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

IN THE

Supreme Court of the United States

DEB HAALAND,
SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Petitioners,

v.

CHAD EVERET BRACKEEN, *et al.*,

Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN 21-376 & 21-377 AND RESPONDENTS IN 21-378 & 21-380

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August 19, 2022 * Counsel of Record

Additional Captions Listed on Inside Cover

CHEROKEE NATION, *et al.*,

Petitioners,

v.

CHAD EVERET BRACKEEN, *et al.*,

Respondents.

STATE OF TEXAS,

Petitioner,

v.

DEB HAALAND,
SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

CHAD EVERET BRACKEEN, *et al.*,

Petitioners,

v.

DEB HAALAND,
SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has an interest in ensuring that Constitutional provisions, including the Tenth Amendment, are interpreted in a manner consistent with their text and history and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

To "promote the stability and security of Indian tribes and families," the Indian Child Welfare Act (ICWA) sets "minimum Federal standards for the removal of Indian children from their families." 25 U.S.C. § 1902. These standards apply in "child custody proceedings," including proceedings for the termination of parental rights and for foster, pre-adoptive, and adoptive placements, *see id.* § 1903(1), and to "any party" seeking to place an Indian child in foster care or adoption, *id.* § 1912(a), (d). In service of its mission, ICWA also requires "state court[s]" to share final adoption decrees with the Secretary of the Interior, *id.* § 1951(a), and mandates that "the state" make records of adoption or foster placements available to the

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Secretary of the Interior or to the Indian child's tribe, *id.* § 1915(e).

Notwithstanding the powerful role these provisions play in advancing ICWA's efforts to "protect the rights of the Indian child . . . and the rights of the Indian community and tribe," *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (citing H.R. Rep. No. 95-1386, 23 (1978)), Plaintiffs argue that they are unconstitutional because, among other things, they impermissibly commandeer state actors. Texas Br. 60-69; Individual Pet'rs Br. 59-68. But Plaintiffs are wrong. Their argument is at odds with both Founding-era history and this Court's anti-commandeering precedents.

First, most of the challenged provisions simply create federal standards that state judges must enforce in proceedings governed by ICWA. Contrary to Plaintiffs' arguments, Congress does not run afoul of any anti-commandeering prohibition when it requires a "state court considering a *state* cause of action to apply federal law," Individual Pet'rs Br. 66.

Seeking to ensure national unity, the Framers of the Constitution provided that federal law "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. And in the years following ratification, Congress repeatedly passed laws that assumed that state courts would apply that "supreme Law of the Land," *id.*, even in state-law causes of action. In the Bankruptcy Act of 1800, for example, Congress created federal rights that private parties could assert in state causes of action, and state judges were in turn required to comply with that federal law. *See* Act of April 4, 1800, ch. 18, § 13, 2 Stat. 25. And Congress has done the same in countless federal laws since, including acts relating to

servicemembers' rights in child custody and placement proceedings. *See infra* Part I.

Plaintiffs also contend that ICWA's provisions constitute commandeering because states "must take extensive affirmative steps to comply" with them. Texas Br. 60-61; *see also* Individual Pet'rs Br. 67. But the historical record does not support this understanding of the anti-commandeering doctrine. Many early laws establishing federal rights enforceable in state courts tangentially imposed obligations on state litigants. For example, when state officials were parties to proceedings under the Bankruptcy Act of 1800, those officials were required to comply with the Act's requirements as any other party would. *See Sullivan v. Bridge*, 1 Mass. 511, 516 (1805) (Sedgwick, J.) (considering assignee's suit against sheriff). And laws protecting servicemembers in child custody proceedings affect participating state agencies much like ICWA does. Nevertheless, so far as *amicus* is aware, there is no evidence that anyone has objected to these laws because they affect state actors who participate in regulated proceedings.

Consistent with this history, this Court has recognized that courts should be "viewed distinctively" in the anti-commandeering analysis, *Printz*, 521 U.S. at 907. Indeed, this Court has explained that "the Constitution was originally understood to permit the imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Id.* It also has confirmed Congress's "substantial power" to prescribe rules that affect state causes of action. *Stewart v. Kahn*, 78 U.S. 493, 506 (1870); *Jinks v. Richland County*, 538 U.S. 456, 465 (2003)

(Congress has the power to make substantive changes to state limitations periods).

Second, there is no anti-commandeering concern when Congress requires state officials, particularly state courts, to engage in recordkeeping and share information with the federal government.

Congress has long relied on state courts to perform administrative tasks that facilitate the enforcement of federal law. In the Judiciary Act of 1789, for example, Congress required state officials to arrest and release federal offenders. *See* Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 73, 91. And in a 1790 law protecting the rights of mariners, Congress required state judges to take evidence and certify claims—obligations that aided in the adjudication of federal rights. *See* Act of July 20, 1790, ch. 29, §§ 2-3, 1 Stat. 131, 132.

Most significantly, some Founding-era legislation included recordkeeping and information-sharing duties that parallel those imposed by ICWA. For example, early federal laws required state officials to keep records and share them with federal entities, including the Secretary of State, *see* Act of June 18, 1798, ch. 54, § 2, 1 Stat. 566, 567, and the Secretary of War, *see* Regulation of the 26th of March, 1818, *in American State Papers: Claims* 683 (Walter Lowrie & Walter S. Franklin eds., 1834) [hereinafter *Claims*]. This Court has never held that laws requiring recordkeeping or "the provision of information to the Federal Government" commandeer state officials. *Printz*, 521 U.S. at 918. Indeed, in the context of laws related to information that is "judicial in nature," this Court has indicated to the contrary, suggesting that such laws are valid. *Printz*, 521 U.S. at 908 n.2.

