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, Cross-Respondents,

v.

CHAD EVERET BRACKEEN, *et al.*,

Respondents, Cross-Petitioners.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR INDIVIDUAL PETITIONERS

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CHEROKEE NATION, *et al.*,

Petitioners,

v.

CHAD EVERET BRACKEEN, *et al.*

THE STATE OF TEXAS,

Petitioner,

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*

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REPLY BRIEF
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The federal parties rightly concede that some classifications based on Indian status single out Indians "as a discrete racial group" and are therefore subject to strict scrutiny. U.S.Br.60 (quoting *Morton* v. *Mancari*, 417 U.S. 535, 554 (1974)). This Court's decisions, from *Mancari* to *Rice* v. *Cayetano*, 528 U.S. 495 (2000), to *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637 (2013), put that basic point beyond dispute. The Indian Child Welfare Act ("ICWA") is just such a statute, and it goes to unprecedented extremes. It deprives children who are U.S. citizens residing under State jurisdiction—including some who are not (and may never become) tribal members—of the protections that the best-interests-of-the-child standard provides, simply because they have a certain Indian blood quantum. And ICWA imposes stark *de jure* disadvantages on any prospective parents who do not. This scheme is constitutionally indistinguishable from a federal ban on adoption of Indian children by non-Indian families—a result that is irreconcilable with this Court's unanimous decision in *Palmore* v. *Sidoti*, 466 U.S. 429 (1984). ICWA must face strict scrutiny, which no one suggests it can survive.

The federal parties unsurprisingly strive to insulate ICWA from this searching review. Their principal strategy is to stretch the "limited exception" *Mancari* recognized for certain laws that advance "Indian self-government," *Rice*, 528 U.S. at 520, into a sweeping sanction for any measure that Congress "designed to fulfill" its obligations to Indian tribes, U.S.Br.56. That distortion of *Mancari*'s "limited exception" provides no limitation at all and has no foundation in this Court's decisions.

ICWA is no political measure. It is expressly "biological" in its sweep, and it expressly advantages *any* adult in any Indian tribe over *all* non-Indian families. And it bears no resemblance to statutes governing Indians that the Court has previously approved, which were closely tied to tribal institutions, lands, and resident members. Nor can ICWA plausibly be defended as a political measure to preserve individual tribes' ability to self-govern because the statute expressly treats all Indian tribes as fungible. Indeed, the mismatch between ICWA's means and supposed ends is so plain that it fails even rational-basis review. And that is why invalidation of ICWA poses no threat to the rest of Title 25. ICWA is an outlier statute that applies only *outside* of tribal lands, only in *state* courts, and even governs non-tribal members.

Respondents also attempt to escape review of ICWA's equal-protection problems by denying any justiciable case or controversy, contradicting the near-unanimous view of the en banc court of appeals. But Petitioners' standing to raise their APA claim is indisputable, and because ICWA's regulations duplicate the statute, there is a case and controversy concerning ICWA's violation of equal protection. In any event, Individual Petitioners continue to suffer all-too-real injuries from ICWA's race-based restrictions, which place them on unequal footing relative to other placements.

Respondents do not dispute that Petitioners' Article I and anti-commandeering challenges are justiciable. And Respondents' submissions on the merits illustrate just how expansively and atextually the Court would have to construe both Congress's power under the Indian Commerce Clause and Congress's ability to usurp control of state governments to uphold

ICWA. The Court should not try to save this misconceived statute at the cost of upending long-settled limits on federal power. It should make clear that this particular, peculiar statute crosses several constitutional lines.

I. ICWA VIOLATES EQUAL PROTECTION.

A. ICWA's Classifications Are Subject To Strict Scrutiny.

ICWA's "Indian child" definition, 25 U.S.C. § 1903(4), and its placement preferences, *id.* § 1915(a)-(b), work together to supplant the best-interests-of-the child test and ensure that "Indian child[ren]" are routed to the "Indian community," H.R. Rep. No. 95-1386, at 23 (1978). That is a plainly stated racial purpose and it is reflected in ICWA's grasp of even non-member children and its preference for any Indian placement over all non-Indian placements. ICWA's classifications are racial in nature and are subject to strict scrutiny.

ICWA's classifications cannot be characterized as political under the "limited exception" of *Mancari*. The statute is not one that applies "only to members of 'federally recognized tribes,'" *Mancari*, 417 U.S. at 553 n.24; it expressly applies to non-member children. Nor does it meaningfully advance tribal "self-government," *id.* at 554; instead, it encourages placement of children of one tribe with *other* tribes. And far from being focused on "tribal Indians living on or near reservations," *id.* at 552, ICWA does not apply on tribal lands at all, *see* 25 U.S.C. § 1911(a); 25 C.F.R. § 23.103(b)(1). It applies instead only in state court proceedings—a quintessential "affair of the State."

