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

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

BRIEF FOR THE FEDERAL PARTIES

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
TODD KIM
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
CHRISTOPHER G. MICHEL
Assistants to the Solicitor General
SAMUEL C. ALEXANDER
AMBER BLAHA
RACHEL HERON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ROBERT T. ANDERSON
Solicitor
Department of the Interior
Washington, D.C. 20240
SAMUEL R. BAGENSTOS
General Counsel
Department of Health and Human Services
Washington, D.C. 20201

Additional Captions Listed On Inside Cover

CHEROKEE NATION, ET AL., PETITIONERS

v.

CHAD EVERET BRACKEEN, ET AL.

STATE OF TEXAS, PETITIONER

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

CHAD EVERET BRACKEEN, ET AL., PETITIONERS

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

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. 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." *Ibid.* The questions presented are:

1. Whether ICWA's minimum federal standards exceed Congress's plenary power over Indian affairs.

2. Whether ICWA's minimum federal standards violate the anticommandeering doctrine.

3. Whether plaintiffs' equal-protection challenge is justiciable.

4. Whether ICWA violates the equal-protection component of the Due Process Clause of the Fifth Amendment.

5. Whether Texas has Article III standing to challenge 25 U.S.C. 1915(c), which allows an Indian child's tribe to establish a different order of placement preferences.

6. Whether Section 1915(c) violates the nondelegation doctrine.

PARTIES TO THE PROCEEDING

In No. 21-376, petitioners (defendants-appellants below) are 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; the Bureau of Indian Affairs; the United States Department of the Interior; the United States of America; Xavier Becerra, in his official capacity as Secretary of the United States Department of Health and Human Services; and the United States Department of Health and Human Services.*

In No. 21-377, petitioners (intervenor defendants-appellants below) are the Cherokee Nation; the Oneida Nation; the Quinault Indian Nation; and the Morongo Band of Mission Indians.

In No. 21-378, petitioner (plaintiff-appellee below) is the State of Texas.

In No. 21-380, petitioners (plaintiffs-appellees below) are Chad Everet Brackeen; Jennifer Kay Brackeen; Danielle Clifford; Jason Clifford; Altagracia Socorro Hernandez; Frank Nicholas Libretti; and Heather Lynn Libretti.

Respondents State of Louisiana and State of Indiana were plaintiffs in the district court and appellees in the court of appeals. Respondent Navajo Nation was intervenor in the court of appeals.

---

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

TABLE OF CONTENTS

Page

Opinions below ... 2
Jurisdiction ... 2
Constitutional and statutory provisions involved ... 2
Statement:
A. Legal background ... 2
B. Procedural history ... 5
Summary of argument ... 7
Argument ... 9
I. ICWA is a valid exercise of Congress's plenary power over Indian affairs ... 10
A. Congress has plenary power over Indian affairs ... 10
1. Congress's plenary power over Indian affairs derives explicitly from the Constitution's text ... 11
2. Congress's plenary power over Indian affairs is grounded in the Constitution's structure ... 14
3. History confirms Congress's plenary power over Indian affairs ... 18
B. ICWA falls squarely within Congress's plenary power over Indian affairs ... 20
C. Plaintiffs' counterarguments lack merit ... 23
1. Congress's power is not limited to regulating trade ... 23
2. Congress's power is not limited to regulating tribes ... 27
3. Congress's power within a State is not limited to regulating on tribal lands ... 28
4. Congress's power is not subject to a domestic-relations exception ... 30
5. State-court proceedings are not immune from Congress's power ... 32

Table of Contents—Continued: Page

II. ICWA's minimum federal standards do not violate the anticommandeering doctrine 34
A. ICWA's minimum federal standards for removal do not violate the anticommandeering doctrine 35
1. Section 1912 directly regulates the removal of Indian children from their families 35
2. Section 1912 does not commandeer state agencies or judges 38
B. ICWA's placement preferences do not violate the anticommandeering doctrine 42
1. ICWA's placement preferences directly regulate the placement of Indian children 42
2. ICWA's placement preferences do not commandeer state agencies or judges 43
C. ICWA's recordkeeping provisions do not violate the anticommandeering doctrine 46
III. Plaintiffs' equal-protection challenge should be rejected 48
A. Plaintiffs' equal-protection challenge is not justiciable 48
1. Texas lacks *parens patriae* standing to sue the federal government 48
2. The individual plaintiffs cannot satisfy Article III's case-or-controversy requirement 49
B. The challenged ICWA provisions satisfy equal-protection principles 55
1. Statutory classifications designed to fulfill Congress's unique obligations to Indians are not suspect and are subject to rational-basis review 55

Table of Contents—Continued: Page

2. The classifications in the challenged ICWA provisions are subject to rational-basis review.................................. 60
3. The challenged ICWA provisions are rationally related to their objectives.......... 72

IV. Texas's nondelegation challenge should be rejected 79
A. Texas lacks Article III standing to bring its nondelegation challenge 79
B. Section 1915(c) does not violate nondelegation principles.................................... 80

Conclusion 85

Appendix — Constitutional and statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995)... 60

Adoptive Couple v. *Baby Girl*, 570 U.S. 637 (2013) .... *passim*

Alaska v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998)... 10

Alfred L. Snapp & Son, Inc. v. *Puerto Rico*, 458 U.S. 592 (1982)... 49

American Fed'n of Gov't Emps. v. *United States*, 330 F.3d 513 (D.C. Cir.), cert. denied, 540 U.S. 1088 (2003)... 71

American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 84

Antoine v. *Washington*, 420 U.S. 194 (1975) 19

Arizona v. *United States*, 567 U.S. 387 (2012) 16

Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 53

Cases—Continued: Page

Board of County Comm'rs v. *Seber*, 318 U.S. 705 (1943)....11, 15, 19, 20, 24, 31
Brader v. *James*, 246 U.S. 88 (1918)....20
Bryan v. *Itasca County*, 426 U.S. 373 (1976)....11
Burrus, In re, 136 U.S. 586 (1890)....31
California v. *Texas*, 141 S. Ct. 2104 (2021)....53
Cherokee Nation v. *Georgia*, 30 (5 Pet.) U.S. 1 (1831)....14, 17, 56
Cherokee Nation v. *Hitchcock*, 187 U.S. 294 (1902)....11, 20
Choate v. *Trapp*, 224 U.S. 665 (1912)....11
City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)....56
City of Sherrill v. *Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005)....29
Clapper v. *Amnesty Int'l USA*, 568 U.S. 398 (2013)....50, 80
Coey v. *Low*, 77 P. 1077 (Wash. 1904)....33
Cotton Petroleum Corp. v. *New Mexico*, 490 U.S. 163 (1989)....24, 27
County of Oneida v. *Oneida Indian Nation of N.Y. State*, 470 U.S. 226 (1985)....2, 22
Davis v. *FEC*, 554 U.S. 724 (2008)....52
Delaware Tribal Bus. Comm. v. *Weeks*, 430 U.S. 73 (1977)....11, 23
EEOC v. *Wyoming*, 460 U.S. 226 (1983)....40
Egelhoff v. *Egelhoff*, 532 U.S. 141 (2001)....30
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973)....65
Federal Power Comm'n v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960)....22
Frederick v. *Rock Island Sav. Bank*, 184 N.W. 234 (S.D. 1921)....34
Fisher v. *District Court*, 424 U.S. 382 (1976)....58, 61, 82

Cases—Continued: Page

Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) ... 31
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) ... 26
Gonzales v. *Raich*, 545 U.S. 1 (2005) ... 25, 26
Government of Manitoba v. *Bernhardt*, 923 F.3d 173 (D.C. Cir. 2019) ... 49
Gundy v. *United States*, 139 S. Ct. 2116 (2019) ... 84
Henson v. *Johnson*, 246 P. 868 (Okla. 1926) ... 34
Hillman v. *Maretta*, 569 U.S. 483 (2013) ... 30, 31, 43, 45
Hirabayashi v. *United States*, 320 U.S. 81 (1943) ... 69
Houston Cmty. Coll. Sys. v. *Wilson*, 142 S. Ct. 1253 (2022) ... 18
Howell v. *Howell*, 137 S. Ct. 1400 (2017) ... 46
Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979) ... 27
Jinks v. *Richland County*, 538 U.S. 453 (2003) ... 33, 46
Lake Country Estates, Inc. v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979) ... 83
Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) ... 11, 18
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ... 51, 53, 54
M. L. B. v. *S. L. J.*, 519 U.S. 102 (1996) ... 37
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) ... 49
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. *Patchak*, 567 U.S. 209 (2012) ... 50
Mathews v. *Diaz*, 426 U.S. 67 (1976) ... 64
Mayes v. *Cherokee Strip Live-Stock Ass'n*, 51 P. 215 (Kan. 1897) ... 33
McCarty v. *McCarty*, 453 U.S. 210 (1981) ... 46
McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973) ... 27

Cases—Continued: Page

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).... 19
Means v. *Navajo Nation*, 432 F.3d 924 (9th Cir. 2005), cert. denied, 549 U.S. 952 (2006)............ 76
Michigan v. *Bay Mills Indian Cmty.*, 572 U.S. 782 (2014).. 10, 65, 71
Mississippi Band of Choctaw Indians v. *Holyfield*, 490 U.S. 30 (1989) .... *passim*
Moe v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).. 59, 65, 67
Montana v. *United States*, 450 U.S. 544 (1981) 82
Morton v. *Mancari*, 417 U.S. 535 (1974)................... *passim*
Murphy v. *NCAA*, 138 S. Ct. 1461 (2018) .... *passim*
Myers v. *United States*, 272 U.S. 52 (1926) 20
National Farmers Union Ins. Cos. v. *Crow Tribe of Indians*, 471 U.S. 845 (1985) 14
Negonsott v. *Samuels*, 507 U.S. 99 (1993)........................... 10
New York v. *United States*, 505 U.S. 144 (1992)...............................32, 34, 38, 41, 42, 45
Nishimura Ekiu v. *United States*, 142 U.S. 651 (1892).. 16
Oklahoma v. *Castro-Huerta*, 142 S. Ct. 2486 (2022) 14
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)... 15
Oneida Indian Nation of N.Y. v. *Oneida County*, 414 U.S. 661 (1974)... 22, 23
Palm Springs Paint Co. v. *Arenas*, 242 Cal. App. 2d 682 (Cal. Dist. Ct. App. 1966) 34
Parker Drilling Mgmt. Servs., Ltd. v. *Newton*, 139 S. Ct. 1881 (2019) 81
Perrin v. *United States*, 232 U.S. 478 (1914).... 20, 21, 27, 30

Cases—Continued: Page

Personnel Administrator v. *Feeney*,
442 U.S. 256 (1979).. 57
Printz v. *United States*,
521 U.S. 898 (1997)................................24, 32, 34, 41, 46, 47
Puerto Rico v. *Sanchez Valle*,
579 U.S. 59 (2016) 10
Quiban v. *Veterans Admin.*, 928 F.2d 1154
(D.C. Cir. 1991), cert. denied, 513 U.S. 918 (1994) 64
Reed v. *Town of Gilbert*, 576 U.S. 155 (2015)...................... 63
Reno v. *Condon*, 528 U.S. 141 (2000)....................... 38, 39, 41
Reno v. *Flores*, 507 U.S. 292 (1993) 43
Rice v. *Cayetano*, 528 U.S. 495 (2000) 66, 67
Ridgway v. *Ridgway*, 454 U.S. 46 (1981) 30, 43, 46
Rockwell Int'l Corp. v. *United States*,
549 U.S. 457 (2007).. 50
Santa Clara Pueblo v. *Martinez*,
436 U.S. 49 (1978) 2, 67
Santosky v. *Kramer*, 455 U.S. 745 (1982) 37, 73
Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996) 25
Shelby County v. *Holder*, 570 U.S. 529 (2013).............. 77, 78
Smith v. *Smith*, 123 N.W. 146 (Wis. 1909).......................... 34
South Carolina v. *Baker*, 485 U.S. 505 (1988).............. 39, 41
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 49
South Dakota v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018)...... 83
South Dakota v. *Yankton Sioux Tribe*,
522 U.S. 329 (1998).. 10
Stephens v. *Cherokee Nation*, 174 U.S. 445 (1899)............. 20
Summers v. *Earth Island Inst.*, 555 U.S. 488 (2009)......... 51
Sunderland v. *United States*,
266 U.S. 226 (1924)... 20, 31
Tiger v. *Western Inv. Co.*, 221 U.S. 286 (1911) 20
Trump v. *Hawaii*, 138 S. Ct. 2392 (2018)............................ 73

Cases—Continued: Page

United States v. *Antelope*,
430 U.S. 641 (1977)................................56, 59, 61, 62, 63, 64
United States v. *Candelaria*, 271 U.S. 432 (1926)............. 15
United States v. *Chavez*, 290 U.S. 357 (1933) 20
United States v. *Cohen*, 733 F.2d 128 (D.C. Cir. 1984)...... 64
United States v. *Cooley*, 141 S. Ct. 1638 (2021)............ 10, 15
United States v. *Creek Nation*, 295 U.S. 103 (1935) 23
United States v. *Curtiss-Wright Export Corp.*,
299 U.S. 304 (1936)... 16, 17
United States v. *Forty-three Gallons of Whiskey*,
93 U.S. 188 (1876) 29, 56
United States v. *Harris*, 106 U.S. 629 (1883)........................ 9
United States v. *Hellard*, 322 U.S. 363 (1944) 11
United States v. *Holliday*,
70 U.S. (3 Wall.) 407 (1866) .... *passim*
United States v. *Jackson*, 280 U.S. 183 (1930) 20
United States v. *Jicarilla Apache Nation*,
564 U.S. 162 (2011)... 17
United States v. *Kagama*,
118 U.S. 375 (1886).......................................17, 20, 24, 25, 31
United States v. *Lara*, 541 U.S. 193 (2004)............... *passim*
United States v. *Lopez*, 514 U.S. 549 (1995) 26, 30
United States v. *Mazurie*,
419 U.S. 544 (1975)................................14, 20, 29, 81, 82, 83
United States v. *McGowan*, 302 U.S. 535 (1938)................ 29
United States v. *Morrison*, 529 U.S. 598 (2000)........... 30, 31
United States v. *Nice*, 241 U.S. 591 (1916).............. 20, 28, 29
United States v. *Rioseco*, 845 F.2d 299
(11th Cir. 1988).. 82
United States v. *Salerno*, 481 U.S. 739 (1987).............. 73, 78
United States v. *Sanchez-Gomez*,
138 S. Ct. 1532 (2018) 51, 52

Cases—Continued: Page

United States v. *Sandoval*,
231 U.S. 28 (1913) 10, 17, 18, 20, 29
United States v. *Sharpnack*, 355 U.S. 286 (1958)......... 81, 82
United States v. *Sherwood*, 312 U.S. 584 (1941)................. 16
United States v. *Vaello Madero*,
142 S. Ct. 1539 (2022) 55, 57, 64, 73, 74
United States v. *Wheeler*, 435 U.S. 313 (1978)............. 11, 15
United States v. *White Mountain Apache Tribe*,
537 U.S. 465 (2003).. 11
United States Railroad Retirement Bd. v. *Fritz*,
449 U.S. 166 (1980)... 76, 77
Uzuegbunam v. *Preczewski*, 141 S. Ct. 792 (2021)............. 50
Vance v. *Bradley*, 440 U.S. 93 (1979).................................. 78
Washington v. *Confederated Bands & Tribes of the Yakima Indian Nation*,
439 U.S. 463 (1979)... 10, 60, 62, 67
Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*,
443 U.S. 658 (1979)... 59, 60, 65
Welfare of the Child of S.B., In re, No. A19-225,
2019 WL 6698079 (Minn. Ct. App. Dec. 9, 2019) 51, 54
Whitman v. *American Trucking Ass'ns*,
531 U.S. 457 (2001)... 83, 84
Williams v. *Lee*, 358 U.S. 217 (1959) 27
Wilson v. *Omaha Indian Tribe*,
442 U.S. 653 (1979)... 10, 18, 28
Winton v. *Amos*, 255 U.S. 373 (1921) 11
Woodward v. *De Graffenried*, 238 U.S. 284 (1915) 34
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832)...... *passim*
Y.J., In re, No. 02-19-235, 2019 WL 6904728
(Tex. Ct. App. Dec. 19, 2019) 52

Cases—Continued: Page

Yellen v. *Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434 (2021) 61
Ysleta del Sur Pueblo v. *Texas*, 142 S. Ct. 1929 (2022)...... 19

Constitution, treaties, statutes, and regulations:

U.S. Const.:
Art. I 6, 7
§ 8 .... 11, 1a
Cl. 3 (Commerce Clause) ...12, 14, 26, 28, 57, 63, 1a
Foreign Commerce Clause 28, 1a
Indian Commerce Clause...................*passim*, 1a
Interstate Commerce Clause ...25, 26, 28, 30, 83, 1a
Cl. 4.. 64
Cl. 18 (Necessary and Proper Clause)......... 11, 2a
§ 10, Cl. 3 (Interstate Compact Clause) 30
Art. II, § 2, Cl. 2.. 11, 57, 2a
Art. III.. 50, 54, 79, 2a
Art. IV, § 3, Cl. 2 (Territory Clause) 64
Art. VI, Cl. 2 (Supremacy Clause)................ 8, 42, 45, 3a
Amend. V (Due Process Clause).................. 48, 49, 55, 3a
Amend. XIV, § 1 (Equal Protection Clause) 55
Amend. XV... 66, 67
Treaty with the Cherokee, July 2, 1791, art. II, 7 Stat. 39 17
Treaty with the Wyandot, Jan. 21, 1785, art. II, 7 Stat. 16.. 17
Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 46
Act of June 18, 1798, ch. 54, §§ 2-3, 1 Stat. 567................... 46
Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-155 47
Act of Mar. 3, 1817, ch. 92, 3 Stat. 383................................ 19
Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 19
Act of Aug. 9, 1888, ch. 818, 25 Stat. 392 34

