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

In the Supreme Court of the United States

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

v.

CHAD EVERET BRACKEEN, ET AL.

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.

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

REPLY BRIEF FOR PETITIONER THE STATE OF TEXAS

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INTRODUCTION

"The Federal Government 'is acknowledged by all to be one of enumerated powers.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)). "Th[at] enumeration of powers is also a limitation of powers." *Id.* Respondents demonstrate that they have no coherent theory about which enumerated power creates Congress's putative "plenary and exclusive" power to control Indian affairs. After unsuccessfully scouring this Court's precedent for a holding that ICWA falls within the meaning of "Commerce," respondents try to expand the Constitution's language based on (among other things) the Articles of Confederation's use of "affairs," the first Congress's legislation regarding "intercourse," various treaties' use of "protection," and even the pre-constitutional law of nations. But words have meaning, and the Framers did not use any that grant a plenary power over Indian affairs. ICWA therefore does not fall within the scope of Congress's Article I authority.[1]

Even if Congress generally has the power to regulate child-custody proceedings—and it does not—it could not do so in a way that violates other constitutional norms. Congress may not command States to take any particular action, let alone to violate the "moral imperative of racial neutrality," which has long been understood to be "the driving force of the Equal Protection Clause." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part). And Congress may not delegate to Indian tribes the power to do so either.

[1] The failure to respond to any specific statement in respondents' sprawling briefs should not be construed as a concession.

ARGUMENT

I. ICWA Exceeds Article I Power.

Notwithstanding the broad language in some of its opinions, the Court has never approved congressional power over Indians of the scope respondents describe. The Court should not further extend Congress's authority over Indian affairs to include state child-custody proceedings that involve Indian children—that extension is unsupported by the Constitution's text or any atextual "inherent sovereignty" theory.

A. The Court has not recognized a plenary and exclusive power that would permit ICWA.

To save ICWA, respondents rely heavily on a supposedly "unbroken" line of authority, U.S. Br. 10-11, by which they insist this Court has granted Congress plenary and exclusive power to "regulate interactions between non-Indians and Indians and protect Indians from harm," Tribes Br. 24. This Court has done no such thing. To the contrary, this Court's precedent establishes that States have always retained significant authority over such interactions—particularly when they involve Indians who live off reservations. *Contra* U.S. Br. 13-14; Tribes Br. 20-22.

1. This Court's precedent clearly establishes that States retain sovereign authority over many Indian affairs. Indeed, Indians who do not live on reservations "have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). For example, "[i]t has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country." *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 75 (1962). As a

result, state courts have long exercised jurisdiction over criminal proceedings involving Indians. *E.g.*, *Oshoga v. State*, 3 Pin. 56 (Wis. 1850); *Hudson v. State*, 1 Blackf. 317 (Ind. 1824).

Although federal respondents insist (at 14 n.4) that this "state authority" is "not at issue," the existence of such authority belies the theory that Congress has "plenary and exclusive" power over *all* Indian affairs.

2. Because States have "more extensive" authority over Indians "not on any reservation," *Organized Vill. of Kake*, 369 U.S. at 75, the scope of Congress's power over Indian tribes thus depends on whether a particular law governs on- or off-reservation. Beginning with the Trade and Intercourse Acts, Congress has always closely regulated Indian lands. *E.g.*, Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (sale of Indian land); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973) (taxation of activities on Indian lands); *United States v. Lara*, 541 U.S. 193 (2004) (crime on Indian lands). In upholding the Major Crimes Act of 1885, this Court emphasized that the statute's effects were "confined to" criminal acts of an Indian "committed within the limits of the reservation." *United States v. Kagama*, 118 U.S. 375, 383 (1886).

Outside of Indian lands, Congress's authority is more restrained. Congress has been permitted to regulate the sale of goods—typically alcohol—to Indians, *e.g.*, *Perrin v. United States*, 232 U.S. 478 (1914); *United States v. McGowan*, 302 U.S. 535 (1938), to control the tribes' immunity from suit, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and to adopt preferences in federal employment, *Morton v. Mancari*, 417 U.S. 535 (1974). But Congress has never created—and this Court has never sanctioned—separate Indian-specific rules to replace

reasonable and nondiscriminatory state laws that would otherwise apply to non-reservation Indians.

3. As Texas has explained (at 5), ICWA applies only to Indian children living off-reservation. This has a correspondingly significant impact on state sovereignty: as the congressional committee considering ICWA recognized, States' "traditional jurisdiction" extends to "Indian children falling within their geographic limits"—that is, over the children to whom ICWA applies. H.R. Rep. No. 95-1386, at 19, *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7541. That is why courts routinely affirmed state-court adjudication of Indian child-custody proceedings before ICWA. *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 428-29 (1975); *Matter of Duryea*, 563 P.2d 885, 887 (Ariz. 1977); *Matter of Doe's Adoption*, 555 P.2d 906, 917 (N.M. Ct. App. 1976); *In re Cantrell*, 495 P.2d 179, 182 (Mont. 1972).

Because States have traditionally exercised such authority, this Court proceeds with caution when Indian-specific laws would "involve an unjustifiable encroachment upon a power obviously residing in the state." *Perrin*, 232 U.S. at 486. Moreover, laws that "interfere[] with th[at] power or authority" face tougher constitutional scrutiny. *Lara*, 541 U.S. at 205. After all, even in cases involving Indians, "States do not need a permission slip from Congress to exercise their sovereign authority." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2503 (2022).