In summary, neither history nor this Court's precedent supports the conclusion that ICWA is unconstitutional on anti-commandeering grounds. Both demonstrate that Congress has the power to create standards that state courts must follow. As this Court has instructed, when Congress creates a "right under the law of the United States," state courts have "no discretion to withhold that right," *Gordon v. Longest*, 41 U.S. 97, 104 (1842); *Testa v. Katt*, 330 U.S. 386, 394 (1947) (state courts cannot "deny enforcement to claims growing out of a valid federal law"), even when a state litigant is involved. Furthermore, ICWA's modest recordkeeping and information-sharing requirements, which are "ancillary," *Printz*, 521 U.S. at 908 n.2, to the law's core provisions, do not unlawfully commandeer state officials, either. There is no merit to the argument that any of ICWA's provisions, which are "vital to the continued existence and integrity of Indian tribes," 25 U.S.C. § 1901(3), must fall on anti-commandeering grounds, and this Court should reject it.

ARGUMENT

I. Founding-Era History and this Court's Precedent Demonstrate that Congress May Make Rules that Apply in State Courts.

At the Constitutional Convention in 1787, the Founding generation debated different means of ensuring that states could not "defeat[]" or ignore the acts of Congress, 1 *The Records of the Federal Convention of 1787*, at 164 (Max Farrand ed., 1911) (Pickney), a proposition that would "destroy the order & harmony" of the new nation's "political system," *id.* at 165 (Madison). In the end, the Constitution's Framers concluded that the "Judiciary department"—including the "Judiciaries of the several states," 2 *id.* at 28-29—

would best preserve the "National authority," 1 *id.* 165 (Madison). For this reason, the Constitution's Supremacy Clause instructs that "Judges in every State shall be bound" by any "Laws of the United States," notwithstanding "anything in the Constitution or Laws of any State to the Contrary." U.S. Const. art. VI, cl. 2. Since then, Congress has passed many "[f]ederal statutes enforceable in state courts," *New York v. United States*, 505 U.S. 144, 178 (1992), and has often directed state judges to participate in the implementation of federal law.

A. The first Congress—the same Congress that proposed the Tenth Amendment—passed several laws enforceable in state courts, including laws that applied in state-law causes of action.

For example, the Judiciary Act of 1789 stated that it "shall . . . be the duty of the state court" to "proceed no further" in cases where litigants invoked the federal courts' removal jurisdiction. § 12, 1 Stat. at 79; *see Gordon*, 41 U.S. at 104 (holding that removal was a "right under the law of the United States; and . . . [a state] judge had no discretion to withhold that right"). In a later customs act, Congress created a similar duty for state courts to "proceed no further" in "suit[s] or prosecution[s] . . . commenced" against federal officers. Act of Feb. 4, 1815, ch. 31 § 8, 3 Stat. 195, 198; Act of Mar. 3, 1817, ch. 109, § 2, 3 Stat. 396 (extending these provisions for four years); *see* Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 805-07 (1965) (describing later removal provisions). Although these removal statutes required state courts to stop adjudications in a wide array of contexts, including when they were adjudicating state-law

causes of action, there is no suggestion that lawmakers worried that the Act "put[] state courts under the direct control of Congress," Individual Pet'rs Br. 63.

Beyond the removal provisions, Congress in the Provisional Army Act of 1798 provided that enlisted soldiers would be exempt from arrest for "any debt or contract" and instructed that "it shall be the duty" of federal and state judges to grant a writ of habeas corpus and discharge soldiers from such arrests. Act of May 28, 1798, ch. 47, § 14, 1 Stat. 558, 560-61. This Act—a precursor to a variety of statutes establishing certain rights for servicemembers, *see infra* at 9-12—preempted state laws that permitted arrest for debt or contract, but Congress passed it without any suggestion that doing so would impermissibly "graft [federal law] onto state-law causes of action," Individual Pet'rs Br. 30.

Similarly, the Bankruptcy Act of 1800 permitted federal bankruptcy commissioners to assign debts due to bankrupt people to "assignees" and required state courts to enforce assignees' "remedy to recover" the debts in "their . . . own name." § 13, 2 Stat. at 25. State courts routinely complied with the "general policy of the bankrupt law" by permitting assignees to bring state-law claims that had been assigned by federal bankruptcy commissioners, *Sullivan*, 1 Mass. at 516 (reviewing assignee's tort and debt claims); *Barstow v. Adams*, 2 Day 70, 95 (Conn. 1805) (holding that assignees can maintain action for ejectment); *Brown v. Cuming*, 2 Cai. R. 33 (N.Y. 1804) (reviewing assignee's assumpsit action), even when the assignee would have been unable to do so under state law, *see Ward v. Jenkins*, 51 Mass. 583, 593 (1846); Edward D. Ingraham, *A View of the Insolvent Laws of Pennsylvania* 62-63 (1827) (noting conflict between assignees'

powers under state and federal law).

In sum, many acts of Congress have affected state-law causes of action, and state courts have consistently recognized those laws as supreme.

Plaintiffs nonetheless argue that ICWA's provisions constitute commandeering because they may require state child welfare agencies to take "extensive affirmative steps." *See* Texas Br. 60-61. But nineteenth century state courts understood the Bankruptcy Act to require them to hear assignees' claims against state officials, *see Sullivan*, 1 Mass. at 512 (permitting assignee to sue sheriff), suggesting that the participation of state officials in suits regulated by the Act did not amount to unconstitutional commandeering—even when the officials were defendants in the proceedings and thus did not choose to participate in the legal process that required them to undertake "extensive" actions.