Statutes and regulations—Continued: Page

Act of Feb. 28, 1891, ch. 383, § 5,
26 Stat. 795-796 34

Act of June 7, 1897, ch. 3, § 1, 30 Stat. 90 34

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 6

Brady Handgun Violence Prevention Act,
Pub. L. No. 103-159, 107 Stat. 1536 41

Driver's Privacy Protection Act of 1994,
18 U.S.C. 2721 *et seq.* 39

General Allotment Act, ch. 119, 24 Stat. 388 19

§ 5, 24 Stat. 389 33

General Crimes Act, 18 U.S.C. 1152 19

Indian Child Welfare Act of 1978,
25 U.S.C. 1901 *et seq* 4

25 U.S.C. 1901 ..... 61, 78, 5a

25 U.S.C. 1901(1) 4, 20, 6a

25 U.S.C. 1901(2) 21, 6a

25 U.S.C. 1901(3) ..... *passim*, 6a

25 U.S.C. 1901(4) 3, 21, 22, 40, 6a

25 U.S.C. 1901(5) 4, 21, 22, 33, 6a

25 U.S.C. 1902 ..... *passim*, 7a

25 U.S.C. 1903(1) 77, 7a

25 U.S.C. 1903(2) 62, 72, 8a

25 U.S.C. 1903(3) 62, 8a

25 U.S.C. 1903(4) 28, 61, 73, 8a

25 U.S.C. 1903(4)(a) 48, 63, 8a

25 U.S.C. 1903(4)(b) 48, 69, 8a

25 U.S.C. 1903(5) 76, 9a

25 U.S.C. 1903(8) 61, 9a

25 U.S.C. 1911(a) 4, 10a

25 U.S.C. 1911(b) 4, 83, 10a

25 U.S.C. 1912 ..... 35, 38, 39, 42, 44, 11a

Statutes and regulations—Continued: Page

25 U.S.C. 1912(a) ... 5, 35, 11a
25 U.S.C. 1912(d) ... 5, 36, 40, 42, 13a
25 U.S.C. 1912(e) ... 5, 36, 37, 13a
25 U.S.C. 1912(f) ... 5, 37, 77, 13a
25 U.S.C. 1914 ... 38, 15a
25 U.S.C. 1915 ... 42, 43, 44, 45, 16a
25 U.S.C. 1915(a) ... *passim*, 16a
25 U.S.C. 1915(a)-(c) ... 77, 16a
25 U.S.C. 1915(a)(1)-(3) ... 48, 16a
25 U.S.C. 1915(a)(1) ... 62, 72, 74, 16a
25 U.S.C. 1915(a)(2) ... 62, 74, 16a
25 U.S.C. 1915(a)(3) ... 7, 52, 62, 75, 16a
25 U.S.C. 1915(b) ... *passim*, 16a
25 U.S.C. 1915(b)(i)-(iii) ... 48, 16a
25 U.S.C. 1915(b)(i) ... 52, 62, 72, 74, 16a
25 U.S.C. 1915(b)(ii) ... 62, 74, 16a
25 U.S.C. 1915(b)(iii) ... 7, 52, 62, 75, 16a
25 U.S.C. 1915(c) ... *passim*
25 U.S.C. 1915(e) ... 46, 47, 17a
25 U.S.C. 1921 ... 38, 22a
25 U.S.C. 1922 ... 77, 23a
25 U.S.C. 1951 ... 48, 28a
25 U.S.C. 1951(a) ... 46, 47, 48, 28a
25 U.S.C. 1951(b) ... 47, 29a
25 U.S.C. 1963 ... 10, 31a

Indian Civil Rights Act, Pub. L. No. 90-284, Tit. II, 82 Stat. 77 ... 19
25 U.S.C. 1301(2) ... 76

Indian Reorganization Act, ch. 576, 48 Stat. 984 ... 19

Lacey Act, 16 U.S.C. 3371 *et seq.*:
16 U.S.C. 3372(a)(1) ... 82

Statutes and regulations—Continued: Page

Major Crimes Act, ch. 341, § 9, 23 Stat. 385 19
Pub. L. No. 83-280, 67 Stat. 588 19
Stigler Act, ch. 458, § 3(b), 61 Stat. 732 36
Trade and Intercourse Act of 1790, ch. 33,
1 Stat. 137 .... 3, 12, 18
§ 4, 1 Stat. 138 .... 3, 18, 22, 29, 33
§ 5, 1 Stat. 138 18
Trade and Intercourse Act of 1793, ch. 19, § 5,
1 Stat. 330 19
Trade and Intercourse Act of 1796, ch. 30, § 2,
1 Stat. 470 19
Trade and Intercourse Act of 1834, ch. 161,
4 Stat. 729:
§ 12, 4 Stat. 730 33
§ 22, 4 Stat. 733 33
8 U.S.C. 1153(a) 68
8 U.S.C. 1431 68
8 U.S.C. 1433 68
18 U.S.C. 1152 31
20 U.S.C. 7441 57
22 U.S.C. 9003 33
22 U.S.C. 57, 58
25 U.S.C. 177 33
26 U.S.C. 544(a)(2) 68
26 U.S.C. 2701(b)(2)(C) 68
42 U.S.C. 402(d) 68
42 U.S.C. 416(e) 68
42 U.S.C. 622(b)(9) 49
42 U.S.C. 1395 57
42 U.S.C. 1996 57
42 U.S.C. 1996a 57

Statutes and regulations—Continued: Page

42 U.S.C. 14932(b) 33
42 U.S.C. 14952(a) 68
43 U.S.C. 1457 57
50 U.S.C. 3931(a) 33
Tex. Fam. Code Ann.:
§ 153.002 (West 2014) 78
§ 161.001(b) (West 2022) 78
§ 161.003(a)(4) (West 2022) 36
§ 262.101(4) (West 2019) 36
§ 262.105(b)(2)(C) (West 2019) 36
§ 262.114(d)(1)-(2) (West 2019 & Supp. 2021) 62, 74
§ 262.201(g)(3) (West 2019 & Supp. 2021) 36
§ 262.1095 (a)(1)(A) (West 2019 & Supp. 2021) 68
§ 263.001 (West 2019) 43
§ 263.002 (West 2019 & Supp. 2021) 43
25 C.F.R.:
Section 23.141(c) 47
Section 83.11(e) 71

Miscellaneous:

Articles of Confederation and Perpetual Union, Art. IX (1777) .... *passim*, 5a
Cohen's Handbook of Federal Indian Law (Nell Jessup Newton ed., 2012 ed.) 18, 25, 60, 76
20 *Documentary History of the Ratification of the Constitution* (John P. Kaminski et al. eds., 2004) 13
81 Fed. Reg. 38,778 (June 14, 2016) 6, 36, 40, 47, 78
H.R. Rep. No. 1386, 95th Cong., 2d Sess. (1978) .... *passim*
Indian Affairs, U.S. Dep't of the Interior, *Petitions Resolved—Acknowledged*, https://go.usa.gov/xSVPr 72

Miscellaneous—Continued: Page

2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) 63

Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 Stan. L. Rev. 491 (2017) 68

Letter from Henry Knox to Israel Chapin (Apr. 28, 1792), *in* 1 *American State Papers: Indian Affairs* (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) 13

Letter from Charles Pinckney to George Washington (Dec. 14, 1789), *in* 4 *Papers of George Washington: Presidential Series* (Dorothy Twohig ed., 1993) 13

Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834* (1962) 12

2 *Records of the Federal Convention of 1787* (Max Farrand ed., 1911) 12

10 Reg. Deb. 4763 (1834) 25

Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789) 63

Joseph Story, *Commentaries on the Constitution of the United States* (1833):

- Vol. 1 26
- Vol. 2 13
- Vol. 3 17

The Federalist (Jacob E. Cooke ed., 1961):

- *No. 42* (James Madison) 13
- *No. 81* (Alexander Hamilton) 16

Unif. Prob. Code § 2-103(a)(1)-(5) (Amended 2010) 67

Emmerich de Vattel, *The Law of Nations* (1792) 15

1 Noah Webster, *An American Dictionary of the English Language* (1828) 26

In the Supreme Court of the United States

No. 21-376

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

v.

CHAD EVERET BRACKEEN, ET AL.

No. 21-377

CHEROKEE NATION, ET AL., PETITIONERS

v.

CHAD EVERET BRACKEEN, ET AL.

No. 21-378

STATE OF TEXAS, PETITIONER

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

No. 21-380

CHAD EVERET BRACKEEN, ET AL., PETITIONERS

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL PARTIES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-396a[1]) is reported at 994 F.3d 249. The panel opinion (Pet. App. 400a-467a) is reported at 937 F.3d 406. The district court's order granting summary judgment (Pet. App. 468a-527a) is reported at 338 F. Supp. 3d 514. The district court's order denying motions to dismiss (Pet. App. 530a-579a) 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 petitions for writs of certiorari were filed on September 3, 2021, and granted on February 28, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-31a.

STATEMENT

A. Legal Background

Indian tribes are "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). Throughout our Nation's history, they have faced threats to their very existence. At the Founding, the threat came from States and non-Indians who sought to acquire lands that Indians occupied. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 231-232 (1985). To protect Indians

---

[1] All references to "Pet. App." are to the petition appendix in No. 21-378.

from that threat, the First Congress enacted the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137, which, among other protections, prohibited the conveyance of Indian land without federal approval, § 4, 1 Stat. 138.

Two centuries later, Congress recognized that tribes face a different threat—not from the breakup of their lands, but from the breakup of their families. After extensive hearings, Congress found that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. 1901(4). Indeed, studies "showed that 25 to 35% of all Indian children had been separated from their families." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32 (1989). And Congress found that "an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. 1901(4).

Congress further found that the breakup of Indian families harmed not only Indian children and their parents, but also their tribes. *Holyfield*, 490 U.S. at 33-34. As one tribal leader told Congress, tribes cannot long survive as "self-governing" communities if they cannot pass their "heritage" on to the next generation. *Id.* at 34 (citation omitted). Congress thus recognized that, by severing that connection to future generations, the breakup of Indian families was threatening "the continued existence and integrity of Indian tribes." 25 U.S.C. 1901(3).

While acknowledging that "[f]ederal boarding school and dormitory programs" had also "contribute[d] to the destruction of Indian family and community life," H.R. Rep. No. 1386, 95th Cong., 2d Sess. 9 (1978) (House Report), Congress determined that child-custody proceed-

ings in state court were a major cause of the problem. Such proceedings, Congress found, "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5). For example, social workers often misunderstood "the role of the extended family in Indian society"—treating "'as neglect and thus as grounds for terminating parental rights'" the decision to leave a child "'with persons outside the nuclear family.'" *Holyfield*, 490 U.S. at 35 n.4 (citation omitted). And in seeking foster-care and adoptive placements for Indian children, social workers often overlooked Indian families "of modest means"—undervaluing the importance of preserving the child's community ties. House Report 11, 24.

"Recognizing the special relationship between the United States and the Indian tribes and their members" —and invoking its "plenary power over Indian affairs" under the Indian Commerce Clause and "other constitutional authority," 25 U.S.C. 1901(1)—Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.* ICWA provides for exclusive tribal jurisdiction over child-custody proceedings involving Indian children who reside or are domiciled on the tribe's reservation or who are wards of the tribal court. 25 U.S.C. 1911(a). For other child-custody proceedings involving Indian children, tribal courts and state courts have concurrent jurisdiction. 25 U.S.C. 1911(b). When such proceedings occur in state court, ICWA "protect[s] the best interests of Indian children" and "promote[s] the stability and security of Indian tribes and families" in two main ways. 25 U.S.C. 1902.

First, ICWA establishes "minimum Federal standards for the removal of Indian children from their fam-

ilies." 25 U.S.C. 1902. Those standards require that any party seeking an Indian child's removal give notice of the state-court proceedings to the child's parent (or Indian custodian) and tribe. 25 U.S.C. 1912(a). They also prohibit the state court from ordering the child's removal unless it makes certain findings—including 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) and (f); see 25 U.S.C. 1912(d).

Second, ICWA establishes "minimum Federal standards" for "the placement of [Indian] children in foster or adoptive homes." 25 U.S.C. 1902. Those standards require, for example, that in an 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); see 25 U.S.C. 1915(b) (preferences for foster-care and preadoptive placements). If, however, "the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." 25 U.S.C. 1915(c).

B. Procedural History

1. This suit was brought in federal district court by the State of Texas and seven individuals—three non-Indian couples (the Brackeens, Librettis, and Cliffords) and Altagracia Socorro Hernandez (the biological mother of an Indian child whom the Librettis eventually

adopted). J.A. 61-65; Pet. App. 50a (Dennis, J.).[2] In March 2018, plaintiffs filed the operative complaint, naming the United States and various federal agencies and officials as defendants. J.A. 65-66.

Plaintiffs challenged multiple provisions of ICWA as facially unconstitutional, alleging violations of Article I, the anticommandeering doctrine, equal protection, the nondelegation doctrine, and substantive due process. J.A. 132-147, 151-156. Plaintiffs also challenged under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, a 2016 rule promulgated by the Secretary of the Interior to implement ICWA, 81 Fed. Reg. 38,778 (June 14, 2016) (2016 Rule). J.A. 125-132, 148-151. The complaint sought declaratory and injunctive relief. J.A. 157. Four Indian tribes—the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians—intervened as defendants. J.A. 26-27.

The district court denied the defendants' motions to dismiss, Pet. App. 530a-579a, and granted summary judgment for plaintiffs except as to their substantive-due-process claims, which the court rejected, *id.* at 468a-527a. The court then entered final judgment, but granted only declaratory relief. *Id.* at 528a-529a.

2. The federal defendants and the tribes appealed, and the Navajo Nation intervened. J.A. 6. A divided panel of the court of appeals reversed and rendered judgment for the defendants on all claims. Pet. App. 400a-467a.

3. The court of appeals granted rehearing en banc and issued a fractured decision affirming in part and reversing in part. Pet. App. 1a-399a. The en banc court affirmed the district court's conclusion that at least one

---

[2] Louisiana and Indiana were also plaintiffs, but they have declined to participate in the proceedings in this Court.

plaintiff had standing to bring each claim. *Id.* at 3a. A majority then held that Congress had the Article I power to enact ICWA; that many of ICWA's applications present no anticommandeering problem; that ICWA draws political, not racial, classifications; that ICWA's definition of "Indian child" and most of its placement preferences do not violate equal protection; and that Section 1915(c) does not violate the nondelegation doctrine. *Id.* at 3a-7a, 197a, 352a.

In contrast, the en banc court affirmed, in some respects by an equally divided vote, the district court's judgment that certain applications of ICWA violate the anticommandeering doctrine. Pet. App. 4a-5a. An equally divided court also affirmed the district court's judgment that ICWA's third-ranked 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), violate equal protection. Pet. App. 4a. And a majority declared the 2016 Rule invalid to the extent that "it implemented [certain] unconstitutional provisions." *Id.* at 6a.

SUMMARY OF ARGUMENT

I. ICWA is a valid exercise of Congress's plenary power over Indian affairs. That power derives from the constitutional text, including the Indian Commerce Clause. It is a necessary consequence of the constitutional structure, in which Indian tribes occupy a unique status as domestic dependent sovereigns. And it finds support in centuries of constitutional history dating to the Founding, when early Congresses enacted Trade and Intercourse Acts to protect Indians from numerous threats, including the breakup of their lands. ICWA carries on that historical tradition by preventing the unwarranted breakup of Indian families—and in so doing, falls well within Congress's power over Indian affairs.

II. Plaintiffs' anticommandeering challenge lacks merit. ICWA establishes minimum federal standards that confer rights on individuals and tribes and impose restrictions on the removal of Indian children from their families and their placement in new homes. Like any other party, state agencies must satisfy ICWA's standards if they seek to justify a child's removal or placement. But such evenhanded conditions present no anticommandeering problem. And though state judges must apply ICWA's standards, the Supremacy Clause mandates that they do so.

III. Plaintiffs' equal-protection challenge also lacks merit. No plaintiff has a justiciable claim against the ICWA provisions at issue—the definition of an "Indian child" and the default preferences for adoptive and foster-care placement. Texas lacks *parens patriae* standing to sue the federal government, and the individual plaintiffs lack injury fairly traceable to the challenged provisions that would be redressed by the relief sought in this suit.

In any event, plaintiffs' equal-protection claims fail on the merits. The challenged provisions draw classifications based on membership in or close connection to an Indian tribe. Those classifications are not suspect; indeed, the Constitution itself singles Indians out as a proper subject for separate legislation, and this Court has held in an unbroken line of precedents that such classifications are political rather than racial and thus subject to rational-basis review. The challenged ICWA provisions readily satisfy that review. By creating a statutory definition and default preferences that seek to prevent the unwarranted separation of Indian children from their families and communities, the provisions are "tied rationally to the fulfillment of Congress' unique

obligation toward the Indians." *Morton* v. *Mancari*, 417 U.S. 535, 552, 555 (1974).

IV. Texas's nondelegation challenge to 25 U.S.C. 1915(c)—which allows tribes to "establish a different order of preference" for adoptive and foster-care placements—fails as well. Because Texas has not shown any certainly impending injury from that provision, the State lacks standing to challenge it. Regardless, Section 1915(c) does not delegate legislative power. The provision directs the application of another government's law for a specified purpose—a familiar legislative approach that this Court has long upheld, including when Congress adopts tribal law.

ARGUMENT

Over 40 years ago, Congress enacted ICWA "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. Since then, ICWA has become integrated into state child-welfare systems and been applied routinely in state courts throughout the Nation. It has also become the "gold standard" for child-custody practices more generally, providing a model for promoting children's welfare within their families and communities. Pet. App. 10a (Dennis, J.); see Casey Family Programs Cert. Amicus Br. 5-6.

There is no basis for uprooting those long-settled practices and overturning Congress's judgment concerning how best to protect Indian children, families, and tribes. To the contrary, "[p]roper respect for a coordinate branch of the government requires" that the Court refrain from invalidating an Act of Congress "unless the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *United States* v. *Harris*, 106 U.S. 629, 635 (1883). To the extent their

claims are justiciable, plaintiffs have not overcome that presumption of constitutionality.[3]

I. ICWA IS A VALID EXERCISE OF CONGRESS'S PLENARY POWER OVER INDIAN AFFAIRS

"The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). ICWA falls squarely within that power by establishing federal standards to protect Indian children and families and "the continued existence and integrity of Indian tribes." 25 U.S.C. 1901(3). The en banc court therefore correctly upheld Congress's authority to enact ICWA. Pet. App. 71a-105a.

