No.

In the Supreme Court of the United States

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

v.

CHAD EVERET BRACKEEN, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.*, "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. 1902. The provisions of 25 U.S.C. 1912 establish minimum federal standards for the removal of Indian children from their families, while 25 U.S.C. 1915(a) and (b) establish default preferences for the placement of such children in adoptive or foster homes. The statute also contains several recordkeeping provisions. See 25 U.S.C. 1915(e), 1951(a).

Three States and seven individuals brought suit, asserting that these and other ICWA provisions are facially unconstitutional. The district court agreed and granted declaratory relief. The en banc court of appeals rejected most of the plaintiffs' challenges, but affirmed, in some respects by an equally divided vote, the judgment declaring the foregoing provisions invalid. The questions presented are:

1. Whether various provisions of ICWA—namely, the minimum standards of Section 1912(a), (d), (e), and (f); the placement-preference provisions of Section 1915(a) and (b); and the recordkeeping provisions of Sections 1915(e) and 1951(a)—violate the anticommandeering doctrine of the Tenth Amendment.

2. Whether the individual plaintiffs have Article III standing to challenge ICWA's placement preferences for "other Indian families," 25 U.S.C. 1915(a)(3), and for "Indian foster home[s]," 25 U.S.C. 1915(b)(iii).

3. Whether Section 1915(a)(3) and (b)(iii) are rationally related to legitimate governmental interests and therefore consistent with equal protection.

PARTIES TO THE PROCEEDING

Petitioners Deb Haaland, in her official capacity as Secretary of the United States Department of the Interior; Bryan Newland, in his official capacity as Assistant Secretary–Indian Affairs; Bureau of Indian Affairs; United States Department of the Interior; United States of America; Xavier Becerra, in his official capacity as Secretary of the United States Department of Health and Human Services; and United States Department of Health and Human Services were defendants in the district court and appellants in the court of appeals.*

Respondents Chad Everet Brackeen; Jennifer Kay Brackeen; Danielle Clifford; Jason Clifford; Altagracia Socorro Hernandez; Frank Nicholas Libretti; Heather Lynn Libretti; State of Texas; State of Louisiana; and State of Indiana were plaintiffs in the district court and appellees in the court of appeals. Respondents Cherokee Nation; Oneida Nation; Quinault Indian Nation; and Morongo Band of Mission Indians were intervenors-defendants in the district court and appellants in the court of appeals. Respondent Navajo Nation was intervenor in the court of appeals.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Brackeen v. *Zinke*, No. 17-cv-868 (Oct. 4, 2018)

United States Court of Appeals (5th Cir.):

Brackeen v. *Haaland*, No. 18-11479 (Apr. 6, 2020)

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* Bryan Newland is substituted for Darryl LaCounte, former Acting Assistant Secretary–Indian Affairs. See Sup. Ct. R. 35.3.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Secretary of the Interior, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-396a) is reported at 994 F.3d 249. The opinion of a panel of the court of appeals (Pet. App. 397a-462a) is reported at 937 F.3d 406. The order of the district court granting in part and denying in part the plaintiffs' motions for summary judgment (Pet. App. 464a-522a) is reported at 338 F. Supp. 3d 514. The order of the district court denying the defendants' motions to dismiss (Pet. App. 523a-571a) is not published in the Federal Supplement but is available at 2018 WL 10561971.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2021. The effect of this Court's orders on March 19, 2020, and July 19, 2021, was to extend the deadline for filing a petition for a writ of certiorari in this case to September 3, 2021, 150 days from the date of the lower-court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. Pet. App. 572a-599a.

STATEMENT

A. The Indian Child Welfare Act

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.*, "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 642 (2013) (citation omitted); see *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32-35 (1989) (discussing congressional hearings). To "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. 1902. Those standards preempt contrary state-law standards, except to

the extent that state law "provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child." 25 U.S.C. 1921; see 25 U.S.C. 1903(4) (defining "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe").

Three sets of ICWA's provisions are relevant here. The first set, found in 25 U.S.C. 1912, governs the removal of Indian children from their families. In particular, Section 1912 governs two types of "involuntary" proceedings in state court, *ibid.*: "action[s]" to remove Indian children from their families for placement in foster homes, 25 U.S.C. 1903(1)(i); and "action[s] resulting in the termination of the parent-child relationship," 25 U.S.C. 1903(1)(ii). Section 1912(a) requires "the party seeking the foster care placement of, or termination of parental rights to, an Indian child" to "notify" the child's parent or Indian custodian and the child's tribe of the pending proceedings. 25 U.S.C. 1912(a). Section 1912(d) further requires "[a]ny party seeking to effect a foster care placement" or "termination of parental rights" to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. 1912(d). And Section 1912(e) and (f) provide that no foster-care placement or termination of parental rights "may be ordered * * * in the absence of a determination," supported by "testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

25 U.S.C. 1912(e) (requiring "clear and convincing evidence" for a foster-care placement); see 25 U.S.C. 1912(f) (requiring "evidence beyond a reasonable doubt" for the termination of parental rights).

The second set of provisions, found in 25 U.S.C. 1915, governs the placement of Indian children in foster or adoptive homes, once the decision to remove them from their families has been made. Section 1915(a) requires that "[i]n any adoptive placement," "preference" be given, "in the absence of good cause to the contrary," to placement with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. 1915(a). Section 1915(b) similarly requires that, "[i]n any foster care or preadoptive placement," "preference" be given, "in the absence of good cause to the contrary," to placement with "(i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." 25 U.S.C. 1915(b).

The third set of provisions governs recordkeeping. Section 1915(e) requires "the State" to maintain "[a] record of each [adoptive or foster-care] placement, under State law, of an Indian child," "evidencing the efforts to comply with the order of preference specified in [Section 1915]." 25 U.S.C. 1915(e). Section 1915(e) further requires that "[s]uch record * * * be made available at any time upon the request of the Secretary [of the Interior] or the Indian child's tribe." *Ibid.* Section 1951(a) provides that "[a]ny State court entering a final decree

or order in any Indian child adoptive placement * * * shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show" the child's name and tribal affiliation, the name and addresses of the biological parents, the names and addresses of the adoptive parents, and the identity of any agency having relevant files. 25 U.S.C. 1951(a).