Laws relating to federal property also created rights and procedures that state courts were bound to follow in state-law cases. Various laws gave settlers a "right of pre-emption" to public land—a right to purchase a property from the federal government notwithstanding competing claims. *See, e.g.*, Act of May 29, 1830, ch. 208, § 3, Stat. 420, 420-21; *Wilcox v. Jackson ex dem. McConnel*, 38 U.S. 498, 517 (1839) (citing acts). These acts also prescribed how state courts should evaluate the "assignment" and "transfer" of claims to federal land. The Homestead Act, for example, gave settlers the right to seek title to public land, Act of May 20, 1862, ch. 75, §§ 1-2, 12 Stat. 392, and as this Court observed, determined "to whom and for whom title would pass" after the death of a claimant, *McCune v. Essig*, 199 U.S. 382, 388 (1905). These laws sometimes conflicted with state laws that determined inheritance

and property ownership, but state courts were bound to follow the federal procedures because, as this Court noted, "state legislation" could not "take from the United States their own land." *Wilcox*, 38 U.S. at 517. Furthermore, these laws easily could have required state officials participating in property disputes to take "extensive affirmative steps." Texas Br. 60-61; *see, e.g.*, La. Resolution relative to the duty of the Attorney General, 10th Leg., 1st sess. (Jan. 21, 1831) (giving the state Attorney General the duty to "institute . . . suit or suits on behalf of the state" regarding property). Notwithstanding all that, no evidence suggests that states objected to participating in such lawsuits on anti-commandeering grounds.

In addition, during periods of national conflict, Congress used its war powers to make various and extensive changes to state-law causes of action. For example, during the Civil War, it passed statutes tolling limitations periods for state causes of action during the war-related "interruption of judicial proceedings," *see* Act of June 11, 1864, ch. 118, 13 Stat. 123, and for the period of an individual's military service, *see id.*; *see also* Act of Mar. 8, 1918, ch. 20, § 205, 40 Stat. 440, 443; Act of Oct. 17, 1940, ch. 888, § 205, 54 Stat. 1180, 1181; *Jinks*, 538 U.S. at 461 (noting that "the enactment of § 1367(d) was not the first time Congress prescribed the alteration of a state-law limitations period" and citing statutes). Significantly, state courts used these tolling provisions to revive otherwise time-barred actions against state officials. *See, e.g.*, *Batesville Inst. v. Kauffman*, 85 U.S. 151 (1873); *Parker v. State*, 57 N.Y.S.2d 242 (N.Y. Ct. Cl. 1945); *Perkins v. Manning*, 59 Ariz. 60 (1942); *Shell Oil Co. v. Indus. Comm'n*, 407 Ill. 186 (1950). While participating in these actions certainly required "extensive

affirmative steps" of state officials, Texas Br. 61, anti-commandeering objections were not raised in these cases.

In addition to requiring tolling, these laws exempted members of the military from a variety of state-law actions. *See* Gregory M. Huckabee, *Operations Desert Shield and Desert Storm: Resurrection of the Soldiers' and Sailors' Civil Relief Act*, 132 Mil. L. Rev. 141, 143 (1991) (describing acts that made "soldiers or sailors . . . immune from service of process and arrest" for various actions); *see* § 1, 13 Stat. at 123. They protected service members from actions for "eviction or distress," § 300, 40 Stat. at 443; § 300, 54 Stat. at 1181, the enforcement of taxes or assessments on property, § 500, 40 Stat. at 447, § 500, 54 Stat. at 1186, and from "proceeding[s] to resume possession of a motor vehicle," § 303, 54 Stat. at 1183; § 301, 40 Stat. at 443 (preventing actions for repossession of "real or personal property"). They also required state courts to enforce servicemembers' "right[s] to redeem" property that was sold during their service, § 500, 54 Stat. at 1186; § 500, 40 Stat. at 447, and created procedures that "any court" was required to follow to "protect[] persons in military service" against default judgment, § 200, 40 Stat. at 441 (requiring state courts to accept an affidavit "as to [the] status of defendant" before entering default judgment); § 200, 54 Stat. at 1180 (same).

In 2003, Congress strengthened and modified these provisions by passing the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. §§ 3901 *et seq.*, which aims to help members of the military "devote their entire energy to the defense needs of the Nation," *id.* § 3902. Like previous acts, the SCRA tolls statutes of limitations in cases involving servicemembers, *id.*

§ 3936, and protects them from eviction, *id.* § 3951, foreclosure, *id.* § 3953, repossession, *id.* § 3952, and default judgments, *id.* § 3931. The Act also provides that state courts must automatically stay proceedings against servicemembers if certain conditions are met, further "expand[ing] protections" for servicemembers in state courts. H.R. Rep. No. 108-81, at 35, 45 (2003); 50 U.S.C. § 3931.