B. Congress's enumerated powers do not support ICWA.

The Court should not extend its precedent to uphold ICWA because—as respondents' reliance on at least four constitutional clauses underscores—Congress's power to "protect the Indians" is "not expressly granted in so

many words by the Constitution." *Bd. of Comm'rs of Creek Cnty. v. Seber*, 318 U.S. 705, 715 (1943); *accord Kagama*, 118 U.S. at 378. And adopting respondents' view would require the Court to ignore its own caution against "pil[ing] inference upon inference . . . to convert congressional authority under the Commerce Clause to a general police power." *United States v. Lopez*, 514 U.S. 549, 567 (1995).

1. Indian Commerce Clause

By making no argument to the contrary, respondents implicitly concede that ICWA exceeds Congress's power under the Court's modern Commerce Clause jurisprudence. *See United States v. Morrison*, 529 U.S. 598, 609-10 (2000). Respondents nonetheless insist that "Commerce . . . with Indian tribes," U.S. CONST. art. I, § 8, cl. 3, should be read to have the same meaning as Indian "affairs" as used in the Articles of Confederation of 1781, and that "intercourse" as used in the Trade and Intercourse Act of 1790, ch. 33, § 1, 1 Stat. 137, indicates a plenary power. Respondents are wrong.

a. From the Republic's earliest days, this Court has recognized that the words of the Constitution "are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816). Early interpretations of "commerce" followed that rule, holding that the term when used in the Commerce Clause "describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824). Similarly, the Constitution's other use of "Commerce" is in a mercantile context: prohibiting any "Regulation of Commerce" preferring one State's ports over another's. U.S. CONST. art. I,

§ 9, cl. 6. Children are not merchandise and do not fall within this definition.

Respondents are thus forced to argue that "Commerce" means something different when conducted with Indian tribes rather than States or foreign nations. U.S. Br. 25-27; Tribes Br. 34. But the meaning of "Commerce" does not change depending on who is participating. Instead, as Justice Story noted, "Commerce, as used in the constitution, is a unit" and "must carry the same meaning throughout the sentence." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 510 (1833); *accord United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876) (equating Congress's "power to regulate commerce with the Indian tribes" with its power "to regulate commerce with foreign nations"); *Caldwell v. State*, 1 Stew. & P. 327, 330-31 (Ala. 1832) (Lipscomb, C.J.) (similar). To the extent loose language in some of the Court's opinions has suggested otherwise, *see Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), those comments are no reason to depart from this original understanding as they are recent and unexplained. Texas Br. 33-34.

b. Equally unavailing is the United States' assertion (at 11-13) that the Court should depart from the terms used in the Constitution because the Articles of Confederation gave Congress the "sole and exclusive right and power" of "regulating the trade and managing all affairs with the Indians." Articles of Confederation of 1781, art. IX. The Constitution was drafted with "meticulous care and by men who so well understood how to make language fit their thought." *United States v. Sprague*, 282 U.S. 716, 732 (1931). If the Founders wished the Constitution to contain a power to "manag[e] all affairs with Indians," the Articles of Confederation reflect they knew

how to do so. Yet those are not the words the Framers chose—even though James Madison specifically proposed language that would have given Congress the authority "[t]o regulate affairs with the Indians as well within as without the limits of the U. States." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324 (Max Farrand ed., 1911).

True, the Founders also omitted the Articles of Confederation's express provision that "the legislative right [regarding Indians] of any State within its own limits be not infringed or violated," Articles of Confederation of 1781, art. IX; U.S. Br. 11-12; Tribes Br. 20-21, to address a problem of States undermining treaties with Indians, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02(3) (2019 ed.). But this omission does not change that the Framers empowered Congress to "regulate Commerce," *not* to "manag[e] all affairs with Indians"—or that the same men quickly clarified that "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States," U.S. CONST. amend. X.

c. Finally, the United States (at 12) and Tribes (at 18) point to the first Trade and Intercourse Act, which (1) required a license to "carry on any trade or intercourse with the Indian tribes," (2) required federal approval for an Indian or tribe to sell land, and (3) punished certain criminal acts committed by non-Indians on Indian lands. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. at 137-38. But these provisions can be explained as exercises of enumerated constitutional powers without having to create a plenary power. *See* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause: An Update*, 23 FED. SOC'Y R. 209, 231-34 (2022).

First, the Act's reference to "intercourse" is a somewhat dated synonym for "trade." *See Gibbons*, 22 U.S. at 189-90 (using that term); 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1060 (4th ed. 1773) (defining "intercourse" to mean "commerce," "exchange," or "communication"). This reading is confirmed by other early versions of the Act clarifying that "intercourse" included purchasing, trading, and bartering, as well as traveling on roads and rivers, Trade and Intercourse Act of 1796, ch. 30, §§ 9, 19, 1 Stat. 469, 471, 474; Trade and Intercourse Act of 1802, ch. 13, §§ 9, 19, 2 Stat. 139, 142, 145—not child-custody proceedings.