ICWA authorizes the Secretary of the Interior to "promulgate such rules and regulations as may be necessary to carry out the provisions of [ICWA]." 25 U.S.C. 1952. Pursuant to that authority, the Secretary promulgated non-binding guidance in 1979. 44 Fed. Reg. 67,584 (Nov. 26, 1979). After state courts "interpreted the Act in different, and sometimes conflicting, ways," the Secretary promulgated a rule in 2016. 81 Fed. Reg. 38,778, 38,782 (June 14, 2016) (2016 Rule). The 2016 Rule provides, among other things, that "[t]he party seeking departure from the placement preferences [in Section 1915(a) and (b)] should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." 25 C.F.R. 23.132(b).

B. Facts And Procedural History

1. In March 2018, three States and seven individuals filed the operative complaint in this case against the federal government in federal district court. See D. Ct. Doc. 35 (Mar. 22, 2018) (Second Am. Compl.). The state plaintiffs are Texas, Louisiana, and Indiana. *Id.* ¶¶ 23-25. The individual plaintiffs are three non-Indian couples—the Brackeens, the Librettis, and the Cliffords—and Altagracia Socorro Hernandez, the biological mother of an Indian child, Baby O., whom the Librettis eventually adopted. *Id.* ¶¶ 19-22; Pet. App. 49a (opinion of Dennis, J.).

In their complaint, the plaintiffs challenged various provisions of ICWA as unconstitutional on their face, alleging violations of Article I, the anticommandeering doctrine of the Tenth Amendment, the equal protection component of the Fifth Amendment, substantive due process, and the non-delegation doctrine. Second Am. Compl. ¶¶ 18, 266-338, 350-376. The plaintiffs also challenged the 2016 Rule as unconstitutional, contrary to the statute, and arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Second Am. Compl. ¶¶ 247-265, 339-349. The plaintiffs sought declaratory and injunctive relief. *Id.* at 83-84.

Four Indian tribes—the Cherokee Nation, the Oneida Nation, the Quinault Indian Nation, and the Morongo Band of Mission Indians—intervened as defendants. D. Ct. Doc. 45 (Mar. 28, 2018). The government and the tribes moved to dismiss the complaint for lack of Article III standing, see Pet. App. 523a, and the plaintiffs moved for summary judgment, see *id.* at 465a.

The district court denied the motions to dismiss, upholding the plaintiffs' standing to bring each of their claims. Pet. App. 549a-564a. In addition, the court granted summary judgment to the plaintiffs on all of their claims except their substantive due process claims, which the court rejected on the merits. *Id.* at 464a-522a. The court then entered final judgment, declaring various provisions of ICWA and the 2016 Rule unconstitutional. *Id.* at 463a.

2. The government and the tribes appealed, and the court of appeals granted a stay pending appeal. C.A. Order 1 (Dec. 3, 2018). The court also permitted the Navajo Nation to intervene in support of the appellants. C.A. Order 2 (Jan. 25, 2019).

A divided panel of the court of appeals affirmed the district court's judgment that the plaintiffs have Article III standing, but reversed the district court's grant of summary judgment and rendered judgment in the government's favor on all claims. Pet. App. 398a-451a. Judge Owen concurred in part and dissented in part. *Id.* at 452a-462a. Although she agreed with the majority's rejection of most of the plaintiffs' claims, she expressed the view that several provisions of ICWA violate the Tenth Amendment "because they direct state officers or agents to administer federal law." *Id.* at 452a; see *id.* at 461a.

3. The court of appeals granted rehearing en banc and issued a fractured decision affirming in part and reversing in part. Pet. App. 1a-396a.

a. The en banc court of appeals affirmed the district court's judgment that at least one plaintiff had Article III standing to bring each of the plaintiffs' claims. Pet. App. 3a; *id.* at 59a-66a (opinion of Dennis, J.); *id.* at 212a-221a (opinion of Duncan, J.); *id.* at 343a-348a (Owen, C.J., concurring in part, dissenting in part); *id.* at 363a (Haynes, J., concurring). On appeal, the government did not challenge the state plaintiffs' standing to bring their Tenth Amendment claims. The government did argue, however, that no plaintiff had standing to challenge ICWA on equal protection grounds. Gov't C.A. En Banc Br. 14-19.

As relevant here, a majority of the en banc court of appeals held that at least some of the individual plaintiffs had standing to challenge Section 1915(a) and (b)'s placement preferences on equal protection grounds. Pet. App. 3a. Judge Duncan, joined by seven other judges, concluded that "ICWA's unequal treatment of non-Indians" had "burdened, in various ways," the individual

plaintiffs' adoptions, *id.* at 216a; that "[t]hose unequal burdens are injuries-in-fact for equal protection purposes," *id.* at 218a; and that a favorable decision would redress the individual plaintiffs' injuries by "mak[ing] overcoming ICWA's preferences easier," *id.* at 220a. Judge Dennis, joined by two other judges, concluded that the Brackeens had suffered "increased regulatory burdens" from application of Section 1915(a)'s placement preferences in Texas state-court proceedings to adopt an Indian child, Y.R.J., *id.* at 59a; that the Cliffords had suffered "injury" from application of Section 1915(b)'s placement preferences in Minnesota state court, *id.* at 62a; and that even though the Texas and Minnesota state courts would not be bound by a decision of the Fifth Circuit, the possibility that they would follow such a decision was sufficient to establish redressability, *id.* at 59a-60a, 62a-63a.

Judge Wiener dissented on the issue of whether the individual plaintiffs had standing to challenge Section 1915(a) and (b). Pet. App. 353a-362a. In his view, the Brackeens lacked standing to challenge Section 1915's placement preferences because the Brackeens "did not move to supplement the record with information relating to [their] attempted adoption of Y.R.J. until" after the district court had already entered final judgment, *id.* at 359a, and the Cliffords likewise lacked standing to challenge those preferences because "the Cliffords could have appealed their case to the Minnesota Supreme Court but did not do so," *id.* at 353a.