In 2008, inspired by reporting about servicemembers losing custody of their children during deployments to Iraq and Afghanistan, Congress amended the SCRA to provide explicitly that its automatic stay and default judgment provisions apply in child custody proceedings. *See* Pub. L. No. 110-181, 122 Stat. 128 (2008); Christopher Missick, *Child Custody Protections in the Servicemembers Civil Relief Act: Congress Acts to Protect Parents Serving in the Armed Forces*, 29 Whittier L. Rev. 857, 858 (2008) (describing coverage). In 2014, Congress amended the Act to further protect the custody rights of deployed servicemembers, using language that mirrors ICWA's. *Compare* 50 U.S.C. § 3938(d) (state courts "shall apply" federal law in a custody proceeding if doing so would offer servicemember a "higher standard of protection"), *with* 25 U.S.C. § 1921 (courts "shall apply the State or Federal standard" that offers a "higher standard of protection to the rights of the parent or . . . custodian of an Indian child").

State courts routinely apply these provisions to protect servicemembers' "substantial right[s]" in custody cases. *Davidson v. Laws*, 837 S.E.2d 482 (N.C. Ct. App. 2020) (unpublished table decision) (referring to "[t]he statutory right for deployed servicemen to request a stay of a child custody proceedings"); *Wood v. Woeste*, 461 S.W.3d 778, 782 (Ky. Ct. App. 2015)

(holding that "[t]he SCRA directly applies to child custody proceedings"). State courts also consistently comply with the SCRA's provisions when a state agency initiates custody or termination proceedings, even if the agency is required to undertake "extensive" efforts as a result. *See In re A.R.*, 170 Cal. App. 4th 733, 744 (2009) (holding that the court below violated the SCRA by permitting the agency to terminate a father's parental rights); *In re C.K.*, No. 12-1279, 2013 WL 5788570, at *4 (W. Va. Oct. 28, 2013) (holding that the court below erred by allowing the agency to terminate parental rights without complying with the SCRA); *New Jersey Div. of Youth & Fam. Servs. v. V.W.*, No. A-5196-08T4, 2010 WL 4075325, at *6 (N.J. Super. Ct. App. Div. July 12, 2010) (suggesting that the trial court would be required to grant a stay under the SCRA if the servicemember sought it against the agency).[2]

And the SCRA is just one of many federal laws that regulate state family law proceedings. *See*, *e.g.*, Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (requiring states to enforce and not modify the child custody determinations of other states when they meet certain criteria); Tribal Defs.' Br. 42-43 (citing additional examples).

B. Consistent with this history, this Court's precedent makes clear that whatever restrictions on commandeering state officials the Tenth Amendment may impose, those restrictions do not prevent Congress

[2] Even before the 2008 amendments, courts consistently enforced servicemembers' federal rights in state-law cases involving custody and family law. *See, e.g.*, *Konkel v. State*, 168 Wis. 335 (1919) (child support); *Kelley v. Kelley*, 38 N.Y.S.2d 344, 347 (Sup. Ct., Oneida Cnty. 1942) (divorce); *Hernandez v. Hernandez*, 169 Md. App. 679, 690, 906 (2006) (divorce and custody).

from requiring state courts to enforce federal law.

As an initial matter, this Court has long held that Congress can create substantive standards that state courts are "bound to recognize . . . as operative." *Claflin v. Houseman*, 93 U.S. 130, 137 (1876); *see Gordon*, 41 U.S. at 104. In *Claflin*, for example, this Court heard a case involving the Bankruptcy Act of 1867 which, like earlier bankruptcy laws, *see supra* at 7-8, invested assignees "with all the bankrupt's rights of action," *Claflin*, 93 U.S. at 135. Claflin was sued by an assignee in state court and argued that the court had no jurisdiction. *Id.* at 133. This Court rejected the argument, concluding that "[t]he fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief" made available by a federal statute. *Id.* at 137. This Court also observed that the state court had to follow the Bankruptcy Act's requirements "because it is subject also to the laws of the United States." *Id.*; *see Testa*, 330 U.S. at 394 (state court was not "free to refuse enforcement" of federal claim when it had "jurisdiction adequate and appropriate under established local law to adjudicate [the] action").

The principle that state courts are bound to recognize federally created rights as "paramount," *Wilcox*, 38 U.S. at 517, is equally strong in areas within the "States' traditional control," Texas Br. 40. In *Wilcox*, the plaintiff claimed a right to a plot of federal land because an Illinois land office had allowed him to claim the land under Illinois law. *Id.* at 510. Although this Court recognized that Illinois law would have allowed the plaintiff to have title to the land without a patent from the federal government, *id.* at 516, it concluded that Congress had "declared [that] . . . a patent is necessary to complete the title," *id.* at 516, and Illinois's

laws were not "paramount to those of Congress," *id.* at 517, even when they concerned the "disposition of the property of her citizens," *id.* at 516; *see McCune*, 199 U.S. at 390 (rejecting effort to "assert[] the law of the state against the law of the United States" when state probate law conflicted with provisions of the Homestead Act); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001) (describing the possibility of federal preemption in "areas of traditional state regulation such as family law").

Finally, this Court has also confirmed Congress's "substantial power" to require state courts to apply federal tolling provisions in state-law cases. *Stewart*, 78 U.S. at 506. In *Stewart*, this Court upheld a federal statute that tolled state limitations periods in civil and criminal cases during the Civil War. It rejected an argument that Congress cannot "prescribe rules of property or practice for the . . . courts of the several States," *id.* at 498 (argument of counsel), upholding the tolling provision because it stemmed from a "substantial power[] . . . confided by the Constitution" to Congress, *id.* at 506; *see also Pierce County v. Guillen*, 537 U.S. 129, 146-48 (2003) (Congress is authorized by the Commerce Clause to establish a federal evidentiary privilege applicable in cases arising under state law); *Jinks*, 538 U.S. at 461-65 (Congress can require courts to toll state statute of limitations on a state-law claim while a supplemental federal cause of action is pending); *see Amici* Const'l Scholars Br. Part II.

