concerning Indian lands.

The Individual Plaintiffs fare no better distinguishing Congress's criminal statutes as "appl[ying] only in Indian country." Brackeen Br. 49. This Court has held that "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be." *United States v. McGowan*, 302 U.S. 535, 539 (1938). That has to be right: "Indian country" is what Congress has by statute *defined*, and

many Indians reside outside Indian country because Congress encouraged or forced Indians to leave (or even disestablished) reservations. *Supra* 11; *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 534 (1998); *Forty-Three Gallons of Whiskey*, 93 U.S. at 196.

The first Congress had no doubt on that point when it protected Indians both within and outside Indian country. *Supra* 22. And for good reason: It had just witnessed the Framers resolving that issue. The Articles *had* limited federal authority and preserved States' "legislative right[s] within [their] own limits." *Supra* 20. At the Convention, Madison proposed making express that Congress's Indian-affairs powers applied "as well within as without the limits of the U[nited] States." 2 *The Records of the Federal Convention of 1787*, at 324 (Max Farrand ed., 1911). The Committee of Detail instead proposed keeping a relic of the Articles and excluding from Congress's authority Indians "subject to the laws" of States. *Id.* at 367. But Madison won, and the Constitution eliminated the State-protective limit. *Id.* at 493, 497, 503, 655.

b. As to Congress's treaty, war, and other powers, this Court has long rejected Plaintiffs' all-trees-no-forest position that Congress cannot legislate generally to protect Indians because not every Tribe has treaties containing "specific" promises (and, similarly, because the United States did not make war against every Tribe). Brackeen Br. 57; Texas Br. 25-26. All that was true when *Kagama* relied on these powers to uphold the Major Crimes Act. And this Court has since reaffirmed that Congress may recognize "the necessity of giving *uniform* protection to" Tribes, *Williams v. Lee*, 358 U.S.

217, 219 n.4 (1959) (emphasis added), and has "discretion to reorder its priorities from serving a subgroup of [Indians] to serving the broader class of all Indians nationwide," *Jicarilla Apache*, 564 U.S. at 182.

Under the Necessary and Proper Clause, Congress may conclude that treating Tribes equally is more "appropriate," *Neely*, 180 U.S. at 121, than withholding protection from Tribes lacking treaties specifically promising it. Likewise, in regulating "intercourse" with Tribes, Congress may decline to create two classes of Tribes, one entitled to protection and the other not. *Cf.* §5123(f)-(g) (prohibiting Interior from "classif[ying], enhanc[ing], or diminish[ing] the privileges and immunities available to [an] Indian tribe relative to other … tribes").

Plaintiffs' position is particularly meritless because, to the extent Tribes today lack treaties promising protection, it is largely because Congress ended treatymaking in 1871—due solely to the House's desire for a greater role. *Cohen's* §1.03[9], at 70; *see* Texas Br. 25. The statute that ended treatymaking provided that it did not "invalidate[] or impair[]" existing treaties. §71. And this Court has held that "[t]hi[s] change in no way affected Congress' plenary powers to legislate on problems of Indians." *Antoine v. Washington*, 420 U.S. 194, 203 (1975); *accord Lara*, 541 U.S. at 200. Congress has thus continued to enter non-treaty agreements with Tribes, *Antoine*, 420 U.S. at 203, and to legislate to fulfill its "general trust relationship" with "all Indians," *Jicarilla Apache*, 564 U.S. at 182. Any other rule would turn historical happenstance into a sea change and hamstring the federal government's ability to protect

the more than 340 Tribes lacking ratified treaties, including every Tribe in California and Alaska.[34]

c. Plaintiffs' arguments are bad piecemeal and worse together. Multiple constitutional grants of authority can independently sustain legislation like the 1790 Act, the General and Major Crimes Acts, and the Violence Against Women Act. *Cf.* Ablavsky, *supra*, at 1043-44 (arguing that the 1790 Act was based on both the Indian Commerce Clause and treaty powers). But if Plaintiffs were right that the Indian Commerce Clause is narrowly limited to trade, and Congress's treaty and other powers permit only implementing "specific" promises in specific treaties, then all these statutes (and many more) will

[34] The Define and Punish Clause underscores that, when Congress legislates on a matter addressed by the law of nations, it is not limited to enforcing specific treaty provisions. Because the Framers understood that the law of nations cannot be "completely ascertained and defined in any public code," they gave Congress the "power to *define* as well as to *punish*." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820). The Define and Punish Clause reaches all conduct that would "give just ground of complaint" under the law of nations and "disturb that harmony between the governments which each is bound to cultivate and promote." *United States v. Arjona*, 120 U.S. 479, 487 (1887). Congress thus may "derive from the often broadly phrased principles of international law a more precise code, as it determined that to be necessary." *Finzer v. Barry*, 798 F.2d 1450, 1455 (D.C. Cir. 1986) (Bork, J.), *aff'd in part, rev'd in part sub nom. Boos v. Barry*, 485 U.S. 312 (1988). That is what ICWA does. ICWA addresses a core area of inter-sovereign concern under the Founding-era law of nations: the security of citizens of one sovereign in another's territory. *See generally* Quapaw Nation 5th Cir. Br.

fall.[35] Meanwhile, it would work a dreadful betrayal to retreat *in this case* from this Court's broad "plenary power" holdings. This Court has relied on those holdings to sustain myriad statutes that limit Tribes' powers of self-government and are much farther removed from "intercourse" or trust duties. *Supra* 23.

C. Congress's Powers Contain No Indian-Children Exception.

Plaintiffs' alternative argument—that ICWA is unconstitutional because it intrudes on "a virtually exclusive province of the States," Texas Br. 36—comprehensively fails.

1. First, even were the Court to entertain crafting unenumerated exceptions to Congress's enumerated powers, this one lacks basis in Founding-era history or tradition. ICWA's subject—Indian children—has from the start been a quintessentially tribal and federal domain. *Supra* 6-9. The United States has sometimes acted as a wise steward and sometimes used children to target Tribes for destruction. But the choices, for good or ill, have been federal. States, by contrast, began

---

[35] Plaintiffs' position is even more destructive given their argument that *Missouri v. Holland*, 252 U.S. 416 (1920), should be overruled. Entertaining that argument in the Indian-law context would require overruling not just *Holland* but *Kagama*, *Seber*, *Lara*, and many others and would disable the United States from fulfilling most treaty obligations to Tribes. Indeed, Plaintiffs' objection to *Holland*—that international law now "cover[s] matters traditionally understood as domestic," Texas Br. 25—is irrelevant here: ICWA addresses matters that have long been a subject of the law of nations and Indian treaties. The Court should leave debates about *Holland* for the context where they arose.

seriously addressing Indian children only reluctantly, at the federal government's behest, in the 1950s. *Supra* 8-9; *cf. United States v. Quiver*, 241 U.S. 602, 603-04 (1916) (the "settled policy of Congress" from "an early period" was to "permit the personal and domestic relations of the Indians" … to be dealt with[] according to … tribal … laws," except where federal law intervened).

More: Plaintiffs' attempt to constitutionalize child-welfare matters generally as an exclusive state sphere, Texas Br. 36, is entirely anachronistic. At the Founding and "[i]nto the early twentieth century, the care of orphaned and abandoned children in the United States remained largely in the hands of private charitable and religious organizations." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1885 (2021) (Alito, J., concurring); *see* Leo A. Huard, *The Law of Adoption: Ancient and Modern*, 9 Vand. L. Rev. 743, 748 (1956). Massachusetts enacted the nation's first adoption law—in 1851. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443, 456-70 (1971). Indeed, States' modern child-welfare systems owe their existence to the 1935 Social Security Act, which "created the foundation" for "states to develop and implement" foster-care programs.[36] Only in 1962 did States assume responsibility for providing such services statewide, again after the Social Security Act spurred

[36] Meredith L. Alexander, *Harming Vulnerable Children: The Injustice of California's Kinship Foster Care Policy*, 7 Hastings Race & Poverty L.J. 381, 398 (2010).

them to do so.[37] The Constitution cannot have embedded nontextual limits in areas that, at the Founding, States did not touch.

2. More fundamentally, the Constitution contains no such unenumerated exceptions to Congress's enumerated powers. The Tenth Amendment—which Plaintiffs invoke—says so: "The powers *not delegated to the United States* … are reserved to the States." U.S. Const. amend. X (emphasis added). Thus, "[v]irtually by definition" powers delegated to the United States "are not powers … 'reserved to the States.'" *United States v. Comstock*, 560 U.S. 126, 144 (2010).

This Court has applied that principle to reject Plaintiffs' position nearly verbatim and repudiate a nontextual exception for laws regulating "in areas of traditional [state] governmental functions." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985). Quoting Madison, the Court explained that "[i]nterference with the power of the States was no constitutional criterion of the power of Congress." *Id.* at 549 (quoting 2 Annals of Cong. 1897 (1791)); *see United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 369 (2007) (Alito, J., dissenting) (endorsing *Garcia*'s holding that an exception for "traditional" "governmental function[s]" is "unsound in principle and unworkable in practice").

Plaintiffs simply re-excavate nontextual arguments this Court properly buried. When this Court a century

---

[37] John E.B. Myers, *A Short History of Child Protection in America* 9 (2004), https://bit.ly/3Q5Uz08.

ago held that Congress may protect Indians outside Indian country "within a state," it emphasized that "if Congress possesses power" to act, "it follows that the state possesses no exclusive control." *Perrin v. United States*, 232 U.S. 478, 483 (1914). Taxation is a "fundamental" state power, *CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 552 U.S. 9, 20 (2007), yet *Seber* held that Congress may exercise its "plenary" power to "with-draw lands from the tax rolls and [to] possibly embarrass the finances of a state," 318 U.S. at 718. And this Court has held that Congress may create reservations within States, *see United States v. John*, 437 U.S. 634, 649 (1978), though doing so preempts fundamental state powers, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43, 145 (1980).