Judge Costa, joined by four other judges (including Judge Wiener), also dissented on this issue. Pet. App. 370a-384a. He explained that because a state court could simply decline to follow any decision of the Fifth Circuit, the individual plaintiffs could not satisfy the

redressability requirement and no plaintiff had standing to challenge ICWA on equal protection grounds. *Id.* at 373a & n.2.

b. On the merits of the plaintiffs' Tenth Amendment claims, the en banc court of appeals held that many of ICWA's provisions validly preempt contrary state law and present no anticommandeering problem. See Pet. App. 5a, 305a-307a, 309a-313a, 316a. The court observed that, in various places, "ICWA enacts substantive child-custody standards applicable in state child-custody proceedings." *Id.* at 311a. "For instance," the court explained, "ICWA requires courts to place Indian children with certain persons (§ 1915), and also requires courts to make specific findings under a heightened standard of proof before an Indian child may be placed in a foster home or his parents' rights terminated (§ 1912(e) and (f))." *Ibid.* The court held that, "[t]o the extent those substantive standards compel state *courts* (as opposed to state *agencies*)," "they are valid preemption provisions." *Ibid.*

A majority of the en banc court of appeals, however, held that, to the extent that Section 1912(e) and (f) "require state agencies and officials to bear the cost and burden of adducing expert testimony to justify placement of Indian children in foster care, or to terminate parental rights," they impermissibly "commandeer states." Pet. App. 289a. A majority also held that, to the extent that Section 1912(d) requires state agencies to engage in "'active efforts'" to provide remedial services to Indian families "as a condition to" the placement of Indian children in foster care or the termination of parental rights, *id.* at 286a (citation omitted), it likewise "commandeers states" in violation of the Tenth Amendment, *id.* at 287a. Judge Dennis, joined by five

other judges, disagreed, explaining that because Section 1912(d), (e), and (f) apply equally to "any private party seeking a foster placement" or "termination of parental rights," *id.* at 130a, "any burden [they] place[] on state actors is incidental and falls evenhandedly on private parties participating in the same regulated activity," *id.* at 138a.

In addition, an equally divided en banc court of appeals affirmed the district court's judgment that Section 1912(a) violates the anticommandeering doctrine to the extent that it requires state agencies to provide notice of a child-custody proceeding in state court to the parent or Indian custodian and the Indian child's tribe. Pet. App. 5a; see *id.* at 294a-296a (opinion of Duncan, J.). Judge Duncan, joined by seven other judges, expressed the view that "the anti-commandeering doctrine forbids Congress from imposing [such] duties on state agencies." *Id.* at 296a. Eight other judges disagreed. See *id.* at 130a (opinion of Dennis, J.); *id.* at 364a (Haynes, J., concurring). In their view, Section 1912(a) raises no anticommandeering concern because it "evenhandedly regulate[s] an activity in which both States and private actors engage." *Id.* at 127a (opinion of Dennis, J.) (citation omitted).

An equally divided en banc court of appeals also affirmed the district court's judgment that Section 1915(a) and (b) violate the anticommandeering doctrine "to the extent they direct action by state agencies and officials." Pet. App. 4a-5a. Judge Duncan, joined by seven other judges, concluded that Section 1915(a) and (b) "appear to independently demand efforts by state agencies and officials" to "'identify and assist'" individuals entitled to preferred placements. *Id.* at 290a (citation omitted). In Judge Duncan's view, to the extent

that Section 1915(a) and (b) "require [such] efforts by state agencies and officials," they "violate[] the anti-commandeering doctrine." *Id.* at 292a; see *id.* at 351a (Owen, C.J., concurring in part, dissenting in part). Eight other judges read Section 1915(a) and (b) differently, to "merely require the body adjudicating an Indian child custody proceeding to apply the preferences contained therein in deciding contested claims unless there is good cause not to." *Id.* at 134a n.46 (opinion of Dennis, J.); see *id.* at 364a (Haynes, J., concurring). In their view, Judge Duncan's "interpretation of § 1915(a) & (b) as separately directing state administrative action" was "not only plainly unreasonable given the text of the statute, but also contrary to settled canons of statutory construction," including the canon of constitutional avoidance. *Id.* at 135a n.46 (opinion of Dennis, J.).

As for ICWA's recordkeeping provisions, a majority of the en banc court of appeals held that Section 1915(e) violates the anticommandeering doctrine. Pet. App. 292a-294a. The majority concluded that, by "requir[ing] 'the State' to 'maintain[] . . . [a] record' of any Indian child placements under state law," *id.* at 292a (citation omitted; second and third sets of brackets in original), Section 1915(e) "co-opt[s]" a State's agencies or courts "into administering a federal program," *id.* at 294a n.108. Judge Dennis, joined by six other judges, disagreed, explaining that because federal laws have "placed specific recordkeeping and sharing requirements on state courts" since the Founding, such laws are consistent with the original understanding of the Supremacy Clause and the Tenth Amendment. *Id.* at 114a.

An equally divided en banc court of appeals likewise affirmed the district court's judgment that Section 1951(a) violates the anticommandeering doctrine. Pet.

App. 5a. Judge Duncan, joined by seven other judges, expressed the view that, by "requir[ing] state courts to provide the Secretary with a copy of an Indian child's final adoption decree, 'together with . . . other information,'" *id.* at 313a (citation omitted), Section 1951(a) "imposes an extensive recordkeeping obligation directly on state courts and agencies" and "is not a valid preemption provision," *id.* at 315a. In contrast, eight other judges took the view that requiring state courts to provide information to the federal government is consistent with the original understanding of the Constitution. See *id.* at 116a-117a (opinion of Dennis, J.); *id.* at 364a (Haynes, J., concurring).

c. On the merits of the plaintiffs' equal protection claims, a majority of the en banc court of appeals held that ICWA's Indian-based classifications are political, not racial, classifications and are thus subject to rational-basis review. See Pet. App. 142a; *id.* at 351a (Owen, C.J., concurring in part, dissenting in part). The majority then upheld the constitutionality of ICWA's definition of "Indian child," finding it to be "rationally linked to the trust relationship between the tribes and the federal government, as well as to furthering tribal sovereignty and self-government." *Id.* at 164a; see *id.* at 3a-4a.