Rice, 528 U.S. at 520. Respondents' arguments to the contrary are unavailing.[1]

1. ICWA's "Indian Child" Definition Is A Racial Classification.

ICWA's "Indian child" definition—either (a) a tribal member or (b) the "biological" child of a tribal member who is eligible for membership—operates to identify a racial group and accordingly is a racial classification subject to strict scrutiny. The two prongs of the definition work together to identify a class of children with Indian blood. Relying on the fact that tribal membership (and eligibility for membership) depends on ancestral tracing, the definition sweeps in those who have Indian blood, and the "biological" requirement sweeps out those non-members who lack it. The "Indian child" definition's racial nature is demonstrated by its clear "racial purpose and by its actual effects." *Rice*, 528 U.S. at 517.

a. As for the definition's first prong, tribes generally must define membership based on "descen[t]." 25 C.F.R. § 83.11(e). The federal parties quibble that this regulation is not the only path to federal recognition, U.S.Br.71 n.11, but they do not dispute the relevant

[1] The federal parties insist that, even if ICWA is racial in many applications, it is not facially invalid. U.S.Br.78. First, Individual Petitioners *have* challenged ICWA and the Final Rule as applied to them. *See* Ct. App. ROA.511-15. In any event, when a provision impermissibly discriminates on the basis of race, it is necessarily invalid on its face, even if it could conceivably be valid in certain applications. *See City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (plurality) (striking down racial preference even though a preference could have been granted to identified victims of past racial discrimination); *id.* at 526-27 (Scalia, J., concurring in the judgment) (same).

point: that "Tribes' use of ancestry in their membership criteria" is ubiquitous, U.S.Br.68. Thus, this Court has recognized that ICWA "put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple*, 570 U.S. at 655-56.

The Tribes argue that ICWA's tribal-membership criterion is not racial because tribal membership reflects a voluntary decision to join a political community. Tribes.Br.59. Even if generally true of adults, that is not true where the members in question are children, especially those in foster care.

First, as the federal parties acknowledge, tribal membership is often "conferred automatically" based on blood quantum. U.S.Br.70. For example, "[c]hildren born to any" Navajo Nation member "shall automatically become members of the Navajo Nation and shall be enrolled, provided they are at least one-fourth degree Navajo blood." Navajo Nation Code § 701(c).

Second, tribes often enroll children unilaterally, against parents' wishes, simply because the children have the requisite "Indian Blood," as happened here. Tex. Pet. App. 211a, 269a; Brackeen.Br.8-10, 30-31. ICWA thus allows tribes to "clai[m]" any "children who are related by blood to such a tribe … solely on the basis of their biological heritage." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (Cal. Ct. App. 1996).

Third, even where an Indian child has a custodial parent or guardian empowered to disenroll her, tribes often prohibit minors from disenrolling absent proof of enrollment in a different tribe, and thereby guarantee that children are subject to ICWA regardless of the child's or parents' wishes. *See* Hopi Enrollment Ordinance No. 33 § 11.1(B)(III). For an "Indian child" in

foster care there is nothing voluntary about ICWA's application. Those children are deprived of the best-interests test based solely on their ancestry.

That tribal-membership criteria both "exclude" people who are "racially Indian" and "include some people who are not racially Indian" (U.S.Br.68-69; Tribes.Br.59) also "does not suffice to make the classification race neutral." *Rice*, 528 U.S. at 516-17. Indeed, *Rice* squarely "reject[ed] this line of argument." *Id.* at 514.

b. The "Indian child" definition is based on ancestry, as is clear from the fact that, under the second prong, it sweeps in not just tribal members, but also non-member children merely eligible for membership who may never become members. While tribal membership sometimes operates as a non-racial classification, eligibility for tribal membership is only an ancestral classification. And "[a]ncestry can be a proxy for race." *Rice*, 528 U.S. at 514.

The Tribes also claim that the second prong is not racial because it applies "only if a parent voluntarily remains enrolled." Tribes.Br.71. But ICWA can apply even when an Indian parent does not wish to be enrolled. *See*, *e.g.*, *In re M.K.T.*, 368 P.3d 771, 795-801 & n.75 (Okla. 2016) (holding that ICWA applied to child despite child's father "execut[ing] … a document relinquishing his membership in the tribe"). In any event, the fact that the definition excludes the small number of children whose parents disenroll from their tribes does not demonstrate race-neutrality. "[A] class defined by ancestry" can be race-based even if it "does not include all members of the race." *Rice*, 528 U.S. at 516-17.

The "Indian child" definition's racial purpose is made plain by its explicit biological-descent requirement. Congress apparently limited the second prong to "biological" children of tribal members based on its belief that "[b]lood relationship ... is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe." H.R. Rep. No. 95-1386, at 20. The Department of Justice ("DOJ") expressed concern that defining "Indian child" based on "blood connection" "may constitute racial discrimination." *Id.* at 39 (May 23, 1978 Letter). Respondents mistakenly argue that DOJ's May 1978 letter referred to an "earlier" ICWA bill with a "broader definition" of "Indian child," U.S.Br.71; it was DOJ's *February* 1978 letter that discussed earlier versions, H.R. Rep. No. 95-1386, at 35-38. In May 1978, DOJ was "still concerned" with the "definition of 'Indian child'" that appeared in the final version. *Id.* at 39. And rightly so, because the "biological" limitation "reflect[s]" an obvious "effort to preserve the commonality of people," which is an impermissible racial purpose. *Rice*, 528 U.S. at 515.

Respondents attempt to pass off biological-descent requirements as "common in the law." U.S.Br.67. But the classifications they identify are not biological at all—for example, they draw no distinction between biological children and adopted children or stepchildren. *See* Unif. Prob. Code § 2-118(a) ("descendant" includes adopted child); 26 U.S.C. § 2701(e)(4) (same for tax code); 8 U.S.C. § 1101(b)(1)(E) (same for immigration law); 42 U.S.C. § 402(d)(8) (same for social security); 42 U.S.C. § 14952(a) (same for intercountry adoptions); Tex. Gov't Code § 573.022(b) (same for Texas law). ICWA is different; it excludes non-biological children. This cannot be explained except as an effort to ensure that ICWA applies only to children

with Indian blood. It "use[s] ancestry as a racial definition and for a racial purpose." *Rice*, 528 U.S. at 515.