Plaintiffs' favorite cases, *Sosna* and *Burrus*, recognize only that Congress has no *general* domestic-relations power. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). They do not bar Congress from exercising enumerated powers simply because they touch domestic relations. Congress has done so often:

- In the Servicemembers Civil Relief Act, Congress exercised its war powers to regulate domestic-relations proceedings concerning servicemembers. It provided for stays and protections against default judgments in "child custody" matters and specified that deployment cannot be "consider[ed] … as the sole factor in determining the best interest of the child." 50 U.S.C. §§2931-32, 3938(b).

- Via the Uniformed Services Former Spouses' Protection Act, Congress exercised its war powers to preempt state divorce laws. *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989).
- In the International Child Abduction Remedies Act, 22 U.S.C. §9001 *et seq.*, Congress exercised powers under the Foreign Commerce and Treaty Clauses to address child-custody matters that implicate multiple sovereigns' interests, like ICWA.[38]
- Congress has deployed the Full-Faith-and-Credit Clause to regulate which States may exercise jurisdiction over interstate child custody disputes and prescribe procedural rights that state courts must afford "contestants," "parent[s]," and those with "physical custody." 28 U.S.C. §1738A(e).
- Congress has exercised Spending Clause powers to set comprehensive standards and procedures for child support, foster care, and adoption.[39]

These statutes underscore that Plaintiffs' nontextual exception finds no footing in history or tradition and, if accepted, would wreak havoc.

---

[38] *Accord* 18 U.S.C. §228; Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825.

[39] *E.g.*, Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343; Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, tit. I, 94 Stat. 500 (1980); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

II. Plaintiffs' Equal-Protection Claims Fail.

The *en banc* Fifth Circuit rejected Plaintiffs' equal-protection claims nearly in full: It upheld every provision Plaintiffs challenged, except for affirming—by an equally divided court—the district court's judgment invalidating the adoptive preference for "other Indian families" (and the similar foster-care preference) as lacking a rational basis. No Fifth Circuit judge endorsed Plaintiffs' arguments that ICWA draws racial lines.

The Fifth Circuit should have rejected the equal-protection claims entirely. Plaintiffs lack standing, and ICWA comfortably passes muster under *Mancari*.

A. The Court Lacks Jurisdiction Over Plaintiffs' Equal-Protection Claims.

To invoke federal jurisdiction, "litigant[s] must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). The courts below violated those limits. No Individual Plaintiff had standing to raise an equal-protection challenge. Nor did Texas.

1. The Individual Plaintiffs Cannot Show Redressability.

The Individual Plaintiffs' standing fails, first, on redressability. Justiciability law's "oldest and most consistent thread" is that "federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *see Hayburn's Case*, 2 U.S. (2 Dall.) 408, 409, 410 n.* (1792). The redressability requirement ensures federal courts act only where they may provide "an

acceptable Article III remedy." *California v. Texas*, 141 S. Ct. 2104, 2116 (2021). It "must be 'likely,' as opposed to merely 'speculative,' that [an] injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Article III, moreover, requires a properly *judicial* form of cause and effect. As Justice Scalia explained, a court must "be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part). Redressability does not exist simply because "a favorable decision in [one] case might serve as useful precedent for" another. *United States v. Juv. Male*, 564 U.S. 932, 937 (2011) (per curiam). No matter how *likely* that the decision would help the plaintiff, the *judgment* provides no redress—and "possible, indirect benefit[s]" do not suffice. *Id.*

The Individual Plaintiffs' theory of redress violates these principles. Their supposed injuries flowed from state courts applying ICWA. They posited that, if federal courts declared ICWA unconstitutional, state courts might follow. Pet. App. 63a (Dennis, J.). Those courts, however, are not parties. Nor would any other doctrine bind them to accept the opinions below. State courts are not required to follow federal-court interpretations. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997).

Nor does it matter that this lawsuit is now before this Court. Standing is "determined as of the commencement of the suit." *Lujan*, 504 U.S. at 570 n.5.

"[A]t that point it could certainly not be known that the suit would reach this Court." *Id.*

Utah v. Evans, 536 U.S. 452 (2002)—which the Individual Plaintiffs have cited, Brackeen Cert. Reply 10-11—does not hold that federal courts may issue "law review article[s]," Pet. App. 373a (Costa, J.). There, the court could *order* someone to *do something*, which would likely redress the plaintiff's injuries. Utah claimed the Secretary of Commerce incorrectly calculated the census, which deprived it of a representative. *Evans*, 536 U.S. at 461-62. The Secretary issues a "report" to the President, who tells Congress how many representatives States get. *Id.* at 461. *Evans* rejected the argument that Utah lacked standing to sue the Secretary because he did not bind the President. *Id.* at 464. *Evans* explained that courts could "order a change in a legal status" (requiring the Secretary to correct "the 'report'") and that this change would "significant[ly] increase … the likelihood that [Utah] would obtain" another representative. *Id.* *Evans* does not suggest redressability exists when judgments lack legal effect.

2. No Individual Plaintiff Has Injury-In-Fact.

The Individual Plaintiffs also failed to show injury-in-fact. Injury-in-fact "must exist at the commencement of the litigation (standing)" and "continue throughout … (mootness)." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The Individual Plaintiffs posited that ICWA harmed them in state-court child-custody cases. J.A. 99; Pet. App. 217a-219a. But those have ended. They thus face no impending injury.

a. The Brackeens never had injury-in-fact. They fostered and moved to adopt an Indian child, A.L.M. Pet. App. 48a. The Navajo Nation—A.L.M.'s ICWA Tribe—pressed for a Navajo placement. *Id.* The Brackeens sued in federal court alleging injuries in "their adoption of A.L.M." 1st Am. Compl. ¶252, No. 17-cv-868, ECF No. 22. But when they amended their complaint, they had "successfully … adopt[ed]" A.L.M. J.A. 99.

That means the Brackeens never had standing. Plaintiffs seeking prospective relief must face prospective harm. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). And courts measure standing based on the operative complaint. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007). Nor could the Brackeens plead around their lack of standing by saying they "intend to provide foster care for, and possibly adopt, additional children." J.A. 100. "'[S]ome day' intentions" cannot "support a finding of … 'actual or imminent' injury." *Lujan*, 504 U.S. at 564; *see Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009).

Such allegations are especially inadequate here. Prospective parents cannot by fiat conjure children. A child might not come forward needing care. That child might not be an ICWA "Indian child." And the proceeding might not implicate ICWA's preferences. Such a "theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

All that shows why this case differs from this Court's cases—which the Individual Plaintiffs invoke, Brackeen

Cert. Reply 8-9—finding standing to challenge unequal application procedures on the ground that the plaintiffs were "'able and ready' to apply in the imminent future." *Carney v. Adams*, 141 S. Ct. 493, 503 (2020). Those plaintiffs could *unilaterally* and *immediately* take actions that would *definitely* subject them to unequal treatment. Unlike in *Gratz v. Bollinger*, 539 U.S. 244 (2003), Indian children are not made available to the Individual Plaintiffs on a "rolling" basis "each year." *Id.* at 277-80 (O'Connor, J., concurring); *accord Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212 (1995).

The Brackeens cannot rely on their later effort to adopt Y.R.J., A.L.M.'s half-sister. When they filed the operative complaint, Y.R.J. had not been born, and they had not sought to adopt her. Pet. App. 60a n.15; *see In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728, at *2 (Tex. Ct. App. Dec. 19, 2019, *pet. denied*). The Brackeens did not move to amend and sought to supplement the record only *after* the district court entered judgment. Pet. App. 360a-61a. If plaintiffs "ha[ve] not met the challenge to their standing at the time of judgment, they … [can]not remedy the defect retroactively." *Summers*, 555 U.S. at 495 n.*.

b. Mootness has overtaken any injury-in-fact the Cliffords faced. They tried to foster and adopt Child P. J.A. 106. A Minnesota state court applied the §1915(b) foster-care preferences, placing Child P. with her grandmother in January 2018. Pet. App. 50a. The appellate court affirmed. *In re Welfare of Child of S.B.*, No. A19-0225, 2019 WL 6698079, at *1 (Minn. Ct. App. Dec. 9, 2019). The state supreme court denied review. *In re Welfare of Child of S.B.*, No. A19-0225, 2020 Minn.

LEXIS 17, at *1 (Minn. Jan. 9, 2020). The Cliffords did not seek this Court's review.

Below, Judge Dennis found the Cliffords had standing because "Child P. has not yet been adopted" and the Cliffords could "petition for custody." Pet. App. 63a. But Child P.'s grandmother had finalized her adoption before the Fifth Circuit ruled. Brackeen Pet. 7. Plaintiffs never told the Fifth Circuit.

The Librettis have no personal stake for the same reasons. Their adoption of Baby O became final on December 19, 2018. Pet. App. 50a.

Nor can the exception for claims "capable of repetition, yet evading review" save these claims. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018). That exception applies "only 'if … the challenged action is in its duration too short to be fully litigated prior to its cessation.'" *Id.* A party to a child-custody dispute can fully litigate constitutional arguments in state court.

c. Moreover, the Individual Plaintiffs' state-court child-custody proceedings never gave them a concrete stake in this *blunderbuss* challenge. "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim," including each statutory provision challenged. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021); *see California*, 141 S. Ct. at 2117; *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2351 (2020).

That principle forecloses challenge to the adoptive preference for "other Indian families," §1915(a)(3), and to any foster-placement preference besides for family

members. Those preferences were never applied to any Individual Plaintiff.

3. Texas Lacks Standing To Pursue Equal-Protection Claims.

Texas cannot remedy the Individual Plaintiffs' lack of standing. Article III requires an "invasion of a 'legally protected interest.'" *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74 (2008). Texas has no legally protected interest in its equal-protection arguments: The "word 'person' in … the Due Process Clause of the Fifth Amendment cannot … be expanded to encompass … States." *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966).