An equally divided en banc court of appeals, however, affirmed the district court's judgment that Section 1915(a)(3)'s third-ranked preference for adoptive placement, which is for "other Indian families," and Section 1915(b)(iii)'s third-ranked preference for foster-care placement, which is for licensed "Indian foster home[s]," violate equal protection. Pet. App. 4a (citations omitted). Judge Duncan, joined by seven other judges, concluded that placing an Indian child with Indian families or homes of "a *different* Indian tribe," *id.* at 277a, "does

nothing to further ICWA's stated aim of ensuring that Indian children are linked to their [own] tribe," *id.* at 278a; see *id.* at 363a (Haynes, J., concurring). In contrast, Judge Dennis, joined by seven other judges, found it "rational to think that ensuring that an Indian child is raised in a household that respects Indian values and traditions makes it more likely that the child will eventually join an Indian tribe—thus 'promot[ing] the stability and security of Indian tribes.'" *Id.* at 163a (quoting 25 U.S.C. 1902) (brackets in original); see *id.* at 351a (Owen, C.J., concurring in part, dissenting in part). Judge Dennis also reasoned that, because "many contemporary tribes descended from larger historical bands and continue to share close relationships and linguistic, cultural, and religious traditions," "placing a child with another Indian family could conceivably further the interest in maintaining the child's ties with his or her tribe or culture." *Id.* at 163a-164a.

d. Rejecting the plaintiffs' remaining constitutional claims, a majority of the en banc court of appeals held that, "as a general proposition, Congress had the authority to enact ICWA under Article I." Pet. App. 3a. A majority likewise held that 25 U.S.C. 1915(c), "which permits Indian tribes to establish an order of adoptive and foster preferences that is different from the order set forth in § 1915(a) and (b), does not violate the nondelegation doctrine." Pet. App. 6a. With respect to the 2016 Rule, a majority deemed invalid portions of the rule that implement certain statutory provisions that the court held "unconstitutional." *Ibid.* In addition, a majority held that the Secretary's decision to promulgate a "binding" rule did not violate the APA, while a different majority held that the rule's provision regarding the burden of proof for demonstrating "good cause"

for departing from the placement preferences under Section 1915 is contrary to ICWA. *Id.* at 6a & nn.12, 14.

REASONS FOR GRANTING THE PETITION

Congress "has assumed the responsibility for the protection and preservation of Indian tribes and their resources." 25 U.S.C. 1901(2). "Recognizing the special relationship between the United States and the Indian tribes and their members," 25 U.S.C. 1901, Congress enacted ICWA forty years ago "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," 25 U.S.C. 1902. ICWA's provisions are routinely applied in state courts across the country, and state courts have consistently rejected constitutional challenges to the statute.

The courts below nevertheless declared unconstitutional various provisions of ICWA as violations of the anticommandeering doctrine. They also declared unconstitutional two of ICWA's placement preferences as violations of equal protection. Those decisions are wrong, and this Court should follow its usual course of granting certiorari when a lower court has invalidated an Act of Congress. Moreover, because a federal court lacks jurisdiction to declare a statute unconstitutional when no plaintiff has Article III standing to challenge it, the Court should also grant certiorari to correct the lower courts' erroneous holding that the individual plaintiffs had standing to challenge the two placement preferences invalidated below.[1]

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[1] The government does not seek review of the en banc majority's holding that 25 C.F.R. 23.132(b)—which provides that a party "should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences"—is contrary to the statute. See Pet. App. 6a. An en banc majority, however, "also h[e]ld[] that—consistently with the en banc court's

A. The Decisions Below Are Wrong

Review is warranted because the decisions below are wrong. Those decisions erred in declaring various provisions of ICWA unconstitutional and in even reaching the merits of the plaintiffs' equal protection challenge to Section 1915(a)(3) and (b)(iii).

1. The relevant provisions of ICWA do not violate the anticommandeering doctrine

The decisions below declared unconstitutional various provisions of ICWA as violations of the anticommandeering doctrine. Pet. App. 4a-5a. Under a straightforward application of this Court's precedents, however, all of those provisions are constitutional.

a. In exercising the powers conferred on it by the Constitution, Congress may not "issue direct orders to the governments of the States." *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). "The anticommandeering doctrine simply represents the recognition of this limit on congressional authority." *Ibid.* Thus, Congress may not "command[] state legislatures to enact or refrain from enacting state law." *Id.* at 1478. Nor may Congress "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). But Congress does not violate the anticommandeering doctrine when it enacts a law that "imposes restrictions or confers rights on private actors," *Murphy*, 138 S. Ct. at 1480,

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holding that §§ 1912(d), 1912(e), and 1915(e) commandeer states—the [2016] Rule violated the APA to the extent it implemented these unconstitutional provisions." *Ibid.* In challenging the underlying holding that those statutory provisions are "unconstitutional," the government also challenges the declaration that the 2016 Rule "violated the APA to the extent it implemented" those provisions. *Ibid.*

and a law that does so "pre-empt[s] contrary state regulation," *New York* v. *United States*, 505 U.S. 144, 178 (1992); see U.S. Const. Art. VI, Cl. 2.

b. The provisions of Section 1912 do not violate the anticommandeering doctrine. Those provisions confer on Indian families certain rights: in Section 1912(a), the right to "notice" of "involuntary" child-custody proceedings to remove an Indian child from the family; in Section 1912(d), the right to avoid "the breakup" of the family, unless "active efforts" to "provide remedial services and rehabilitative programs" have "proved unsuccessful"; and in Section 1912(e) and (f), the right to "continued custody" of the Indian child, absent sufficient evidence, "including testimony of qualified expert witnesses," that "continued custody * * * is likely to result in serious emotional or physical damage to the child." 25 U.S.C. 1912(a) and (d)-(f). Section 1912(a) also confers on the Indian child's tribe the right to notice of involuntary proceedings to remove the child from his family. 25 U.S.C. 1912(a). The text of Section 1921, which refers to "the rights provided under this subchapter," confirms that the provisions of Section 1912 confer "rights." 25 U.S.C. 1921; see 25 U.S.C. 1914 (granting Indian children, parents, and tribes the right to sue to enforce Section 1912's provisions).