Second, the Act's limitation on land sales recognized that Indians held "aboriginal title" to their lands that only a sovereign act could extinguish. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) (citing *County of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 233-34 (1985)). But despite the United States' repeated analogy (*e.g.*, at 7, 22), Indian children are not property to whom Indian tribes hold title.

The Trade and Intercourse Act of 1834, which stated that the burden of proof in land disputes was on "the white person," Trade and Intercourse Act of 1834, ch. 161, § 22, 4 Stat. 729, 733; U.S. Br. 33, is admittedly more analogous to ICWA—particularly in the way it violates equal protection. *Infra* Part II.B. But this interference in state-court proceedings came a half-century after ratification and hardly demonstrates that the Founding Generation understood the Constitution to grant power to "manag[e] all affairs with Indians."

Third, the criminalization of non-Indian conduct on Indian lands was necessary to carry out treaty provisions. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 197

n.8 (1978) (citing, *e.g.*, Treaty with the Shawnees, art. III, Jan. 31, 1786, 7 Stat. 26, 27). Thus, it is justified (if at all) not by the Commerce Clause but by the Treaty Clause—a different constitutional power held by a different branch of government, U.S. CONST. art. II, § 2, cl. 2.

2. Treaty Clause

Although respondents also invoke the Treaty Clause, it similarly cannot sustain ICWA. While previously listing the treaty power as part of broader grant of authority over Indians, *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), this Court has since abandoned that blanket approach for "more individualized treatment of particular treaties and specific federal statutes," *Mescalero Apache Tribe*, 411 U.S. at 148. And, as the Court has stated, "even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *United States v. Choctaw Nation*, 179 U.S. 494, 533 (1900). Respondents fail to identify any treaty, much less treaties with all Indian tribes, that would require the enactment of ICWA.

The treaties identified by the Tribes (at 6-8) or the United States (at 17): (1) make vague statements about protection without any specific guarantees, *see, e.g.*, Treaty with the Cherokee, art. II, July 2, 1791, 7 Stat. 39; Treaty with the Osage, art. X, Sept. 29, 1865, 14 Stat. 687; (2) promise to educate Indian children on reservations, *e.g.*, Treaty with the Navajo, art. VI, June 1, 1868, 15 Stat. 667; (3) provide certain Indian orphans with allotted lands under appointed guardians, *e.g.*, Treaty with the Wyandot, arts. III, VI, Jan. 31, 1855, 10 Stat. 1159; or (4) promise to house and protect the women, children, and old men of a single tribe while men of military age

fought alongside the United States, Treaty with the Delawares, art. III, Sept. 17, 1778, 7 Stat. 13. None involve parental-rights terminations or adoption proceedings.

Disrupting the federal-state balance to federalize child-custody proceedings in all fifty States requires much more. In other contexts, the Court has determined that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also Bond v. United States*, 572 U.S. 844, 858 (2014); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The treaties identified by respondents do not even apply to all tribes covered by ICWA—let alone permit Congress to rewrite the domestic-relations laws of all fifty States.

3. "War Powers"

Similarly insufficient is the Tribes' argument (at 32) that ICWA falls under Congress's "war powers." Although unclear, Texas presumes the Tribes mean Congress's power to "declare War," U.S. CONST. art. I, § 8, cl. 11, and "to remedy the evils which have arisen from [war's] rise and progress," *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919).[2] Respondents cite no authority transforming this power into a perpetual grant of authority to benefit the descendants of combatants a century after hostilities have ceased.

4. Territory Clause

The Territory Clause, U.S. CONST. art. IV, § 3, cl. 2, is irrelevant to Congress's authority to apply ICWA in state courts. *Contra* Tribes Br. 32-33. Assuming the

[2] ICWA, for example, has no conceivable connection to raising an army or maintaining a navy. U.S. CONST. art. I, § 8, cls. 12-13.

United States historically treated Indian lands as U.S. territory, ICWA would not apply on those lands because tribal courts have exclusive jurisdiction over any child residing on a reservation, 25 U.S.C. § 1911(a), and ICWA does not apply to tribal courts, 25 C.F.R. § 23.103(b)(1).

* * *

In sum, none of the four constitutional provisions cited by respondents empowers Congress to regulate the domestic relations of Indians. Contrary to the United States' (at 30-32) and the Tribes' (at 39-42) insistence, Texas is *not* asserting a domestic-relations exception to the Constitution. Indeed, that gets matters precisely backwards. "The Constitution confers on Congress not plenary legislative power but only certain enumerated powers." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). The powers it confers on Congress do not *include* regulating domestic relations. *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). Thus, such power is reserved to the States, U.S. CONST. amend. X, unless necessary to effectuate an enumerated power, *e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); 50 U.S.C. § 3938(b). And none of the four provisions respondents identify supports ICWA.

C. Unenumerated powers cannot sustain ICWA.

Finally, unable to cite an enumerated power to sustain ICWA, the United States (at 14) and Tribes (at 31) assert that Congress never needed the Constitution to regulate child-custody proceedings involving Indian children. Congress, they insist, received unbounded authority to protect Indians from the federal government's status as sovereign, the law of nations, and concepts of trust and guardian/ward relationships. Not so.