Finally (and disconcertingly), the federal parties seek to justify ICWA's biological limitation by reference to the fact that *Mancari*'s hiring preference was limited to tribal members with "one-fourth or more degree Indian blood." U.S.Br.70. That aspect of the hiring preference was not directly implicated by the class action of "non-Indian employees of the BIA" that this Court confronted in *Mancari*. 417 U.S. at 539. Consequently, *Mancari* never addressed whether or how this glaring "racial component" (*Rice*, 528 U.S. at 519) possibly could operate in a non-racial way. In fact, it functioned only to limit the preference to tribal-member employees that were sufficiently "racially Indian." *Mancari*, 417 U.S. at 553 n.24. And since *Mancari*, the Court has made clear that such an "inquiry into ancestral lines" is incompatible with equal-protection principles. *Rice*, 528 U.S. at 517; *see McLaughlin* v. *Florida*, 379 U.S. 184, 187 n.6, 192-93 (1964) (invalidating prohibition on interracial cohabitation applicable to persons "having one-eighth or more of African or negro blood"). In any event, even if some non-racial purpose—unidentified by the federal parties—could have justified the blood-quantum requirement in *Mancari*, it could not today justify ICWA's biological limitation.[2]

ICWA's "biological" requirement demonstrates beyond serious doubt that, in crafting its definition of "Indian child," Congress acted with a racial purpose. And the plain effect of the definition is to identify a

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[2] If this Court should read the blood-quantum aspect of *Mancari* as authorizing ICWA's "biological" requirement, that part of *Mancari*, at least, should be abrogated.

class of racial Indians who, because of their "[b]lood relationship," should be placed within the "Indian community." H.R. Rep. No. 95-1386, at 20, 23.

2. ICWA's Placement Preferences Establish A Racial Classification.

ICWA's coordinated, tripartite scheme of placement preferences, 25 U.S.C. § 1915(a)-(b), too, establishes a racial classification subject to strict scrutiny. Brackeen.Br.37-42.

a. The placement preferences' racial purpose is demonstrated most clearly by the third preference, which favors any member of any of the 574 federally recognized tribes over any non-Indian family. Unsurprisingly, Respondents hardly muster any defense of this preference, other than to contend that the preference's obvious "overbr[eadth]" speaks only to "whether the [preference is] rational." U.S.Br.72. But a preference for placing a child of one tribe with any family of any other tribe can be explained only as an effort to "preserv[e] th[e] commonality of" the Indian people, *regardless* of tribal affiliation. *Rice*, 528 U.S. at 515. That is a racial purpose.

b. The fact that Congress acted with an obvious racial purpose with respect to the third preference strips away any presumption that Congress acted with a non-racial purpose in enacting the other preferences. The first and second preferences do not "operate independently" from the third and thus cannot be viewed in isolation from (or severed from) the third preference. *Contra* Tribes.Br.66. Congress designed the preferences to work "as a whole" to achieve the federal policy of placing Indian children with the "Indian community." H.R. Rep. No. 95-1386, at 23; *see*

Adoptive Couple, 570 U.S. at 652 (ICWA must be analyzed in a "holistic endeavor"). And the fact that Congress was willing, through the third preference, to send Indian children to any member of any tribe defeats the suggestion that ICWA's preference for tribal members has only the non-racial purpose of preserving tribal populations. But even apart from the third preference, the first and second preferences discriminate on the basis of race.

The second preference for members of the child's tribe discriminates in favor of one group of common ancestry, and against prospective parents who lack the blood quantum required to join it. As the *Rice* Court made clear, classifying individuals based on "ethnic characteristics and cultural traditions," as the second preference does, "employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." 528 U.S. at 517. The claimed nonracial purpose of safeguarding the "stability and security of Indian tribes" (U.S.Br.74) is refuted by the fact that the preference applies whatever the tribal member's actual connection to the tribe, and regardless of non-Indian prospective parents' willingness to foster the child's connection to the tribe. And the claimed purpose of "protecting the best interests of Indian children" is refuted by the fact that the preference does not permit application of the best-interests-of-the-child test. Instead, it reflects a judgment that an Indian child—whatever the wishes of her biological family and whatever her actual connection to a tribe—is best off with some, any, tribal member. It is part and parcel of ICWA's central purpose of ensuring that "Indian child[ren]" are placed in the "Indian community." H.R. Rep. No. 95-1386, at 23. That is a ra-

cial purpose; it discriminates against non-Indian prospective parents based on their race and Indian children based on theirs.

Finally, the first preference for extended family members is, as the Tribes concede, particularly "*broad*." Tribes.Br.65. Indeed, tribes may define "extended family member" however they see fit. 25 U.S.C. § 1903(2). That imposes, based on the race of the Indian child, a *de jure* disadvantage on prospective parents who do not fall within the definition of extended family adopted by the child's tribe.

B. ICWA's Classifications Are Not Political.

In an effort to save ICWA from searching scrutiny, Respondents attempt to flip this Court's doctrine on its head, recasting *Mancari*'s "limited exception" (*Rice*, 528 U.S. at 520) as a general rule that Indian classifications are "political" and subject to rational-basis review. But Respondents misread *Mancari* and its follow-on cases and largely ignore *Rice*. Respondents' other arguments for *sui generis* treatment of tribal Indians lack merit.

1. Respondents' main contention is that Indian classifications are subject to rational-basis review even when they are not tethered to Indian self-government, tribal status, or Indian lands. But this conclusion is premised on Respondents' misreadings of *Mancari*.