The provisions of Section 1912 thus "operate[] just like any other federal law with preemptive effect": they regulate a matter directly by "confer[ring] rights on private actors," and to the extent that "state law confers rights or imposes restrictions that conflict with" Section 1912's provisions, "state law is preempted." *Murphy*, 138 S. Ct. at 1480; see 25 U.S.C. 1921. Of course, that means that Section 1912's provisions "do, in a sense, direct state judges to enforce them" in cases pending

before those judges. *New York*, 505 U.S. at 178. But as this Court has explained, that "sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause" and therefore presents no anticommandeering problem. *Id.* at 178-179.

In his opinion for the majority below, Judge Duncan acknowledged that, to the extent Section 1912's "substantive" provisions "compel state *courts* (as opposed to state *agencies*)," "they are valid preemption provisions." Pet. App. 311a. Judge Duncan nevertheless concluded that Section 1912(a), (d), (e), and (f) are unconstitutional "to the extent they command state *agencies*." *Id.* at 315a (opinion of Duncan, J.) (emphasis added). None of those provisions, however, issues a "direct order[]" to a state agency. *Murphy*, 138 S. Ct. at 1476.

Section 1912 does not, for example, "command[]" state agencies "to enact or refrain from enacting" any laws or regulations. *Murphy*, 138 S. Ct. at 1478. Rather, Section 1912 regulates Indian child welfare directly, through "the establishment of minimum *Federal* standards for the removal of Indian children from their families." 25 U.S.C. 1902 (emphasis added). The source of regulation under Section 1912 is thus federal, not state; Section 1912 does not "command [any] state government to enact *state* regulation." *New York*, 505 U.S. at 178.

Nor does Section 1912 "command" state agencies (or their officers) "to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. Like any other "party," a state agency may "seek[]" to remove an Indian child from his family, through "the foster care placement of, or termination of parental rights to, [the] Indian child." 25 U.S.C. 1912(a). But Section 1912 does not command any state agency (or other party) to seek such a removal. Rather, Section 1912 provides that if a

state agency (or other party) decides to seek such a removal in state court, the court may not order the child's removal unless the agency (or other party) satisfies certain "minimum Federal standards" that Congress determined to be necessary "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. 1902. As this Court has explained, the mere fact "[t]hat a State wishing to engage in certain activity must take administrative * * * action to comply with federal standards regulating that activity 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, 514-515 (1988)); see *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 653 (2013) (describing Section 1912(d), which requires a party seeking an Indian child's removal to satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs, as "a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families"); cf., *e.g.*, 42 U.S.C. 14932 (establishing similar minimum federal standards for international adoptions).

That is particularly true where, as here, the federal standards apply "evenhandedly" to "an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. Both state agencies and private actors can—and do—seek the removal of Indian children from their families. See 25 U.S.C. 1901(4) (noting historic abuses of child-custody proceedings "by nontribal public *and private* agencies") (emphasis added). And under Section 1912, "[a]ny party" that does so—whether a state agency or a private actor—is subject to the same minimum federal standards. 25 U.S.C. 1912(d); see

25 U.S.C. 1912(a), (e), and (f). Indeed, *Adoptive Couple* itself involved a private couple who sought a termination of parental rights and was therefore subject to those standards. 570 U.S. at 644-646; see Pet. App. 124a-125a (opinion of Dennis, J.) (citing other cases involving private actors seeking a foster-care placement or a termination of parental rights in state court). Because a law that applies evenhandedly to state and private actors cannot be understood as conscripting state officers into federal service, the "anticommandeering doctrine does not apply." *Murphy*, 138 S. Ct. at 1478.

c. The provisions of Section 1915 likewise do not violate the anticommandeering doctrine. Section 1915(a) establishes a default order of preference for adoptive placements, while Section 1915(b) does the same for foster-care and preadoptive placements. 25 U.S.C. 1915(a) and (b). Those preferences "are inapplicable in cases where no alternative party * * * has come forward." *Adoptive Couple*, 570 U.S. at 654. If, however, an "alternative party that is eligible to be preferred" does "come forward," *ibid.*, Section 1915(a) and (b) require the court to give that party "preference," unless another party demonstrates "good cause" to depart from the order of preference, 25 U.S.C. 1915(a) and (b).

Section 1915(a) and (b) thus "operate[] just like any other federal law with preemptive effect." *Murphy*, 138 S. Ct. at 1480. They regulate a matter directly by "confer[ring] rights on private actors," *ibid.*—namely, Indian children and their parents and tribes. See *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 37 (1989) (explaining that Section 1915 "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society") (citation omitted). And state judges

are bound to enforce those "substantive" federal rights in matters pending before them. *Id.* at 36; see U.S. Const. Art. VI, Cl. 2.

Of course, a state agency, like any other party in state-court proceedings subject to ICWA, may seek to persuade the court that "good cause" exists to depart from the placement preferences. 25 U.S.C. 1915(a) and (b). But Section 1915 does not command any state agency (or other party) to seek such a departure; the good-cause standard merely governs a court's determination of whether such a departure is justified, see *Condon*, 528 U.S. at 150-151; and the good-cause standard applies "evenhandedly" to departures sought by state and private actors alike, *Murphy*, 138 S. Ct. at 1478. For all these reasons, Section 1915(a) and (b) cannot fairly be understood as conscripting state officers into federal service. See pp. 17-19, *supra*. And to the extent that any ambiguity in the statute exists, that ambiguity should be construed in favor of avoiding any constitutional problem. See *New York*, 505 U.S. at 170 (relying on federalism and constitutional-avoidance canons in declining to construe a federal statutory provision "as a command to the States").[2]