1. As Texas explained (at 28), this Court has recognized preconstitutional powers only in the field of foreign

relations. Specifically, the Court has held that the "necessary concomitants of nationality" include the ability to make treaties, declare war, occupy land, expel aliens, and maintain diplomatic relations. *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 318 (1936). ICWA is different in kind from these powers.

2. Fluid concepts derived from the law of nations are no more availing. As an initial matter, because Indian children are citizens of the State in which they live, U.S. CONST. amend. XIV; 8 U.S.C. § 1401(b), the law of nations has little to say about how a State treats them, *Murray v. Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64, 70-71 (1804); *accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 749-50 (2004) (Scalia, J., concurring). Moreover, the Founders demonstrated the extent to which they wanted the law of nations to affect domestic policy by empowering Congress to "define and punish . . . Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10. That the Constitution specifies what power Congress has regarding the law of nations suggests that it is not a source of legislative power otherwise. *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

3. Finally, the Court has refused to allow the "trust relationship" to override statutory language—let alone create constitutional power. *See Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. 250, 258-59 (2016). To the contrary, this Court's past descriptions of trust and guardian/ward relationships stem from outdated stereotypes of Indians as "uneducated, helpless and dependent people needing protection." *Seber*, 318 U.S. at 715; *see also United States v. Sandoval*, 231 U.S. 28, 39 (1913). The statements have no basis in the Constitution, U.S. CONST. amend. XIV, or modern Indian law, *see, e.g.*, *Lara*, 541 U.S. at 200; *Mancari*, 417 U.S. at

552. To say otherwise "would require this Court to treat Indian [children] as second-class citizens," which this Court has declined and should "decline to do." *Castro-Huerta*, 142 S. Ct. at 2502.

II. ICWA Violates Equal Protection.

Such treatment is particularly noxious here as respondents do not seriously dispute that ICWA's applicability often turns on "blood-quantum requirements." Tribes Br. 59. Texas has standing to challenge such a requirement because ICWA not only inflicts significant financial costs, it forces Texas to violate its fundamental duty to treat its citizens in a race-neutral manner. *E.g.*, *Croson*, 488 U.S. at 518 (Kennedy, J., concurring). Respondents cannot avoid that conclusion by insisting that because ICWA speaks in terms of Indian tribes, it must use political classifications.

A. Texas has standing to vindicate the financial costs it suffers to enforce an unconstitutional law.

Respondents dispute whether Texas can bring a *parens patriae* claim against the federal government on an equal-protection theory. U.S. Br. 48-49; Tribes Br. 50-51. Even if true, it is largely irrelevant. As Texas explained (at 38-41), it seeks primarily to remedy two injuries: the pocketbook injury it suffers from having to comply with ICWA, and the sovereign injury of having to do so in a racially biased manner. Either is sufficient to satisfy Article III; neither turns on a *parens patriae* theory.

1. Texas has standing to challenge ICWA's discriminatory provisions because ICWA imposes financial costs on Texas regardless of whether Texas chooses to comply. *First*, as Texas explained (at 39), ICWA's procedural requirements make child-custody proceedings more

expensive. Texas must, among other things, provide specific types of notice and hire specific "qualified expert witnesses." 25 U.S.C. § 1912(a), (e). These requirements cost States, in the aggregate, hundreds of thousands of dollars annually, Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,864 (2016). Moreover, while this process is playing out, Indian children must remain in custody—which also costs States money. *See, e.g.*, *In re M.K.T.*, 368 P.3d 771, 792 (Okla. 2016) (waiting on ICWA-compliant placement for 2.5 years). Either satisfies the minimal requirements of Article III. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801-02 (2021).

Second, if Texas does *not* comply with ICWA's placement preferences, it stands to lose federal Social Security funding. 42 U.S.C. § 622(a), (b)(9). The United States counters (at 49 n.6) that Texas can meet Congress's condition on spending by describing its *noncompliance* with federal law. Such a remarkable interpretation of a spending condition, introduced for the first time in litigation, is entitled to little if any deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417-18 (2019). Even if true, however, Texas still has standing because it must maintain records of its compliance with the race-based preferences to describe that noncompliance. 81 Fed. Reg. at 38,785 (citing 25 U.S.C. § 1915(e)). Moreover, a parent or the Tribe can seek to reopen proceedings they claim did not comport with ICWA's procedural requirements. 25 U.S.C. § 1914. Each imposes costs on the State.

2. Texas can also assert standing based on injuries to Texans, not because it asserts *parens patriae* status, U.S. Br. 48-49; Tribes Br. 50-51, but because ICWA forces Texas to violate its own constitutional obligations and thereby undermine its citizens' confidence that the State is safeguarding all Texas children regardless of

race, *see* Texas Br. 39-40; J.A. 65; *cf. Palmore*, 466 U.S. at 433. This satisfies the three-part test for third-party standing—namely: (1) a close relationship to the third party, (2) some hindrance to the third party's ability to protect its own interests, and (3) a concrete injury. *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

For example, applying the *Powers* factors to Georgia's prohibition on discriminatory jury strikes by criminal defendants, the Court noted that defense counsel's actions were attributable to the State, which may not "deny persons within its jurisdiction the equal protection of the laws." *Georgia v. McCollum*, 505 U.S. 42, 56 (1992). The nature of the violation hindered the dismissed juror from asserting his own rights, which injured the State by "plac[ing] the fairness of a criminal proceeding in doubt." *Id.* Indeed, as the party whose "judicial process is undermined," this Court held that Georgia was "the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial." *Id.*; *see also Thomas v. Mundell*, 572 F.3d 756, 763 (9th Cir. 2009).