The federal parties interpret *Mancari* as holding that classifications singling out Indians are political, rather than racial, when they are "designed to fulfill 'Congress' unique obligation towards the Indians.'" U.S.Br.56 (quoting *Mancari*, 417 U.S. at 555). This reading seemingly would bless any law that a given

Congress, in its (possibly quite paternalistic) judgment, determines would fulfill its obligations to Indians. The Tribes, meanwhile, claim that *Mancari* shields *all* tribal-affiliation classifications from anything but rational-basis review. Tribes.Br.53-54. On this even more extreme view, Congress conceivably could enact laws that impose discriminatory burdens on tribal members, such as laws requiring tribal members to reside on reservations, use the Indian Health Service, or even serve in the BIA. On Respondents' view, the question whether there could be "a blanket exemption for Indians from all civil service examinations" would not be "difficult" at all. *Mancari*, 413 U.S. at 554. Congress could do, at minimum, anything rationally related to a theory of improving the lives of tribal Indians.

Mancari is much more limited than Respondents suggest. In divining their political-classification test, the federal parties quote the Court's *application* of rational-basis review, not its determination of which standard of review applied. *See Mancari*, 417 U.S. at 555 (upholding classifications "tied *rationally* to the fulfillment of Congress' unique obligation toward the Indians" (emphasis added)). The opinion's *prior* paragraph determined that the preference "does not constitute 'racial discrimination'" because it is "designed to further the cause of Indian self-government." *Id.* at 553-54.

Mancari also relied on the fact that all laws then regulating Indian affairs (prior to ICWA's passage) involved "tribal Indians living on or near reservations." 417 U.S. at 552. Respondents note that BIA's hiring preference challenged in *Mancari* "applied off Indian lands." U.S.Br.65. But *Mancari* explained that the BIA's preference was designed "to make the BIA more

responsive to the needs of its constituent groups," and therefore was similar to requirements that political representatives "[i]nhabit[]" or "reside within" the represented locale, thus maintaining the close connection to tribal lands. 417 U.S. at 554. And of course, *Mancari* emphasized that BIA's hiring preference applied only to members of federally recognized Indian tribes. *Id*. at 553 n.24.

The Court emphasized these same limits in decisions following *Mancari*. Brackeen.Br.25-27. Respondents contend that the classifications in those cases provided special treatment to tribal Indians in areas unrelated to tribal lands or tribal self-government. U.S.Br.58-60; Tribes.Br.57-58. But they misread these cases, too. *Fisher* v. *District Court of Sixteenth Judicial District of Montana* involved tribal-court jurisdiction over child-custody "dispute[s] arising on the reservation among reservation Indians." 424 U.S. 382, 385, 387, 390-91 (1976) (per curiam). *United States* v. *Antelope* upheld a federal criminal code that applied "only" to "enrolled tribal members" who committed a crime "within the confines of Indian country." 430 U.S. 641, 645-47 & n.7 (1977). *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation* upheld a federal law that "sought to protect … tribal self-government" by preventing States from taxing "on-reservation sales" to "members of the Tribe." 425 U.S. 463, 466, 468 n.7, 479-80 (1976). And the treaty in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association* applied only in "treaty area waters" in "traditional tribal fishing grounds," and only to members of "signatory Indian tribes." 443 U.S. 658, 673 n.20, 679, 688-89 (1979).

Respondents also ignore those cases' core limitations. *Antelope* emphasized that it was not deciding whether the Major Crimes Act would be constitutional if it applied to those "emancipated from tribal relations" or to acts occurring outside "the confines of Indian country." 430 U.S. at 646 n.7. And *Antelope* and *Moe* expressly reserved whether Congress could make blanket distinctions between Indians and non-Indians, and whether those distinctions could apply to non-members or to members who did not reside on the reservation. Brackeen.Br.27.[3]

Given the close connection between tribal membership and race, the only tribal classifications that have been approved as political are those that are limited to tribal members and apply "on or near reservations" or otherwise "further the cause of Indian self-government." *Mancari*, 417 U.S. at 552, 554.

ICWA observes no such limitations. ICWA applies only to proceedings conducted under state law, to persons under state jurisdiction; it does not apply at all on tribal lands, or to persons under tribal jurisdiction. And in those state proceedings, ICWA grasps children of Indian ancestry who are not, and may never become, members of an Indian tribe.

This is why the Tribes' contention that ICWA "promotes 'Indian self-government'" by increasing tribal population (Tribes.Br.56) necessarily fails.

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[3] It is the Tribes that "[m]isrea[d]" *Moe*'s sixteenth footnote. Tribes.Br.63 n.46. The district court had held that sales to on-reservation Indians—regardless of whether they were tribal members—were immune from state taxation as a matter of both preemption *and equal protection*. 392 F. Supp. 1297, 1307 n.19, 1312, 1315, 1317 (D. Mont. 1974). The Supreme Court reserved judgment on "this holding." 425 U.S. at 480 n.16.

Forcing an arm of the State to implement a separate child-placement regime for children with Indian ancestry is miles away from "internal [tribal] affair[s]." *Rice*, 528 U.S. at 520. Under the Tribes' logic, Congress could force state governments to impose a host of additional barriers on tribal members—such as hindering their ability to reside off reservation, marry outside the tribe, adopt non-member children, or relinquish tribal membership—all in the name of promoting Indian tribes. *Mancari* never countenanced such restrictions.

2. *Mancari*'s limitations were elaborated and applied by this Court in *Rice*. In *Rice*, this Court explained that *Mancari* was a "limited exception" confined to the "*sui generis*" BIA and declined "[t]o extend *Mancari*['s]" exception to the "new and larger dimension" of a state "voting scheme that limits the electorate ... to a class of tribal Indians, to the exclusion of all non-Indian citizens." 528 U.S. at 520, 522. Such a tribal classification, the Court concluded, would be an impermissible "racial classification." *Id.* at 522. Respondents attempt to dismiss *Rice* as an irrelevancy, but it is this Court's only application of *Mancari*'s equal-protection holding in the last four decades.