C. This Court's cases concerning the anti-commandeering doctrine do not disturb these precedents. According to this Court, the anti-commandeering principle bars Congress from "command[ing] state and local law enforcement officers" to "participate . . . in the administration of a federally enacted regulatory

scheme," *Printz*, 521 U.S. at 902, 904, and from "directly compelling" state legislatures "to enact and enforce a federal regulatory program," *New York*, 505 U.S. at 176 (internal quotation omitted).

In *New York*, this Court invalidated a federal requirement that states either "take title" to nuclear waste produced in their boundaries or enact a congressionally dictated regulatory program. *Id.* at 175. In deciding that case, this Court specifically distinguished Congress's authority to pass the take-title provision from "the well established power of Congress to pass laws enforceable in state courts." *Id.* at 178. While Congress could not "require the States to regulate," *id.*, it could "direct state judges to enforce" federal statutes in state courts because "this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause," *id.* at 178-79.

In *Printz*, this Court similarly distinguished "statutes imposing obligations on state courts" from those that "impress the state executive into its service." 521 U.S. at 907. *Printz* involved a federal law that required local law enforcement agents to conduct background checks of prospective handgun purchasers. *Id.* at 903. Surveying the history of "executive-commandeering statutes in the early Congresses," *id.* at 916, this Court explained that this requirement violated state sovereignty by "conscripting the State's officers directly," *id.* at 935. In doing so, it distinguished laws that impose obligations on state judges—including the naturalization and maritime laws surveyed below, *see infra* at 20-24—and concluded that "the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal

prescriptions," *Printz*, 521 U.S. at 907.[3] This original understanding—rooted in the text of the Supremacy Clause as well as the "implicit" structure of the Constitution—distinguished the regulation of state court proceedings from the impermissible commandeering of "States' executive power." *Id.* at 909.

Most recently, in *Murphy*, this Court struck down a provision of the Professional and Amateur Sports Protection Act (PASPA) that prohibited states in which sports gambling was illegal from "author[izing]" it. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1473 (2018). The provision was impermissible, this Court explained, because it "unequivocally dictate[d] what a state legislature may and may not do," putting the legislature "under the direct control of

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[3] *Printz* raised the possibility that these early naturalization laws "applied only in States that authorized their courts to conduct naturalization proceedings." 521 U.S. at 906 (citing *Holmgren v. United States*, 217 U.S. 509 (1910) and *United States v. Jones*, 109 U.S. 513 (1883)). To be sure, there is some debate about the extent to which Congress can authorize state courts to hear cases over which they have no jurisdiction, *compare Holmgren*, 217 U.S. at 517 (1910) (observing that "the right to create courts for the states does not exist in Congress"); *Jones*, 109 U.S. at 520 (reviewing the naturalization acts and noting that "the *jurisdiction thus conferred* could not be enforced against the consent of the states" (emphasis added)), *with Haywood v. Drown*, 556 U.S. 729, 739 (2009) (holding that state statute depriving courts of jurisdiction over certain claims under 42 U.S.C. § 1983 violates the Supremacy Clause because "[a] jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear"). But this does not mean that a state court that has valid jurisdiction may ignore the rules of decision created by Congress. *See Holmgren*, 217 U.S. at 218 (noting that Congress may "constitutionally authorize the magistrates or courts of a state to enforce a statute providing for a uniform system of naturalization").

Congress." *Id.* at 1478. Once again, this Court distinguished the commandeering of state legislatures from provisions requiring state courts to enforce preemptive federal statutes. *Id.* at 1479-81. It confirmed that Congress can "enact[] a law that imposes restrictions or confers rights on private actors," *id.* at 1480, and distinguished the PAPSA provision because it could in "no way . . . be understood as a regulation of private actors," or indeed "as anything other than a direct command to the States," *id.* at 1481.

As this Court confirmed in *Murphy*, the anti-commandeering doctrine does not bar Congress from "evenhandedly regulat[ing] an activity in which both States and private actors engage." *Id.* at 1478 (quoting *Reno v. Condon*, 528 U.S. 141, 151 (2000)). In *Condon*, this Court considered whether a federal statute regulating the disclosure of personal information contained in state motor vehicle departments violated the anti-commandeering doctrine. 528 U.S. at 143. While state parties argued that the statute "thrusts upon the States all of the day-to-day responsibility for administering its complex provisions," *id.* at 149-50 (citations omitted), the Court upheld the statute because it "regulates the universe of entities that participate as suppliers to the market for motor vehicle information," including both states and private parties, *id.* at 151.

Consistent with this principle, this Court has never held that Congress offends the Tenth Amendment by making rules that apply in state courts, even if those rules affect state actors as litigants. That is why this Court has upheld Congress's suspension of state limitations periods, notwithstanding that the suspension applied to state litigants. *See supra* at 9-10. Similarly, when this Court upheld 28 U.S.C. § 1367(d), a provision of the supplemental jurisdiction

statute that requires state courts to toll state statutes of limitations while cases are pending in federal court, it rejected the argument that the provision should be invalidated on anti-commandeering grounds. *Jinks*, 538 U.S. at 465-66 (describing contention that "Congress may not, consistent with the Constitution, prescribe procedural rules for state courts' adjudication of purely state-law claims," but concluding that the tolling provision fell on the "'substantive' side of the line"); Resp. Br., *Jinks v. Richland County*, 2003 WL 145133, at *5. It also did not suggest that it would violate the Tenth Amendment to apply the law when state or local agencies initiate proceedings affected by § 1367(d). *Jinks*, 538 U.S. at 466 (noting only that the sovereign immunity doctrine would prevent the application of § 1367(d) to state defendants).