Texas cannot proceed by asserting its citizens' equal-protection rights. States do 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." *Id.* at 324; *accord Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007); *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). No member of the *en banc* court concluded otherwise. Pet. App. 55a n.13 (Dennis, J.) (finding Texas lacks equal-protection standing); *id.* at 373a n.2 (Costa, J.) (same); *see id.* at 218a n.13 (Duncan, J.) (declining to reach).

Texas's counterarguments lack merit. Its claim of injury-in-fact to "proprietary and sovereign interests," Texas Br. 39, is beside the point. Texas has no equal-protection rights. Nor can Texas assert "third party" standing based on others' equal-protection rights. Texas Br. 39. A "party 'generally must assert his own legal rights.'" *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct.

2067, 2100 (2019). The Court "depart[s] from this rule only where the [plaintiff] … 'has a "close"' relationship with the" rightsholder and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Id.* No "hindrance" exists here, and Texas's only relationship is *parens patriae*.

B. ICWA Comports With The Fifth Amendment.

ICWA satisfies the Fifth Amendment's equal-protection component. It draws political classifications that the Constitution and Congress have drawn since the Founding and that, under *Mancari*, are subject to rational-basis review. Congress had compelling reasons to protect Indian Tribes and families from unwarranted removals via ICWA.

1. Classifications Based On Tribal Affiliation Are Political Classifications Subject Only To Rational-Basis Review.

When Congress classifies based on affiliation with "[f]ederally recognized tribes," those classifications are "political rather than racial." *Mancari*, 417 U.S at 553 n.24. They "will not be disturbed" "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* at 555.

a. The Constitution's text establishes that Congress may treat Indians differently. The Indian Commerce Clause does so. So does Article I's Apportionment Clause, which "exclud[es] Indians not taxed." U.S. Const. art. I, §2, cl. 3. If rules treating Indians differently triggered strict scrutiny as racial classifications, these provisions would be—in effect—

unconstitutional. The Constitution instead recognizes Tribes for what they are: sovereign political entities. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831). Congress from the beginning has thus enacted legislation protecting Indians' lands, regulating their trade, punishing crimes against them, managing their resources, and providing education, housing, and healthcare—all in reliance on the principle that Congress may legislate specifically for Indians. *E.g.*, Act of July 22, 1790, ch. 33, §§1, 4-5; 25 U.S.C. §§391, 1601, 2000, 3102.

b. The Fourteenth Amendment did not diminish this power. It prohibits "any State" from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. This Court has also applied equal-protection constraints to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954). Those constraints, however, are not identical. In areas of "paramount federal power," *Hampton v. Wong*, 426 U.S. 88, 100 (1976)—including immigration, nationalization, and Indian affairs—the analysis "involves significantly different considerations," *Matthew v. Diaz*, 426 U.S. 67, 84 (1976).

The Fourteenth Amendment did not end federal power to treat Indians differently. Its text continued to do so. U.S. Const. amend. XIV, §2. Its ratifiers, too, understood that Congress retained power to legislate specifically for Indians. Radical Republican leader Thaddeus Stephens emphasized the importance of fulfilling the federal promise "of … protection" to Indians. Cong. Globe, 39th Cong., 1st Sess. 1684 (1866). Just after ratification, an influential Senate Report

found the amendment had "no effect whatever upon the status of the Indian tribes" and did not "repudiat[e] [the United States'] national obligations." S. Rep. No. 41-268, at 1, 11 (1870). Fourteenth Amendment challenges to tribal treaties and legislation thus "went nowhere." Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 Calif. L. Rev. 1165, 1176 (2010).

The grant of U.S. citizenship to Indians also did "not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." *Duro v. Reina*, 495 U.S. 676, 692 (1990); *see John*, 437 U.S. at 653-54.

c. For centuries, this Court has read the Constitution's textual commitments to require judicial deference. In deciding what groups to recognize as tribal Indians, this Court "follow[s] the action of the … political departments …, whose more special duty it is to determine such affairs." *Holliday*, 70 U.S. at 419. And in "determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion and its action, unless purely arbitrary, must be … given full effect." *Perrin*, 232 U.S. at 486.

Mancari crystalized that rule and held that when Congress classifies based on tribal affiliation, it draws "political" classifications reviewed only for rational basis. 417 U.S at 554-55 & n.24. *Mancari* emphasized that the Constitution "singles Indians out as a proper subject for separate legislation"; that "[l]iterally every piece of legislation dealing with Indian tribes … single[s] out for special treatment a constituency of tribal Indians"; and that "[i]f these laws … were deemed invidious racial discrimination, an entire Title of the

United States Code (25 U.S.C.) would be effectively erased." *Id.* at 552.

Mancari also explained that classifications defined by tribal affiliation are "not … 'racial'" in any sense. *Id.* at 553. Those classification "exclude many individuals who are racially … 'Indians.'" 417 U.S. at 553 n.24; *e.g.*, J.A. 245. And such classifications include some individuals without Native ancestry. In the 19th century, many tribes adopted non-Indians. *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), concerned "a white man … adopted in an Indian tribe." *Id.* at 572-73.[40] Likewise, *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899), affirmed a decision recognizing as Chickasaw (1) a white man who married an Indian woman, (2) his second, white wife, and (3) their white daughter.[41] Other examples abound.[42] Today, descendants of adopted citizens are often membership-eligible, even when lacking Native ancestry—including Freedman

---

[40] *Rogers* held as a matter of statutory construction that some "Indian" statutes that "do[] not speak of members of a tribe" exclude people lacking Native ancestry. 45 U.S. (4 How.) at 573. That holding is irrelevant as to ICWA, which speaks to tribal affiliation and requires no Native ancestry.

[41] *Stephens*, 174 U.S. at 473-74 (synopsis) (describing lower-court decision); *id.* at 492 (opinion) (affirming).

[42] *E.g.*, *United States ex rel. West v. Hitchcock*, 205 U.S. 80, 83 (1907); *Lucas v. United States*, 163 U.S. 612, 615-16 (1896); *Westmoreland v. United States*, 155 U.S. 545, 548 (1895); 1854 Treaty with the Shawnee, Art. II; Treaty with the Wyandot, Art. VIII, 1817, 7 Stat. 160; Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189; Act of May 2, 1890, ch. 182, §30, 26 Stat. 81; Sen. Ex. Doc. 51, 51st Cong. 1st Sess. 289-92 (1890).

descendants of former enslaved persons. *E.g.*, Const. of the Kiowa Tribe art. IV, §1(b); Const. of the Seminole Nation of Oklahoma art. II; J.A. 215.[43]

d. *Mancari* does not hold that all laws addressing "Indians" or "Native Americans" draw political classifications. This country has a sordid history of discriminating against Native Americans *as a race*, based solely on blood. While Plaintiffs tar ICWA with these statutes, Brackeen Br. 21-23, they only underscore what genuinely racial classifications look like. *Loving v. Virginia*, 388 U.S. 1 (1967), invalidated a statute that "punish[ed] interracial marriages" and defined "white person" as having "no trace of whatever of" "Indian" blood. *Id.* at 4-5 & n.4; *accord*, *e.g.*, Act of May 15, 1854, ch. 78, §42 (amending §394), 1854 Cal. Stat. 84, 94; Act of Apr. 4, 1741, ch. I, §§XIII-XIV, 1741 N.C. Laws 158, 160; 1705 Va. Acts ch. IV, 3 Va. Stat. 250, 252. This Court has also applied strict scrutiny to state programs benefitting "Native Americans" alongside "Black Americans, Hispanic Americans, … Asian Pacific Americans, and other minorities." *Adarand Constructors*, 515 U.S. at 205, 207-08, 213 (plurality op.); *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 271 n.2 (1986). These holdings are irrelevant to statutes, like ICWA, that uphold Congress's trust duties by classifying based on tribal affiliation.

---

[43] Plaintiffs' claims concerning exactly what rights Seminole Freedman have, *see* Brackeen Br. 34, just distract from the point that matters: Freedmen are Seminole citizens, including under ICWA, despite lacking Indian blood. *In re A.G.*, No. A155629, 2019 WL 4233921, at *3 n.3 (Cal. Ct. App. Sept. 6, 2019).

2. Plaintiffs' Gerrymandered Limits Are Invented.

Plaintiffs acknowledge that "'political' classifications" are not "subject to strict scrutiny," Brackeen Br. 20, but then try to gerrymander around this concession. They claim that *Mancari*'s rule that Indian classifications are political "extends only to the regulation of tribes as political entities or of tribal lands, in matters pertaining to Indian self-government or internal tribal affairs" and does not reach "laws that regulate an 'affair of the State.'" Brackeen Br. 20; *see* Texas Br. 44-45. Outside those limits, Plaintiffs say, Indian classifications become racial.

a. To start, even narrowly read, *Mancari* applies here. ICWA promotes "Indian self-government" in the most fundamental way—by protecting the next generation of tribal members and ensuring "the continued existence and integrity of Indian tribes." §1901(3); *see Mancari*, 417 U.S. at 554. The means ICWA employs also further tribal self-government. ICWA authorizes Tribes, as sovereigns, to enforce its substantive and procedural standards. §1911(c). ICWA accords preferences to tribal members and to foster homes identified "by the Indian child's tribe." §1915(a)(2), (b)(ii). And ICWA gives effect to "a different order of preference" that Tribes as sovereigns "establish." §1915(c). Meanwhile, the welfare of Indian children has never been an "affair of the State." *Rice v. Cayetano*, 528 U.S. 495, 520 (2000); *supra* 6-9, 39-40.

b. More fundamentally, Plaintiffs' limits are unmoored from the Constitution's text and rebel against constitutional principle. Tribal classifications are

political because Tribes are sovereign political entities that the Constitution expressly authorizes Congress to legislate for as such. And once Plaintiffs concede, as they do, that some tribal classifications are political, all that remains is a question of textual interpretation: whether the relevant text draws lines tied to political relationships or instead race. The ad hoc considerations Plaintiffs invoke relate, at most, to whether classifications rationally further Congress's obligations to Indians.