The federal parties suggest—without any support—that *Rice* is inapposite because it was a Fifteenth Amendment case. U.S.Br.66. But this Court has explained that *Rice* is a core part of "the Court's broader equal protection jurisprudence," and has relied on it in equal-protection cases. *Fisher* v. *Univ. of Tex. at Austin*, 570 U.S. 297, 309 (2013); *see Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (plurality). Likewise, *Rice* itself relied on equal-protection cases. *See* 528 U.S. at 517-20. In both contexts, the relevant question is the

same: whether the classification "is a racial one." *Id.* at 517.

The federal parties also insist that *Rice* "has no application here" because ICWA does not involve "political issues." U.S.Br.66. But *Rice* did not turn on the existence of a "political issue." Rather, *Rice* distinguished between "the internal affair[s] of a quasi sovereign" on the one hand and "the affair[s] of [a] State" on the other. 528 U.S. at 520. Under *Mancari*, limiting matters of internal tribal "self-governance"—such as "tribal elections"—to tribal members does not draw racial classifications. *Id.* at 518, 520. But *Mancari*'s "limited exception" could not be extended to "critical state affairs," *i.e.*, public acts of an "arm of the State," such as "the administration of state laws and obligations." *Id.* at 520-22. In that arena, distinguishing between "tribal Indians" and "non-Indian citizens" constitutes race-based classification. *Ibid.*

The Tribes, meanwhile, assert that *Rice* is irrelevant because it did not involve a "tribal statute[]." Tribes.Br.58. That disregards *Rice*'s holding. Addressing the defendants' argument that a classification of native Hawaiians should be treated like the classification of tribal Indians in *Mancari*, the *Rice* Court explicitly assumed that it could treat "native Hawaiians as tribes." 528 U.S. at 519; *see* Brackeen.Br.23. *Rice* then held that a "class of tribal Indians" in that context would constitute a racial classification because the elections at issue were "the affair of the State of Hawaii" and involved an "arm of the State" that was "responsible for the administration of state laws," rather than "the internal affair of a quasi-sovereign." 528 U.S. at 520-21.

The Tribes also insist that the "critical state affairs" component of *Rice*'s holding is not a relevant

limit on *Mancari*. Tribes.Br.58. But *Rice* makes clear that classifications based on tribal status are political if they involve "the internal affair" of a tribe; because the classification instead involved an "affair of the State," it was racial in nature precisely because it "fence[d] out whole classes of its citizens from decisionmaking in critical state affairs." *Rice*, 528 U.S. at 520. Indeed, *Rice* held that a law excluding non-tribal members from a state election was racial *even though* it "afford[ed] Hawaiians a measure of self-governance." *Id.* at 520, 522.

Rice confirms that a tribal classification can operate as a racial classification. And it makes clear that *Mancari*'s holding that a preference for tribal Indians is not racial should be confined to the *sui generis* context of the BIA. *Rice* thus refutes Respondents' contention that tribal classifications are presumptively political in nature. Fencing classes of persons out of state affairs—or fencing them in—based on their ancestry is a form of "racial classification." *Rice*, 528 U.S. at 522.

3. Unable to find support for their proposed rule in this Court's cases, Respondents contend that Indian classifications are presumptively constitutional because the Constitution singles out Indians. U.S.Br.56-57; Tribes.Br.51-53. But the Constitution's text cuts sharply in the opposite direction. The "Indians not taxed" clauses, U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2—like the "subject to the jurisdiction thereof" limitation, *id.* amend. XIV, § 1—merely distinguish noncitizen Indians from American citizens, all of whom are taxed, subject to the United States' jurisdiction, and must be treated equally, regardless of their Indian status.

At the Founding, members of Indian tribes were considered "allegian[t] to their … tribes" alone and therefore "not part of the people of the United States." *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884). The "Indians not taxed" clause in Article I was a "reference to the historical point of beginning, when Indians were not subject to any ordinary law, save those of their tribes." Felix Cohen, *Handbook of Federal Indian Law* 389 (1982 ed.). Section 1 of the Fourteenth Amendment likewise confers citizenship on persons "subject to the jurisdiction" of the United States, and this phrase was considered sufficient to exclude Indians not taxed, *i.e.*, "Indians … who are not in all respects subject to the jurisdiction of the United States." Cong. Globe, 39th Cong., 1st Sess. 2897 (1866). The Fourteenth Amendment thus distinguishes between Indians not "subject to the laws of the United States" and those Indians who "come within the jurisdiction of the United States," "exercise the privileges of civil life," "owe allegiance to the United States," and "submi[t] to the [general] laws"—*i.e.*, those who are citizens. *Id.* at 527-28, 572-73.

Today, however, all "Indians … are American citizens." *McClanahan* v. *State Tax Comm'n of Ariz.*, 411 U.S. 164, 172-73 (1973). Now that Congress has "grant[ed] the privileges of citizenship to ... Indian[s]," it cannot treat them as a "special class" solely because of the "Indian ... blood in [their] veins." *In re Heff*, 197 U.S. 488, 508-09 (1905), *overruled on other grounds by United States* v. *Nice*, 241 U.S. 591 (1916); *see United States* v. *Vaello Madero*, 142 S. Ct. 1539, 1551 (2022) (Thomas, J., concurring) ("[T]he Citizenship Clause

guarantees citizens equal treatment by the Federal Government.").[4]