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[2] In concluding that Section 1915(a) and (b) "appear to independently demand efforts by state agencies and officials" to search for alternative placements that satisfy the statutory preferences, Judge Duncan relied on the 2016 Rule and language in now-superseded guidelines. Pet. App. 290a-291a. In *Adoptive Couple*, however, this Court interpreted Section 1915 and held that "there simply is no 'preference' to apply if no alternative party that is eligible to be preferred * * * has come forward." 570 U.S. at 654. The text of Section 1915(a) and (b), including its good-cause standard, therefore cannot be read to require a state agency (or other party) to make efforts to search for such "alternative part[ies]." *Ibid.* The Department of the Interior, in consultation with this Office, has

d. The recordkeeping provisions of Sections 1915(e) and 1951(a) also do not violate the anticommandeering doctrine. The judges who concluded otherwise asserted that the anticommandeering rule draws no distinction between obligations imposed on state executive officers and those imposed on state courts. Pet. App. 292a-294a & n.108, 313a-315a (opinion of Duncan, J.). But this Court drew precisely that distinction in *Printz*. The Court catalogued many Founding-era statutes imposing recordkeeping, reporting, and other obligations on "state *judges*." *Printz*, 521 U.S. at 905-907. The Court recognized that such early statutes are "weighty evidence" of the Constitution's original meaning. *Id.* at 905 (citation omitted). And the Court thus carefully limited its holding to laws that "impress the state executive" into federal service. *Id.* at 907. The requirements in Sections 1915(e) and 1951(a) are akin to Founding-era laws described in *Printz*, and they thus raise no anticommandeering concern under the Constitution as originally understood. See Pet. App. 113a-117a (opinion of Dennis, J.).

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

The en banc court of appeals, by an equally divided vote, affirmed the district court's judgment declaring unconstitutional Section 1915(a)(3)'s adoptive-placement preference for "other Indian families," and Section 1915(b)(iii)'s foster-care-placement preference for "Indian foster home[s]," as violations of the equal protection component of the Due Process Clause of the Fifth

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concluded that, to the extent language in the 2016 Rule or its preamble suggests the existence of such a requirement in Section 1915, that language is inconsistent with *Adoptive Couple*.

Amendment. Pet. App. 4a (citations omitted). The court erred, however, in reaching the merits of whether those provisions violate equal protection. The court held that at least some of the individual plaintiffs had standing to challenge those provisions. *Id.* at 3a.[3] But that holding is incorrect. The individual plaintiffs did not carry their "burden of establishing standing as of the time [they] brought this lawsuit," *Carney* v. *Adams*, 141 S. Ct. 493, 499 (2020), for two independent reasons.

a. First, no individual plaintiff demonstrated any actual or imminent "injury fairly traceable" to Section 1915(a)(3) or (b)(iii). *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006) (citation omitted); see *California* v. *Texas*, 141 S. Ct. 2104, 2114 (2021) (explaining that a plaintiff who challenges a statute must "assert an injury that is the result of a statute's actual or threatened *enforcement*, whether today or in the future"); *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.").

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[3] In reaching the merits of whether Section 1915(a)(3) and (b)(iii) violate equal protection, the en banc court of appeals relied only on the standing of the individual plaintiffs. The court did not resolve whether the state plaintiffs had standing to challenge those provisions on equal protection grounds. Eight judges declined to reach the issue, Pet. App. 216a n.13 (opinion of Duncan, J.), while eight other judges correctly rejected the state plaintiffs' theory of *parens patriae* standing, *id.* at 55a n.13 (opinion of Dennis, J.). See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966) (holding that a State lacks "standing as the parent of its citizens to invoke [the Fifth Amendment] against the Federal Government, the ultimate *parens patriae* of every American citizen").

At the time that the operative complaint was filed in March 2018, the Brackeens had already "successfully petitioned to adopt" one Indian child, A.L.M., in Texas state court. Second Am. Compl. ¶ 152. Section 1915(a)(3) and (b)(iii) played no role in that adoption. See *id.* ¶¶ 127-152. The Brackeens alleged that they "intend to provide foster care for, and possibly adopt, additional children in need." *Id.* ¶ 154. But they did not suggest that Section 1915(a)(3) or (b)(iii) would play a role in any such future child-custody proceedings, and any such suggestion would have been entirely speculative. After all, Section 1915(a)(3) and (b)(iii) are both third-ranked preferences; they would come into play, if at all, only if the preferences ranked ahead of them were passed over, and even then only if someone eligible to be preferred under Section 1915(a)(3) or (b)(iii) came forward. See *Adoptive Couple*, 570 U.S. at 654.

The Brackeens' subsequent efforts to adopt another Indian child, Y.R.J., cannot establish standing because those efforts postdated the commencement of this suit and were not brought to the district court's attention until after final judgment. Pet. App. 354a, 359a-360a (Wiener, J., dissenting in part); see *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000) (requiring that standing exist "at the time the action commences"). And even if those efforts were considered, the Brackeens would still not be any closer to establishing injury from Section 1915(a)(3) or (b)(iii). Although proceedings in Texas state court have involved a dispute over Y.R.J.'s placement, the dispute has concerned her placement with a member of her extended family—a first-ranked preference—so the Brackeens have not demonstrated a realistic possibility that Section 1915(a)(3) or (b)(iii) will come into play. See *In*

re Y.J., No. 02-19-235, 2019 WL 6904728, at *1, *16 (Tex. App. Dec. 19, 2019).

Nor have the Cliffords identified any injury fairly traceable to Section 1915(a)(3) or (b)(iii). In the operative complaint, the Cliffords alleged that they had moved to adopt an Indian child, Child P., in Minnesota state court. Second Am. Compl. ¶ 176. They further alleged that "Child P. was removed from the Cliffords' home in January 2018, and placed in the care of her maternal grandmother." *Ibid.*; see *In re S.B.*, No. A19-225, 2019 WL 6698079, at *1 (Minn. Ct. App. Dec. 9, 2019). Given that Child P.'s maternal grandmother is a member of Child P.'s extended family—and thus a first-ranked preference—there is no realistic possibility that Section 1915(a)(3) or (b)(iii) will come into play.

As for the Librettis, a Nevada state court "issued a decree of adoption," declaring them to be Baby O.'s lawful parents, in December 2018. Pet. App. 49a (opinion of Dennis, J.); see Second Am. Compl. ¶ 169 (stating that the "Librettis are the only people who have indicated an intent to formally adopt Baby O."). And although the Librettis, like the Brackeens, alleged that they "intend to provide foster care for, and possibly adopt, additional children in need," Second Am. Compl. ¶ 170, any suggestion that Section 1915(a)(3) or (b)(iii) would play a role in any such future child-custody proceedings would be entirely speculative.