This Court's cases, no surprise, have thus rejected Plaintiffs' approach. *United States v. Antelope* observed that some of this Court's cases "involved preferences or disabilities directly promoting Indian interests in self-government." 430 U.S. 641, 646 (1977). But those cases "point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications." *Id.* *Antelope* thus upheld a law that dealt "not with matters of tribal self-regulation, but with federal regulation of criminal conduct"—the Major Crimes Act. *Id.*

Many decisions agree. In *Mancari*, the hiring preference was not restricted to positions near Indian lands, and "none of the[] [challengers was] employed on or near an Indian reservation." 417 U.S. at 539 n.4. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979), this Court applied *Mancari* to uphold special fishing rights for individual Indians that applied outside Indian country (underscoring that laws conferring individual rights often, like ICWA, simultaneously promote tribal sovereignty). *Accord Washington v.*

Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 500-02 (1979) (applying *Mancari* to reject equal-protection challenge to state regulation of criminal conduct in Indian country).

c. Plaintiffs' "affair of the State" limit, Brackeen Br. 20, just recapitulates their nontextual congressional-power arguments. Classifications defined by tribal affiliation do not cease to be "political," *id.*, when they impact States. Indeed, the Framers crafted the Constitution's Indian-affairs powers so the federal government could *protect* Indians from States, which sometimes means legislating specifically for Indians in state affairs. *Supra* 20-21.

Rice v. Cayetano imposes no relevant limit on *Mancari*. *Rice* was a Fifteenth Amendment challenge to a State's racial classification targeting "descendant[s] of the aboriginal peoples inhabiting the Hawaiian Islands." 528 U.S. at 516. The statute then used this immutable characteristic to "fence out" part of the electorate from statewide elections. *Id.* at 522. But *Rice* itself cautioned that tribal statutes were different. It emphasized that "every piece of legislation dealing with Indian tribes and reservations singles out for special treatment a constituency of tribal Indians," *id.* at 519 (cleaned up) (quoting *Mancari*), and reaffirmed that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs," *id.* *Rice* thus casts no doubt on statutes, like ICWA, that advance Congress's trust obligation by classifying based on present-day tribal affiliation.

3. ICWA Draws Political Classifications.

As ICWA's text confirms, all its classifications are based on—and defined by—affiliation with federally recognized Tribes. No Fifth Circuit judge concluded otherwise.

a. ICWA's "Indian Child" Definition Draws Political Classifications.

ICWA's "Indian child" definition "classifi[es] based on tribal status." *Yakima Nation*, 439 U.S. at 501.

i. ICWA's first prong applies to children who are "member[s] of an Indian tribe." §1903(4). Classifications defined by "member[ship in] 'federally recognized' tribes" are "not … 'racial.'" *Mancari*, 417 U.S. at 553 & n.24. This Court has thus repeatedly upheld, on rational-basis review, statutes treating tribal members differently. *Supra* 53-54, 57-58. That includes, in *Fisher v. District Court of Sixteenth Judicial District of Montana*, 424 U.S. 382, 383, 390-91 (1976) (per curiam), upholding exclusive tribal jurisdiction over on-reservation adoption proceedings involving tribal members. Such classifications are political, whether on reservation or off.

Plaintiffs contend even this prong is "a racial classification," Brackeen Br. 31; *see* Texas Br. 42, because tribal "[m]embership … is based on lineal descent" and some Tribes employ blood-quantum requirements. Brackeen Br. 31; *see* Texas Br. 42. But to start, tribal membership is about much *more* than descent or blood, including political choices by Tribes to extend membership and by individuals to remain members. And this Court properly has never been

distracted by tribal citizenship practices; Tribes are a "separate people" whose "right to define [their] own membership"—like that of foreign governments—is "central to [their] existence as … independent political communit[ies]" and "unconstrained" by the Fifth and the Fourteenth Amendments. *Santa Clara Pueblo*, 436 U.S. at 56, 72 n.32.[44]

ii. The second prong extends coverage to children who are "eligible for membership in an Indian tribe and [are] the biological child[ren] of a member." §1903(4).

This prong is not racial either: It applies only when Tribes have made political choices to make children membership-eligible; when parents have made political choices to maintain membership; and when the United States has made political choices to maintain government-to-government relationships. *E.g.*, *In re R.L.-P.*, 842 N.W.2d 889, 899 (N.D. 2014) (ICWA did not apply when "the father … purposefully did not enroll in the Tribe"). Children "[a]re not subject to [ICWA] because they are of the Indian race but because" they or their parents "are enrolled [tribal] members." *Antelope*, 430 U.S. at 646.

In ICWA, moreover, Congress crafted its definitions to ensure that "Indian children" have tight present-day affiliations with Tribes—a non-racial goal through and through. Congress initially considered applying ICWA

---

[44] The legislative history Plaintiffs invoke merely recognized that some Tribes make "[b]lood relationship" relevant to membership. H.R. Rep. No. 95-1386, at 20; *see* Brackeen Br. 5; Texas Br. 11. Congress did not, by acknowledging these choices, make ICWA racial.

to all membership-eligible children. The Department of Justice, however, raised concerns with subjecting children who were eligible for membership—and had no other tribal connection—to exclusive tribal-court jurisdiction. H.R. Rep No. 95-1386 at 37-38. So Congress narrowed the definition to require that a biological parent *also* be a member and have voluntarily chosen to retain tribal affiliation. *Id.* at 39. The Department said this change "for the most part[] eliminated" its concerns. *Id.* Plaintiffs rely heavily on the Justice Department's statements, Brackeen Br. 5, 29, 51; Texas Br. 11-12, yet ignore how Congress changed course in response.

The approach ICWA takes to ensuring that membership-eligible children have this tight affiliation—attributing to them parents' choices to remain enrolled—is unexceptional. The law routinely treats parents and children that way. *E.g.*, *Holyfield*, 490 U.S. at 48 ("Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents.").

Nor does limiting ICWA's coverage to membership-eligible children whose *biological* parents are members, §1903(4), render the second prong a racial classification. "State and federal laws are replete with provisions that target individuals based on" that type of "biological descent without reflecting racial classifications." *Davis v. Guam*, 932 F.3d 822, 836 (9th Cir. 2019). That "include[s] laws of intestate succession, citizenship, and child custody," *id.* at 836-37—including Texas's own, which define placement preferences for "relatives" based on "consanguinity," Tex. Fam. Code §264.751; *see*

Tex. Gov't Code §573.022. A *jus sanguinis* approach to citizenship was common at the Founding.[45] And U.S. citizenship still sometimes turns on "blood relationship[s]." 8 U.S.C. §1409(a)(1). Other countries also determine "citizenship based on descent," including Ireland, Greece, Armenia, Israel, Italy, and Poland. Pet. App. 150a n.51 (Dennis, J.).

Plaintiffs thus badly err with their *Rice*-based arguments that the Indian-child definition is a "proxy for race" because it considers biological parentage. Texas Br. 46. The *Rice* classification used "ancestry" to create exactly the type of immutable classification that is characteristic of a race-based statute: It reached back to 1778 and swept in "any descendent of the aboriginal [Hawaiian] peoples." 528 U.S. at 509; *cf. Hirabayashi v. United States*, 320 U.S. 81, 88 (1943) (curfew for "all persons of Japanese ancestry"). Under ICWA, it never suffices that "an ancestor—even a remote one—was an Indian." Brackeen Br. 30. The "Indian child" definition *prevents* that result by demanding a tight, present-day political affiliation.

iii. The Constitution's text and history confirm that Congress may protect these membership-eligible individuals. Even as the Constitution authorizes Congress to legislate specifically for "Tribes" and "Indians," it leaves these terms undefined. At the Founding, moreover, most Tribes did not have formal membership (which largely emerged only a century or more later). *Cohen's* §3.03[2], at 173-74. And hewing to

---

[45] *E.g.*, de Vattel, *supra*, bk. I, ch. XIX, §212; Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103.

the Constitution's text, this Court has long held that questions of tribal recognition are political questions, *Holliday*, 70 U.S. at 419, and that Congress may itself define tribal membership, *Stephens*, 174 U.S. at 488; *accord Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 814-15 (E.D. Wash. 1965) (three-judge panel) (upholding Congress's membership definition, which included blood-quantum requirements, against equal-protection challenge), *aff'd*, 384 U.S. 209 (1966). The Constitution thus cannot preclude Congress from treating certain children with close tribal affiliations the same as members under ICWA.

Indeed, ICWA's second prong is more closely tied to tribal affiliation than other statutes this Court has approved.[46] And Congress for centuries has likewise enacted statutes extending beyond enrolled members, in reliance on this Court's broad holdings that "*federal regulation of Indian affairs* is not based upon impermissible classifications." *Antelope*, 430 U.S. at 646

---

[46] That includes *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), which applied *Mancari* to reject an equal-protection challenge to a tax exemption for "on-reservation sales by Indians to Indians," including non-member Indians on the reservation. *Id.* at 480. Misreading footnote 16, Individual Plaintiffs claim *Moe* did not decide whether a tax exemption for non-member Indians violates the Fifth Amendment. Brackeen Br. 27. Footnote 16, however, concerned preemption. 425 U.S. at 480 n.16. As to equal protection, *Moe* considered the immunity as "*extended by the District Court*," *id.* at 479 (emphasis added), including cigarette sales "to any Indian residing on the Reservation." *Confederated Salish & Kootenai Tribes of Flathead Rsrv. v. Moe*, 392 F. Supp. 1297, 1317 (D. Mont. 1975) (per curiam) (three-judge panel).