Because Indians are American citizens, Respondents miss the mark by invoking the federal government's power to differentiate between citizens and noncitizens. U.S.Br.64 & n.9; Tribes.Br.52, 76. Moreover, even if tribal membership were akin to citizenship, classifications singling out tribal members would discriminate against American citizens based on their national origin, which is likewise subject to strict scrutiny. *See Hernandez* v. *Texas*, 347 U.S. 475, 479 (1954).[5]

The federal parties also analogize to the Territory Clause. U.S.Br.63 (citing *Vaello Madero*, 142 S. Ct. at 1543). But the law in *Vaello Madero* applied to individuals *residing in Puerto Rico*, 142 S. Ct. at 1541, and thus, like *Mancari* and the cases that rely on it, is closely tied to particular lands. No constitutional provision contemplates distinctions between American citizens residing *in the States* based on whether they

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[4] The Tribes attempt to brush aside Indians' citizenship as irrelevant, relying on *Duro* v. *Reina*, 495 U.S. 676, 692 (1990). Tribes.Br.53. But *Duro*—which did not consider a constitutional equal-protection claim—simply reaffirmed the basic principle that Indian citizenship did not eliminate Congress's ability to draw political classifications among "enrolled" tribal members in the specific circumstances carved out by *Mancari* and later cases.

[5] This argument does not "exten[d] beyond" the question presented, *contra* U.S.Br.65 n.9, because national origin, ancestry, and race are closely intertwined concepts, *see Saint Francis Coll.* v. *Al-Khazraji*, 481 U.S. 604, 609-13 (1987). And even if Respondents' erroneous contention were correct, Individual Petitioners are also Respondents in part and thus "entitled … to defend the judgment on any ground supported by the record." *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997).

or their ancestors were born in a territory. *See DiMarco-Zappa* v. *Cabanillas*, 238 F.3d 25, 36 (1st Cir. 2001).

Finally, the Constitution's references to Indian tribes do not change the general rule against racial discrimination. U.S.Br.56-57; Tribes.Br.51-52. Tribal sovereignty does not give Congress carte blanche to make distinctions based on Indian ancestry or tribal membership any more than Sweden's sovereignty allows Congress to make distinctions between American citizens based on Swedish ancestry. *See Oyama* v. *California*, 332 U.S. 633, 640 (1948).

* * *

ICWA's classifications go far beyond the hiring preference considered in *Mancari*. ICWA reaches beyond tribal members and applies in state child-placement proceedings that bear no meaningful relation to Indian lands or tribal self-governance. *Mancari* simply cannot bear ICWA's discriminatory weight.

C. ICWA Fails Any Level Of Scrutiny.

Respondents make no attempt to argue that ICWA can survive strict scrutiny. Instead, the Tribes urge the Court to remand if it concludes that strict scrutiny should apply. Tribes.Br.77. But Respondents did not even "*attempt to prove*" below that ICWA survives strict scrutiny. Tex. Pet. App. 501a; *see* Ct. App. ROA.4516-22. This Court has not hesitated to resolve a case under the appropriate level of scrutiny when the lower court applied a different standard, *see, e.g.*, *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163, 171 (2015); *Frontiero* v. *Richardson*, 411 U.S. 677, 688-90 (1973), and it should do so here.

ICWA also fails rational-basis review, as eight judges concluded below. ICWA applies to children who are not and may never become tribal members, applies where no Indian family is being broken up, and grants a placement preference to all 574 tribes as if they were fungible.

1. ICWA's "Indian child" definition subjects covered children to a different child-custody regime that changes the course of their lives. Under the regime, the child and the biological parent typically have no say. The tribe may unilaterally enroll an infant (as with A.L.M., Y.R.J., and Child P.), or the child may be a non-member but nevertheless happen to be the offspring of a tribal member—perhaps an absent one. There is no "rational justification" for subjecting "children" to ICWA's "discriminatory burden on the basis of a legal characteristic over which children can have little control." *Plyler* v. *Doe*, 457 U.S. 202, 220 (1982); Brackeen.Br.30.

Moreover, ICWA's "Indian child" definition does not rationally further tribal self-government. ICWA would not apply to adopted children of tribal members because of their "biolog[y]," even if the child were born and raised on the reservation. *See supra* at 7-8. Additionally, ICWA's "Indian child" definition applies even if the sole tribal-member parent is absent and the child has no connection to a tribe—as happened with the Librettis and Ms. Hernandez. JA204-05, JA209-10. In either scenario, ICWA's application does not serve any political purpose. The Tribes ask the Court to turn a blind eye to this dramatic misfit between means and ends, Tribes.Br.69, but such "unreasoned distinctions" fail rational-basis review, *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966).

2. ICWA's placement preferences also fail rational-basis review.

The placement preferences work together to prefer any Indian family over any non-Indian family. Congress's assumption that placing a child with *any* of the 574 Indian tribes advances tribal survival—or the child's best interests—is "indefensible" even under rational-basis review. *Quinn* v. *Millsap*, 491 U.S. 95, 108 (1989).

ICWA's placement preferences are no more rational in isolation. The federal parties argue that ICWA's first placement preference—which covers "extended family" members who may not be a tribal member—is no different than state law. U.S.Br.74. But ICWA allows each tribe to craft its own definition of "extended family," 25 U.S.C. § 1903(2), and then disables state courts from applying the best-interest-of-the-child test to evaluate competing placements, *see* 25 C.F.R. § 23.132. ICWA may thus accord a preference to someone who has merely "dated" the child's biological parent, *e.g.*, White Earth Nation Order for Protection Code § 1.01(13), over any non-Indian placement, including foster parents to whom the child is deeply attached. And it does so whatever the extended family member's connection to the tribe. Disregarding the Indian child's best interests may advance the interests of certain Indian adults but it does nothing to "protect the best interests of Indian children." 25 U.S.C. § 1902.