Given these precedents, there is simply no basis for Plaintiffs' claim that ICWA violates anti-commandeering principles by imposing duties on state agencies. Those duties arise from state agencies' participation in adoption, termination, and placement proceedings and apply to "any party" seeking to participate in those proceedings, state and private actors alike, *see* Pet. App. 125a-26a (describing the participation of private parties in ICWA-regulated actions); *S.S. v. Stephanie H.*, 241 Ariz. 419, 423 (Ariz. Ct. App. 2017) ("ICWA's plain language does not limit its scope to proceedings brought by state-licensed or public agencies."). Unlike PASPA, which could in "no way . . . be understood as a regulation of private actors [or] as anything other than a direct command to the States," *Murphy*, 138 S. Ct. at 1481, ICWA plainly regulates an activity in which both private and state actors participate—including actions in which no state or state actor is a party.

II. History and this Court's Precedent Demonstrate Congress's Power to Require State Actors to Perform Certain Tasks that Supplement the Adjudicative Process, Including Keeping Records and Sharing Information with the Federal Government.

In addition to requiring state courts to comply with federal standards, Founding-era legislation often compelled state judicial officials to play a role in the enforcement of federal law. Many of these laws specifically required state officials to record information and share it with the federal government.

A. As an initial matter, early legislation often imposed ancillary administrative duties on state judicial officials. The Judiciary Act of 1789, for example, gave justices of the peace and "magistrates of any of the United States" the power to arrest and imprison federal offenders and required those judges to set bail at the offenders' request. § 33, 1 Stat. at 91. The law also gave state courts concurrent jurisdiction over certain federal claims. *Id.* §§ 9, 11, 1 Stat. at 76-79.

Both aspects of the Act provoked objections that it commandeered state officers, *see, e.g.*, 1 Annals of Cong. 839 (1789) (Joseph Gales ed., 1834) [hereinafter, *Annals*] (Rep. Ames) ("Individuals may be commanded, but are we authorized to require the servants of the States to serve us?"); Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 Yale L.J. 1150 n.198 (2013) (noting a Senator's objection that Congress "Cannot compel [state judges] to act—or to become our Officers"), although most objectors raised practical rather than legal concerns, *see, e.g.*, 1 *Annals* 836 (Rep. Sedgwick) (worrying that state courts

"might refuse or neglect to attend to the national business"); Campbell, *supra*, at 1147-50.

Lawmakers countered these concerns by arguing that the "General Government [was] authorized" to make demands on state judges when "carrying into execution the powers of the Constitution." 1 *Annals* 861 (Rep. Gerry). They noted that state "Executive and Judicial officers" had been "bound by oath or affirmation to support . . . the laws of the United States," 1 *id.* 863 (Rep. Livermore), and so could be compelled to set bail for federal offenders and, in certain circumstances, to adjudicate federal claims. In the end, Congress rejected the anti-commandeering objections. *See* Campbell, *supra*, at 1164 ("During the Judiciary Act debates in 1789, Fisher Ames and William Maclay had directly questioned federal power to commandeer state officers . . . [but] were far outnumbered by endorsements of federal commandeering power.").

The next year, Congress passed a maritime labor law that required judicial officials to gather and certify evidence. This law, which was "possibly the most ambitious exercise of the commerce power" on the part of the first Congress, established certain rights for crewmembers, David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. Chi. L. Rev. 775, 791 (1995), including the right to request a review of the fitness of a vessel, *id.* at 791-72; §§ 2-3, 1 Stat. at 131-32. The law clearly envisioned the "participation of state officials in the enforcement of federal law." Currie, *supra*, at 792 n.93. It allowed sailors to appeal to their first mate and then to the "justice of the peace of the city, town or place" closest to the ship's location. § 3, 1 Stat. at 132. After such an appeal, the Act "required" the justice of the peace to direct three of the "persons in the

neighbourhood . . . most skilful in maritime affairs" to report on the vessel's fitness. *Id.* Judicial officials were also required to "certify" the report and "commit by warrant under his hand and seal" any sailor who refused to return to a ship after its fitness was determined. *Id.* Congress passed these provisions without debate, Currie, *supra*, at 791, suggesting that lawmakers did not view them as an incursion on state sovereignty.

Finally, Congress required state judges to undertake recordkeeping efforts to enforce a law protecting imprisoned debtors. A 1792 Act provided that people imprisoned for debts issuing out of federal courts "shall be entitled to like privileges . . . as persons confined . . . for debt on judgments rendered in [state courts]." Act of May 5, 1792, ch. 29, § 1, 1 Stat. 265. To enforce this requirement, a prisoner was entitled to "have [an] oath or affirmation" of his poverty "administered to him" by a district or state supreme court judge near the site of imprisonment. *Id.* § 1, 1 Stat. at 266. The judge would then certify the oath to the "prison keeper" and "fix a reasonable allowance for the debtor[']s support." *Id.* If the creditor did not pay the "reasonable allowance," the law provided that the debtor "shall be discharged." *Id.* While some *federal* judges protested that these provisions, which they interpreted to be obligations, were "degrading," no one objected that the provisions commandeered *state* judges in violation of the Constitution. Letter of Charles Lee, Jan. 10, 1798, *in Claims*, *supra*, at 162, (validating judges' objections that the law was "burdensome"); Letter of Richard Peters, Jan. 8, 1798, in *id*. (noting that "it is impracticable to do business with propriety and effect in a jail"). After receiving complaints from federal judges, a congressional committee

recommended certain alterations to the Act, but once again made no mention of its use of state judges. *American State Papers: Miscellaneous* 179-80 (Walter Lowrie & Walter S. Franklin eds., 1834) (reprinting reports from Reps. Smith and Otis on Feb. 26, 1798 and April 25, 1798).[4]