(emphasis added). Today, for example, countless children receive health, housing, and education benefits reserved for Indians because Congress conferred those benefits based on their parents' status. *E.g.*, §1680c; §4131(a)(1); 20 U.S.C. §7491(3)(B); *see also, e.g.*, *Antelope*, 430 U.S. at 646 n.7 (enrollment "has not been held to be an absolute requirement" for purposes of federal criminal law, if defendants have sufficient tribal ties (quoting *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938)); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968) (individual Indians retain treaty rights even after termination of federal relationship with Tribe). Settled law and longstanding practice thus rebel against Plaintiffs' members-only limit.

b. ICWA's Placement Preferences Are Not Racial.

ICWA's placement preferences also do not classify based on race.

i. The first preference, for both adoptive and pre-adoptive or foster-care placements, is for "a member of the child's extended family." §1915(a)(1), (b)(i). This preference accords the highest priority to many individuals who are not racially Indian. *E.g.*, *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 622 (Cal. Ct. App. 2016).

In calling this preference "racial," Brackeen Br. 41, Plaintiffs descend into absurdity. Plaintiffs observe that ICWA defines "extended family" based on "the law or custom of the Indian child's tribe" and assert that some Tribes have "sweeping definitions of 'extended family.'"

Id.; *see* §1903(2). But a *broad* definition of "extended family" is not a *racial* definition.

ii. The second adoptive preference is for "other members of the Indian child's tribe." §1915(a)(2). The second foster-care preference applies to homes identified "by the Indian child's tribe." §1915(b)(ii). These preferences are not racial either. The adoptive preference is defined by the political community with which a child is affiliated. *Mancari*, 417 U.S. at 554. And the foster-care preference applies equally to non-Indian foster families identified by that political community.

Plaintiffs' sole counterargument—that the adoptive preference includes "*any* member," without regard to location or connections to the Tribe or child, Brackeen Br. 40—has nothing to do with whether this preference classifies *based on race*. It is a dressed-up policy argument about whether this preference satisfies the rational-basis standard (and is meritless as such; as detailed below, ICWA never mandates placements with members with only tenuous connections). *Infra* 72-74.

iii. The third adoptive preference is for "other Indian families." §1915(a)(3). The third foster-care preference is for "an Indian foster home licensed or approved by an authorized non-Indian licensing authority." §1915(b)(iii).

These preferences—which, again, were never applied to any Individual Plaintiff—also draw political classifications. "'Indian' means any person who is a member of an Indian tribe." §1903(3). So these preferences again classify based on tribal membership, as in *Mancari* and *Antelope*. Like those classifications,

this preference excludes many people who are racially Indian while including some who are not. *Supra* 54-55.

iv. Plaintiffs' miscellaneous arguments lack merit.

First, Plaintiffs mischaracterize ICWA's preferences as "a coordinated, interlocking scheme" that relegates "non-Indian[s] … to the back of the line." Brackeen Br. 38; Texas Br. 47. In fact, ICWA places many non-Indian families *first* in line, whenever they are in an Indian child's "extended family" (a common occurrence given that Indians often marry non-Indians).[47] Many racially Indian families, meanwhile, are treated the same as the Individual Plaintiffs.

As for "interlocking scheme," Plaintiffs surely picked this rhetoric to dodge their obvious lack of standing to challenge the "other Indian families" preference. But ICWA's preferences operate independently: There "simply is no 'preference' to apply if no alternative party that is eligible to be preferred under § 1915(a) [or (b)] has come forward." *Adoptive Couple*, 570 U.S. at 654. And Congress made ICWA's provisions severable. §1963.

Second, Plaintiffs falsely claim ICWA's purpose is racial because ICWA supposedly "was designed to prevent Indian children from being raised according to 'white, middle-class standard[s].'" Texas Br. 45 (quoting H.R. Rep. No. 95-1386, at 24); *accord id.* at 53 (similar false claim that ICWA "reflect[s] *disapproval of* 'white suburbia's preference[s]"). In fact, Congress found that

---

[47] Wendy Wang, *Interracial Marriage: Who is 'Marrying Out'?*, Pew Research Center (June 12, 2015), https://pewrsr.ch/3bpLQHe.

States were *discriminating against* Indian families by applying "white, middle-class standards," H.R. Rep. No. 95-1386, at 24, that "failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," §1901(5). Congress combatted that discrimination by requiring state courts to consider "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or … maintain[s] … ties." §1915(d). Considering community standards to combat discrimination is not itself race discrimination.

Third, Plaintiffs are wrong that Congress "implicitly recognize[d] that ICWA engages in race discrimination," Brackeen Br. 39, by specifying that certain anti-discrimination laws "shall not be construed to affect [ICWA's] application." 42 U.S.C. §§674(d)(4), 1996b. Congress enacted these provisions to *forestall arguments* like Plaintiffs'. For good reason. In *Mancari* itself, the challengers claimed that Title VII's prohibition on race discrimination implicitly repealed the employment preference there. 417 U.S. at 545-47. *Mancari* rejected that argument and held the preference was not "discrimination on the basis of race." *Id.* at 550. "Congressional action" to preclude such arguments from recurring "cannot reasonably be characterized as unnecessary surplusage." *Castro-Huerta*, 142 S. Ct. at 2500.

4. ICWA Rationally Fulfills Congress's Unique Obligations Toward Indians.

ICWA satisfies *Mancari*.

a. Under *Mancari*, classifications need only "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 555. This Court "hardly ever strikes down a policy … under rational basis scrutiny." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018). This standard demands yet more in facial challenges, where plaintiffs must "'establish that no set of circumstances exists under which the [law] would be valid,' or show that the law lacks 'a plainly legitimate sweep.'" *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021).

b. Congress had a sound basis for enacting ICWA. The interests ICWA vindicates—to "protect the best interests of Indian children" and "promote the stability and security of Indian tribes and families," §1902—are compelling and recognized by the Constitution itself. The Framers crafted the Constitution partly to ensure The United States could keep its promises to Tribes, and every Branch has recognized the United States' trust duties—grounded in treaties and war—to protect Tribes and Indians. *Supra* 6, 20-21, 27-33.

Meanwhile, parents' interests in raising their children are "perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Indeed, "[i]t has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child." *Adoptive Couple*, 570 U.S. at 668 (Scalia, J., dissenting). That includes "bring[ing] up children" in a family's culture, traditions, and religion, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and "traditional way of life," *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). This "constitutional

protection," moreover, is not "limited to … the nuclear family." *Moore v. City of E. Cleveland*, 431 U.S. 494, 504-05 (1977). It extends to "a larger conception of the family" including "uncles, aunts, cousins, … grandparents" and others who "draw together and participate in the duties" of family life. *Id.* For many Indians, that includes extended family and tribal communities.

c. Congress also had a rational basis for drawing each of ICWA's classifications. No one claims applying ICWA to tribal-member children was irrational. And Congress rationally concluded that achieving ICWA's aims also required covering some children—like infants—who do "not have the capacity to initiate the formal, mechanical procedure necessary" for enrollment. H.R. Rep. No. 95-1386 at 17. Congress then chose to limit ICWA to membership-eligible children with particularly close tribal links. *Supra* 60-61. This balance rationally furthers ICWA's goals while excluding children whose tribal connections are more tenuous.

Plaintiffs' over- and under-inclusiveness arguments, *see* Texas Br. 53-57; Brackeen Br. 43-45, simply reflect disagreements with Congress's policy judgments. And precisely because the rational-basis standard requires courts to respect those judgments, it does not concern itself with either "underinclusive [or] overinclusive" classifications. *Vance v. Bradley*, 440 U.S. 93, 108 (1979); *see Yakima Nation*, 439 U.S. at 501. Plaintiffs' policy arguments, moreover, lack merit even as such.

First, Plaintiffs say Congress should have included children "raised as Indians" even if not eligible for tribal membership, or excluded children with insufficient

"prior contact with Indian society." Brackeen Br. 44-45. But applying ICWA to children ineligible for membership would not further Congress's goal to "promote the stability and security of Indian Tribes." §1902. And it is hard to imagine a less administrable standard than asking whether a family is "Indian enough."

Second, Congress rationally rejected Plaintiffs' view that ICWA should not apply where "no Indian family is being broken up" or "the tribal-member parent is completely absent." Brackeen Br. 45. Regardless of whether Indian parents are involved, Congress has "a direct interest, as trustee, in protecting Indian children" and Tribes. §1901(3); *see Holyfield*, 490 U.S. at 52 ("[T]he tribe has an interest in the child which is distinct from … the interest of the parents."). ICWA thus governs not just the removal of Indian children but their placement in settings Congress has determined further their "best interests" and protect Tribes. §1902. Plaintiffs' arguments are doubly meritless in a *facial* challenge. The "existing Indian family" doctrine has spurred disagreement among lower courts, *see* Tribes Br. in Opp. At 19-20, No. 21-378, but has no bearing on whether ICWA is facially irrational.

Third, Congress rationally declined to make ICWA turn on biological parents' case-specific decisions about whether ICWA should apply. *Cf.* Brackeen Br. 30 (asserting that A.L.M.'s family "wish[ed] … the child to be adopted" without regard to ICWA). The proceedings where ICWA in practice applies—the only proceedings to which Tribes are entitled to notice—are "involuntary proceeding[s] … seeking the foster care placement … or

termination of parental rights." §1912(a); *supra* 12. Congress had good reason not to give biological parents ad hoc opt-outs.

Biological parents, moreover, do have an option. Plaintiffs assert that "ICWA's application … is often entirely involuntary." Texas Br. 47; *see* Brackeen Br. 30. But "for an adult Indian, there is an absolute right of expatriation." H.R. Rep. No. 95-1386, at 20 (citing *United States ex. Rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879)); *accord* 81 Fed. Reg. at 38,783; J.A. 215, 244-45. ICWA can thus apply to a minor, membership-eligible child only if a parent voluntarily remains enrolled. *Cf. In re K.P.*, 195 Cal. Rptr. 3d 551, 558-59 (Cal. Ct. App. 2015) (disenrollment terminates ICWA's application). More strained hypotheticals—such about situations where both biological parents expatriate but, for whatever reason, a child remains enrolled—raise as-applied issues that are irrelevant here. Indeed, in all the Individual Plaintiffs' state-court cases, the children's biological parents or prior caregivers were *and remained* enrolled members. Pet. App. 48a-50a; *see* Cliffords' Petition for Review at 1-3, *In re Welfare of the Child of S.B.*, A19-0225 (Minn. Dec. 23, 2019).[48]

d. ICWA's placement preferences are also rational.