The same factors that allowed Georgia to challenge racially biased jury selection exist here: actors whose behavior is attributable to the State are required to apply ICWA. *McCollum*, 505 U.S. at 55-56. It is difficult for non-Indian families to seek redress for a one-time violation of their equal-protection rights. *See* Individual Br. 9-10. This injures Texas by requiring it to break its promise to its citizens that it will be colorblind in child-custody proceedings. *See* TEX. CONST. art. I, § 3a; Tex. Fam. Code § 162.015(a). Taken alone or together with the State's financial injuries, this harm satisfies Article III.

B. ICWA's racial classifications are subject to—and fail—strict scrutiny.

Although ICWA has many problematic provisions, two underscore that it commands States to make impermissible racial classifications: the "Indian child" definition and the placement preferences, which turn on blood quantum and ancestry. Respondents cannot avoid this conclusion by baldly insisting that the classifications should nonetheless be deemed "political rather than racial" so long as they "fulfill 'Congress' unique obligation toward the Indians'"—a concept that respondents make no attempt to define. U.S. Br. 54 (quoting *Mancari*, 417 U.S. at 553 n.24, 555); *see* Tribes Br. 68.

1. ICWA's definition of "Indian child" is racial: it includes not just any "member of an Indian tribe," but also any child who is "*eligible* for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (emphasis added). As a result, it applies even if a child—due to the choices of that child's parents—is not a member of an Indian tribe, has never lived on Indian land, and has never been immersed in a different culture. Texas Br. 46.

2. The placement preferences also make impermissible racial classifications: when there is no family connection available, the "Indian child" will be placed with a tribal member or *any other* Indian family. 25 U.S.C. § 1915(a). The second preference applies regardless of whether the tribal member has any personal or territorial connection to the child; the third regardless of whether the "other Indian family" has any personal, tribal, cultural, *or* territorial connection. Texas Br. 46. The second preference, while rooted in race, is not even arguably political when it applies to children who have no connection to the tribal community. The third preference

cannot be political because, as this Court has recognized, tribes are not "fungible groups of homogenous persons among whom any Indian would feel at home." *Duro v. Reina*, 495 U.S. 676, 695 (1990) (citing SMITHSONIAN INSTITUTION, HANDBOOK OF NORTH AMERICAN INDIANS (1983); HAROLD E. DRIVER, INDIANS OF NORTH AMERICA (1961); LESLIE SPIER, YUMAN TRIBES OF THE GILA RIVER (1933)).

The United States nevertheless argues (at 75) that the placement preference in section 1915(a)(3) is constitutional under *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989), because it fulfills Congress's desire that an Indian child remain in "the Indian community." But this Court has held both before and after *Holyfield* that regardless of Congress's power over Indian tribes, it cannot "bring a community or body of people within the range of [that] power by arbitrarily calling them an Indian tribe." *Sandoval*, 231 U.S. at 46; *see Duro*, 495 U.S. at 695.

3. Respondents cannot avoid that ICWA uses racial classifications by arguing that, under *Mancari*, all classifications that are rationally related to Congress's perceived obligations toward Indian tribes are political. U.S. Br. 54; Tribes Br. 68. Indeed, in *Mancari* itself, the relevant preference did not apply to all tribal members, but only to Indians who sought "greater participation in their own self-government." 417 U.S. at 541. In addition, the employment preference "applie[d] only to members of 'federally recognized' tribes," and thus "exclude[d] many individuals who are racially to be classified as 'Indians.'" *Id.* at 553 n.24. Subsequent case law confirms that *Mancari* is at the outer bounds of what is permissible. *Rice v. Cayetano*, 528 U.S. 495, 519-20 (2000) (noting the "sui generis" nature of the law in question). Under

this precedent, preferences for Indians are constitutional only when they are "*not* directed towards a 'racial' group consisting of 'Indians,'" and the context reveals that the "preference [was] political rather than racial in nature." *Id.* (emphasis added) (alteration in original) (quoting *Mancari*, 417 U.S. at 553 n.24). ICWA's race-based preferences thus do not become political just because they relate to Indians.

4. Because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people," they can be justified only if they are the narrowest possible means and are used to achieve a compelling governmental interest. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745-46 (2007); *e.g.*, *Lara*, 541 U.S. at 212 (Kennedy, J., concurring). ICWA fails to meet that standard.

Congress's asserted purposes in enacting ICWA included to (1) "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," (2) "provid[e] for assistance to Indian tribes in the operation of child and family service programs," and (3) encourage "the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902. But the first two purposes largely pre-date the decision to remove a child from his current home and cannot explain why non-Indian parents are disfavored in child-custody placements *after* such decision is made—at least apart from Congress's stated desire to prevent Indian children from being raised according to "white, middle-class standard[s]." 81 Fed. Reg. at 38,829 (citing *Holyfield*, 490 U.S. at 37 and H.R. Rep. No. 95-1386, at 24). *But see Mancari*, 417 U.S. at 542 n.12. And, as Texas has

explained (at 54) and as respondents nowhere dispute, the third does not explain the preferences because it is possible for Indian children to learn their heritage even when not placed in Indian homes.