At the turn of the century, a court affirmed Congress's power to impose administrative responsibilities on state officials in *United States v. Mannen*. Campbell, *supra*, at 1167 (reprinting archival copy of *United States v. Mannen* (6th Cir. 1802)). There, Mannen argued that he could not be convicted for obstructing a local constable empowered to enforce federal law because Congress, in his words, lacked "the power . . . to require any service to be performed by a State Officer in his official capacity." *Id.* at 1168-69 (quoting archival copy of opinion); *see also* Act of Mar. 3, 1791, ch. 15, § 32, 1 Stat. 198, 207 (providing that local

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[4] In addition to requiring state judges to take "burdensome" actions, the 1792 Act could have required state litigants to take "extensive affirmative steps" when seeking relief in debt cases, Texas Br. 66. Specifically, the 1792 Act affected creditors, including states prosecuting actions for debt against imprisoned debtors, *see, e.g.*, 6 Acts of the General Assembly of New Jersey 47 (1781) (permitting the treasurer and Superintendent of Purchases to bring "an action of debt . . . on behalf of the state" against contractors); *State of Georgia v. Brailsford*, 3 U.S. 1, 4-5, (1794) (noting that the State of Georgia sued "three private persons" for debt). The Act's requirements for the treatment of debtors also affected the many states that agreed to "receive and keep safe" federal prisoners in their jails. *United States v. Noah*, 27 F. Cas. 176, 177 (C.C.S.D.N.Y. 1825) (describing New York law agreeing to "receive [federal prisoners] in their respective jails"). But no one at the time suggested that these provisions constituted unconstitutional commandeering merely because they affected state judges, litigants, or jailers.

constable could search "suspected places" with a warrant authorized by state judges in order to enforce federal tax on distilled spirits). The Sixth Circuit rejected this argument on Supremacy Clause grounds, concluding that Congress's authority to involve local officials in the collection of duties was "evident from the Constitution," which made the "Laws of the U. States . . . the Supreme Law of the Land." Campbell, *supra*, at 1168 n.256. The court further noted that several statutes, including the Judiciary Act, "compelled [state officers] to act officially in order to carry into effect particular Laws of the U.S." *Id*.

B. In addition to demanding the assistance of state judicial officials in the enforcement of federal law, early legislation also required state officials to record and share information with the federal government.

For example, a 1790 naturalization act required the state courts that received naturalization applications to "record" these applications and "the proceedings thereon." Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103. Even though this law plainly "co-opt[ed] state agencies to enforce federal law," there "is no evidence that the First Congress was troubled by . . . [this] concern[]." Currie, *supra*, at 824-25. Subsequent naturalization statutes required state judicial officials to keep similar records. *See* Act of April 14, 1802, ch. 28, § 2, 2 Stat. 153, 154 (requiring the court "of a particular state" to "receive" and "register" certain information from any arriving non-citizen, including their "name, birthplace, age . . . and place of . . . intended settlement"). Indeed, in 1795, Congress once again required state courts hearing naturalization petitions to keep a record of related oaths. Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414 (requiring a non-citizen to make "oath

or affirmation before the supreme, superior, district or circuit court of some one of the states" or in a federal court). Three years later, Congress made it the "duty of the clerk, or other recording officer of [a] court," including a state court, to "certify and transmit" non-citizens' declarations to the federal Secretary of State. §§ 1-3, 1 Stat. 567 (referring to courts empowered to receive declarations under the Act of Jan. 29, 1795, which explicitly included state courts); *see also* § 6, 1 Stat. at 200 ("any magistrate . . . shall take an oath or affirmation" which "shall be transmitted to the comptroller of the treasury").

Congress also compelled state courts to provide information relating to pension claims to federal officials. The Confederation Congress had given states the "right of judging" veterans' pension claims, *see* Letter of Henry Knox, Feb. 25, 1791, *in Claims*, *supra* at 28 (noting that in a June 1788 enactment, "Congress, by a liberal and honorable conduct, transferred to the several States the right of judging who of their citizens respectively were entitled to be placed on the list of invalid pensioners of the United States and ascertaining the sum they should receive"), and in 1790, Congress authorized pension payments based on these state judgments, William Henry Glasson, *Federal Military Pensions in the United States* 54-55 (1918); Act of July 16, 1790, ch. 27, 1 Stat. 129, 129-30. In the years after, Congress experimented with using the new federal judiciary to evaluate pensioners' claims and transmit them to the Secretary of War for final approval. Glasson, *supra*, at 56-58. This prompted objections from federal judges, who protested that it was unconstitutional to authorize the Secretary "to sit as a court of errors on the judicial acts" of federal judges. *Hayburn's Case*, 2 U.S. 409, 414 (1792). Later, Congress

revised the law so that it "imposed no duty of making a decision upon the judges," Glasson, *supra*, at 60, but instead required them to take evidence and "transmit" it to the Secretary of War. Act of Feb. 28, 1793, ch. 18, §§ 1-2, 1 Stat 324, 325.