The first, for extended family, accords with the preference Congress has required States to apply in

---

[48] *Cf. Nielson v. Ketchum*, 640 F.3d 1117, 1123-24 (10th Cir. 2011) (declining to give effect, under ICWA, to provision of Cherokee law conferring temporary citizenship on certain newborns for 240 days following birth).

order to receive Social Security Act funding.[49] The second, for members of a child's Tribe (or foster placements identified by the Tribe), is tailored to ICWA's twin goals—"protect[ing] the best interests of Indian children" and "promot[ing] the stability and security of Indian tribes and families." §1902.

Leading child-welfare organizations explain that ICWA follows "evidence-based best practices" by prioritizing "maintaining a child within the child's birth family first, placement with extended family next (even if they have no tribal connection), then members of the child's broader community, including the child's tribe." Casey 5th Cir. Br. 2, 5. Indeed, many States similarly prefer tribal-member placements, reflecting the same policy judgment.[50] Other States expressly direct courts to consider children's cultural needs and identity. *E.g.*, Haw. Rev. Stat. §587A-2; Ga. Code Ann. §15-11-26(10)-(20). Congress rationally rejected Plaintiffs' policy view that ICWA "subordinate[s] [children's] interests" by following the same approach, Texas Br. 51, and rationally concluded that ICWA's preferences benefit children and Tribes.

---

[49] 42 U.S.C. §671(a)(19); *see* U.S. Dep't of Health and Human Services, Children's Bureau, *Placement of Children with Relatives* at 4 (2018), https://bit.ly/3Oo9wcx.

[50] *E.g.*, Alaska Stat. §47.10.990(10) (defining "extended family" to include tribal members); *see, e.g.*, Minn. Stat. §260C.007, subd. 26b; Neb. Rev. Stat. §43-1503; N.M. Stat. Ann. §32A-28-2; N.C. Gen. Stat. §7B-101(15a); Okla. Stat. tit. 10A, §§1-4-204(A), 1-4-813; Or. Admin. R. 413-120-0730, Or. Rev. Stat. §419B.192; Utah Code Ann. §80-2a-101; Wash. Rev. Code §74.15.020(2)(a)(vi).

That is particularly true given ICWA's "good cause" departure authority. §1915(a), (b). That, too, accords with "evidence-based [best-]practices" showing children do best under "a structured system," provided "presumptions" are "rebuttable." Casey 5th Cir. Br. 17. Indeed, ICWA's statutory text does not limit what "good cause" factors courts may consider. §1915(a), (b). And when the regulations identify factors, they frame those factors broadly. Courts may depart based on:

- "The request of one or both of the Indian child's parents …."
- "The request of the child, if the child is of sufficient age and capacity …."
- "[S]ibling attachment …."
- "[E]xtraordinary physical, mental, or emotional needs …."
- "The unavailability of a suitable [preferred] placement."

25 C.F.R. §23.132(c).

This departure authority devastates Plaintiffs' policy arguments—which may be why Plaintiffs mischaracterize these factors. They say ICWA renders parental preferences irrelevant, Brackeen Br. 30, when the regulations say the opposite. *Accord, e.g.*, *Matter of Baby Boy Doe*, 902 P.2d 477, 487 (Idaho 1995). Plaintiffs claim the regulations preclude consideration of "ordinary bonding or attachment," Brackeen Br. 43, 45, when the regulations restrict departures only "based *solely* on ordinary bonding or attachment"—and only when the placement was "made in violation of ICWA,"

25 C.F.R. §23.132(e) (emphasis added); *cf. Holyfield*, 490 U.S. at 54 (improper to "reward those who obtain custody … and maintain it during any ensuing (and protracted) litigation"). Finally, Plaintiffs imply that courts cannot consider "cultural, social, religious, or political" connections, Texas Br. 48 (quoting 25 C.F.R. §23.103(c)), when the regulations say only that the "Indian child" definition does not incorporate such factors.

e. The "other Indian families" preference is also rational.

First, many Tribes "descend[] from larger historical bands and continue to share close relationships and linguistic, cultural, and religious traditions." Pet. App. 164a (Dennis, J.). This Court recently heard a case concerning a neglected child who was a member of the Eastern Band of Cherokee and lived in Oklahoma, surrounded by Cherokee Nation citizens. *Castro-Huerta*, 142 S. Ct. at 2491-92. And during ICWA's passage members of Congress observed that in "South Dakota there are eight reservations occupied by different bands of Sioux" with "many close family ties between the members of the various tribes." Letter from Sen. Abourezk to Rep. Teno Roncalio, at 3 (Sept. 1978), https://bit.ly/3PUssRI.

Second, many children are eligible for membership in multiple Tribes. That includes A.L.M., whose biological mother is a Navajo Nation member and whose father is an enrolled Cherokee Nation citizen. Pet. App. 48a. A placement with either could further ICWA's goals.

Third, federal programs like relocation have created intertribal communities. They exist, for instance, in major cities like Chicago. *See* American Indian Center of Chicago, *Our History*, https://aicchicago.org/ (last visited July 22, 2022). And many Indians live on lands that belong to other Tribes. *Cf. Lara*, 541 U.S. at 196. When a Cherokee child lives among Pomo Indians in California, it is rational to prefer a nearby Pomo family.

The list goes on—but these points confirm that this preference has a "legitimate sweep" and end Plaintiffs' facial equal-protection challenge. *Bonta*, 141 S. Ct. at 2387. If litigants believe courts have erred in declining to apply ICWA's good-cause standard, they can press as-applied arguments in cases *actually implicating* this preference.

f. Congress also rationally applied ICWA's placement preferences to all state-court proceedings, whether they concern children domiciled on- or off-reservation. Congress did so because the crisis of unwarranted removals it found occurred both within and outside Indian country. *E.g.*, 1977 Hearings at 350-51; 1974 Hearings at 38; *Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. On Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 190-91 (1978). Moreover, ICWA's placement preferences often "apply to children that live on a reservation," Brackeen Br. 45—whenever state courts have jurisdiction to adjudicate on-reservation cases (like in Public Law 280 States or under jurisdictional agreements). *Holyfield*, 490 U.S. at 42 n.16; §1919(a).

5. ICWA Does Not Impermissibly Discriminate Based On National Origin.

Mancari's holding that "the Constitution" authorizes "special" legislation for the "problems of Indians," 417 U.S. 551-52, forecloses Plaintiffs' alternative argument that tribal classifications are subject to strict scrutiny as national-origin discrimination. Brackeen Br. 35-36. Otherwise, every statute and treaty treating Indians differently from non-Indians, or Tribes differently from one another, would be presumptively invalid. *Cf. Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 79-82, 85 (1977) (upholding statute distinguishing among Indians).

Mancari's rule correctly reflects the differing standards of the Fifth and Fourteenth Amendments. Given the federal government's paramount power, the Fifth Amendment *permits* Congress, unlike States, to distinguish based on citizenship. *See Hampton*, 426 U.S. at 100-04; *Matthews*, 426 U.S. at 84-87. Thus, "a citizenship requirement in the federal service" may be justified "even though an identical requirement may not be enforced by a State." *Hampton*, 426 U.S. at 101. The federal government for decades employed immigration quotas based on national origin and today uses a quota-based lottery. 8 U.S.C. §§1151(e), 1153(c)(1).

It is thus telling that Plaintiffs' lead cases concern States. *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); *Oyama v. California*, 332 U.S. 633, 640 (1948). Meanwhile, the decision at issue in *Korematsu*—to "forcibly relocat[e] U.S. citizens to concentration camps, *solely and explicitly on the basis of race*," *Trump*, 138 S. Ct. at 2423 (emphasis added)—is a far cry from Congress

upholding its trust duties by drawing tribal classifications the Constitution expressly authorizes.

C. If The Court Determines Strict Scrutiny Applies, It Should Remand.

If the Court determines strict scrutiny applies, it should remand. No Fifth Circuit opinion analyzed whether ICWA satisfies strict scrutiny. Pet. App. 277a (Duncan, J.) ("assum[ing] *arguendo*" rational-basis applied); *cf.* Pet. App. 363a (Haynes, J.) (opining without elaboration that ICWA's first two preferences satisfy strict scrutiny). This Court is one "of review, not of first view." *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022). Indeed, in district court, the United States requested that, if the court applied strict scrutiny, it allow for factual development. ROA.4034 n.12. The district court did not—but if this Court applies strict scrutiny, it should afford that opportunity.

III. ICWA Does Not Impermissibly Commandeer.

ICWA also comports with the anti-commandeering doctrine. Principally, ICWA "set[s] procedural and substantive standards for … child custody proceedings … in state court." *Holyfield*, 490 U.S. at 36. That is preemption, not commandeering—particularly because ICWA's requirements apply equally to private and state actors. ICWA also imposes record-keeping requirements on state courts. The Constitution did not prohibit such requirements in 1790, when Congress required state courts to maintain myriad records, and has not changed.

A. ICWA's Substantive And Procedural Requirements Do Not Commandeer.

1. ICWA Protects Private Rights Via Federal Standards.

a. When, as here, Congress validly legislates to create substantive rights, it may require state courts to follow federal law. That is preemption, which the Supremacy Clause expressly authorizes. This Court's anti-commandeering doctrine derives from a structural limitation: Congress may not "issue direct orders to [States'] governments." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). Congress may not "command[] state legislatures to enact or refrain from enacting state law," *id.* at 1478, nor "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 935 (1997).