A. Congress Has Plenary Power Over Indian Affairs

In "an unbroken current of judicial decisions," *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913), this Court has repeatedly reaffirmed Congress's plenary power over Indian affairs. See, *e.g.*, *United States* v. *Cooley*, 141 S. Ct. 1638, 1643 (2021); *Puerto Rico* v. *Sanchez Valle*, 579 U.S. 59, 70 (2016); *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *United States* v. *Lara*, 541 U.S. 193, 200 (2004); *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998); *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 657 n.1 (1979); *Washington* v. *Confederated Bands*

---

[3] Before this Court, plaintiffs do not challenge the 2016 Rule on any ground independent of the statute's constitutionality. Thus, in rejecting plaintiffs' challenges to the statute, the Court should likewise reject their challenges to the rule. In addition, insofar as "any provision of [ICWA] or the applicability thereof is held invalid," it should be severed from the rest of the statute. 25 U.S.C. 1963.

& Tribes of the Yakima Indian Nation, 439 U.S. 463, 470 (1979); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 84 (1977); *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n.2 (1976); *Mancari*, 417 U.S. at 551; *United States* v. *Hellard*, 322 U.S. 363, 367 (1944); *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 718 (1943); *Winton* v. *Amos*, 255 U.S. 373, 391 (1921); *Choate* v. *Trapp*, 224 U.S. 665, 671 (1912); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 306 (1902). Indeed, the Court has "recognized a general trust relationship" between the United States and Indian tribes "since 1831." *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 474 n.3 (2003).

As a matter of constitutional text, structure, and history, those decisions are correct, and plaintiffs do not ask this Court to reconsider them.

1. Congress's plenary power over Indian affairs derives explicitly from the Constitution's text

The text of the Constitution "confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); see U.S. Const. Art. I, § 8; Art. II, § 2, Cl. 2. As Chief Justice Marshall explained for the Court in *Worcester*, "[t]hese powers comprehend all that is required for the regulation of our intercourse with the Indians." 31 U.S. at 559; see Art. I, § 8, Cl. 18 (Necessary and Proper Clause).

Indeed, the Indian Commerce Clause itself "provide[s] Congress with plenary power to legislate in the field of Indian affairs." *Lara*, 541 U.S. at 200 (citation omitted). Its predecessor—Article IX of the Articles of Confederation—had granted the Continental Congress

"the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians, *not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated*." Art. IX (emphasis added). The italicized phrases "which follow[ed] the grant of power" proved problematic; various States "so construed" those "ambiguous phrases" "as to annul the power itself." *Worcester*, 31 U.S. at 559. So at the Constitutional Convention, James Madison proposed a new clause without such limitations. 2 *Records of the Federal Convention of 1787*, at 324 (Max Farrand ed., 1911).

The Indian Commerce Clause resulted from that proposal. Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834*, at 42 (1962). Approved by the Convention without controversy, see *ibid.*, that Clause grants Congress the power to "regulate Commerce * * * with the Indian Tribes," Art. I, § 8, Cl. 3. Unlike Article IX of the Articles of Confederation, the Clause does not refer explicitly to "trade" or "affairs with the Indians." But "commerce with the Indian tribes" encompasses both of those concepts—not just trade (*i.e.*, "buying and selling and exchanging commodities"), but also "intercourse between the citizens of the United States and those tribes." *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 417 (1866). Congress's first major piece of Indian legislation reflected that understanding. Known as the Trade and Intercourse Act of 1790, it "regulate[d] trade *and intercourse* with the Indian tribes." 1 Stat. 137 (emphasis altered).

The shift in language from "trade" and "affairs with the Indians" to "Commerce * * * with the Indian Tribes" therefore reflected no substantive change. The Consti-

tution was understood to have vested Congress with the same "authority to regulate trade and intercourse with the Indian tribes" that the Articles had conferred on the Continental Congress—and that "the crown" had exercised "in the ante-revolutionary times." 2 Joseph Story, *Commentaries on the Constitution of the United States* 540-541 (1833) (Story). The only substantive difference was the Indian Commerce Clause's omission of the "two limitations" that had "render[ed]" Article IX "obscure and contradictory." *The Federalist No. 42*, at 284 (James Madison) (Jacob E. Cooke ed., 1961). That was the only distinction identified by Madison and later by Chief Justice Marshall and Justice Story. See *ibid.*; *Worcester*, 31 U.S. at 559 ("The shackles imposed on this power, in the confederation, are discarded."); 2 Story 540-541 ("The constitution has wisely disembarrassed the power of these two limitations.").

In discarding those limitations, the Constitution thus broadened Congress's power over Indian affairs. The Antifederalist Abraham Yates, for example, recognized that ratification would "totally surrender into the hands of Congress the management and regulation of the Indian affairs." 20 *Documentary History of the Ratification of the Constitution* 1158 (John P. Kaminski et al. eds., 2004). After ratification, the first Secretary of War, Henry Knox, likewise wrote that "the United States have, under the constitution, the sole regulation of Indian affairs, in all matters whatsoever." Letter to Israel Chapin (Apr. 28, 1792), *in* 1 *American State Papers: Indian Affairs* 232 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832). And the Governor of South Carolina, Charles Pinckney, similarly acknowledged that "the sole management of India[n] affairs is now committed" to "the general Government." Letter to George Wash-

ington (Dec. 14, 1789), *in* 4 *Papers of George Washington: Presidential Series* 404 (Dorothy Twohig ed., 1993) (brackets in original).

The Constitution was accordingly understood to have conferred on Congress a plenary power over Indian affairs, free from the "shackles" that the Articles had imposed. *Worcester*, 31 U.S. at 559; see *id.* at 560 (noting "the universal conviction," in which even Georgia had seemingly acquiesced, "that the whole power of regulating the intercourse with [the Indian nations] was vested in the United States").[4]

2. Congress's plenary power over Indian affairs is grounded in the Constitution's structure

Congress's plenary power over Indian affairs is also "implicit[]" in the structure of the Constitution more generally. *Mancari*, 417 U.S. at 551-552. Within that structure, "Indian tribes occupy a unique status." *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Though "possessing attributes of sovereignty," *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975), tribes are considered "domestic dependent" sovereigns, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, C.J.). That status differentiates them from both "foreign Nations" and "States"—the other sovereigns mentioned in the Constitution. Art. I, § 8, Cl. 3. Unlike foreign nations, tribes are "domestic" because they exist "within the jurisdictional limits of the United States." *Cherokee Na-*

---

[4] The separate question of *state* authority, see, *e.g.*, *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022), is not at issue here. And even in *Castro-Huerta*, the Court held that the State's authority was "*concurrent*" with Congress's authority, *ibid.*, thus accepting Congress's power over non-economic activities.

tion, 30 U.S. at 17. And unlike States, tribes are "dependent" because, "[i]n the exercise of the war and treaty powers, the United States overcame [them] and took possession of their lands, sometimes by force." *Seber*, 318 U.S. at 715.

The tribes' dependent status has implications for both tribal and federal powers. For tribes, it worked the "implicit divestiture" of "some aspects of the sovereignty which they had previously exercised." *Wheeler*, 435 U.S. at 323, 326. This Court has held, for example, that tribes were implicitly divested of the power to "'enter into direct commercial or governmental relations with foreign nations'" and the "power to exercise criminal jurisdiction over non-Indians." *Cooley*, 141 S. Ct. at 1643 (citation omitted). But "in return for" their "forfeiture of full sovereignty," tribes gained "the protection of the United States." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978). And by assuming "the duty of furnishing that protection," the United States also assumed "the authority to do all that [is] required to perform that obligation." *Seber*, 318 U.S. at 715.

That authority is a "'necessary concomitant[]'" of the United States' overriding sovereignty—an authority "necessarily inherent" in any national government over a domestic dependent sovereign. *Lara*, 541 U.S. at 201 (citation omitted). Under the law of nations, that power had belonged to Great Britain before the Revolution; the tribes, "by associating with" Great Britain, had "tak[en] its protection." *Worcester*, 31 U.S. at 561; see *id.* at 548, 555; see also Emmerich de Vattel, *The Law of Nations* § 6, at 17 (1792) (explaining that "a weak state" may "place[] itself under the protection of a more powerful one"); *United States* v. *Candelaria*, 271 U.S. 432, 442 (1926) (observing that Spanish and Mexican

law likewise treated Indians as dependent communities). When the United States defeated the British in the Revolutionary War, the tribes came under the protection of the United States, which succeeded to the power to provide it. *Worcester*, 31 U.S. at 544, 555, 560.

The Constitution did not displace that "preconstitutional" power, just as it did not displace other incidents of national sovereignty. *Lara*, 541 U.S. at 201. After ratification, the United States retained such incidents "inherently inseparable from the conception of nationality," though not "expressly affirmed by the Constitution." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). "It is inherent in the nature of sovereignty," for example, "not to be amenable to the suit of an individual *without its consent*." *The Federalist No. 81*, at 548 (Alexander Hamilton). Thus, the "United States, as sovereign, is immune from suit save as it consents to be sued," even though the Constitution makes no mention of federal sovereign immunity. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Similarly, "[i]t is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). Accordingly, "there was no need to set forth control of immigration as one of the enumerated powers of Congress." *Arizona* v. *United States*, 567 U.S. 387, 422 (2012) (Scalia, J., concurring in part and dissenting in part). Nor was there any need to enumerate other "necessary concomitants of nationality," such as the "power to acquire territory

by discovery and occupation." *Curtiss-Wright*, 299 U.S. at 318.

The power "of exercising a fostering care and protection over all dependent Indian communities," *Sandoval*, 231 U.S. at 46, is likewise a "natural incident, resulting from the sovereignty and character of the national government," 3 Story 124; see *Lara*, 541 U.S. at 201. Accordingly, after ratification of the Constitution, Indian tribes continued to exist as dependent nations "under the protection of the United States." Treaty with the Cherokee, July 2, 1791, art. II, 7 Stat. 39. Indeed, that "stipulation" appeared "in Indian treaties, generally"—as it had before ratification. *Worcester*, 31 U.S. at 551; see, *e.g.*, Treaty with the Wyandot, Jan. 21, 1785, art. II, 7 Stat. 16. Ratification thus did not alter the tribes' "relation to the United States." *Cherokee Nation*, 30 U.S. at 17.

"Over the years," this Court has "described the federal relationship with the Indian tribes," *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011), as "that of a ward to his guardian," *Cherokee Nation*, 30 U.S. at 17, and, more recently, as a "trust relationship," *Jicarilla*, 564 U.S. at 178. Those formulations reflect the same fundamental understanding: that from the tribes' dependent status—and from the conditions the tribes have endured—"there arises the duty of protection, and with it the power." *United States* v. *Kagama*, 118 U.S. 375, 384 (1886); see *ibid.* (explaining that the power "must exist in [the general] government, because it never has existed anywhere else"). Indeed, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."

Cohen's Handbook of Federal Indian Law § 5.04[3][a], at 414 (Nell Jessup Newton ed., 2012 ed.) (Cohen).

3. History confirms Congress's plenary power over Indian affairs

Congress's plenary power over Indian affairs finds further confirmation in "long continued legislative and executive usage." *Sandoval*, 231 U.S. at 46. "When faced with a dispute about the Constitution's meaning or application, 'long settled and established practice is a consideration of great weight.'" *Houston Cmty. Coll. Sys.* v. *Wilson*, 142 S. Ct. 1253, 1259 (2022) (brackets and citation omitted). As Madison wrote, "'a regular course of practice' can illuminate or 'liquidate' our founding document's 'terms & phrases.'" *Ibid.* (citation omitted). That is the case here.

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning." *Lone Wolf*, 187 U.S. at 565. As noted, the First Congress passed and President Washington signed an Act to regulate not just "trade," but also "intercourse," "with the Indian tribes." 1 Stat. 137 (emphasis omitted). In addition to prohibiting the conveyance of Indian land to "any person" or "any state" without federal approval, § 4, 1 Stat. 138, that Act made it a federal offense for a non-Indian to commit "any crime" or "trespass" against an Indian in Indian territory that would otherwise be punishable under state law if committed within the jurisdiction of any State, § 5, 1 Stat. 138.

The 1790 Act was merely the first "of a series of Acts * * * designed to regulate trade and other forms of intercourse between the North American Indian tribes and non-Indians." *Omaha*, 442 U.S. at 664. In the ensuing decades, Congress enacted further such Acts that prohibited non-Indians from, among other things, "sur-

vey[ing]" or "settl[ing] on lands belonging to any Indian tribe," Trade and Intercourse Act of 1793, ch. 19, § 5, 1 Stat. 330; and "cross[ing] over" onto Indian lands to "hunt, or in any wise destroy the game," or "drive, or otherwise convey any stock of horses or cattle range," Trade and Intercourse Act of 1796, ch. 30, § 2, 1 Stat. 470. Congress also enacted a precursor to the General Crimes Act, 18 U.S.C. 1152, further extending federal criminal law into Indian country. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383. And though Congress in 1871 ended treaty-making with tribes (thereby giving the House of Representatives a greater role in Indian policy), Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566, the "change in no way affected Congress' plenary powers to *legislate* on problems of Indians," *Antoine* v. *Washington*, 420 U.S. 194, 203 (1975).

Since then, Congress has continued to exercise "plenary" power over Indian affairs, enacting numerous Acts that extend well beyond economic activity. *Seber*, 318 U.S. at 716. Those Acts include criminal statutes, such as the Major Crimes Act, ch. 341, § 9, 23 Stat. 385; statutes governing the allotment of land, such as the General Allotment Act, ch. 119, 24 Stat. 388; statutes regulating tribal self-government, such as the Indian Reorganization Act, ch. 576, 48 Stat. 984, and the Indian Civil Rights Act, Pub. L. No. 90-284, Tit. II, 82 Stat. 77; and statutes "allow[ing] state law to apply on tribal lands where it otherwise would not," *Ysleta del Sur Pueblo* v. *Texas*, 142 S. Ct. 1929, 1934 (2022), such as Pub. L. No. 83-280, 67 Stat. 588.

Thus, at every turn, history confirms Congress's plenary power over Indian affairs. The exercise of that authority dates to the First Congress. See *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (citing

practice "introduced at a very early period of our history"). It is embodied in legislative enactments still in effect today. See *Myers* v. *United States*, 272 U.S. 52, 175 (1926) (citing a "legislative exposition of the Constitution * * * acquiesced in for a long term of years"). And this Court has consistently upheld such enactments as valid exercises of congressional power. See, *e.g.*, *Lara*, 541 U.S. at 200-207; *Mazurie*, 419 U.S. at 553-556; *Seber*, 318 U.S. at 715-719; *United States* v. *Chavez*, 290 U.S. 357, 365 (1933); *United States* v. *Jackson*, 280 U.S. 183, 190 (1930); *Sunderland* v. *United States*, 266 U.S. 226, 233 (1924); *Brader* v. *James*, 246 U.S. 88, 96 (1918); *United States* v. *Nice*, 241 U.S. 591, 597-601 (1916); *Perrin* v. *United States*, 232 U.S. 478, 482-487 (1914); *Sandoval*, 231 U.S. at 45-49; *Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 310-316 (1911); *Hitchcock*, 187 U.S. at 307; *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 488 (1899); *Kagama*, 118 U.S. at 383-385; *Holliday*, 70 U.S. at 415-418. Because Congress's plenary power over Indian affairs has "always been recognized by the Executive and by Congress, and by this [C]ourt, whenever the question has arisen," *Kagama*, 118 U.S. at 384, "its existence cannot be doubted," *Seber*, 318 U.S. at 715.

B. ICWA Falls Squarely Within Congress's Plenary Power Over Indian Affairs

In enacting ICWA, Congress expressly invoked its "plenary power over Indian affairs" grounded in the Indian Commerce Clause and "other constitutional authority." 25 U.S.C. 1901(1). And Congress specifically cited "the special relationship between the United States and the Indian tribes and their members," explaining that "through statutes, treaties, and the general course of dealing with Indian tribes," Congress "has assumed

the responsibility for the protection and preservation of Indian tribes and their resources." 25 U.S.C. 1901(2).

This Court has explained that, to fall within Congress's power over Indian affairs, a statute "must not be purely arbitrary, but founded upon some reasonable basis." *Perrin*, 232 U.S. at 486. Specifically, the statute must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. And the Court has emphasized that "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 accepted and given full effect by the courts." *Perrin*, 232 U.S. at 486.

Here, Congress's statutory findings establish that ICWA falls well within Congress's authority. Congress identified a substantial and widespread problem: the "unwarranted" removal of Indian children from their families, followed by their placement "in non-Indian foster and adoptive homes and institutions." 25 U.S.C. 1901(4). Congress understood that problem to threaten not just the welfare of Indian children and their families, but also "the continued existence and integrity of Indian tribes." 25 U.S.C. 1901(3). And Congress determined that a major cause of that problem was that state child-custody proceedings "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5).

Congress responded by establishing "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. Congress determined that application of those standards in state

child-custody proceedings would "protect the best interests of Indian children" and "promote the stability and security of Indian tribes and families." *Ibid.* The standards are thus "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," *Mancari*, 417 U.S. at 555, and ICWA is a valid exercise of Congress's power over Indian affairs.

Indeed, ICWA carries on a historical tradition of protecting Indian tribes that began with the Trade and Intercourse Act of 1790. Congress enacted that statute and its many successors to protect tribes from an existential threat: the breakup of their lands. See *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). Congress understood that threat to come from outside the tribe—namely, from non-Indians and States, see, *e.g.*, *County of Oneida* v. *Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 231-232 (1985) (*Oneida II*)—so Congress stepped in to regulate their intercourse with the tribes. § 4, 1 Stat. 138. And it did so by establishing a federal standard for the conveyance of Indian land—rendering conveyances without the United States' approval "[in]valid," including in state court under state law. *Ibid.*; see *Oneida Indian Nation of N.Y.* v. *Oneida County*, 414 U.S. 661, 672 n.8 (1974) (*Oneida I*) (discussing state-court decisions applying the Trade and Intercourse Acts to invalidate Indian-land leases ratified under state law).

Like the Trade and Intercourse Acts, ICWA addresses a threat to tribes and their members: the breakup of Indian families. 25 U.S.C. 1901(3) and (4). As in 1790, that threat comes from outside the tribe—namely, from "nontribal public and private agencies" and "States," 25 U.S.C. 1901(4) and (5)—so Congress stepped in to regulate their intercourse with the tribes.

And as in 1790, Congress did so by establishing federal standards that apply in state court and preempt contrary state law. 25 U.S.C. 1902. Far from lacking "historical precedent," Brackeen Br. 51 (citation omitted), ICWA has historical analogues in Congress's earliest enactments.

Of course, Congress's "plenary" power over Indian affairs is "not absolute." *Weeks*, 430 U.S. at 84 (citation omitted). As noted, its exercise must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* at 85 (citation omitted). And the power is subject to "pertinent constitutional restrictions," *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935), such as those discussed below. But where, as here, a statute is rationally related to providing for the Indians' protection, it does not exceed Congress's power over Indian affairs.