The United States seeks (at 70) to bolster ICWA's broad, blood-based classification system by arguing that it may be difficult for tribes to enroll infants. Even if true, administrative convenience is not an adequate governmental purpose to survive strict scrutiny. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

Even if ICWA has a sufficiently weighty purpose, courts that have applied it agree that it is not tailored to serve that purpose: for example, a California court found "the preservation of American Indian culture to be a compelling interest," but that "applying the ICWA was not actually necessary and effective in preserving Indian culture." *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 718-19 (Cal. Ct. App. 2001). Another averred that "[i]t is almost too obvious to require articulation" that "'the unique values of Indian culture' will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 526 (Cal. Ct. App. 1996) (quoting 25 U.S.C. § 1902). Thus, "absent a showing by the parents of significant social, cultural, or political ties with their Indian heritage," ICWA's purpose is not compelling enough to "overcome the child's fundamental right to remain in the home where he or she is loved and well cared for, with people to whom the child is daily becoming more and more attached by bonds of affection and among whom the child feels secure to learn and grow." *Santos*, 112 Cal. Rptr. 2d at 719. The Kansas Supreme Court similarly observed that it would not serve "the overriding concern of Congress" to have removed a child who "has never been a

member of an Indian home or culture, and probably never would be, . . . from its primary cultural heritage and placed [that child] in an Indian environment over the express objections of its non-Indian mother." *Matter of Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982).

Such a mismatch between the stated governmental interest and the means used to achieve it is fatal under strict scrutiny. *Croson*, 488 U.S. at 492 (plurality op.).

C. ICWA's classifications fail even rational-basis review.

But even under the more forgiving rational-basis standard, ICWA cannot survive this Court's review. Generally, a law subject to rational-basis review will be upheld so long as "the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). But laws that "harm a politically unpopular group" or that "inhibit[] personal relationships" are given "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment); *see Stanley v. Illinois*, 405 U.S. 645, 655 (1972). Both are true here, and ICWA cannot meet this "more searching" standard.

1. As Texas has explained (at 47-49), ICWA treats non-Indians as a politically disfavored class: they are placed last on preference lists for either adoptive or foster-care placements. 25 U.S.C. § 1915(a)-(b). Their homes are thus deemed not to be in the "best interests of Indian children" compared to placement of an Indian child with an Indian person. *Id.* § 1902. And their custody of an Indian child can be revoked at any time pre-adoption and for two years thereafter. *Id.* § 1914.

ICWA is also subject to a heightened form of rational-basis review because it touches on one of life's

most personal relationships—that of "parents in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). And as a quick look at the cases discussed above (at Part II.B.4) demonstrates, ICWA "inhibits" that personal relationship. *Lawrence*, 539 U.S. at 580.

2. As Texas has explained (at 59), ICWA fails to meet the heightened standard of review applicable to such statutes. As this Court has observed, "the primary mischief the ICWA was designed to counteract was the unwarranted *removal* of Indian children from [intact] Indian families due to the cultural insensitivity and biases of social workers and state courts." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 649 (2013). But ICWA makes non-Indians' custody of Indian children a last resort, regardless of whether doing so *prevents* such unwarranted removal. Thus, ICWA is not afforded the same presumption of constitutionality as neutral laws that happen to work to the "disadvantage of a particular group." *Romer v. Evans*, 517 U.S. 620, 632 (1996) (citing *New Orleans v. Dukes*, 427 U.S. 297 (1976)); *see Dandridge v. Williams*, 397 U.S. 471 (1970). Moreover, 50 years of evidence demonstrates that ICWA has *not* served the best interest of Indian children.

3. Respondents counter by reciting events of the 1970s, U.S. Br. 3-4, 77, citing state statutes that were required to implement ICWA, U.S. Br. 36; Tribes Br. 14, or repeating that ICWA is the "gold standard," U.S. Br. 9; Tribes Br. 1. But a close review of the "record does not reveal" that these assertions provided "any rational basis" to sustain ICWA—as is required by heightened rational-basis review. *City of Cleburne*, 473 U.S. at 448.

First, respondents cite statistics concerning the separation of Indian children from their parents. *See* U.S.

Br. 77 (citing 81 Fed. Reg. at 38,779, 38,782-84); Tribes Br. 15 (citing Robert B. Hill, *An Analysis of Racial/Ethnic Disproportionality & Disparity at the National, State, and County Levels*, Casey-CSSP Alliance for Racial Equity in Child Welfare 10 (2007), https://bit.ly/3PSjzrH). But respondents' cited studies are either outdated or fail to account for the fact that the "vast majority of American Indian and Alaska Native children live in communities with alarmingly high rates of poverty, homelessness, drug abuse, alcoholism, suicide, and victimization." *Compare* Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive viii (Nov. 2014), *with* Hill, *supra*, at 9-10. To the contrary, one shows that the number of Indian children separated from their parents is comparable to the number of Black children, suggesting socioeconomic factors are the major culprit—not misunderstandings about tribal culture. *See* Hill, *supra* at 9-10.