Congress, however, can protect individuals by creating substantive and procedural rights. Under the Supremacy Clause, such legislation preempts contrary state law. *Murphy*, 138 S. Ct. at 1480. Congress routinely preempts state-law claims altogether. *E.g.*, *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347 (2000). Congress also routinely preempts state-law standards applying in state courts. *E.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008). Indeed, Congress has displaced state-law standards, substantive and procedural, in virtually every area. That includes family law, *supra* Part I.C, and Indian law. Congress long before ICWA set requirements for state courts appointing guardians

for Indian children,[51] mandated that certain tribal laws apply in state courts,[52] and modified statutes of limitations in suits involving tribal members, *see* §375.

b. ICWA grants rights to Indian children, parents, and Tribes, and preempts contrary state law, just like many federal statutes. ICWA ensures that Indian children have the right to remain with their families and communities unless certain conditions are met. And ICWA grants Indian families and Tribes rights to retain connections with their children to the greatest extent possible. That is why Congress referred to "the rights provided under this subchapter," §1921, and authorized Indian children, parents, and Tribes to enforce those rights, §1914. Specifically:

- The notice provision, §1912(a), gives Indian families and Tribes rights to know about child-welfare proceedings.
- The active-efforts and qualified-expert-witness provisions, §1912(d)-(f), protect the rights of Indian children and families to remain together, by requiring courts find that "active efforts" were made to protect the family and allowing removal only based on "clear and convincing evidence" supported by "qualified expert[s]." *Id.*
- If removal is warranted, ICWA's preferences, §1915(a)-(b), protect Indian children's rights to the placements Congress has determined

[51] 1867 Treaty with the Potawatomi, Art. VIII.

[52] *E.g.*, §233; *see* §1322(c); 28 U.S.C. §1360(c).

> "protect the[ir] best interests" and Tribes' interests in "stability and security," §1902.

c. Congress does not commandeer state courts by requiring them to apply and enforce rights ICWA creates. That "federal 'direction' … is mandated by the text of the Supremacy Clause" and implements rather than frustrates the Constitution's federalist structure. *New York v. United States*, 505 U.S. 144, 178-79 (1992). As Justice Scalia put it, "the Constitution was originally understood to permit imposition of an obligation on state court *judges* to enforce federal prescriptions." *Printz*, 521 U.S. at 907. Congress thus "may require state courts of 'adequate and appropriate' jurisdiction" to "'enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power,'" including by "declar[ing] federal law binding and enforceable in state courts." *Alden v. Maine*, 527 U.S. 706, 752 (1999) (quoting *Testa v. Katt*, 330 U.S. 386, 394 (1947), and *Printz*, 521 U.S. at 907). Congress has set federal standards for state courts to apply for over 200 years.[53] Indeed, in the Republic's first decade, the Indian Trade and Intercourse Act required state courts to hold bail proceedings for individuals detained by federal officials within Indian country and to "take proper bail if offered." Act of Mar. 3, 1799, ch. 46, §16, 1 Stat. 743. And thereafter, Congress required state courts to provide "notice" to the United States of certain suits involving

[53] *E.g.*, Act of Mar. 18, 1818, ch. 19, §§1-2, 3 Stat. 410; Act of Feb. 4, 1815, ch. 31 §8, 3 Stat. 195; Act of May 20, 1862, ch. 75, §§1-2, 12 Stat. 392.

Indians—among many mandates involving Indians. *Hellard*, 322 U.S. at 364; *supra* 78-79.

The *en banc* Fifth Circuit drew a distinction between state courts and state agencies, holding that certain ICWA provisions "validly preempt contrary state law to the extent they apply to state courts" but impermissibly commandeer as applied to "state agencies." Pet. App. 5a-6a; *see* Pet. App. 333a (Duncan, J.). But that is a distinction without a difference. ICWA imposes obligations on state agencies only in the sense that *all* rules of decision "demand action" and "impose duties" on those seeking relief. Pet. App. 295a, 308a (Duncan, J.). If state agencies want relief from state courts, agencies must satisfy federal-law standards. Such laws do not require state actors "to administer or enforce a federal regulatory program," *Printz*, 521 U.S. at 935, nor "command[]" state agencies "to enact or refrain from enacting" any laws or regulations, *Murphy*, 138 S. Ct. at 1478. Indeed, this Court has repeatedly recognized that "a State wishing to engage in certain activity" often "must take administrative and sometimes legislative action to comply with federal standards regulating that activity"—which "is a commonplace that presents no constitutional defect." *Reno v. Condon*, 528 U.S. 141, 150-151 (2000) (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)).

The conclusion that ICWA does not commandeer is unchanged by the fact that some provisions are phrased as requirements on "part[ies]" seeking relief. *E.g.*, §1912(d). Even leaving aside that those "parties" are often private, *see infra* 84-85, this phrasing simply reflects that ICWA operates in state-court

adjudications. What matters is that these provisions protect private rights. *Murphy* recognized as much, explaining that "it is a mistake to be confused by the way in which a preemption provision is phrased." 138 S. Ct. at 1480. The question is how a provision "operates." *Id.* "[I]f we look beyond the phrasing employed in [ICWA], it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities (*i.e.*, [Indian children and parents]) a federal right … subject only to certain (federal) constraints." *Id.*

2. Plaintiffs' Arguments Lack Merit.

Plaintiffs' arguments are meritless.

a. Plaintiffs principally argue that requiring state judges to apply federal standards circumvents the anti-commandeering doctrine. Brackeen Br. 62, 66-67; Texas Br. 67. No member of the *en banc* Fifth Circuit agreed. For good reason. When ICWA establishes federal standards that preempt conflicting state standards in state courts, it does the one thing Congress can most obviously do under the Supremacy Clause. Texas's claim that "ICWA is unlike any other statute that the Court has upheld against a commandeering challenge," Texas Br. 64, is true only in the sense that this Court has never heard an anti-commandeering challenge that so flouts the Supremacy Clause's text. Indeed, whenever Congress creates federal rights, *Testa v. Katt* requires state courts to apply those federal rights and in practice imposes a host of procedural demands on state courts, including filing, processing, and hearing the suit. 330 U.S. 386, 394 (1947).

The Individual Plaintiffs contend that, because ICWA applies in court, it does not actually provide individual rights in the "real world." Brackeen Br. 69. But by determining whether children will remain with their families, and if not, where they will go, ICWA protects "perhaps the oldest"—and most real-world—"of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65. That ICWA does so by setting standards in state court, *supra* 79-80, is yet another false distinction. Just as a federal law might provide an immunity to suit that operates via state courts, *cf.* Act of May 28, 1798, ch. 47, §14, 1 Stat. 558, or protect a property right by extending a statute of limitations, *Batesville Inst. v. Kauffman*, 85 U.S. 151, 155 (1873), ICWA provides Indian children and their parents with rights via standards in state courts. *Accord, e.g.*, Act of Mar. 8, 1918, Pub. L. No. 65-103, ch. 20, §200, 40 Stat. 440 (granting rights to servicemembers to redeem property and directing state courts to follow certain standards and procedures).

b. Plaintiffs fare no better arguing that state agencies in practice incur costs to comply with ICWA—for example, to satisfy its "active efforts" standards. Texas Br. 62-64. Under this Court's anti-commandeering cases, the measure of a federal law is how it operates. And as explained above, ICWA's provisions simply provide that, if Texas wishes relief governed by federal law, it must satisfy federal-law standards. Congress does not impermissibly commandeer by enacting federal standards that, as a practical matter, "require time and effort on the part of

state employees" to account for rights Congress has created. *Condon*, 528 U.S. at 150.

If practicalities mattered, moreover, the key point is this: Congress undoubtedly could have preempted state law entirely, substituted federal causes of action, and compelled state courts to hear those causes. *Testa*, 330 U.S. at 394. And if state agencies desired relief governed by these exclusive federal causes of action, they would have had to satisfy the standards Congress set (burdensome or not). Congress does not violate the anti-commandeering doctrine by preserving state-law causes of action to the greatest extent consistent with federal law.

3. ICWA Does Not Commandeer Because It Applies Evenhandedly.

Even if, counterfactually, ICWA directly regulated state actors, it would be constitutional. ICWA applies to state and private parties alike.

The "anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. That is because the doctrine's rationale—that Congress may not directly regulate States as States, *New York*, 505 U.S. at 162-63—does not hold when rules apply evenhandedly. Congress thus could prohibit States from disclosing information in drivers' license applications, because that "law applied equally to state and private actors," *Murphy*, 138 S. Ct. at 1479, and could limit States' issuance of bearer bonds, because "the law would simply treat state bonds the same as private bonds," *id.*at 1478; *see Condon*, 529 U.S.

at 150-51; *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988).

So, too, here. For example, "any party" seeking to terminate parental rights or effect a foster-care placement must show "active efforts" were made. §1912(d)-(e). Similarly, the qualified-expert-witness provisions, evidentiary standards, and placement preferences apply to any covered proceeding—whether or not a State is involved. §§1912(e)-(f), 1915(a)-(b). ICWA thus "applies equally to state and private actors." *Murphy*, 138 S. Ct. at 1478-79.

ICWA's requirements apply to private parties not only in theory but in practice. Private parties routinely bring actions to terminate parental rights—for example, when stepparents seek to adopt—and state courts routinely apply ICWA's standards to those proceedings. Indeed, this Court's own cases interpreting ICWA have involved individual and tribal litigants, not States. *See Adoptive Couple*, 570 U.S. at 643; *Holyfield*, 490 U.S. at 38. Courts often require private litigants to show "active efforts,"[54] to present testimony by "qualified expert witnesses,"[55] and so on.

Judge Duncan assumed that States *more often* find themselves subject to ICWA. But even accepting that dubious assumption (which no record evidence

---

[54] *E.g.*, *In re Guardianship of Eliza W.*, 938 N.W.2d 307, 315 (Neb. 2020); *Matter of Adoption of T.A.W.*, 383 P.3d at 502; *D.J. v. P.C.*, 36 P.3d 663, 673 (Alaska 2001).