C. Plaintiffs' Counterarguments Lack Merit

Plaintiffs' various arguments that ICWA exceeds Congress's power cannot be squared with this Court's precedents or with the Constitution's text and historical understanding.

1. Congress's power is not limited to regulating trade

a. Plaintiffs contend that, under the Indian Commerce Clause, commerce with the Indian tribes encompasses only "trade," which they define as "buying, selling, and transporting goods." Tex. Br. 23; see Brackeen Br. 47-49. But this Court rejected that contention over 150 years ago, explaining that commerce with the Indian tribes encompasses not just "buying and selling and exchanging commodities," but also "intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very im-

portant one." *Holliday*, 70 U.S. at 417. The Court, moreover, has described "the central function of the Indian Commerce Clause" as "provid[ing] Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989). And it has repeatedly upheld exercises of that power that do not involve trade. See, *e.g.*, *Lara*, 541 U.S. at 200 (upholding "lift[ing]" of "restrictions on the tribes' criminal jurisdiction"); *Seber*, 318 U.S. at 715-719 (upholding immunity of Indian land from state taxation). Because plaintiffs do not challenge those precedents, that should be the end of the matter.

In any event, plaintiffs' contention is contrary to the original understanding of the Indian Commerce Clause. In discarding the limitations that the Articles of Confederation had imposed, the Clause broadened—not "narrowed," Tex. Br. 29; see Brackeen Br. 48—Congress's power over Indian affairs. See pp. 11-14, *supra*. And early Congresses enacted a series of Trade *and Intercourse* Acts, addressing a range of non-economic activities, such as crime, settlements, and hunting. See pp. 18-19, *supra*. Those Acts "provide 'contemporaneous and weighty evidence' of the Constitution's meaning." *Printz* v. *United States*, 521 U.S. 898, 905 (1997) (brackets and citation omitted).

Quoting this Court's decision in *Kagama*, Texas contends that it would be "a very strained construction" of the Indian Commerce Clause to read it as granting Congress plenary power over Indian affairs. Br. 32 (citation omitted). But what the *Kagama* Court thought "strained" was a construction of the Clause that would authorize Congress to regulate a tribe's *internal* affairs—namely, punishment for a crime committed by one Indian against another on a reservation. 118 U.S. at 378-379. The

Court did not question Congress's general authority to regulate "trade and intercourse" with Indian tribes. *Id.* at 378. And the Court ultimately upheld the statute at issue—the Major Crimes Act—in recognition of the United States' duty and power to protect the Indians. *Id.* at 381-385.

For similar reasons, Texas's reliance (Br. 30-31) on Congress's failure to pass an 1834 bill that would have established an Indian confederacy is misplaced. The bill's opponents did not question Congress's general authority "to regulate trade and intercourse with the Indian tribes." 10 Reg. Deb. 4763 (1834). Rather, they questioned whether Congress had the power "to form a constitution and form of government for Indians," *ibid.*, and the bill "failed to pass because of concerns that it impermissibly intruded on tribal sovereignty," Cohen § 1.03[4][b], at 54. Such concerns are absent here.

b. This Court's Interstate Commerce Clause decisions likewise do not support plaintiffs' interpretation. Brackeen Br. 51-53; Tex. Br. 23-24. This Court has declined to construe "Commerce * * * among the several States" as encompassing only trade. See *Gonzales* v. *Raich*, 545 U.S. 1, 58, 69-70 (2005) (Thomas, J., dissenting) (proposing that construction and criticizing the Court for not adopting it). To construe "Commerce * * * with the Indian Tribes" as encompassing only trade would thus give the Indian Commerce Clause a much narrower reading than the Interstate Commerce Clause—contrary to this Court's recognition that, "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 62 (1996).

Moreover, even if "Commerce" carries the same meaning (*i.e.*, "intercourse") throughout Article I, Section 8, Clause 3, the Clause still refers to three different types of "intercourse": "with foreign Nations," "among the several States," and "with the Indian Tribes." It would be wrong "to suppose, that the framers weighed only the force of single words, as philologists or critics, and not whole clauses and objects, as statesmen, and practical reasoners." 1 Story 439. And though this Court has described "Commerce * * * among the several States" as "commercial intercourse," *United States* v. *Lopez*, 514 U.S. 549, 553 (1995) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 189-190 (1824)), it has never understood "Commerce * * * with the Indian tribes" as so limited. See, *e.g.*, *Holliday*, 70 U.S. at 417 (describing "intercourse between the citizens of the United States and th[e] tribes," without any modifier); see also 1 Noah Webster, *An American Dictionary of the English Language* 42, 112 (1828) (defining "commerce" to include "intercourse," which may, in context, encompass "connection by reciprocal dealings between persons or nations" in "common affairs and civilities") (capitalization and emphasis altered).

History explains why. Whereas the Interstate Commerce Clause had no counterpart in the Articles of Confederation, see *Raich*, 545 U.S. at 16, the Indian Commerce Clause was adopted against the backdrop of Article IX and the tribes' unique status as domestic dependent sovereigns. See pp. 14-18, *supra*. The Clause was thus understood to have the same scope as Article IX, without the limitations—a scope extending beyond trade and other economic activity. Accordingly, it is "well established that the Interstate Commerce and Indian Commerce Clauses have very different applica-

tions." *Cotton Petroleum*, 490 U.S. at 192; cf. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 446 (1979) (rejecting the premise "that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved").

c. In any event, Congress's plenary power over Indian affairs also rests on the United States' power to protect domestic dependent sovereigns. Plaintiffs cite (Tex. Br. 22; Brackeen Br. 56) a footnote in *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973), that did not specifically mention the tribes' dependent status as a "source of federal authority over Indian matters," *id.* at 172 n.7. But that footnote's identification of such sources did not purport to be exhaustive; the footnote cited two decisions in which this Court expressly recognized that "[t]he Federal Government's power over Indians is derived * * * from the necessity of giving uniform protection to a dependent people," *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959); see *Perrin*, 232 U.S. at 482 (similar); and the Court has since reaffirmed that understanding, see, *e.g.*, *Lara*, 541 U.S. at 200-201; *Mancari*, 417 U.S. at 551-552.

2. Congress's power is not limited to regulating tribes

The individual plaintiffs contend (Br. 50) that, under the Indian Commerce Clause, Congress has power only to regulate "tribes as such." But as Texas acknowledges (Br. 23), this Court long ago rejected that contention—and for good reason. Indian tribes are composed of individuals, so "commerce with the Indian tribes" naturally encompasses "commerce with the individuals composing those tribes." *Holliday*, 70 U.S. at 417; see, *e.g.*, *Nice*, 241 U.S. at 600 (similar). Congress's power under the Indian Commerce Clause is thus not limited to regulating "Tribes" as "Tribes," any more than its power

under the Interstate Commerce Clause is limited to regulating "States" as "States," or its power under the Foreign Commerce Clause is limited to regulating "foreign Nations" as "foreign Nations." U.S. Const. Art. I, § 8, Cl. 3. Rather, Congress has the power under each Clause to regulate "individuals." *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1479 (2018) (citation omitted); see *Holliday*, 70 U.S. at 417.

The individual plaintiffs observe (Br. 50) that ICWA's definition of "Indian child" extends beyond children who are tribal members, to encompass children who are eligible for tribal membership and are the biological children of tribal members. 25 U.S.C. 1903(4). But the application of ICWA to a child in the latter category is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," *Mancari*, 417 U.S. at 555, by protecting "the continued existence and integrity" of tribes themselves. 25 U.S.C. 1901(3); see p. 73, *infra*. It also protects the rights of individuals who are currently tribal members—including the child's biological parent (who must be a tribal member when the child is not). 25 U.S.C. 1903(4); see pp. 34-48, *infra*.

The individual plaintiffs further observe (Br. 50) that ICWA regulates "*non*-Indian[s]." But the Indian Commerce Clause has always been understood to encompass the power to prohibit "non-Indians" from infringing "the rights of Indians." *Omaha*, 442 U.S. at 664; see, *e.g.*, *Mazurie*, 419 U.S. at 554; *Holliday*, 70 U.S. at 417. Indeed, the Trade and Intercourse Acts consistently did just that.

3. Congress's power within a State is not limited to regulating on tribal lands

The individual plaintiffs also argue (Br. 50) that Congress's power over Indian affairs is diminished outside

"Indian lands." But while this Court has recognized certain geographic limits on a *tribe*'s authority, this Court has rejected any geographical component to *Congress's* power. Instead, the Court has held that "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." *United States* v. *McGowan*, 302 U.S. 535, 539 (1938) (citation omitted); see *United States* v. *Forty-three Gallons of Whiskey*, 93 U.S. 188, 194-195 (1876) ("[T]his [C]ourt held that the power to regulate commerce with the Indian tribes was in its nature, general, and not confined to any locality.").

It therefore does not matter that ICWA applies "within * * * the limits of a State." *Sandoval*, 231 U.S. at 46; see *Holliday*, 70 U.S. at 418 (similar). Nothing in the text of the Indian Commerce Clause references state boundaries; indeed, the Constitution "discarded" a limitation in Article IX that had done so. *Worcester*, 31 U.S. at 559. Moreover, Congress has regulated Indian affairs within state boundaries from the beginning. The Trade and Intercourse Act of 1790, § 4, 1 Stat. 138, for example, applied "within the boundaries of the original 13 States." *City of Sherrill* v. *Oneida Indian Nation of N.Y.*, 544 U.S. 197, 204 n.2 (2005). And every statute that now governs "Indian country" likewise applies within the States.

Nor does it matter that ICWA applies "off a reservation." *Perrin*, 232 U.S. at 482. Nothing in the text of the Indian Commerce Clause limits Congress's power to tribal lands. And this Court has repeatedly upheld Congress's power under that Clause to regulate off-reservation activities. See, *e.g.*, *Nice*, 241 U.S. at 597; *Forty-three Gallons*, 93 U.S. at 195; *Holliday*, 70 U.S. at 415-418.

4. Congress's power is not subject to a domestic-relations exception

Plaintiffs additionally contend that Congress's plenary power over Indian affairs does not extend to "core matters of state concern," such as "domestic relations." Tex. Br. 36; see Brackeen Br. 53-54. But there is no domestic-relations exception to Congress's power over Indian affairs—just as there is no domestic-relations exception to Congress's other powers. Thus, "[n]otwithstanding the limited application of federal law in the field of domestic relations generally, this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law." *Ridgway* v. *Ridgway*, 454 U.S. 46, 54 (1981) (citations omitted).

This Court's decisions in *Lopez*, *supra*, and *United States* v. *Morrison*, 529 U.S. 598 (2000), are not to the contrary. In those decisions, the Court rejected an interpretation of the Interstate Commerce Clause that would allow Congress to "regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." *Lopez*, 514 U.S. at 564; see *Morrison*, 529 U.S. at 615-616. In doing so, however, the Court did not disturb Congress's power to displace state family law where the requisite federal interest exists. Since *Lopez* and *Morrison*, the Court has thus reiterated that "family law is not entirely insulated from conflict pre-emption principles." *Hillman* v. *Maretta*, 569 U.S. 483, 491 (2013); see *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 151 (2001) (observing that the Court has "not hesitated to find state family law preempted when it conflicts with ERISA").

It would be particularly anomalous to carve out certain "matters of state concern," Tex. Br. 36, from the scope of Congress's power over Indian affairs. Under the Articles of Confederation, that power had been subject to the proviso that "the legislative right of any State within its own limits be not infringed or violated." Art. IX. Plaintiffs' approach would effectively undo the Framers' decision to discard that limitation. See pp. 13-14, *supra*. And it would be contrary to the historical recognition of the need to protect Indians from undue exercises of state authority and non-Indian disregard of Indian and tribal interests. See *Seber*, 318 U.S. at 715 (noting longstanding "recogni[tion]" of "federal power" to "protect the Indians" against "interference even by a state"); *Kagama*, 118 U.S. at 384 (noting "local ill feeling" of "people of the States").

Any attempt to exclude certain matters of state concern from Congress's power over Indian affairs would also be as "unworkable in practice" as previous attempts to exclude such matters from Congress's power over interstate commerce. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). Just as the "regulation of domestic relations is traditionally the domain of state law," *Hillman*, 569 U.S. at 490; see *In re Burrus*, 136 U.S. 586, 593-594 (1890), so too is the regulation of "real property," *Sunderland*, 266 U.S. at 232-233, and "violent crime," *Morrison*, 529 U.S. at 618. Yet it is well settled that Congress may restrict alienation of Indian property, *Sunderland*, 266 U.S. at 233, and punish crimes committed by or against Indians, see, *e.g.*, 18 U.S.C. 1152. There is no principled or administrable line between real property and violent crime, on one hand, and domestic relations, on the other, in identifying proper subjects of congressional legislation.

Plaintiffs' reliance on this Court's decision in *Lara*, *supra*, is likewise misplaced. Tex. Br. 36; Brackeen Br. 53-54. *Lara* involved a federal statute that "relax[ed] restrictions * * * on the exercise of a tribe's inherent legal authority." 541 U.S. at 196. In upholding the statute, the Court noted, as one consideration among many, that the change in inherent tribal authority did not "interfere[] with the power or authority of any State." *Id.* at 205. The challenged provisions here, in contrast, effect no change in inherent tribal authority, so this case involves no potential conflict between a "change[] in tribal status" and "the power or authority of any State." *Ibid.*

5. State-court proceedings are not immune from Congress's power

Finally, plaintiffs contend that "state-court proceedings" lie beyond Congress's power over Indian affairs. Tex. Br. 30; Brackeen Br. 49. But Congress's power "to pass laws enforceable in state courts" is "well established." *New York* v. *United States*, 505 U.S. 144, 178 (1992). Indeed, the Constitution "made the creation of lower federal courts optional" and thus necessarily contemplated that state courts would apply federal law. *Printz*, 521 U.S. at 907. And this Court has upheld, for example, the constitutionality of federal statutes that alter the "state-law limitations period" for "state-law claims brought in state court." *Jinks* v. *Richland County*, 538 U.S. 456, 461-462 (2003).

Congress's decision to enact federal standards enforceable in state courts is particularly unremarkable here, given those courts' "recognized jurisdiction" over child-custody proceedings. 25 U.S.C. 1901(5). Indeed, Congress has enacted federal standards enforceable in state child-custody proceedings in other contexts—for

example, to protect the rights of children in intercountry adoptions, *e.g.*, 42 U.S.C. 14932(b); to secure the prompt return of children wrongfully removed to the United States, 22 U.S.C. 9003; and to protect the rights of servicemembers against default judgments, *e.g.*, 50 U.S.C. 3931(a).

Plaintiffs assert that "the Founding generation * * * did not require States to apply different rules to Indians in state-court proceedings." Tex. Br. 30. To the contrary, the Trade and Intercourse Acts did just that in establishing standards for the conveyance of land by Indians. See, *e.g.*, 25 U.S.C. 177; Trade and Intercourse Act of 1834, ch. 161, § 12, 4 Stat. 730; Trade and Intercourse Act of 1790, § 4, 1 Stat. 138; see also Trade and Intercourse Act of 1834, § 22, 4 Stat. 733 (establishing "burden of proof" in "trials about the right of property in which an Indian may be a party on one side, and a white person on the other"). State courts applied those standards in declaring particular conveyances invalid. See, *e.g.*, *Oneida I*, 414 U.S. at 672 n.8; *Coey* v. *Low*, 77 P. 1077, 1079 (Wash. 1904) (per curiam); *Mayes* v. *Cherokee Strip Live-Stock Ass'n*, 51 P. 215, 216-218 (Kan. 1897).

Other statutes established rules restricting alienation of allotted lands, see, *e.g.*, General Allotment Act, § 5, 24 Stat. 389; regulating the inheritance of such lands, see, *e.g.*, Act of Feb. 28, 1891, ch. 383, § 5, 26 Stat. 795-796; and addressing the consequences of intermarriage, see, *e.g.*, Act of Aug. 9, 1888, ch. 818, 25 Stat. 392; Act of June 7, 1897, ch. 3, § 1, 30 Stat. 90. Such rules were likewise enforceable in state courts. See, *e.g.*, *Woodward* v. *De Graffenried*, 238 U.S. 284 (1915); *Palm Springs Paint Co.* v. *Arenas*, 242 Cal. App. 2d 682, 685 (Cal. Dist. Ct. App. 1966); *Henson* v. *Johnson*, 246 P.

868, 870 (Okla. 1926); *Frederick* v. *Rock Island Sav. Bank*, 184 N.W. 234, 234-235 (S.D. 1921); *Smith* v. *Smith*, 123 N.W. 146, 147-148 (Wis. 1909). Thus, far from being "an unheard-of exercise of the Indian affairs power," Pet. App. 201a (Duncan, J.), ICWA is part of a historical tradition of federal standards applicable in state court.[5]

II. ICWA'S MINIMUM FEDERAL STANDARDS DO NOT VIOLATE THE ANTICOMMANDEERING DOCTRINE

Absent express constitutional authorization, Congress may not "command[] state legislatures to enact or refrain from enacting state law," *Murphy*, 138 S. Ct. at 1478, or "command the States' officers" to "administer or enforce a federal regulatory program," *Printz*, 521 U.S. at 935. But while the Constitution "does not give Congress the authority to require the States to regulate," it does "give[] Congress the authority to regulate matters directly and to pre-empt contrary state regulation." *New York*, 505 U.S. at 178. Congress exercised that authority in ICWA—regulating directly the removal and placement of Indian children by establishing "minimum Federal standards" for the protection of Indian children, families, and tribes. 25 U.S.C. 1902. ICWA thus validly preempts contrary state law and presents no anticommandeering problem.

---

[5] Plaintiffs observe (Brackeen Br. 6, 51) that the Department of Justice expressed concern about the application of ICWA in state proceedings during the legislative process. Those concerns were based on a view of "the 10th Amendment and general principles of federalism," House Report 40, that this Court later repudiated in *Garcia*.

A. ICWA's Minimum Federal Standards For Removal Do Not Violate The Anticommandeering Doctrine

To prevent the unwarranted removal of Indian children from their families, Section 1912 addresses two types of "involuntary" state-court proceedings: those seeking to remove an Indian child for temporary placement in a foster home, and those seeking to terminate the parent-child relationship altogether. 25 U.S.C. 1912(a). Section 1912 establishes minimum federal standards for such actions, and those standards "operate[] just like any other federal law with preemptive effect." *Murphy*, 138 S. Ct. at 1480.