Years later, lawmakers imposed similar recordkeeping duties on state judges. *See* Act of Mar. 18, 1818, ch. 19, §§ 1-2, 3 Stat. 410 (claimant "shall make a declaration" before "any judge or court of record of the county, state, or territory"). Regulations concerning these duties explain that the law required judges to certify and "attest by seal" to certain discharge records and transmit them to the federal government. Regulation of the 26th of March, 1818, *in Claims*, *supra*, at 683-84; War Department Regulation of June 1818, *in id*. State judges complied with the pension law's requirements without protest. Glasson, *supra*, at 66-71 (describing debate about the pension law, but not about its use of state judges). And the next year, Congress once again called upon local magistrates and justices of the peace to take evidence for claimants to enforce a law authorizing payment for property destroyed in the War of 1812. Letter of Richard Bland, Commissioner, Mar. 26, 1817, *in Claims*, *supra*, at 693.

Notably, state judicial officers were not the only state officials who Congress subjected to recordkeeping requirements in this early period. The Second Congress also imposed recordkeeping duties on state governors. A 1792 Act regulating presidential elections provided "[t]hat the executive authority of each state shall cause three lists of the names of the electors of such state to be made and certified and to be delivered to the electors" before the election. Act of Mar. 1, 1792, ch. 8, § 3, 1 Stat. 239, 240; *id.* § 4 (providing for

enforcement by the Secretary of State). During congressional debate, one lawmaker moved to eliminate the provision because "no person could be called upon to discharge any duty on behalf of the United States . . . who had not accepted of an appointment under their authority." 3 *Annals* 279 (Dec. 1791) (Rep. Niles). Others responded that the law was not an "undue assumption of power," *id.* at 280 (Rep. Livermore), because Congress was authorized to make such a demand of state executives, *id.* at 279-80 (noting that Rep. Sedgwick "observed that if Congress were not authorized to call on the Executives of the several States, he could not conceive what description of persons they were empowered to call upon"). The House rejected the motion to eliminate the obligation for governors, suggesting that most lawmakers had not "perceived any constitutional problem" with the requirement. David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 Nw. U. L. Rev. 606, 618 (1996).

C. Even as this Court has created other limits on commandeering state officials, it has never prohibited Congress from imposing modest recordkeeping requirements on state actors, and it has even affirmatively suggested that recordkeeping and information-sharing obligations that are "ancillary" to state court functions are permissible. *Printz*, 521 U.S. at 908 n.2.

In *Printz*, this Court expressly declined to address the constitutionality of laws "requir[ing] only the provision of information to the Federal Government," even when applicable to "executive" officials. *Id.* at 918; *see id.* at 936 (O'Connor, J., concurring) (noting that the Court "appropriately refrain[ed] from deciding whether purely ministerial reporting requirements imposed by Congress on state and local

authorities" were invalid). Indeed, as Justice O'Connor noted in her concurrence, several statutes then imposed reporting requirements on state and local law enforcement agencies, including 42 U.S.C. § 5779(a), which required state officials to report cases of missing persons to the Department of Justice. *Id.* (referencing 42 U.S.C. § 5779, which was subsequently transferred to 34 U.S.C. § 41307); *see also* 15 U.S.C. § 2224 (requiring states to submit information to the Administrator of FEMA); 20 U.S.C. § 4013 (requiring governors to "maintain records" relating to the presence of asbestos in school buildings); 42 U.S.C. § 6933(a) (requiring states to develop an inventory of sites at which "hazardous waste" has been stored or disposed of).

Furthermore, this Court suggested in *Printz* that Congress can impose information-sharing requirements on state officials "insofar as . . . [they] relate[] to matters appropriate for the judicial power." *Id.* at 907. It reviewed several of the Founding-era statutes discussed above, including a 1798 Act requiring state courts to transmit naturalization records to the secretary of state. *Id.* at 90-07 (citing § 2, 1 Stat. at 567). "Given that state courts were entrusted with the quintessentially adjudicative task of determining whether applicants for citizenship met the requisite qualifications," this Court explained, it was appropriate for Congress to require state courts to perform the "ancillary functions of recording, registering, and certifying the citizenship applications," as well as sharing them with the federal government. *Id.* at 908 n.2.

In other words, this Court has recognized that Congress can require state courts to comply with recording and information-sharing obligations that are "ancillary" to adjudication. *Id.* This recognition undermines the claim that ICWA commandeers states

when it requires them to "create and maintain records for each placement of an Indian child," Texas Br. 63 (referencing 25 U.S.C. § 1915(e)). This requirement is best understood as an obligation that is ancillary to the "quintessentially adjudicative task" of applying ICWA's core provisions. *Printz*, 521 U.S. at 908 n.2.

* * *

Since the Founding era, Congress has imposed obligations on state courts and judges, both by creating laws that are "to be of force and effect in all courts, state or national," *Ward*, 51 Mass. at 592, and by requiring state courts and other state officials to engage in modest recordkeeping and information-sharing related to federal laws. In ICWA, in order to remedy state courts' persistent "fail[ure] to recognize the essential tribal relations of Indian people," 25 U.S.C. § 1901(5), Congress created a series of substantive and procedural requirements that protect Indian families, *id.* § 1901(4). These requirements are entirely consistent with the kinds of obligations that Congress has imposed on state actors since the Founding, and this Court should hold that they are constitutional.

CONCLUSION

For the foregoing reasons, this Court should hold that ICWA is not unconstitutional on anti-commandeering grounds.

Respectfully submitted,

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