Second, the Tribes note (at 13-14) that "10 states have enacted comprehensive analogs" to ICWA. But that is to be expected: ICWA requires States to apply its rules in their courts. *Id.* at 14 n.17. For example, one of the statutes to which the Tribes point, Minn. Stat. § 260.012, discusses what "efforts" Minnesota employs to promote family reunification as required by ICWA. *See* Tribes Br. 15 n.18. In fact, several ICWA cases before state high courts illustrate that those States did not adopt ICWA's standards in non-Indian proceedings. *See, e.g.*, *People in the Int. of E.A.M.*, No. 22SC29, 2022 WL 4127815, at *5 (Colo. Sept. 12, 2022); *In re M.K.T.*, 368 P.3d at 787-88.

Third, the Tribes misquote (at 13) an amicus brief to create the impression that ICWA is understood to represent the "gold standard" of child-custody regimes.

What the brief actually said was that "[t]he gold standard in child welfare thus calls for practices that maintain a safe environment for the child while preserving as many of a child's connections as possible." Amicus Br. of Casey Family Progs., et al. at 5, *Brackeen v. Berhardt*, No. 18-11479 (5th Cir. Dec. 18, 2019). ICWA "exemplifies that gold standard" only to the extent that "[i]ts placement preferences and related provisions work together, in harmony," to serve the child's welfare. *Id.* All too often, however, ICWA has worked to produce the exact opposite result. Though passed as a putative effort to ensure that Western racial mores are not used to break up an Indian household, those provisions often prevent the removal of a child from a dangerous environment, excusing physical abuse that would require the removal of a non-Indian child. Ashley E. Brennan, *Child Abuse Is Color Blind: Why the Involuntary Termination of Parental Rights Provision of the Indian Child Welfare Act Should Be Reformed*, 89 U. DET. MERCY L. REV. 257, 258-59, 265-67 (2012).

Taken together or separately, respondents' theories fail to show that ICWA is sufficiently tailored to satisfy the heightened rational-basis review applicable to laws touching on family relationships.

III. ICWA Violates the Anticommandeering Doctrine.

ICWA reinforces this harm by requiring States to effectuate the unlawful scheme through their governmental apparatus. As respondents do not deny, ICWA requires States to send notices, provide active efforts, locate expert witnesses, and make and retain records. 25

U.S.C. §§ 1912, 1914-15, 1951.[3] This violates the principle that "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Murphy*, 138 S. Ct. at 1477 (quoting *New York v. United States*, 505 U.S. 144, 178 (1992)). It is no response to insist that ICWA is beneficial. U.S. Br. 35-38; Tribes Br. 79-80. Convenience does not authority make. *E.g.*, *Clinton v. New York*, 524 U.S. 417, 445-46 (1998). Respondents' six additional responses also lack merit.

A. To lessen the effect of ICWA, the federal respondents disavow (at 44) the Department of Interior's position that States must seek out homes that comply with ICWA's placement preferences, asserting that such an obligation is inconsistent with *Adoptive Couple*. This litigation position cannot be squared with the Final Rule's requirement—promulgated after *Adoptive Couple*—that a court must ensure a "diligent search was conducted" to find ICWA-compliant placements before departing from the preferences, 25 C.F.R. § 23.133(c)(5), as well as Interior's assertion that ICWA requires "proactive efforts" to comply with the preferences and that "State efforts to identify and assist preferred placements are critical to the success of the statutory placement preferences," 81 Fed. Reg. at 38,839.

Even after *Adoptive Couple* held the preferences inapplicable when only one party seeks to adopt an Indian child, 570 U.S. at 654-55, Indian tribes have demanded that States make a diligent search for compliant options. For example, the Librettis' adoption of Baby O was delayed because the Ysleta del Sur Pueblo Tribe demanded

[3] Nor do they deny that ICWA costs States hundreds of thousands of dollars and employee hours, 81 Fed. Reg. at 38,864, which demonstrates standing.

that county officials exhaustively search for a placement with the Tribe first. J.A. 205-06. Absent court-ordered vacatur—or Interior's formal repeal of the portions of the rule that the Department of Justice now concedes are unlawful—Texas as well as other States are likely to continue being put to the same task. *See E.I. Du Pont de Nemours & Co. v. Smiley*, 138 S. Ct. 2563, 2563 (2018) (Gorsuch, J., respecting the denial of certiorari) (discussing a circuit split over what deference is due agency litigating positions).

B. Next, to defend these commands, respondents attempt to rename them in at least two different ways. ICWA's constitutionality does not turn on such semantics.

First, respondents assert that these are just federal standards with which States must comply. U.S. Br. 35, 42; Tribes Br. 81-82. But Congress set federal "standards" for the disposal of low-level radioactive waste in *New York*; that did not prevent those standards from crossing the line into unlawful commandeering. 505 U.S. at 177.