1. Section 1912 directly regulates the removal of Indian children from their families

A valid preemption provision is one that directly regulates an activity by "impos[ing] restrictions or confer[ring] rights on private actors." *Murphy*, 138 S. Ct. at 1480. Section 1912 does just that: It directly regulates the removal of Indian children from their families by "confer[ring] rights" on Indian children, their parents (or Indian custodians), and their tribes, and by "impos[ing] restrictions" on when a party seeking an Indian child's removal may obtain a court order for a foster-care placement or termination of parental rights. *Ibid.*

Section 1912(a) provides that "the party seeking" an Indian child's removal "shall notify the parent or Indian custodian and the Indian child's tribe" of "the pending proceedings." 25 U.S.C. 1912(a). It thus confers a right to notice—without which the parent or Indian custodian and tribe would be unable to "exercise other rights guaranteed by ICWA, such as the right to intervene." 81 Fed. Reg. at 38,809. Congress has previously enacted similar notice requirements. See, *e.g.*, Stigler Act, ch. 458, § 3(b), 61 Stat. 732 (requiring parties to provide

notice of state-court probate proceedings to the federal government).

Section 1912(d) provides that "[a]ny party seeking" an Indian child's removal "shall 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). That provision protects against an Indian child's unwarranted removal by conferring on the Indian family a right to remain together unless "active efforts" have failed and by restricting when the child may be removed. *Ibid.* As this Court has recognized, "Section 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families." *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 653 (2013). Indeed, many States, including Texas, have similar provisions conditioning a child's removal upon a showing that "reasonable efforts" were made to prevent the need for removal. 81 Fed. Reg. at 38,791; see House Report 22; Tex. Fam. Code §§ 161.003(a)(4), 262.101(4), 262.105(b)(2)(C), 262.201(g)(3).

Section 1912(e) provides that "[n]o foster care placement may be ordered * * * in the absence of a determination, supported by clear and convincing evidence, including 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). In *Santosky* v. *Kramer*, 455 U.S. 745 (1982), this Court held, in the context of proceedings to terminate parental rights, that "due process requires that the State support its allegations by at least clear and convincing evi-

dence." *Id.* at 748. Emphasizing that "imprecise substantive standards" often render such proceedings "vulnerable to judgments based on cultural and class bias," *id.* at 762-763, the Court explained that a heightened standard of proof "would alleviate 'the possible risk that a factfinder might decide [the case] based solely on a few isolated instances of unusual conduct or idiosyncratic behavior,'" *id.* at 764-765 (brackets, citation, and ellipsis omitted). Seeking to counteract a similar risk of "cultural insensitivity and biases," *Adoptive Couple*, 570 U.S. at 649, Section 1912(e) confers on the Indian family the right to remain together, and imposes a restriction on foster-care placement, unless the requisite evidentiary showing is made.

Section 1912(f) provides that "[n]o termination of parental rights may be ordered * * * in the absence of a determination, supported by evidence beyond a reasonable doubt, including 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(f). "In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is 'irretrievably destructive' of the most fundamental family relationship." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 121 (1996) (brackets and citation omitted). Congress therefore established a higher standard of proof in Section 1912(f) than in Section 1912(e)—conferring a right to maintain the parent-child relationship, and imposing a restriction on termination, unless the reasonable-doubt standard is met. House Report 22.

Texas argues (Br. 66, 68) that Section 1912 is not "best read" as conferring rights on individuals and tribes. But the statutory text itself, in preserving the

State's authority to afford "a higher standard of protection to the rights of the parent or Indian custodian," refers to the "rights provided under this subchapter," which includes Section 1912. 25 U.S.C. 1921. Similarly, ICWA authorizes the Indian child, his parent (or Indian custodian), and his tribe to "petition any court of competent jurisdiction to invalidate [a foster-care placement or termination of parental rights] upon a showing that such action violated any provision of [Section 1912]," confirming that a violation of Section 1912 is a violation of their own rights and of the statute's restrictions on placements and terminations. 25 U.S.C. 1914. In any event, any ambiguity in Section 1912 should be construed to avoid any anticommandeering concern. *New York*, 505 U.S. at 170.

2. Section 1912 does not commandeer state agencies or judges

Because Section 1912 "confers rights" and "imposes restrictions," it "operates just like any other federal law with preemptive effect." *Murphy*, 138 S. Ct. at 1480. Texas nevertheless contends (Br. 62-65) that Section 1912 commandeers state agencies and judges. That contention is incorrect.

a. This Court has long distinguished between direct orders to state agencies to administer a federal regulatory program (which violate the anticommandeering doctrine) and conditions on engaging in certain activity (which do not). *Reno* v. *Condon*, 528 U.S. 141 (2000), for example, involved an anticommandeering challenge to the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721 *et seq.*, which restricts when state motor-vehicle departments (DMVs) may "disclose a driver's personal information without the driver's consent." *Condon*, 528 U.S. at 144. The Court "reject[ed] the

State's argument" that "DPPA violates the principles laid down in either *New York* or *Printz*." *Id.* at 150. The Court instead found the case governed by *South Carolina* v. *Baker*, 485 U.S. 505 (1988). As *Baker* 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." *Id.* at 514-515. Applying that principle in *Condon*, the Court explained that, although "DPPA requires the State's employees to learn and apply the Act's substantive restrictions" if they wish to disclose drivers' personal information, that was a permissible condition on "'engag[ing] in [that] activity.'" 528 U.S. at 150-151 (citation omitted).

The same reasoning applies here. Just as a state DMV must comply with DPPA's standards if it wishes to disclose personal information, a state child-welfare agency must comply with ICWA's standards if it wishes to obtain a court order for the removal of an Indian child from his family. And as in *Condon*, there is no direct order to the state agency: ICWA does not command a state child-welfare agency to seek a child's removal, any more than DPPA commands a state DMV to disclose personal information.

That Section 1912's conditions apply "evenhandedly" to "both States and private actors" further establishes that the "anticommandeering doctrine does not apply." *Murphy*, 138 S. Ct. at 1478. Those conditions apply not just to state agencies, but to "[*a*]*ny* party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child." 25 U.S.C. 1912(d) (emphasis added); see 25 U.S.C. 1901(4) (noting historic abuses "by nontribal public *and private* agencies") (emphasis

added). And private actors can—and do—seek the removal of Indian children. See Tex. Br. 6 n.5 ("Although Texas often initiates child-custody proceedings, private parties may do so as well."); Pet. App. 124a-125a (Dennis, J.) (citing examples). Indeed, *Adoptive Couple* itself involved a private couple who sought a termination of parental rights. 570 U.S. at 644-646.

Texas contends (Br. 68) that a statute's evenhandedness forecloses an anticommandeering challenge "only when Congress regulates the States as market participants." But when a statute applies evenhandedly to state and private actors, that demonstrates that Congress is directly regulating the activity itself—as opposed to "regulat[ing] the States' sovereign authority to 'regulate their own citizens.'" *Murphy*, 138 S. Ct. at 1479 (citation omitted). Nothing about that principle turns on whether the activity can be described as participating in a "market."

Texas notes that it has a "sovereign interest" in protecting the welfare of children within its borders. Br. 69 (quoting 81 Fed. Reg. at 38,832). But nothing in ICWA prevents Texas from pursuing that interest by seeking an Indian child's removal. Here, as in other cases involving conditions on engaging in certain activity, "the State's discretion to achieve its goals" is "merely being tested against a reasonable federal standard." *EEOC* v. *Wyoming*, 460 U.S. 226, 240 (1983).

Texas is wrong to contend (Br. 65) that ICWA undermines political accountability for Indian child welfare. The standards that ICWA establishes are "*Federal* standards," 25 U.S.C. 1902 (emphasis added), enacted by Congress "in full view of the public," *New York*, 505 U.S. at 168. "When Congress itself regulates, the responsibility for the benefits and burdens of the regula-

tion is apparent." *Murphy*, 138 S. Ct. at 1477. Texas also contends (Br. 65, 67-68) that ICWA's conditions make obtaining an Indian child's removal more difficult. But even if that is true, the fact that satisfying a statute's conditions "will require time and effort on the part of state employees" does not amount to commandeering. *Condon*, 528 U.S. at 150; see *Baker*, 485 U.S. at 514-515.

Texas's reliance on *Printz* (Br. 66-67) is likewise misplaced. Unlike ICWA, the Brady Handgun Violence Prevention Act (Brady Act), Pub. L. No. 103-159, 107 Stat. 1536, set forth commands, not conditions—"commanding" state officers to "conduct background checks on prospective handgun purchasers." *Printz*, 521 U.S. at 902; see *id.* at 903-904. And unlike ICWA, the Brady Act directed those commands only to state officers. *Id.* at 903.

Moreover, ICWA does not conscript anyone into "federal service." *Printz*, 521 U.S. at 905. Because the federal government has no program of seeking foster-care placements or terminations of parental rights, state agencies and private actors are not "administer[ing] a federal regulatory program" when they seek such placements or terminations. *Id.* at 926 (citation omitted). Contrary to Texas's contention, ICWA no more turns "state governments into federal adoption agencies," Br. 60 (citation omitted), than it does any other "party" seeking an Indian child's removal, 25 U.S.C. 1912(d).

b. No member of the en banc court concluded that Section 1912 commandeers state judges. In adjudicating whether an Indian child's removal is warranted, state judges must apply Section 1912's standards. But that "sort of federal 'direction' of state judges is man-

dated by the text of the Supremacy Clause," *New York*, 505 U.S. at 178-179, which provides that "the Laws of the United States * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby," U.S. Const. Art. VI, Cl. 2.

Although Texas contends (Br. 67) that Section 1912 commandeers state judges when the party seeking an Indian child's removal is a state agency, Texas makes no similar claim when the party is a private actor. That position only highlights the defects in Texas's anticommandeering challenge. When, as here, a statute applies to "both States and private actors," the "anticommandeering doctrine does not apply" at all. *Murphy*, 138 S. Ct. at 1478.

B. ICWA's Placement Preferences Do Not Violate The Anticommandeering Doctrine

When Indian children are ordered removed from their families, they must be placed in new homes. ICWA establishes minimum federal standards for such placements, including default preferences in Section 1915. Those preferences directly regulate the placement of Indian children and therefore do not violate the anticommandeering doctrine.

1. ICWA's placement preferences directly regulate the placement of Indian children

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. If no one covered by a preference comes forward, that preference is "inapplicable." *Adoptive Couple*, 570 U.S. at 654. If, however, a "party that is eligible to be preferred" does come forward, *ibid.*, that party shall be given preference, unless another party demon-

strates "good cause to the contrary," 25 U.S.C. 1915(a) and (b).

As this Court has recognized, Section 1915 confers "rights" on Indian children and on parties eligible to be preferred, with the goal of allowing Indian children to remain, "where possible," in their "Indian community." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 37 (1989) (quoting House Report 23). Specifically, Section 1915 confers on Indian children a right to placements that will preserve their family and community ties, while conferring on certain family and tribal members a right to be given preference in such placements. And Section 1915 thereby "imposes restrictions" on where an Indian child may be placed, absent good cause to the contrary. *Murphy*, 138 S. Ct. at 1480.

Thus, just as States' own placement preferences directly regulate the placement of children, see, *e.g.*, Tex. Fam. Code §§ 263.001, 263.002, ICWA's placement preferences do too. And contrary to plaintiffs' contention (Brackeen Br. 69), this Court has previously given preemptive effect to "order[s] of precedence" in other federal statutes. *Hillman*, 569 U.S. at 493-497; *Ridgway*, 454 U.S. at 52, 60; cf. *Reno* v. *Flores*, 507 U.S. 292, 297, 315 (1993) (upholding "order of preference" of potential custodians for release of juvenile noncitizens) (citation omitted).

2. ICWA's placement preferences do not commandeer state agencies or judges

State agencies may, like any other party, seek to show good cause to depart from the default preferences, and state judges must apply Section 1915's standards in adjudicating where to place an Indian child. But those features of Section 1915 do not constitute commandeering of state agencies or judges.

a. Section 1915 establishes a standard of "good cause" for departing from the default preferences. 25 U.S.C. 1915(a) and (b). That standard operates as a condition on obtaining such a departure—not as a command to seek one. And it applies evenhandedly to any party seeking to justify such a departure—not only to state agencies. Thus, just as Section 1912's conditions on removal of an Indian child do not commandeer state agencies, Section 1915's good-cause standard does not either. See pp. 38-41, *supra*.

Relying on the 2016 Rule and language in now-superseded guidelines, plaintiffs construe Section 1915(a) and (b) to require parties to conduct a proactive search for alternative parties who would be eligible to be preferred but who have not come forward. Tex. Br. 63; Brackeen Br. 67-68. As the government has explained (21-376 Pet. 20 n.2), however, that construction cannot be squared with this Court's decision in *Adoptive Couple*. There, the Court 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. If a preference is inapplicable, it cannot be the source of any requirement that a state agency (or any other party) search for alternative parties who would be eligible for that preference. Accordingly, the Department of the Interior, in consultation with this Office, has 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*. It therefore does not give rise to any enforceable obligation in state child-custody proceedings. In any event, if the Court concludes that a particular construction of ICWA would raise serious constitu-

tional problems, the Court should construe any ambiguity to avoid them.

b. Although state judges must apply Section 1915's standards in adjudicating an Indian child's placement, that again "involve[s] no more than an application of" the Supremacy Clause. *New York*, 505 U.S. at 178; see pp. 41-42, *supra*. The en banc court therefore correctly—and unanimously—rejected plaintiffs' contention that ICWA's placement preferences commandeer state judges. Pet. App. 112a-114a, 312a-314a.

The individual plaintiffs contend (Br. 66) that Congress cannot require state judges to apply federal law in cases involving a "*state* cause of action" as opposed to a federal one. But as every member of the en banc court determined, that contention lacks merit. Pet. App. 108a-111a, 313a-314a. The Supremacy Clause does not distinguish between state causes of action and federal ones. It establishes a simple rule: "State law is preempted 'to the extent of any conflict with a federal statute.'" *Hillman*, 569 U.S. at 490 (citation omitted). In *Hillman*, for example, the Court held that an "order of precedence" established by a federal statute preempted a state "cause of action" that "interfere[d] with Congress' scheme." *Id.* at 493-494. And in numerous other cases, the Court has similarly held that federal standards preempted state laws applicable to state causes of action brought in state court. See, *e.g.*, *Howell* v. *Howell*, 137 S. Ct. 1400, 1405-1406 (2017); *Jinks*, 538 U.S. at 461-462; *Ridgway*, 454 U.S. at 54-60; *McCarty* v. *McCarty*, 453 U.S. 210, 220-235 (1981).

C. ICWA's Recordkeeping Provisions Do Not Violate The Anticommandeering Doctrine

ICWA's minimum federal standards for placement also include two ancillary recordkeeping provisions, 25

U.S.C. 1915(e) and 1951(a). Neither violates the anti-commandeering doctrine.

1. Section 1915(e) requires that a "record" of each placement of an Indian child "be maintained by the State in which the placement was made" and "be made available at any time upon the request of the Secretary or the Indian child's tribe." 25 U.S.C. 1915(e). Section 1915(e) thus regulates the placement of Indian children by requiring the keeping of records, and it confers on tribes a "right to obtain [those] records." *Holyfield*, 490 U.S. at 49.

Section 1915(e) presents no anticommandeering problem. The "Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907 (emphasis omitted). As this Court has observed, "statutes enacted by the first Congresses"—which are "'weighty evidence'" of the Constitution's original meaning—imposed recordkeeping, reporting, and other requirements on state courts. *Id.* at 905 (citations omitted); see, *e.g.*, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (requiring state courts to record applications for citizenship); Act of June 18, 1798, ch. 54, §§ 2-3, 1 Stat. 567 (requiring state courts to transmit naturalization records and information to the Secretary of State); Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-155 (requiring state courts to register noncitizens seeking naturalization and issue certificates of registry).

Section 1915(e) likewise concerns functions "ancillary" to the courts' "adjudicative task." *Printz*, 521 U.S. at 908 n.2. Though a state agency may be the designated "repository" for the records, 25 C.F.R. 23.141(c),

"only court records" must be kept, 81 Fed. Reg. at 38,849. And in requiring that the records "evidenc[e] the efforts to comply with the order of preference," 25 U.S.C. 1915(e), Section 1915(e) requires only that they include the evidence presented in "court" to "justify[] the placement determination," 81 Fed. Reg. at 38,849. Section 1915(e) thus "relate[s] to matters appropriate for the judicial power" and raises no anticommandeering concern. *Printz*, 521 U.S. at 907; see also *id.* at 918 (contrasting the provisions invalidated in *Printz* with provisions "requir[ing] only the provision of information"); *id.* at 936 (O'Connor, J., concurring) (similar).

2. Section 1951(a) requires "[a]ny State court entering a final decree or order in any Indian child adoptive placement" to "provide the Secretary with a copy of such decree or order together with" "other information," such as "the name and tribal affiliation of the child" and "the names and addresses of the biological parents." 25 U.S.C. 1951(a). Section 1951(b) further provides that the Secretary shall disclose such information "as may be necessary for" certain purposes (such as the child's enrollment in an Indian tribe) upon the request of the child when he reaches 18, his adoptive or foster parents, or the tribe. 25 U.S.C. 1951(b).

Section 1951 thus confers on the adopted Indian child and others a right to information. And the requirement that a state court provide its decree and other information to the Secretary is akin to reporting obligations that Founding-era laws imposed on state judges. See p. 46, *supra*. Thus, Section 1951(a) raises no anticommandeering concern.

III. PLAINTIFFS' EQUAL-PROTECTION CHALLENGE SHOULD BE REJECTED

The equal-protection component of the Fifth Amendment's Due Process Clause bars "invidious racial discrimination" and other irrational classifications by the federal government. *Mancari*, 417 U.S. at 551. Plaintiffs assert that eight separate ICWA provisions—both prongs of the definition of "Indian child," 25 U.S.C. 1903(4)(a) and (b), and each of the three ranked preferences for adoptive and foster-care placements, 25 U.S.C. 1915(a)(1)-(3) and (b)(i)-(iii)—facially violate equal protection. Those claims are mistaken for multiple independent reasons. As a threshold matter, plaintiffs' equal-protection challenge is not justiciable. In any event, the challenged provisions comply with equal-protection principles by drawing non-suspect classifications that are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. And at a minimum, none of the provisions is facially invalid.