The second and third placement preferences, meanwhile, favor any member of the child's tribe or of any other tribe nationwide. Respondents argue that those preferences are rational because they protect the stability and security of Indian tribes and the "broader community of Indian tribes." U.S.Br.75. But

that "broader community" is united only by race, not by any political affiliation or tribal identity. And ICWA prioritizes sending children to *any* members of *any* tribe; it is not limited to tribal members that will pass along the traditions of the child's potential tribe. Conversely, ICWA seeks to keep children away from non-tribal members, even those who—like Individual Petitioners—would facilitate the child's connection to a tribe. *See* JA192, JA198. This does not rationally advance "the stability and security of Indian tribes." 25 U.S.C. § 1902.

The placement preferences also do not advance Congress's goal of preventing the "removal" of Indian children, 25 U.S.C. § 1901(4), given that they apply *only* to children who reside off Indian lands. The federal parties argue that Congress had other concerns. U.S.Br.78. But DOJ understood ICWA at the time of passage as "designed to remedy" the problem of state agencies "ignor[ing]" that "tribal governments have exclusive jurisdiction ... of tribal members located on reservations." H.R. Rep. No. 95-1386, at 35. There is a fundamental difference between protecting Indian children already within Indian communities and wrenching children from their existing non-Indian homes.

Additionally, ICWA applies where state agencies are not "br[ea]k[ing] up" an Indian family, 25 U.S.C. § 1901(4), including where the tribal-member parent is absent or where the tribal-member parent desires a non-Indian family to adopt her child. Respondents argue that ICWA applies even in these cases because of "concerns going beyond the wishes of individual parents." U.S.Br.78. But this only underscores the mismatch between ICWA's application and Congress's expressed objective—preventing "Indian families" from

being "broken up by the removal ... of their children." 25 U.S.C. § 1901(4). For A.L.M., Y.R.J., and Baby O., ICWA displaced their biological parents' wishes, even though no Indian family was being broken up. To the contrary, it was those children's families that ICWA threatened to break up. The "relationship" between ICWA's "asserted goal[s]" and its operation is "so attenuated" that it is "arbitrary [and] irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

D. Ruling In Petitioners' Favor Will Not Endanger Title 25.

The dramatic disconnect between ICWA's means and its claimed ends undermines Respondents' contention that striking down ICWA will imperil all of Title 25. U.S.Br.57; Tribes.Br.64. No other provision of that Title is as extreme as ICWA. Prior to ICWA's passage, "[l]iterally every piece of legislation dealing with Indian tribes and reservations … single[d] out for special treatment a constituency of tribal Indians living on or near reservations." *Mancari*, 417 U.S. at 552.

The laws on which Respondents rely confirm ICWA's outlier status. Many are limited to tribal lands. *See*, *e.g.*, 25 U.S.C. § 4131(a)(1) (promoting "affordable housing ... on Indian reservations and in other Indian areas"). Most programs are limited to "member[s] of an Indian tribe." *Id*. § 1603(13); *id.* § 4103(10); 42 U.S.C. § 1996a(c)(1); *see* 25 U.S.C. § 1680c(a)(2) (encompassing tribal members and all of their descendants, including "adopted child[ren]"). Those that extend beyond tribal members simply appropriate funds for schools with Indian and non-Indian students without dictating how to expend the

funds, 20 U.S.C. §§ 7441, 7491(3)(B), or secure payments to Indian and non-Indian medical providers alike, 42 U.S.C. § 1395qq(a), and thus do not involve discrimination.

Indeed, Respondents point to no law other than ICWA that Congress has needed to shield from anti-discrimination laws. *See* 42 U.S.C. § 674(d)(4), 1996b. There would be no reason to "forestall" arguments that ICWA racially discriminates (Tribes.Br.67 (emphasis omitted)) if Respondents were correct that ICWA does not draw racial classifications, or that ICWA were no different from the rest of Title 25.

E. Respondents' Justiciability Objections Are Meritless.

Respondents seek to escape review of ICWA's equal-protection problems by disputing the existence of a live case or controversy. That contention should be swiftly dispatched.

1. Individual Petitioners Have Standing To Maintain Their APA Claim.

The shortest answer to all of Respondents' justiciability concerns is Individual Petitioners' APA claim, which asks this Court to set aside ICWA's implementing regulations because ICWA itself violates equal protection. *See* Tex. Pet. App. 2a-3a, 180a, 223a n.19. Individual Petitioners are plainly "an object of" those regulations. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992); *see* Tex. Pet. App. 218a, 559a-60a. And because the implementing "regulations cannot 'operate independently of'" ICWA, Individual Petitioners may "rais[e] arguments about the validity of" ICWA through their APA challenge. *FEC* v. *Cruz*, 142 S. Ct. 1638, 1649 (2022) (an agency "literally has no power

to act ... unless and until Congress authorizes it to do so by statute").

Here, the BIA rule incorporates and expands upon the "Indian child" definition and the placement preferences, 25 C.F.R. §§ 23.2, 23.130(a)-(b), and Individual Petitioners' APA claim encompasses each of their constitutional arguments, JA148-51, JA156-57. Thus, "to decide th[e] APA claim, [the Court] would in any event have to address whether the relevant parts of ICWA violate equal protection." Tex. Pet. App. 223a n.19 (Duncan, J.). Even the en banc dissent below "concede[d] the [Individual Petitioners] have standing to bring APA claims." Tex. Pet. App. 223a n.19 (Duncan, J.); Tex. Pet. App. 381a (Costa, J.). The legal issue of ICWA's incompatibility with equal-protection principles thus is properly before this Court.