The judges below who concluded that at least some of the individual plaintiffs had standing to bring their equal protection claims did not address whether any of the plaintiffs' asserted injuries could be traced to Section 1915(a)(3) or (b)(iii) specifically. See Pet. App. 59a-63a (opinion of Dennis, J.); *id.* at 216a-221a (opinion of Duncan, J.). That was error. Standing "is not dispensed

in gross," and "a plaintiff must demonstrate standing for each claim he seeks to press." *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citations omitted). Because the individual plaintiffs have not demonstrated any injury fairly traceable to Section 1915(a)(3) or (b)(iii), they lack standing to challenge those provisions.

b. Second, the individual plaintiffs have not shown that any injury from Section 1915(a)(3) or (b)(iii) is likely to be redressed by "the judicial relief requested." *California*, 141 S. Ct. at 2115 (citation omitted). In the operative complaint, the individual plaintiffs requested declaratory and injunctive relief against the federal defendants. Second Am. Compl. 84. The district court granted only declaratory relief, Pet. App. 463a, and the plaintiffs did "not cross-appeal[] seeking to modify the district court's judgment," *id.* at 340a (opinion of Duncan, J.). The question, then, is whether the declaratory relief requested—namely, a declaration by the district court that Section 1915(a)(3) and (b)(iii) violate equal protection—is likely to redress any injury to the individual plaintiffs.

As Judge Costa, joined by four other judges, explained, the answer is no. Pet. App. 371a-384a. Any injury from Section 1915(a)(3) or (b)(iii) can arise only from the application of one of those provisions in state court. The federal defendants in this case are not parties to state foster-care or adoption proceedings, and they have no role in enforcing any of the statutory provisions applicable in such proceedings. And state courts are not bound by a federal district court's declaration that a statutory provision is unconstitutional. *Id.* at 371a-372a, 375a-376a; see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 58 n.11 (1997). No state judges

were defendants in this case, and the declaratory judgment against the federal defendants has no preclusive effect on any state judge or in state-court proceedings. See Pet. App. 379a (Costa, J., concurring in part and dissenting in part) (noting, among other things, that "the state court judge who will decide Y.R.J.'s case" is not a defendant in this case and that there is "no mutuality of parties").

The district court's declaration that Section 1915(a)(3) and (b)(iii) violate equal protection thus can do nothing more than "advise" a state judge on how to decide this particular equal protection issue if it should be raised in a concrete manner in a foster-care or adoption case covered by ICWA that comes before that state judge. Pet. App. 373a (Costa, J., concurring in part and dissenting in part) (emphasis omitted). And the mere possibility that a state judge might find the declaration of a federal district court persuasive does not make it any less advisory. See *id.* at 374a-375a. Thus, even if the individual plaintiffs could establish the requisite injury, they cannot establish redressability.

3. ICWA's third-ranked placement preferences do not violate equal protection

Even if the individual plaintiffs had standing to challenge Section 1915(a)(3) and (b)(iii), the decisions below erred in declaring those provisions unconstitutional. Pet. App. 4a. The en banc court of appeals correctly held that, under *Morton* v. *Mancari*, 417 U.S. 535 (1974), Congress's judgment to enact ICWA to afford special protections to Indian children—and to their parents and tribes—"will not be disturbed" so "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* at

555; see Pet. App. 141a-142a. Section 1915(a)(3) and (b)(iii) satisfy that standard.

It is undisputed that the federal government has substantial interests in the welfare of Indian children and their parents, the integrity of Indian families, and "the stability and security of Indian tribes." 25 U.S.C. 1902. It is also undisputed that the federal government has a sound interest in "protect[ing] the best interests of Indian children" by promoting the placement of those children in settings that are most likely to foster a connection with their Indian tribes and culture. *Ibid.* The preferences for "other Indian families," 25 U.S.C. 1915(a)(3), and "Indian foster home[s]," 25 U.S.C. 1915(b)(iii), are rationally related to those legitimate governmental interests.

Many tribes are located in close proximity to each other, have a common history, and share linguistic, cultural, and religious traditions. See Pet. App. 163a-164a (opinion of Dennis, J.). Indeed, many tribes that the United States recognizes as separate political units are descended from the same larger historical bands. See 86 Fed. Reg. 7554, 7554-7558 (Jan. 29, 2021). As just one example, the United States recognizes many separate tribes that are all part of the Sioux Nation and that, in addition to sharing social, religious, and political traditions, were at various times placed on the same reservations. See Treaty Between the United States of America and Different Tribes of Sioux Indians art. II, Apr. 29, 1868, 15 Stat. 636. In addition, because of intermarriage and social connections among tribal communities, it is not uncommon for an Indian child to have biological parents who are enrolled in different tribes; indeed, A.L.M., the child adopted by the Brackeens before the operative complaint was filed, is one example.

Pet. App. 47a (opinion of Dennis, J.). Given that the prevailing social, cultural, and political standards of an Indian community may transcend tribal lines, Congress could rationally conclude that Section 1915(a)(3) and (b)(iii) would foster an Indian child's connection to those aspects of his tribe. See 25 U.S.C. 1901(3) (finding "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"); 25 U.S.C. 1902 (emphasizing the importance of standards for "the placement of [Indian] children in foster or adoptive homes which will reflect the unique values of Indian culture"); 25 U.S.C. 1915(d) (providing that the "standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the [relevant] Indian community").