A. Plaintiffs' Equal-Protection Challenge Is Not Justiciable

Plaintiffs' equal-protection challenge fails at the outset because no plaintiff has a justiciable equal-protection claim.

1. *Texas lacks* parens patriae *standing to sue the federal government*

"The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966). Because the Due Process Clause protects only the interests of persons, Texas may not assert an equal-protection claim "in its own ca-

pacity" (Br. 38); any equal-protection claim that it asserts would have to be a claim as *parens patriae* to vindicate the interests of its citizens.

But though a State as *parens patriae* may sue other States or private parties, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982). The "citizens of [a State] are also citizens of the United States." *Massachusetts* v. *Mellon*, 262 U.S. 447, 485 (1923). And with respect to "their relations with the Federal Government," "it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate." *Id.* at 486. Thus, as all eight members of the en banc court who addressed the issue recognized, Texas may not sue the federal government to challenge ICWA on equal-protection grounds. Pet. App. 55a n.13, 373a n.2; see *Government of Manitoba* v. *Bernhardt*, 923 F.3d 173, 181 (D.C. Cir. 2019) (same for APA challenge).[6]

2. *The individual plaintiffs cannot satisfy Article III's case-or-controversy requirement*

The individual plaintiffs cannot satisfy Article III's case-or-controversy requirement as to *any* claim, including their equal-protection claim. 21-380 Gov't Br. in Opp. 12-16. The lack of justiciability is particularly evident with respect to their challenges to ICWA's

---

[6] Texas errs in asserting (Br. 39) that Congress has "conditioned federal funding" on "States' compliance with ICWA." The statute that Texas cites requires only that States "descri[be]" their compliance as a condition of funding. 42 U.S.C. 622(b)(9); see 21-378 Br. in Opp. 5 n.*. As the Department of Health and Human Services interprets that provision, funding would not be withheld even if a State described a lack of compliance.

third-ranked placement preferences—the only provisions declared unconstitutional on equal-protection grounds by the en banc court.

a. "At all stages of litigation, a plaintiff must maintain a personal interest in the dispute." *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021); see *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224 (2012) (same for "suing under the APA"). To do so here, the individual plaintiffs must demonstrate actual or imminent injury that is fairly traceable to enforcement of the challenged provisions. *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). The individual plaintiffs cannot satisfy those requirements as to any provision, let alone the third-ranked preferences.

i. The Brackeens failed to establish standing as of the time they filed the operative complaint in March 2018. See *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457, 473-474 (2007) (explaining that "jurisdiction" is based on "the amended complaint"). At that time, they had already "successfully petitioned to adopt" A.L.M., so they faced no injury traceable to ICWA's application in any ongoing proceedings. J.A. 99. And their current proceedings to adopt Y.R.J. post-dated the filing of the operative complaint, and they did not notify the district court of those proceedings until after the court entered final judgment. D. Ct. Doc. 171 (Oct. 10, 2018); see *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009) (explaining that if the plaintiffs "had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively"). Thus, when the Brackeens filed the operative complaint, their only basis for standing was their allegation that they "intend[ed] to provide foster care for, and pos-

sibly adopt, additional children." J.A. 100. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that [this Court's] cases require." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992); see Pet. App. 357a (Wiener, J.).

The Cliffords, the Librettis, and Hernandez have failed to maintain the requisite personal interest throughout this suit. Although those plaintiffs were involved in child-custody proceedings when they filed the operative complaint, those proceedings concluded many years ago, rendering any injury from ICWA's application moot. 21-380 Pet. 7 n.1; Pet. App. 50a (Dennis, J.). Moreover, the "exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review" is inapplicable here. *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (citation omitted). First, those plaintiffs could have "fully litigated" any relevant constitutional challenges in the state-court proceedings themselves. *Ibid.* (citation omitted); see, *e.g.*, *In re Welfare of the Child of S.B.*, No. A19-225, 2019 WL 6698079, at *1 (Minn. Ct. App. Dec. 9, 2019). Second, their asserted intentions "to foster and adopt children" in the future, 21-380 Cert. Reply Br. 10, are too vague to establish a "reasonable expectation" that they "will be subjected to the same action again," *Sanchez-Gomez*, 138 S. Ct. at 1540 (citation omitted).

ii. The individual plaintiffs' failure to demonstrate injury fairly traceable to a challenged provision is particularly evident as to the third-ranked preferences for "other Indian families" or "foster home[s]" in adoptive and foster-care placements. 25 U.S.C. 1915(a)(3) and (b)(iii). Those preferences come into play, if at all, only

if the first- and second-ranked preferences (for placement with extended family or tribal members) are passed over, and even then only if someone eligible to be preferred under the third-ranked preferences comes forward. *Adoptive Couple*, 570 U.S. at 654.

The third-ranked preferences have played no role in any of the individual plaintiffs' child-custody proceedings —including the Brackeens' efforts to adopt Y.R.J., which, even if considered, see p. 50, *supra*, involve a dispute over Y.R.J.'s placement with a member of her "extended family," a first-ranked preference, 25 U.S.C. 1915(b)(i); see *In re Y.J.*, No. 02-19-235, 2019 WL 6904728, at *1, *16 (Tex. App. Dec. 19, 2019). And any suggestion that the third-ranked preferences might play a role in future proceedings would be entirely speculative.

The individual plaintiffs contend (21-376 Cert. Resp. Br. 18) that it is enough to demonstrate injury traceable to the "placement preferences as a whole." But "[s]tanding is not dispensed in gross." *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (citation omitted). Even if the individual plaintiffs could demonstrate injury traceable to some *other* placement preference, that would not give them any basis to challenge the third-ranked preferences.

b. The individual plaintiffs also cannot demonstrate that any injury would be redressed by "the judicial relief requested," *California* v. *Texas*, 141 S. Ct. 2104, 2115 (2021) (citation omitted)—declaratory and injunctive relief against the federal defendants, J.A. 157; see *Lujan*, 504 U.S. at 569 n.4 (plurality opinion) (explaining that redressability is assessed "when th[e] suit [i]s

filed," as against the "nam[ed]" defendants).[7] As the individual plaintiffs acknowledge (Br. 63), "[t]here is no federal official who administers ICWA or carries out its mandates." The individual plaintiffs' asserted injuries therefore could arise only from ICWA's application in state court. A state court, however, is not bound by a federal district court's decision that a statutory or regulatory provision is unconstitutional. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 58 n.11 (1997). And because the federal defendants would not be parties to any state child-custody proceedings, neither declaratory nor injunctive relief against the federal defendants would have any effect in such proceedings. Pet. App. 379a-380a (Costa, J.).

The individual plaintiffs observe (21-376 Cert. Resp. Br. 20) that the state judge presiding over the Brackeens' efforts to adopt Y.R.J. issued an order in March 2019 "refraining from ruling" on certain constitutional issues out of "deference to" the Fifth Circuit. *Y.J.*, 2019 WL 6904728, at *3-*4. But that order did not exist at the time the operative complaint was filed. And it has nothing to do with the "relief requested" in the district court, *California* v. *Texas*, 141 S. Ct. at 2115 (citation omitted); rather, it suggests, at most, that a decision of the Fifth Circuit could serve as an advisory opinion—which is insufficient to satisfy Article III's case-or-controversy requirement, Pet. App. 374a-375a (Costa, J.).

The individual plaintiffs also assert (21-376 Cert. Resp. Br. 20) that "a favorable ruling from *this* Court would bind *all* courts." But that conflates the precedential effect of an opinion of this Court with the legal effect

---

[7] After the district court granted only declaratory relief, Pet. App. 528a, plaintiffs abandoned any request for injunctive relief by failing to cross-appeal, *id.* at 341a (Duncan, J.).

of a judgment entered by the district court, which would not be binding in any state child-custody proceeding. See pp. 52-53, *supra*. Moreover, even if standing could turn on the possibility of a favorable precedential opinion from this Court, the individual plaintiffs cannot show that, at "the commencement of [this] suit," it was likely that "the suit would reach this Court." *Lujan*, 504 U.S. at 571 n.5 (plurality opinion).

The individual plaintiffs also contend that a declaratory judgment affirmed by this Court would relieve "state officials" of their "'obligations to implement the preferences.'" 21-376 Cert. Resp. Br. 20 (citation omitted). But the individual plaintiffs have not asserted any claim, or sought any relief, against any state officials. Nor have they asserted any ongoing injury from actions by state officials, as distinguished from state courts. There is thus nothing to redress.

Of course, the individual plaintiffs can challenge the constitutionality of ICWA's provisions in state court, as applied to any particular child-custody proceeding in which they may be involved. Indeed, many of the individual plaintiffs have done just that. See *S.B.*, 2019 WL 6698079, at *1; Pet. App. 376a-377a (Costa, J.). What they cannot do, however, is seek ICWA's facial invalidation in federal court in the absence of any Article III case or controversy.

B. The Challenged ICWA Provisions Satisfy Equal-Protection Principles

If the Court finds plaintiffs' equal-protection challenge justiciable, the Court should reject it. Statutory classifications distinguishing between Indians and non-Indians are "political rather than racial" when they are designed to fulfill "Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 553 n.24, 555. The

provisions at issue here are so designed: Congress enacted them "to promote the stability and security of Indian tribes and families." 25 U.S.C. 1902. And because the provisions are "tied rationally to" that objective, *Mancari*, 417 U.S. at 555, they satisfy the equal-protection guarantee.

Plaintiffs' contention that the challenged provisions draw racial classifications subject to strict scrutiny—a position that no Fifth Circuit judge endorsed—disregards the unique relationship between the United States and Indian tribes reflected in the Constitution's text, longstanding historical practice, and an unbroken line of this Court's decisions. And to the extent plaintiffs contest the rationality of the challenged provisions, they raise little more than policy disputes—far less than is required to invalidate an Act of Congress.

1. Statutory classifications designed to fulfill Congress's unique obligations to Indians are not suspect and are subject to rational-basis review

a. The Due Process Clause of the Fifth Amendment contains an "equal-protection component" that parallels the Equal Protection Clause of the Fourteenth Amendment. *United States* v. *Vaello Madero*, 142 S. Ct. 1539, 1541 (2022). The equal-protection requirement does not forbid legislative classifications; the core requirement of equal protection is instead "that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

In applying that requirement, this Court's "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. That "general rule gives way, however, when a statute classifies by race, alienage, or

national origin." *Ibid.* Because those "factors are so seldom relevant to the achievement of any legitimate state interest"—and so likely instead to "reflect prejudice and antipathy"—laws classifying on such grounds "are subjected to strict scrutiny." *Ibid.*

b. Under those equal-protection principles, statutory distinctions designed to fulfill "Congress' unique obligation toward the Indians" are not impermissible racial classifications. *Mancari*, 417 U.S. at 555. "Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians." *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted). Such classifications are accordingly permissible if they are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

i. The United States and Indians have a relationship "perhaps unlike that of any other two people in existence." *Cherokee Nation*, 30 U.S. at 16. That relationship is built on an understanding of Indian tribes as "self-governing sovereign political communities," *Wheeler*, 435 U.S. at 322-323—"dependent, it is true, but still" sovereign, *Forty-three Gallons*, 93 U.S. at 196. The Constitution reflects that understanding by placing "Indian Tribes" alongside other separate sovereigns: "foreign Nations" and "States" in the Commerce Clause. Art. I, § 8, Cl. 3. And by "declaring treaties * * * to be the supreme law of the land," the Constitution "sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties." *Worcester*, 31 U.S. at 559; see Art. II, § 2, Cl. 2.

By affirming Indian tribes' status as separate political sovereigns, the Constitution "singles Indians out as a proper subject for separate legislation." *Mancari*, 417 U.S. at 552. Congress has enacted such legislation from the start. The early Trade and Intercourse Acts are replete with provisions that "manifestly consider the several Indian nations as distinct political communities." *Worcester*, 31 U.S. at 557; see pp. 18-19, *supra*. The signature statutes of every era in federal Indian policy—the General Allotment Act, the Indian Reorganization Act, and the Indian Civil Rights Act—hinge on the distinct political status of tribes and their members. See p. 19, *supra*. An entire title of the United States Code (Title 25) is captioned "Indians." And many other statutes central to the United States' relationship with Indians—addressing subjects from education to health care to religion to public lands to water rights—likewise distinguish Indians from all others. See, *e.g.*, 20 U.S.C. 7441; 42 U.S.C. 1395, 1996, 1996a; 43 U.S.C. 1457.

ii. This Court has uniformly treated such statutory distinctions as political classifications subject to rational-basis review, much like other classifications involving other non-suspect groups. See, *e.g.*, *Vaello Madero*, 142 S. Ct. at 1541; *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272 (1979).

The Court explained that constitutional framework in *Mancari*, which presented an equal-protection challenge to an employment preference in the Bureau of Indian Affairs for individuals who were "one-fourth or more degree Indian blood and * * * member[s] of a Federally-recognized tribe." 417 U.S. at 553 n.24 (citation omitted). Relying on the "unique legal status of Indian tribes under federal law," including the constitutional text granting Congress power "to deal with the

special problems of Indians," the Court determined that the statute applied "to Indians * * * as members of quasi-sovereign tribal entities" and thus constituted a "political rather than racial" classification. *Id.* at 551, 553 n.24, 554. The Court held that such political classifications "will not be disturbed" so "long as the[y] * * * can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* at 555. The Court added that a contrary understanding, under which all Indian classifications are viewed as racial classifications subject to strict scrutiny, would mean that "an entire Title of the United States Code (25 U. S. C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552.[8]

The Court reiterated that understanding in *Fisher* v. *District Court*, 424 U.S. 382 (1976) (per curiam). That case involved measures providing for exclusive tribal-court jurisdiction over tribal adoptions and thereby "denying an Indian plaintiff a [state-court] forum to which a non-Indian has access." *Id.* at 390-391. Relying on *Mancari*, the Court held that the classification did not trigger strict scrutiny because it did "not derive from the race of the plaintiff but rather from the quasi-sovereign status of the [tribe] under federal law." *Ibid.*

---

[8] The Court in *Mancari* also rejected a claim that the challenged Indian classification violated a statute barring racial discrimination in federal employment. 417 U.S. at 540. The Court explained that the "longstanding" Indian classification "can readily co-exist with a general rule prohibiting employment discrimination on the basis of race," and that a contrary "conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians." *Id.* at 550.

The Court followed that framework again in *Antelope*, which upheld application of federal law to an Indian charged with crimes against non-Indians in Indian country. 430 U.S. at 643. The Court rejected the Indian defendant's claim that subjecting him to federal jurisdiction involved "invidious racial discrimination" because federal law included a murder theory not covered by the state law applicable to similarly situated non-Indians. *Id.* at 644. Summarizing the "principles reaffirmed in *Mancari* and *Fisher*," the Court explained that "federal regulation of Indian affairs is not based upon impermissible classifications" if it "is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Id.* at 646.

The Court has repeatedly confirmed those principles. In *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), the Court rejected an equal-protection challenge to a tribe's immunity from certain state taxes, explaining that *Mancari* "foreclosed" any contention that the Indian classification was "invidious" or "'racial' in character." *Id.* at 480. In *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), the Court upheld a treaty provision that "provided fishing rights to Indians that were not also available to non-Indians," noting that the "semisovereign and constitutionally recognized status of Indians justifies" such disparate treatment "when rationally related to the Government's 'unique obligation toward the Indians.'" *Id.* at 673 n.20 (citation omitted). And in *Yakima*, the Court explained that "'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians," even if it "might otherwise be constitutionally of-

fensive" under equal-protection principles. 439 U.S. at 500-501 (citation omitted). The Court added that the contrary "argument that such classifications are 'suspect'" is "untenable." *Id.* at 501.

That a statute mentions Indians does not alone mean that it reflects "Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. *Mancari* clarified that classifications based on Indians' status "as a discrete racial group" are not reviewed for mere rationality. *Id.* at 554. The Court has accordingly applied strict scrutiny to a federal-contracting preference for "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" that had no distinct connection to the United States' unique relationship with Indian tribes. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 205 (1995) (citation omitted); see Cohen § 14.03[2][b][ii], at 959 ("Legislation dealing with Indians as a discrete class, but not" designed to fulfill "distinct federal obligations to Indians[,] should be tested [under strict scrutiny]."). But "the unique status of Indian tribes under the Constitution and treaties establishes a legitimate legislative purpose for singling out Indians as a class," and "[l]egislation rationally related to th[at] purpose is not proscribed by the equal protection principle." Cohen § 14.03[2][b][ii], at 959.

2. *The classifications in the challenged ICWA provisions are subject to rational-basis review*

a. Congress enacted ICWA to protect "Indian children and families" and Indian "tribes themselves" against "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes." *Holyfield*, 490 U.S. at 32, 49; see 25 U.S.C. 1901 and 1902. It is difficult to imagine a clearer illustration of Congress's "unique obligation to-

ward the Indians," *Mancari*, 417 U.S. at 555, than preventing the unwarranted removal of the next generation of Indian tribes.

Each of the challenged provisions serves that objective. The statutory definition of "Indian child," which applies throughout ICWA, encompasses "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. 1903(4). "Indian tribe," in turn, means a federally "recognized" tribe, 25 U.S.C. 1903(8)—*i.e.*, one that "has entered into 'a government-to-government relationship with the United States,'" *Yellen* v. *Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434, 2440 (2021) (brackets and citation omitted). Thus, whether a child is an "Indian child" under ICWA, 25 U.S.C. 1903(4), turns on the child's connection to an Indian tribe—the paradigmatic example of a "political rather than racial" classification. *Mancari*, 417 U.S. at 553 n.24; see *Antelope*, 430 U.S. at 646; *Fisher*, 424 U.S. at 390-391.

ICWA's preferences for adoptive and foster-care placements, 25 U.S.C. 1915(a) and (b), likewise reflect "Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. The first-ranked preferences provide for placement with a member of the "child's extended family," 25 U.S.C. 1915(a)(1) and (b)(i), "as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom," a list of specified relatives, 25 U.S.C. 1903(2). Those preferences reflect Indian tribes' special status as "'a separate people' possessing 'the power of regulating their internal and social relations,'" *Antelope*, 430 U.S. at 645 (citation omitted), and ensure that Indian children are placed according to

well-accepted rules appearing commonly in family law, see, *e.g.*, Tex. Fam. Code § 262.114(d)(1)-(2) (creating placement preferences for a child's specified relatives or those "with whom the child has a long-standing and significant relationship").