[55] *E.g.*, *Matter of Adoption of H.M.O.*, 962 P.2d 1191, 1195-96 (Mont. 1998); *Matter of Baby Boy Doe*, 902 P.2d at 484-85.

supports), the Tenth Amendment is not a nose-counting exercise. In *Condon*, private parties were subject to the Driver's Privacy Protection Act only if they obtained driver's license information from state departments of motor vehicles and resold it. 528 U.S. at 146. This Court, however, correctly deemed it irrelevant that the statute fell more directly, or more often, on States. What mattered was that the Act applied evenhandedly. *Id.* at 151. The same is true here.

B. Recordkeeping Requirements Are Not Commandeering.

ICWA contains a few provisions that are not simply procedural and substantive standards. The lower courts wrongly concluded that these provisions—ICWA's recordkeeping provision, §1915(e), and record-transmittal provision, §1951(a)—violate anti-commandeering principles. Those provisions are constitutional because they merely impose ministerial duties on state courts—ministerial duties akin to those imposed by Congress since the Republic's earliest days. In assessing whether laws impermissibly commandeer, this Court weights "historical understanding and practice." *Printz*, 521 U.S. at 905. Here, historical understanding and practice are clear.

The Founding-era Congresses routinely imposed obligations on state courts to perform record-keeping and reporting tasks. For example, the first Congresses commanded state courts to "record applications for citizenship," transmit "naturalization records to the Secretary of State," "resolv[e] controversies between a captain and the crew of his ship" and "report on" the result, and "tak[e] proof of the claims of Canadian

refugees." *Printz*, 521 U.S. at 905-07 (cataloging Founding-era statutes imposing recordkeeping, reporting, and other obligations on state judges); *see* Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103; Act of June 18, 1798, ch. 54, §2, 1 Stat. 566; Act of July 20, 1790, ch. 29, §3, 1 Stat. 131; Act of Apr. 7, 1798, ch. 26, §3, 1 Stat. 547. Such contemporaneous constructions provide "weighty evidence of the Constitution's meaning." *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986); *see also Printz*, 521 U.S. at 905. More recently, and closely on point, Congress has required state probate courts adjudicating Indian-law disputes to receive reports and make them "public records … subject to the inspection and examination of the public,"[56] and required state agencies to maintain records regarding "[t]itle to records of Indian tribes," §199a.

ICWA thus does just what 230 years of practice approves. The record-transmittal requirement, §1951(a), simply requires a "[s]tate court entering a final decree or order" to "provide the Secretary [of the Interior] with" information. In fact, whenever this Court calls for the record from lower courts, it imposes a similar record-transmittal requirement. The recordkeeping provision, §1915(e), just requires maintenance of "record[s] of each such placement, under State law, of an Indian child." §1915(e). And while the recordkeeping provision does not specify which "State" entity must maintain records, context shows that states courts are the target: The applicable records are court records, and this Court has thus recognized that

---

[56] Act of May 27, 1908, ch. 199, §6, 35 Stat. 312.

"[s]ection 1915(e) … requires *the court* to maintain records" of ICWA placements. *Holyfield*, 490 U.S. at 40 n.13 (emphasis added); *see* 25 C.F.R. §23.141(b) (identifying parts of court record that must be maintained).

It is irrelevant that some States use state agencies for compliance or that ICWA's regulations permit as much. 25 C.F.R. §23.141(c); *see* Pet. App. 295a & n.108. Providing an extra option does not commandeer. Because Congress may impose these sorts of ministerial duties on courts, States lose no sovereignty when they choose to employ executive agencies. *See Murphy*, 138 S. Ct. at 1479 (noting that the law in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), was constitutional because it "offered States [a] choice" to implement a federal program or yield to preemption).[57]

To dodge this mountain of historical evidence, Judge Duncan below averred that ICWA "demand[s] more than 'provid[ing] information.'" Pet. App. 294a. Not so. Judge Duncan's objection appears to be that ICWA requires state courts to maintain and provide information "evidencing the efforts to comply with"

---

[57] Even if ICWA's records provisions applied directly to executive officials, they would be constitutional. *Printz* declined to address the constitutionality of laws "requir[ing] only the provision of information to the Federal Government," even when applicable to "executive" officials." 521 U.S. at 917-18; *see id.* at 936 (O'Connor, J., concurring). Given *Printz's* reservation, however, the avoidance canon supports construing the recordkeeping provisions as addressed to courts. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

ICWA's preferences. §1915(e); *see* Pet. App. 294a. But a requirement to provide information about these "efforts" remains a requirement to provide information.

C. Alternatively, ICWA Does Not Commandeer Because It Is A Proper Exercise Of Congress's Spending-Clause Authority.

Even if ICWA concerned state agencies directly, it would also be valid as an exercise of Congress's Spending Clause power due to ICWA's relationship with the Social Security Act. Title IV-B of the Social Security Act creates numerous requirements for States to create child-welfare plans as a funding condition. One such requirement is a plan showing compliance with ICWA. 42 U.S.C. §622(b)(9). Congress may attach conditions to federal funds (absent impermissible coercion). *E.g.*, *South Dakota v. Dole*, 483 U.S. 203 (1987). And here, to comply with Title IV-B, Texas's Department of Family and Protective Services publishes a lengthy plan outlining how it complies with ICWA. Texas Dep't of Health & Human Services, *2015-2019 Title IV-B Child and Family Services Plan* 276-85, https://bit.ly/3JmUxi8. Texas does so not because ICWA commandeers it, but because Texas wishes to receive federal funds. Together, ICWA and Title IV-B are garden-variety "program[s] of cooperative federalism." *New York*, 505 U.S. at 167.

To find ICWA's provisions unconstitutional commandeering, this Court would need to find that the federal grant conditions of Title IV-B of the Social Security Act are invalid uses of Congress's Spending Clause power. That ruling would invalidate not just ICWA but many federal laws concerning child welfare,

which are generally codified as amendments to the Social Security Act.

IV. Texas's Nondelegation Arguments Fail.

The Fifth Circuit correctly rejected Texas's nondelegation challenge to §1915(c), which allows Tribes to "establish a different order of preference by resolution." §1915(c); *see* Pet. App. 179a.[58]

Texas's nondelegation argument fails, first, because §1915(c) does not delegate Congress's power: It prospectively incorporates tribal law. *United States v. Sharpnack*, 355 U.S. 286 (1958), holds that the nondelegation doctrine has nothing to say when Congress incorporates another sovereign's standards as federal law, as with the Assimilative Crimes Act's prospective incorporation of state law to govern in federal enclaves. *Id.* at 294. ICWA likewise simply incorporates preferences Tribes establish pursuant to their sovereign powers.

Mazurie confirms that, to the extent ICWA constitutes a delegation, it raises no nondelegation problems. *Mazurie* considered a nondelegation challenge to 18 U.S.C. §1161, which authorizes Tribes to regulate liquor sales by non-Indians in Indian country pursuant to "an ordinance duly adopted by the tribe." 419 U.S. at 547 n.4. The Court accepted the parties' shared premise that this provision indeed constituted a

---

[58] Plaintiffs lack standing to challenge §1915(c), as the Tribal Defendants explained in their cert-stage briefs and as the Tribal Defendants understand the Federal Defendants will show in their merits brief.

"delegation" (rather than the prospective incorporation of another sovereign's laws). And the Court assumed *arguendo* that the Tribe did not have "independent authority … sufficient … to impose" these liquor regulations without Congress's authorization. *Id.* at 557.

Mazurie held, nonetheless, that §1161 posed no nondelegation problem. It explained that nondelegation limitations "are … less stringent … where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id.* at 556-57. And Tribes, *Mazurie* emphasized, "are unique aggregations possessing attributes of sovereignty over both their members and their territory," including "their internal and social relations." *Id.* at 557. This retained sovereignty, the Court held, "is quite sufficient" to avoid nondelegation problems. So, too, here.

Texas avers that Tribes do not have independent authority over "nonmembers … who seek to foster adopt Indian children in state proceedings." Texas Br. 72. But in *Sharpnack*, States concededly had no authority to legislate in federal enclaves. And *Mazurie* found it did not need to decide whether Tribes had authority to regulate nonmembers on fee land. 419 U.S. at 556. It sufficed that the regulations related to sovereign authority that States and Tribes *could* exercise. ICWA has a similar nexus to Tribes' authority over their "members" and "social relations." *Id.* at 557.

CONCLUSION

ICWA should be upheld. The judgment below should be affirmed in part and reversed in part.

Respectfully submitted,

KATHRYN E. FORT
MICHIGAN STATE UNIV.
COLLEGE OF LAW,
INDIAN LAW CLINIC
648 N. Shaw Lane
East Lansing, MI 48823

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th St.
Chicago, IL 60637

IAN HEATH GERSHENGORN
Counsel of Record
KEITH M. HARPER
MATTHEW S. HELLMAN
ZACHARY C. SCHAUF
LEONARD R. POWELL
VICTORIA HALL-PALERM
KEVIN J. KENNEDY
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

Counsel for Cherokee Nation, Oneida Nation, and Morongo Band of Mission Indians

ADAM H. CHARNES
KILPATRICK TOWNSEND &
STOCKTON LLP
2001 ROSS AVE., SUITE 4400
DALLAS, TX 75201

ROB ROY SMITH
KILPATRICK TOWNSEND &
STOCKTON LLP
1420 FIFTH AVE., SUITE 3700
SEATTLE, WA 98101

Counsel for Quinault Indian Nation

JEFFREY L. FISHER
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

EPHRAIM A. MCDOWELL
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006

DOREEN N. MCPAUL
ATTORNEY GENERAL
PAUL SPRUHAN
ASSISTANT ATTORNEY
GENERAL
LOUIS MALLETTE
COLLEEN SILVERSMITH
SAGE METOXEN
AIDAN GRAYBILL
NAVAJO NATION
DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, AZ 86515

Counsel for Navajo Nation