Congress also could rationally conclude that Section 1915(a)(3) and (b)(iii) would promote the stability and security of Indian tribes by placing Indian children in settings more conducive to "reasoned decision[-making] about their tribal and Indian identity." H.R. Rep. No. 1386, 95th Cong., 2d Sess. 17 (1978) (House Report). In particular, Congress could rationally believe that, by placing an Indian child with a family that is part of another tribe, the child would be more likely to be surrounded by others—even if not members of the child's tribe—who had gone through the process of deciding whether to maintain a connection with their own tribe and who personally understood the importance of the decision. See 81 Fed. Reg. at 38,783 (explaining that tribal membership "is voluntary and typically requires an affirmative act by the enrollee or her parent"). An Indian child who (or whose parent) already is a member of a tribe would thereby be in a better position to make

a "reasoned decision" about whether to maintain his own "tribal and Indian identity" if he was placed in such a setting than if he was placed in a setting without anyone who had faced a similar decision. House Report 17.

Although Judge Duncan did not dispute that "some tribes are interrelated," he found Section 1915(a)(3) and (b)(iii) to be overinclusive—giving preference to certain placements even when, in his view, they do not serve Congress's goals. Pet. App. 279a. But legislation does not fail the rational-basis standard applicable here "merely because the classifications it makes are imperfect." *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 592 n.39 (1979) (brackets and citation omitted); see *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'") (citation omitted). And Congress expressly provided for departures from Section 1915(a)(3) and (b)(iii) for "good cause," thereby allowing a departure from the preferences when they do not serve Congress's goals or when the advantages of a preferred placement are outweighed by those of another placement.

In any event, Judge Duncan's concerns about particular applications of Section 1915(a)(3) and (b)(iii) provide no basis for declaring those provisions unconstitutional on their face. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (explaining that, to succeed on a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid"). And the varying circumstances in which issues concerning a third-preference placement could arise make it especially clear that the validity of those pref-

erences should be judged in an as-applied challenge by parties with a concrete stake in their application to a particular case—not a sweeping facial challenge asserted by plaintiffs who can only speculate that they will ever be affected by Section 1915(a)(3) or (b)(iii) at all.

B. The Questions Presented Warrant This Court's Review

Since ICWA's enactment in 1978, state courts have repeatedly rejected challenges to its constitutionality. See, *e.g.*, *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981), cert. denied, 455 U.S. 1007 (1982); *In re Armell*, 550 N.E.2d 1060, 1067-1068 (Ill. App. Ct.), cert. denied, 498 U.S. 940 (1990); *In re Marcus S.*, 638 A.2d 1158, 1158-1159 (Me. 1994); *In re Interest of Phoenix L.*, 708 N.W.2d 786, 797-798 (Neb. 2006); *In re A.B.*, 663 N.W.2d 625, 634-637 (N.D. 2003), cert. denied, 541 U.S. 972 (2004); *In re Baby Boy L.*, 103 P.3d 1099, 1106-1107 (Okla. 2004); *Angus* v. *Joseph*, 655 P.2d 208, 213 (Or. Ct. App. 1982), cert. denied, 464 U.S. 830 (1983); *In re Guardianship of D. L. L.*, 291 N.W.2d 278, 281 (S.D. 1980); *In re KMO*, 280 P.3d 1203, 1214-1215 (Wyo. 2012).

The lower courts in this case, however, declared unconstitutional many key provisions of ICWA. See Pet. App. 4a-5a. This Court has recognized that judging the constitutionality of a federal statute is "the gravest and most delicate duty that th[e] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Accordingly, "when a lower court has invalidated a federal statute," this Court's "usual" approach is to "grant[] certiorari." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019); see, *e.g.*, *Maricopa County* v. *Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (statement of Thomas, J., respecting the denial of the application for a stay) (observing that this Court

has "recognized a strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional"); *United States* v. *Kebodeaux*, 570 U.S. 387, 391 (2013) (granting certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional"); *United States* v. *Morrison*, 529 U.S. 598, 605 (2000) (similar). The Court has thus recently and repeatedly granted certiorari to review decisions of lower courts holding federal statutes unconstitutional even in the absence of a square conflict. See, *e.g.*, *United States* v. *Vaello-Madero*, 141 S. Ct. 1462, 1462 (2021); *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2345-2346 (2020); *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020); *Allen* v. *Cooper*, 140 S. Ct. 994, 1000 (2020); *Brunetti*, 139 S. Ct. at 2298; *Matal* v. *Tam*, 137 S. Ct. 1744, 1755 (2017); *Zivotofsky* v. *Kerry*, 576 U.S. 1, 9 (2015); *Department of Transp.* v. *Association of Am. Railroads*, 575 U.S. 43, 46 (2015); *United States* v. *Alvarez*, 567 U.S. 709, 714 (2012) (plurality opinion); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 14 (2010); *United States* v. *Comstock*, 560 U.S. 126, 132-133 (2010).

The importance of the statutory provisions declared unconstitutional underscores the need for this Court's review. Although ICWA has "helped stem the widespread removal of Indian children from their families and Tribes" since its enactment 40 years ago, Indian children "are still disproportionately more likely to be removed from their homes and communities than other children" today. 81 Fed. Reg. at 38,799. ICWA's provisions thus remain essential and are frequently applied in state courts across the country. See *id.* at 38,782. Those provisions include the minimum standards set

forth in Section 1912, which address what this Court has described as "the primary mischief the ICWA was designed to counteract": "the unwarranted removal of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts." *Adoptive Couple*, 570 U.S. at 649 (emphasis omitted). And this Court has described the preferences in Section 1915(a), of which the preferences invalidated below are a part, as ICWA's "most important substantive requirement." *Holyfield*, 490 U.S. at 36.

This Court should therefore grant certiorari to review the lower courts' decisions declaring various provisions of ICWA facially unconstitutional. And because a federal court lacks jurisdiction to declare a statute unconstitutional if no plaintiff has standing to challenge it, this Court should also grant certiorari to review whether the individual plaintiffs had standing to challenge Section 1915(a)(3) and (b)(iii). See, *e.g.*, *California* v. *Texas*, 140 S. Ct. 1262 (2020) (granting a petition for a writ of certiorari presenting questions on both the constitutionality of a federal statute and standing); *Carney* v. *Adams*, 140 S. Ct. 602 (2019) (directing the parties to address standing, in addition to the constitutionality of a state statute); *Thole* v. *U.S. Bank, N.A.*, 139 S. Ct. 2771 (2019) (directing the parties to address standing, in addition to the statutory questions presented in the petition for a writ of certiorari).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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