The second-ranked preferences provide for placement with "other members of"—or "a foster home licensed, approved, or specified by"—the "Indian child's tribe." 25 U.S.C. 1915(a)(2) and (b)(ii). Those preferences accordingly rest on a tribal connection, a quintessential "political rather than racial" classification. *Mancari*, 417 U.S. at 553 n.24. The third-ranked preferences—for "other Indian families" or "an Indian foster home," 25 U.S.C. 1915(a)(3) and (b)(iii)—rest on that same classification because ICWA defines "Indian" as "any person who is a member of an Indian tribe." 25 U.S.C. 1903(3). The challenged provisions thus all draw "political classification[s] subject to rational basis review." Pet. App. 154a; see *id.* at 352a (Owen, C.J.).

b. Plaintiffs urge (Tex. Br. 41-51; Brackeen Br. 21-42) this Court to accept a position no Fifth Circuit judge did—that all of the challenged ICWA provisions draw suspect classifications triggering strict scrutiny. Given the constitutional text, history, and precedent, that contention is "untenable." *Yakima*, 439 U.S. at 501.

i. *First prong of the "Indian child" definition.* Plaintiffs' broadest argument addresses the first prong of the "Indian child" definition, which applies to an unmarried minor "member of an Indian tribe." 25 U.S.C. 1903(4)(a). Plaintiffs contend that the definition's reliance on tribal membership operates as a "prox[y] for race" because some tribes make membership dependent on "ancestry" or "descent," and that strict scrutiny accordingly applies under race-classification prece-

dents like *Adarand*. Tex. Br. 42; see Brackeen Br. 21-23, 31-33. That claim is flawed for multiple reasons.

First, equating a *tribal-membership* classification with the racial classifications at issue in cases like *Adarand* disregards both the "history of the Federal Government's relations with Indians" and the text of "the Constitution itself." *Antelope*, 430 U.S. at 645, 649 n.11. It was understood at the Founding, as it is now, that Indian tribes share ties of family and ancestry. See, *e.g.*, Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789) (defining "tribe" as a "distinct body of the people as divided by family or fortune, or any other characteristic[]") (capitalization omitted); 2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (same). The Constitution nevertheless conferred on Congress a discrete power to regulate "Indian Tribes." Art. I, § 8, Cl. 3. And that power "without doubt" includes authority to regulate "the individuals composing those tribes." *Holliday*, 70 U.S. at 417. By asserting that ICWA's tribal-membership classification is subject to strict scrutiny, plaintiffs therefore contend that a classification "expressly provided for in the Constitution," *Antelope*, 430 U.S. at 645, is "presumptively unconstitutional," *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015).

That is mistaken. This Court has repeatedly recognized that classifications specifically contemplated by the Constitution are not invidious and accordingly require only a rational basis. Just last Term, for example, the Court reaffirmed that rational-basis review applies to a statute separately regulating Puerto Rico, in part because the Territory Clause of the Constitution, Art. IV, § 3, Cl. 2, provides a discrete power to regulate territories, see *Vaello Madero*, 142 S. Ct. at 1541-1543.

The fact that residents of Puerto Rico might be said to have a distinct racial or ethnic identity did not affect the constitutional analysis; "the Territory Clause permits exclusions or limitations directed at a territory and coinciding with race or national origin, so long as the restriction rests upon a rational base." *Quiban* v. *Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991) (R.B. Ginsburg, J.), cert. denied, 513 U.S. 918 (1994).

Rational-basis review similarly applies to statutes enacted under Congress's powers to regulate immigration and naturalization. U.S. Const. Art. I, § 8, Cl. 4; see *Mathews* v. *Diaz*, 426 U.S. 67, 78-80 (1976). "Congress regularly makes rules" distinguishing on the basis of nationality (which often overlaps with race); indeed, the "whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on" such distinctions. *Diaz*, 426 U.S. at 78 n.12, 80. Yet "such disparate treatment" is not by itself "'invidious.'" *Id.* at 80.

The same reasoning applies here. By establishing "a separate federal power which reaches" Indian tribes, "the Constitution itself establishes the rationality of" tribal-membership classifications. *United States* v. *Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc) (Scalia, J.) (citing *Antelope*, 430 U.S. at 649 n.11, and *Mancari*, 417 U.S. at 552). The Constitution also preserves to tribes certain powers and privileges—*e.g.*, to prosecute their members, invoke sovereign immunity, and enter into treaties—that no group united solely by race possesses. See, *e.g.*, *Bay Mills*, 572 U.S. at 788. Plaintiffs' comparison between Indian tribes and racial groups is therefore fundamentally inapt.[9]

---

[9] The individual plaintiffs' assertion (Br. 35) that the Indian-child definition "constitutes national-origin discrimination" by "[t]reating

Second, plaintiffs' contention that ICWA draws a racial classification by defining "Indian child" based on tribal membership contradicts the *Mancari* line of precedent. The classification at issue in *Mancari* applied "only to members of 'federally recognized' tribes," and the Court stated that it was "political rather than racial" in "th[at] sense." 417 U.S. at 553 n.24. The Court relied on tribal membership in the same way in *Fisher* and *Antelope*. See pp. 58-59, *supra*. Precedent accordingly "foreclose[s]" plaintiffs' argument that ICWA's tribal-membership classification is racial. *Moe*, 425 U.S. at 480.

Plaintiffs suggest (Tex. Br. 44; Brackeen Br. 25-26, 32) that a tribal-membership classification is political rather than racial only if it has a connection to "Indian lands." But Congress's power to fulfill its obligations to Indians allows it to regulate off Indian lands. See pp. 29-30, *supra*. And *Mancari* noted that the tribal-membership classification at issue there applied off Indian lands. 417 U.S. at 539 n.4; accord *Fishing Vessel*, 443 U.S. at 673 n.20 (applying *Mancari* to Indian classification applicable off Indian land).

Plaintiffs also assert (Brackeen Br. 32; see Tex. Br. 44) that *Mancari*'s reasoning is limited to classifications that "further tribal self-governance." But in *Mancari*, the link to tribal self-government was the reason the classification was rational—not the reason rational-basis review applied. 417 U.S. at 555. The Court con-

---

children differently simply because they are members of an Indian tribe" fails for the same reasons. Cf. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (holding that distinctions based on citizenship are not "national origin" discrimination under federal employment law). That argument also extends beyond the individual plaintiffs' question presented (21-380 Pet. i), which refers only to "race"-based classifications.

firmed as much in *Antelope*, explaining that "*Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications," even if it does not address "matters of tribal self-regulation." 430 U.S. at 646. In any event, ICWA protects "the continued existence and integrity of Indian tribes," 25 U.S.C. 1901(3), and thus their "ability to continue as self-governing communities," *Holyfield*, 490 U.S. at 34 (citation omitted).

Plaintiffs' effort (Tex. Br. 44-46; Brackeen Br. 32-33) to limit the *Mancari* line of precedent based on *Rice* v. *Cayetano*, 528 U.S. 495 (2000), is similarly misguided. *Rice* reaffirmed *Mancari*, explaining that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs" without triggering strict scrutiny. *Id.* at 519. The Court declined, however, to "extend" *Mancari*'s reasoning to the "new and larger" dimension of a Fifteenth Amendment challenge to a state "voting scheme that limit[ed] the electorate for its public officials to" certain Native Hawaiians and thereby "fence[d] out whole classes of its citizens from decision-making in critical state affairs." *Id.* at 520, 522.

That holding has no application here. ICWA does not "fence out whole classes of" citizens from decision-making on political issues by state or federal actors or otherwise implicate the Fifteenth Amendment. *Rice*, 528 U.S. at 522. And contrary to plaintiffs' contentions (Brackeen Br. 32), the proceedings affected by ICWA are not "critical state affairs" resembling the statewide elections in *Rice*, 528 U.S. at 522, any more than were the state efforts to collect taxes or exercise jurisdiction in other cases governed by *Mancari*, see *Yakima*, 439 U.S. at 465; *Moe*, 425 U.S. at 480.

Third, plaintiffs provide no support for the proposition (Tex. Br. 42; Brackeen Br. 31-32) that courts should impute to *Congress* any purportedly discriminatory classifications adopted by *tribes*. An Indian "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n.32 (1978). Although "classifications based on tribal status * * * inhere in many of the decisions of this Court," *Yakima*, 439 U.S. at 501, the Court has never looked through a tribal-membership classification to evaluate tribes' varying membership criteria—just as it does not look through an immigration statute's nationality classifications to evaluate foreign nations' citizenship criteria. Cf. Pet. App. 150a n.51 (noting "that *jus sanguinis*, or citizenship based on descent, is a common feature of the citizenship laws of foreign nations"). Instead, the Court has "follow[ed] the action of the * * * political departments of the government" in recognizing what constitutes an Indian tribe. *Holliday*, 70 U.S. at 419.

Fourth, and in any event, tribal-membership criteria grounded in descent are not proxies for race. Family classifications are common in the law. Laws of intestate succession, for example, provide for the distribution of property to specified "descendants" of a particular decedent. Unif. Prob. Code § 2-103(a)(1)-(5) (amended 2010). The federal tax code contains rules governing corporate ownership and trust administration based on a person's status as a "lineal descendant[]" of another. 26 U.S.C. 544(a)(2), 2701(b)(2)(C). Federal immigration law ties U.S. citizenship and visa eligibility to, *inter alia*, status as a specified relative of a U.S. citizen. See, *e.g.*, 8 U.S.C. 1153(a), 1431, 1433. Social Security survi-

vor benefits are available to the biological or adopted children of a beneficiary. 42 U.S.C. 402(d); see 42 U.S.C. 416(e). And custody and adoption laws contain many distinctions based on relation to a child. See, *e.g.*, 42 U.S.C. 14952(a) (addressing "procedures for the [intercountry] adoption of children by individuals related to them by blood, marriage, or adoption"); Tex. Fam. Code § 262.1095(a)(1)(A) (requiring notice to individuals "related to the child within the fourth degree by consanguinity" when a child is removed from a home).

Tribes' use of ancestry in their membership criteria serves the same non-racial purpose as those other common classifications: to connect one person to another. In the case of tribes, the connection is one down through the generations between a person today and a member of a "distinct political communit[y]" that inhabited the continent long ago. *Worcester*, 31 U.S. at 557. Such connections are not only political rather than racial, but are integral to the constitutional understanding of an Indian tribe. See Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 Stan. L. Rev. 491, 501 (2017). Such tribal-membership classifications, moreover, typically operate to differentiate among people who would all be described as racially Indian. For example, the Navajo membership law that plaintiffs cite (Tex. Br. 42 n.3; Brackeen Br. 31) requires a certain percentage of "Navajo" blood. The practical effect of that requirement is to exclude various other Indians—for example, those with only Cherokee or Chippewa blood. That result fur-

ther demonstrates that the membership criteria are political rather than racial in nature.[10]

ii. *Second prong of the "Indian child" definition.* Plaintiffs also contend that the second prong of the definition of "Indian child"—an unmarried minor who "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," 25 U.S.C. 1903(4)(b)—draws a classification based "solely on [a child's] ancestry," which plaintiffs assert is a "'proxy for race.'" Brackeen Br. 20, 22 (citation omitted); see Tex. Br. 46. Those assertions are again misplaced.

While the second prong of the "Indian child" definition refers to a "biological child," 25 U.S.C. 1903(4)(b), such a close family relationship is scarcely comparable to "'distinctions between citizens solely because of their ancestry' [that] are interchangeable with 'discrimination based on race alone.'" Brackeen Br. 22 (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)) (brackets omitted). No one would say, for example, that a probate law conferring benefits on a decedent's biological child draws a race-based classification. And here, the second prong of the Indian-child definition relies on two criteria in addition to biological-child status: the parent's "member[ship in] an Indian tribe," and the child's "eligib[ility] for membership in an Indian tribe." 25 U.S.C. 1903(4)(b). Those additional, tribal-membership-based criteria are paradigmatic political classifications. See pp. 61-62, *supra*. A classification based on being the biological child of a tribal member is thus no more race-based than a classification based on being the biological

[10] Tribal-membership criteria relying on ancestry also include some people who are not racially Indian at all. See Pet. App. 149a n.50 (discussing Cherokee freedmen).

child of a Social Security participant or a U.S. citizen—classifications that are common in the law and unobjectionable. See pp. 67-68, *supra*.

Contrary to plaintiffs' assertions (Tex. Br. 46-47; Brackeen Br. 30), the second prong of the Indian-child definition does not exist to cover children who choose (or whose parents choose for them) not to join a tribe. It instead reflects the reality that tribal membership is often not conferred automatically upon birth. See House Report 17. An eligible child (or the child's parents) typically must take affirmative steps to enroll the child. *Ibid.* Congress's decision not to make ICWA's protection "hinge upon the cranking into operation of a mechanical process" of tribal enrollment, *ibid.*, is thus directly aimed at fulfilling the United States' "unique obligation toward the Indians," *Mancari*, 417 U.S. at 555; see 25 U.S.C. 1901(3) (finding that "the United States has a direct interest, as trustee, in protecting" children who "are *eligible for membership* in an Indian tribe") (emphasis added).

Mancari itself further demonstrates that the second prong of the Indian-child definition is a political classification not subject to strict scrutiny. Although the provision at issue in *Mancari* applied only to tribal members, it also required a tribal member to have "one-fourth or more degree Indian blood." 417 U.S. at 553 n.24 (citation omitted). Yet *Mancari* held that only rational-basis review applied. *Id.* at 555. The individual plaintiffs make a cursory assertion (Br. 24 n.3) that the Court should "abrogat[e]" that aspect of *Mancari*'s holding, but they do not even attempt to show the "special justification" required to overrule precedent. *Bay Mills*, 572 U.S. at 798 (citation omitted). Nor does such a justification exist. *Mancari* "was no one-off." *Ibid.* It

"reaffirmed" earlier precedents; both this Court and lower courts have "relied on" it in subsequent decisions; and its doctrinal foundation remains sound. *Ibid.*; see pp. 58-60, *supra*; see also, *e.g.*, *American Fed'n of Gov't Emps.* v. *United States*, 330 F.3d 513, 521-522 (D.C. Cir.) (Randolph, J.) (upholding law under *Mancari* and confirming its validity after *Rice* and *Adarand*), cert. denied, 540 U.S. 1088 (2003).

Finally, the individual plaintiffs suggest that the Department of Justice criticized the bill that became ICWA on the ground that the second prong of the Indian-child definition "may constitute racial discrimination." Brackeen Br. 29 (quoting House Report 39). But the concerns expressed by the Department related principally to an earlier proposal that contained a broader definition, and the Department stated that the revisions resulting in the current Indian-child definition "for the most part[] eliminated" its prior concerns. House Report 39; see *id.* at 35-38 (describing prior concerns). The Department's only remaining concern involved whether "exclusive tribal jurisdiction" could be based on the second prong of the definition where a biological parent who is a tribal member does not have legal custody of the child. *Id.* at 39. Tribal jurisdiction under ICWA, however, is not at issue in this case.[11]

[11] The individual plaintiffs (Br. 22) also mischaracterize the Department of the Interior (DOI) tribal-acknowledgment regulations by asserting that, "[f]or an Indian tribe to be recognized by the federal government, its membership must extend only to 'individuals who descend from a historical Indian tribe.'" *Ibid.* (quoting 25 C.F.R. 83.11(e)). In fact, federal recognition of a tribe "can come in a number of ways," most commonly through legislative action or a "course of dealing with the tribe as a political entity"—neither of which implicates the tribal-acknowledgment regulations. *Chehalis*,

iii. *Preferences for adoptive and foster-care placements.* Plaintiffs contend (Tex. Br. 47-49; Brackeen Br. 37-42) that ICWA's preferences for adoptive and foster-care placements, 25 U.S.C. 1915(a) and (b), constitute race-based classifications warranting strict scrutiny. Those claims likewise fail.

The individual plaintiffs briefly contend (Br. 41) that the first-ranked preferences—for placement with a member of the "child's extended family," 25 U.S.C. 1915(a)(1) and (b)(i)—are suspect because they refer to "extended family" as "defined by the law or custom of the Indian child's tribe," 25 U.S.C. 1903(2). But as explained above, family relationships are not a suspect classification. Indeed, an extended family member of an Indian child may be "non-Indian." House Report 23.

Plaintiffs' arguments (Tex. Br. 47-50; Brackeen Br. 39-40) with respect to the second- and third-ranked preferences also lack merit. Those preferences are based on tribal affiliation, which is not suspect. See p. 62, *supra*. Plaintiffs contend that the third-ranked preferences are overbroad, but—as all the judges on the Fifth Circuit recognized—those arguments speak to whether the third-ranked preferences are rational, not to whether rational-basis review applies.

3. The challenged ICWA provisions are rationally related to their objectives

Because the challenged ICWA provisions classify based on non-suspect criteria, Congress's judgment should "not be disturbed" if the classifications "can be tied rationally to the fulfillment of Congress' unique ob-

---

141 S. Ct. at 2440. In fact, the federal acknowledgment process accounts for only about 3% of federally recognized tribes. See DOI, *Petitions Resolved—Acknowledged*, https://go.usa.gov/xSVPr.

ligation toward the Indians." *Mancari*, 417 U.S. at 555. This Court "hardly ever strikes down a policy as illegitimate under rational basis scrutiny," *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2420 (2018), and the provisions here readily satisfy that "deferential" test, *Vaello Madero*, 142 S. Ct. at 1543. At a minimum, plaintiffs do not show that the provisions are irrational in *all* their applications, so plaintiffs' facial challenge should be rejected. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

a. The link between ICWA's Indian-child definition and Congress's unique obligations toward the Indians is straightforward. By defining "Indian child" to require a close connection to an "Indian tribe," 25 U.S.C. 1903(4), Congress adopted the same classification drawn by the Constitution itself, see pp. 63-64, *supra*. That alone strongly supports the definition's rationality. See *Cohen*, 733 F.2d at 139. And applying ICWA's protections to children who are tribal members or the children of tribal members and eligible for tribal membership clearly advances Congress's distinctive duty to protect the "continued existence and integrity of Indian tribes." 25 U.S.C. 1901(3); cf. *Santosky*, 455 U.S. at 790 (Rehnquist, J., dissenting) ("Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance."). The only aspect of the definition that encompasses children who are not themselves tribal members is readily explained as a way to account for tribal laws that do not provide for automatic membership. See p. 70, *supra*. At a minimum, that approach falls within Congress's "substantial discretion" under rational-basis review. *Vaello Madero*, 142 S. Ct. at 1544.