Second, respondents argue that ICWA is merely a rights-granting statute, which permits Congress to place burdens on States. U.S. Br. 35; Tribes Br. 79; 25 U.S.C. § 1921. This argument, however, misses the point of *Murphy*'s distinction between impermissible anticommandeering and permissible federal preemption which "confers on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) constraints." 138 S. Ct. at 1480. Four-year-old J.F. was not exercising his "rights" when he was removed from the only home he had ever known and sent to live across the country. Br. of Amici Curiae Goldwater Inst., et al, at 2. The birth mother of Paul and Jena Clark's child was

almost denied the right to determine who would adopt her child in voluntary proceedings. *Id.* at 1-2 (describing *In re N.N.E.*, 752 N.W.2d 1, 8 (Iowa 2008)). And the only "right" given effect in A.L.M.'s case was that of the Navajo Nation when it tried to use ICWA to force a Texas state court to place A.L.M. with unrelated tribal members in another State—contrary to the wishes of his parents and away from his Texas family. J.A. 199-200. That is not a "right" that the Navajo Nation is exercising in the real world, "subject only to certain (federal) constraints." *Murphy*, 138 S. Ct. at 1480.

C. All respondents next challenge whether a record-keeping requirement can support an anticommandeering claim. U.S. Br. 45-47; Tribes Br. 86-89. In doing so, they rely on a single footnote in *Printz v. United States*, suggesting that it may be permissible to require a state court to maintain records of naturalization and citizenship proceedings. 521 U.S. 898, 908 n.2 (1997). Assuming this footnote is even binding on the Court, it merely recognizes that, in the eighteenth century, the federal government periodically required state courts to keep records as part of their "ancillary functions" associated with what is a "quintessentially adjudicative task" that already fell within the courts' jurisdiction, *id.*, which "could not be enforced against the consent of the states," *United States v. Jones*, 109 U.S. 513, 520 (1883). Nowhere did *Printz* cite—let alone approve—a regime mandating those state courts turn over records so that the Executive could "affirmatively monitor[]" state-court "compliance with" a federal law. 81 Fed. Reg. at 38,785 (citing 25 U.S.C. § 1915(e)). For good reason: the Founding Generation tasked this Court—not Congress or the Executive—with ensuring state-court compliance with

federal law. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85.

D. The United States next errs (at 39) in claiming that because Texas does not *have* to remove Indian children from their homes, ICWA is analogous to statutes regulating market participants. This ignores Texas's sovereign interest in protecting its citizens, including Indian children. The situation is thus very different from that in *Reno v. Condon*, where a State voluntarily entered the market to sell personal data, 528 U.S. 141, 147 (2000), or *South Carolina v. Baker*, where the State chose to borrow rather than raise taxes, 485 U.S. 505, 511 (1988). In neither case was the State's sovereign role in protecting vulnerable children implicated. And they cannot be read, as respondents' theory suggests, to hold that Congress could commandeer state prosecutors because prosecutors do not have to prosecute any given crime. The Court should not accept respondents' cursory analogy without addressing the distinctions between regulating a State as a market participant and as a sovereign.

E. The argument that ICWA is not commandeering because it applies to public and private parties similarly fails upon closer inspection. U.S. Br. 39-40; Tribes Br. 84-86. While Texas permits some private parties to seek termination of parental rights and adoption of a child, the individuals permitted to do so are limited to those with certain preexisting connections to the child. *See* Tex. Fam. Code §§ 102.003, .005. If there is no such individual to intervene in the child's life, that child's only option is for the State to act. At times, only Texas can act to ensure the safety of an Indian child, leaving Texas with no choice but to comply with ICWA. Congress has, thus, effectively required Texas to "enforce a federal regulatory program." *Murphy*, 138 S. Ct. at 1477.

F. Finally, the Tribes argue (at 89-90) that ICWA is Spending Clause legislation and therefore not subject to anticommandeering analysis. But ICWA was not enacted pursuant to the Spending Clause, 25 U.S.C. § 1901(1), and there is no language that makes compliance optional. Rather, state courts are ordered to enforce its terms regardless of any federal funding. 25 U.S.C. §§ 1912, 1915. Indeed, federal funds were not attached to ICWA compliance until 1994, when Congress amended the Social Security Act to make certain child-welfare payments to the States dependent on whether those States have a plan to comply with ICWA. 42 U.S.C. § 622(a), (b)(9). No court has ever accepted this argument. This Court should not be the first.

IV. Section 1915(c) Violates the Nondelegation Doctrine.

Should it reach this issue, this Court should conclude that ICWA's delegation of power to rearrange the placement preferences to tribes violates the nondelegation doctrine for the reasons Texas explained in Part IV of its opening brief. As respondents do not directly address many of those contentions, Texas will not burden the Court by repeating them here.

The United States *does* challenge (at 79-80) Texas's standing to bring this claim, arguing that because Congress set placement preferences in section 1915(a), Texas should suffer no additional injury if those preferences change. This ignores, however, that a nondelegation injury is a process-based harm. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531-32 (1935); *accord Mistretta v. United States*, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting).

The United States' position also ignores that nothing prevents a tribe from changing the placement preference

midway through a child-custody proceeding, requiring the entire process—with all its attendant costs—to begin anew. Even without that duplication, the state court applying tribe-chosen preferences must determine if a placement "is the least restrictive setting appropriate to the particular need of the child." 25 U.S.C. § 1915(c). This will require the expenditure of state resources to determine whether Congress's preferred process is less restrictive than the tribe's. The costs Texas incurs support a nondelegation injury—especially when a largely unaccountable party is making the rules.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part.

Respectfully submitted.

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