The preferences for adoptive and foster-care placements—each of which can be displaced on a showing of "good cause," 25 U.S.C. 1915(a) and (b)—are also rationally linked to Congress's unique obligations toward the Indians. The first-ranked preferences directly further those obligations by keeping Indian children united with their "extended family." 25 U.S.C. 1915(a)(1) and (b)(i). That goal is plainly appropriate; Texas's own law sets the highest placement preference for a child's relatives or those with whom the child has a close relationship. Tex. Fam. Code § 262.114(d)(1)-(2).

The second-ranked preferences—for placement with an "Indian child's tribe," 25 U.S.C. 1915(a)(2) and (b)(ii)—likewise advance Congress's responsibility to preserve the "stability and security of Indian tribes" and to "protect the best interests of Indian children," 25 U.S.C. 1902. Congress recognized that "the massive removal of" Indian children to "non-Indian homes" harmed "the tribes themselves," and sought to prevent that harm by granting a child's tribe a preference in adoptive and foster-care placements. *Holyfield*, 490 U.S. at 33-34. Congress further recognized that approach would protect "the interests of individual Indian children," given the "evidence of the detrimental impact on the children themselves of * * * placements outside their culture." *Id.* at 49-50. That congressional judgment is rational, as a substantial majority of the Fifth Circuit recognized. Pet. App. 155a-157a (Dennis, J.); *id.* at 352a (Owen, C.J.); see *id.* at 363a (Haynes, J.) (stating that the first two preferences would "withstand even strict scrutiny"); cf. *id.* at 200a n.† (Jones, J., declining to join the portion of Judge Duncan's opinion finding the first two preferences irrational).

The third-ranked preferences provide for placement with "other Indian families" or "an Indian foster home," 25 U.S.C. 1915(a)(3) and (b)(iii), if such a family or home has "come forward" to seek an Indian child's placement, *Adoptive Couple*, 570 U.S. at 654. Those preferences are rationally linked to Congress's unique obligations toward the Indians because they help ensure that Indian children remain within the community of an Indian tribe—even one other than their own. The third-ranked preferences thereby advance the "Federal policy that, where possible, an Indian child should remain in the *Indian community*." *Holyfield*, 490 U.S. at 37 (quoting House Report 23) (emphasis added).

The en banc court divided equally on the rationality of the third-ranked preferences. Pet. App. 277a-280a (Duncan, J.); *id.* at 363a (Haynes, J.). The crux of Judge Duncan's reasoning was that "Congress's goal" in ICWA was "keeping Indian children linked to *their own tribe*." *Id.* at 278a (emphasis added). But as just explained, that description of Congress's objective is incomplete. And Congress's objective of protecting the broader community of Indian tribes is rational. It makes particular sense, for example, when tribes are located in close proximity to each other, have a common history, and share linguistic, cultural, and religious traditions. See *id.* at 164a-165a (Dennis, J.) (citing examples). It is also an especially natural approach when a child has biological parents who are enrolled in different tribes, only one of which is designated as the "child's tribe" for ICWA purposes. 25 U.S.C. 1903(5); see Pet. App. 48a-49a (Dennis, J.) (explaining that A.L.M., the child adopted by the Brackeens before the operative complaint was filed, is such a child). In those situations and more broadly, placing an Indian child with tribal

members helps put the child in a position to make a "reasoned decision" about maintaining his or her own "Indian identity." House Report 17.

ICWA is no outlier in recognizing the bonds uniting the broader Indian community; tribes and Congress do so in a variety of other contexts. Some tribal laws, for example, allow admission of members who have a specified degree of Indian descent "from any tribe." Cohen § 14.03[2][b], at 949 n.46 (citing example). And Congress has recognized tribes' authority "to exercise criminal jurisdiction over *all* Indians," including members of different tribes. 25 U.S.C. 1301(2) (emphasis added); see *Lara*, 541 U.S. at 198; see also *Means* v. *Navajo Nation*, 432 F.3d 924, 933 (9th Cir. 2005) (upholding that statute against an equal-protection challenge), cert. denied, 549 U.S. 952 (2006). While Congress's approach to the third-ranked preference might not be the only rational one, "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations." *United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 175 (1980) (citation omitted). And multiple other aspects of ICWA provide reassurance that the third-ranked preferences will operate rationally, including the "good cause" exception, detailed requirements regarding foster-care placements, and the direction that, "[w]here appropriate, the preference of the Indian child or parent shall be considered." 25 U.S.C. 1915(a)-(c).[12]

b. Plaintiffs' contentions that ICWA is irrational (Tex. Br. 57-60; Brackeen Br. 43-45) lack merit.

---

[12] Plaintiffs briefly criticize (Brackeen Br. 43) the definition of good cause in the 2016 Rule. But at most, that would be grounds for a challenge to the rule, not the statute.

Texas attacks (Br. 58) ICWA for purportedly "subordinat[ing] the actual needs of individual children to the theoretical interests of Indian tribes as a group." But that assertion is contradicted by Congress's determination that Indian children are harmed by their unwarranted removal from their families, tribes, and Indian communities. 25 U.S.C. 1902. Texas thus identifies a "different policy judgment[]," not irrationality. *Fritz*, 449 U.S. at 176 (citation omitted).

Texas relatedly asserts that ICWA leaves "vulnerable child[ren] remaining in an unsafe environment" and facilitates "domestic abuse." Br. 59; see Br. 56-57. But that allegation relies largely on the standard for terminating parental rights, 25 U.S.C. 1912(f), which is not part of the State's equal-protection challenge. And Texas ignores ICWA's provision authorizing the emergency removal of an Indian child "to prevent imminent physical damage or harm to the child." 25 U.S.C. 1922.[13]

Texas also claims that ICWA is not supported by sufficiently recent legislative data. Br. 59 (citing *Shelby County* v. *Holder*, 570 U.S. 529, 557 (2013)). But ICWA was not enacted under Congress's authority to enforce a constitutional protection, so it need not be designed to "remedy" a particular problem. *Shelby County*, 570 U.S. at 557. In any event, the removal of Indian children from their families remains a pressing problem. See, *e.g.*, 81 Fed. Reg. at 38,779, 38,782-38,784.

The individual plaintiffs principally contend (Br. 44) that ICWA's classifications are overinclusive and underinclusive in certain ways. But classifications that are

---

[13] Texas raises the prospect (Br. 59) of abuses of ICWA by an "ex-spouse." Importantly, ICWA does not apply to "an award, in a divorce proceeding, of custody to one of the parents" of an Indian child. 25 U.S.C. 1903(1).

"to some extent both underinclusive and overinclusive" can readily survive rational-basis review, *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979), and all the challenged provisions are rational for the reasons explained above.

The individual plaintiffs also point (Br. 44-45) to passages in the legislative history expressing concern about removal of Indian children from reservations. But Congress's findings are not limited to reservations, see 25 U.S.C. 1901, and this Court has explained that confining ICWA's application in that way "would, to a large extent, nullify" Congress's objectives, *Holyfield*, 490 U.S. at 52.

The individual plaintiffs observe (Br. 45) that ICWA allows the wishes of biological parents to be overridden in some cases. But that is common in family law. See, *e.g.*, Tex. Fam. Code §§ 153.002, 161.001(b). This Court has observed that ICWA reasonably addresses "concerns going beyond the wishes of individual parents." *Holyfield*, 490 U.S. at 50. And, as noted, ICWA directs that, "[w]here appropriate, the preference of the Indian child or parent shall be considered." 25 U.S.C. 1915(c).

c. At a minimum, plaintiffs fall far short of showing that "no set of circumstances exists under which" the challenged provisions "would be valid." *Salerno*, 481 U.S. at 745. For example, it would plainly be valid to apply the third-ranked preferences to place an Indian child with an adoptive or foster family in a closely affiliated tribe or the tribe of a close relative. See pp. 75-76, *supra*. And as-applied challenges remain available in any particular circumstances where an ICWA provision could "raise equal protection concerns." *Adoptive Couple*, 570 U.S. at 656. The Court should accordingly reject plaintiffs' sweeping argument that the challenged ICWA provisions are invalid on their face.

IV. TEXAS'S NONDELEGATION CHALLENGE SHOULD BE REJECTED

The preferences for adoptive and foster-care placement set forth in 25 U.S.C. 1915(a) and (b) are subject to an additional direction set forth in 25 U.S.C. 1915(c): "if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in" Section 1915(b). Texas contends (Br. 69-74) that Section 1915(c) violates the nondelegation doctrine. The en banc court correctly rejected that argument, Pet. App. 166a-179a, 353a, 364a, and this Court should reject it too. Texas lacks standing to make the argument, and it is wrong on the merits.

A. Texas Lacks Article III Standing To Bring Its Nondelegation Challenge

Texas lacks Article III standing to bring its nondelegation challenge for two independent reasons.[14] *First*, Texas cannot demonstrate any "injury in fact" from Section 1915(c)'s application. *Clapper*, 568 U.S. at 409 (citation omitted). Under Section 1915(a) and (b), the default order of preference is one established by Congress. So when a different order is established by a tribe, it does not displace any order established by *the State*. Moreover, Texas has not explained how it could be injured by any difference between the tribe's order

---

[14] In the operative complaint, only the state plaintiffs asserted a nondelegation claim. J.A. 155-156. Even if the individual plaintiffs had brought such a claim, they could not demonstrate any actual or imminent injury fairly traceable to Section 1915(c) and redressable by the relief requested. See pp. 49-54, *supra*.

and the default order. The mere application of "different law" chosen by Congress does not, in itself, injure Texas. 21-378 Cert. Reply Br. 10.

Second, even if application of a tribe's order of preference could cause a cognizable injury to Texas, the State cannot demonstrate that any such injury is "*certainly* impending." *Clapper*, 568 U.S. at 409 (citation omitted). Texas observed below that one of the three federally recognized tribes in Texas—the Alabama-Coushatta Tribe—had established a different order of preference. Tex. C.A. En Banc Br. 47; see J.A. 165, 189. But Texas has not shown that it was or in the imminent future would be a party to a child-custody proceeding involving a child of that tribe or any other with a different order of preference.

B. Section 1915(c) Does Not Violate Nondelegation Principles

If the Court reaches the merits, it should reject Texas's nondelegation challenge. Section 1915(c) does not implicate the nondelegation doctrine; it is a choice-of-law provision that permissibly applies another sovereign's laws. And even if Section 1915(c) were analyzed under nondelegation principles, it is valid.

1. Congress has long enacted statutes that provide choice-of-law directions by incorporating the laws of other sovereigns. Beginning in 1825, for example, Congress enacted an "unbroken series of Assimilative Crimes Acts [(ACAs)]" that established federal law for federal enclaves by adopting the criminal law of the State in which the enclave was located. *United States* v. *Sharpnack*, 355 U.S. 286, 289 (1958). This Court unanimously rejected a nondelegation challenge to one of the ACAs, explaining that, "[r]ather than being a delegation by Congress of its legislative authority to the

States," the ACAs are a permissible "continuing adoption by Congress for federal enclaves of such unpreempted offenses and punishments as shall have been already put in effect by the respective States for their own government." *Id.* at 294. And the Court cited "numerous" other examples of valid federal statutes following the same model. *Id.* at 294-296; see, *e.g.*, *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1891 (2019) (addressing similar statute).

Of particular relevance here, the Court in *Mazurie* rejected a nondelegation challenge to a federal statute that applied the law of Indian tribes for specified purposes. 419 U.S. at 556-557. The statute there was "local-option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country" under certain conditions, notwithstanding a federal statute that generally prohibited such introduction. *Id.* at 547. The Court "recognized limits on the authority of Congress to delegate its legislative power," but explained that such limits are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id.* at 556-557. It was thus "an important aspect of th[e] case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," including over the "distribution and use of intoxicants." *Id.* at 557. That "independent tribal authority," the Court explained, was "sufficient to" justify the federal statute's application of tribal law. *Ibid.*

The validity of Section 1915(c) follows directly from those principles. Like the statutes discussed in *Sharpnack* and *Mazurie*, Section 1915(c) provides for application of the law of a particular government (an Indian

tribe's "resolution") for a specific purpose (setting the "order of preference[s]" for adoption and foster-care placements), 25 U.S.C. 1915(c), on a "subject matter" over which tribes "possess[] independent authority," *Mazurie*, 419 U.S. at 557; see *Montana* v. *United States*, 450 U.S. 544, 564 (1981) (noting tribes' "inherent power to * * * regulate domestic relations among members"); *Fisher*, 424 U.S. at 386-390 (discussing tribes' authority over tribal adoptions). Section 1915(c) accordingly does not constitute a "delegation by Congress of its legislative authority," let alone an invalid delegation. *Sharpnack*, 355 U.S. at 294; see, *e.g.*, *United States* v. *Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (per curiam) (holding that the Lacey Act, which makes it a federal crime to import species taken in violation of "any Indian tribal law," 16 U.S.C. 3372(a)(1), "involves no delegation of power").

2. Texas's principal response (Br. 72) is that tribes "lack sovereignty over non-members who are not on Indian land," and that Congress accordingly cannot incorporate tribal law for purposes of Section 1915(c). But that argument ignores the substantial interest of a tribe and its members in the placement of Indian children. 25 U.S.C. 1901(3), 1903(4). And Texas's reasoning contradicts *Mazurie*, which emphasized that it was unnecessary to decide whether tribes' authority over liquor regulation "is itself sufficient for the tribes to impose" the regulation that the federal statute authorized. 419 U.S. at 557. Even though the defendants in that case were "non-Indians" operating on lands "held in fee by non-Indians," it was "necessary only to state the independent tribal authority" over the "subject matter." *Id.* at 554, 557. There is nothing anomalous about that principle; in a variety of areas, Congress has constitutional

authority to enable actions of another sovereign that the other sovereign could not undertake absent congressional approval. See, *e.g.*, *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018) (Interstate Commerce Clause); *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 398-400 (1979) (Interstate Compact Clause).

While the Court "need not decide" the issue, *Mazurie*, 419 U.S. at 557, a tribe has authority over child-custody proceedings involving Indian children outside Indian country, including when non-Indian parties are involved. ICWA itself recognizes as much by providing for the transfer of a state-court proceeding involving "an Indian child not domiciled or residing within the reservation" to tribal court. 25 U.S.C. 1911(b); see *Holyfield*, 490 U.S. at 36. Given that "no resource * * * is more vital to the continued existence and integrity of Indian tribes than their children," 25 U.S.C. 1901(3), establishing an order of preference for placement of an Indian child is an appropriate exercise of the tribe's authority within ICWA's framework.

3. Because Section 1915(c) is a choice-of-law provision, the limitations applied under the nondelegation-doctrine (cf. Tex. Br. 73-74) do not govern. But even if they did, Section 1915(c) would satisfy them, because Congress in enacting ICWA "la[id] down by legislative act an intelligible principle," *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (citation omitted), for tribes to follow. Any "order of preference" adopted by a tribe "by resolution," 25 U.S.C. 1915(c), must conform to ICWA's explicitly stated policy "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. That direction is "well within the outer

limits of [this Court's] nondelegation precedents," which have upheld statutes with far more general language. *Whitman*, 531 U.S. at 474 (collecting examples); see *Gundy* v. *United States*, 139 S. Ct. 2116, 2126 (2019) (plurality opinion) (relying on statute's "declaration of purpose" in finding intelligible principle) (brackets and citation omitted); *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946) (similar).

CONCLUSION

This Court should hold that plaintiffs' equal-protection and nondelegation challenges are not justiciable and that plaintiffs' plenary-power and anticommandeering arguments fail on the merits. The Court should alternatively reject all of plaintiffs' constitutional challenges on the merits.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
TODD KIM
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
CHRISTOPHER G. MICHEL
Assistants to the Solicitor General
SAMUEL C. ALEXANDER
AMBER BLAHA
RACHEL HERON
Attorneys

ROBERT T. ANDERSON
Solicitor
Department of the Interior
SAMUEL R. BAGENSTOS
General Counsel
Department of Health and Human Services

AUGUST 2022

APPENDIX

1. U.S. Const. Art. I, § 2, Cl. 3, superseded by U.S. Const. Amend. XIV, § 2, provided in pertinent part:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

2. U.S. Const. Art. I, § 8 provides in pertinent part:

[1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * *

[3] To regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes;

* * * * *

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

* * * * *

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. U.S. Const. Art. II, § 2, Cl. 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

4. U.S. Const. Art. III, § 2 provides in pertinent part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

5. U.S. Const. Art. VI, Cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

6. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation.

7. U.S. Const. Amend. X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

8. U.S. Const. Amend. XIV, §§ 1 and 2 provide:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion

which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

9. Articles of Confederation Art. IX, Cl. 4 provides:

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

10. 25 U.S.C. 1901 provides:

Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members

and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of

---

[1] So in original. Probably should be capitalized.

Indian people and the cultural and social standards prevailing in Indian communities and families.

11. 25 U.S.C. 1902 provides:

Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

12. 25 U.S.C. 1903 provides:

Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43;

(4) "Indian child" means 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;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held

by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

13. 25 U.S.C. 1911 provides:

Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence

of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

14. 25 U.S.C. 1912 provides:

Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian

child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall 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.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including 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.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the con-

tinued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

15. 25 U.S.C. 1913 provides:

Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

16. 25 U.S.C. 1914 provides:

Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian

child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

17. 25 U.S.C. 1915 provides:

Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a 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.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which

the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

18. 25 U.S.C. 1916 provides:

Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

19. 25 U.S.C. 1917 provides:

Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

20. 25 U.S.C. 1918 provides:

Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

21. 25 U.S.C. 1919 provides:

Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

22. 25 U.S.C. 1920 provides:

Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

23. 25 U.S.C. 1921 provides:

Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than

the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

24. 25 U.S.C. 1922 provides:

Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

25. 25 U.S.C. 1923 provides:

Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed

prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

26. 25 U.S.C. 1931 provides:

Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act [42 U.S.C. 620 et seq., 1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and

XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

27. 25 U.S.C. 1932 provides:

Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

28. 25 U.S.C. 1933 provides:

Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

29. 25 U.S.C. 1934 provides:

"Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c)[1] of this title.

---

[1] See References in text note below.

30. 25 U.S.C. 1951 provides:

Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

31. 25 U.S.C. 1952 provides:

Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

32. 25 U.S.C. 1961 provides:

Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

33. 25 U.S.C. 1962 provides:

Copies to the States

Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter.

34. 25 U.S.C. 1963 provides:

Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.