2. Individual Petitioners Have Standing To Maintain Their Equal-Protection Claim.

In any event, Respondents' justiciability objections fail on their own terms. "[W]hen there are multiple plaintiffs," the "simple rule" is that "[a]t least one plaintiff must have standing" to pursue each claim and remedy. *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). The district court, a unanimous panel, and 11 members of the en banc court all agreed that Individual Petitioners have standing.

Respondents assert that the Brackeens' equal-protection challenge to ICWA is not justiciable because they adopted A.L.M. after bringing suit and before filing the operative complaint. U.S.Br.50. Whether viewed in terms of standing or mootness, that assertion is unsound.

The Brackeens have standing because the operative complaint alleges that they "intend" to foster and adopt "additional children in need." JA100, JA133. That is no "'some day' intentio[n]." Tribes.Br.41. Just a few months later the Brackeens "undertook efforts to adopt" Y.R.J. in state court, Tex. Pet. App. 60a n.15 (Dennis, J.), where the Navajo Nation insists to this day that ICWA forbids that adoption, *In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728, at *5 (Tex. Ct. App. Dec. 19, 2019) (remanding for further proceedings, which remain ongoing); *see Carney* v. *Adams*, 141 S. Ct. 493, 503 (2020); Tex. Pet. App. 61a n.15 (Dennis, J.). In both adoption proceedings, the Brackeens for years have been and continue to be "forced to compete in a race-based system," *Parents Involved*, 551 U.S. at 719, where they are placed last in line to adopt or foster the children they love simply because they do not belong to ICWA's preferred groups. The Brackeens' "inability" under ICWA to seek adoption "on an equal footing" constitutes Article III injury. *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993).

The Brackeens' claim likewise is not moot merely because this litigation outlasted the adoption proceedings of A.L.M. Tribes.Br.49. That claim is not only capable of repetition, but actually is being repeated with Y.R.J. That custody decisions "have come and gone during the pendency" of "this action" confirms that it is not moot. *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); Tex. Pet. App. 417a-18a. Moreover, the Brackeens and the Cliffords intend to foster

or adopt in the future. JA100, JA133; Brackeen.Pet.7 n.1.[6]

Individual Petitioners' injuries are also fairly "traceable to the challenged actions of the defendant[s]." *Lujan*, 504 U.S. at 560-61 (alteration omitted). "[N]o more than *de facto* causality" is required. *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2566 (2019). At a minimum, the federal parties "bear some responsibility for the regulatory burdens imposed by ICWA." Tex. Pet. App. 60a (Dennis, J.); Tex. Pet. App. 220a-21a (Duncan, J.).

Seeking to shield ICWA's most transparently race-based provisions from review, Respondents contend that no injury is traceable to the second "Indian child" prong and the third placement preference. U.S.Br.51-52. That piecemeal approach misses the point. ICWA's entire scheme of placement preferences operates as an interlocking whole to impose a discriminatory preference for Indian families over non-Indian families. *See supra* at 9-11. The third-ranked placement preference is a core component of a larger "barrier that makes it more difficult for members of one group to obtain a benefit." *Ne. Fla. Chapter*, 508 U.S. at 666. ICWA's most egregious provisions are simply the smoking-gun evidence that the statute deliberately draws racial lines.

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[6] For this reason, Child P.'s finalized adoption in May 2020, *see* Brackeen.Pet.7 n.1, does not alter the justiciability of the Cliffords' claim. Through a regrettable oversight that post-argument development was not brought to the Fifth Circuit's attention, but neither the adoption nor its timing affects this Court's jurisdiction. The Librettis, however, no longer have current plans to foster or adopt additional children due to a recent change in their family circumstances.

Respondents' redressability concerns are similarly insubstantial. For example, a declaration that ICWA's challenged provisions are unconstitutional would allow Individual Petitioners more easily to "overcom[e] ICWA's preferences." Tex. Pet. App. 221a-22a (Duncan, J.). The practical consequence" of such a decision (*Utah* v. *Evans*, 536 U.S. 452, 464 (2002)) is that Individual Petitioners' claims "will '*likely*' be redressed," *Bennett*, 520 U.S. at 171 (emphasis added), an inquiry that takes into account how "third parties will likely react," *Dep't of Commerce*, 139 S. Ct. at 2566; *see FEC* v. *Akins*, 524 U.S. 11, 25 (1998). Indeed, the state court in the Brackeens' pending proceeding explicitly stated that it would abide by the federal ruling. *See* Tex. Pet. App. 60a (Dennis, J.).

Respondents' theory would mean that a federal lawsuit against federal defendants challenging a federal law under the federal Constitution cannot be heard by a federal court, solely because Congress directed state courts to implement ICWA. Congress's conscription of state courts makes ICWA more vulnerable on the merits, but cannot shield the statute from scrutiny.

II. ICWA EXCEEDS CONGRESS'S ENUMERATED POWERS AND COMMANDEERS STATES.

Individual Petitioners join Texas's arguments on reply that ICWA exceeds Congress's enumerated powers and commandeers States. Tex.Reply.2-13, 23-28; *see* Brackeen.Br.46-70. Individual Petitioners write here to emphasize two points.

First, Respondents cast Congress's power to regulate "commerce" as the power to regulate "intercourse." U.S.Br.12-13; Tribes.Br.24-25. But child-

custody placements are not "commerce," "exchange," or "communication." 1 S. Johnson, *A Dictionary of the English Language* 1060 (4th ed. 1773) (defining "intercourse"). Respondents also resist the Commerce Clause's reference to "Tribes." U.S.Br.27-28; Tribes.Br.33-34. The power to regulate commerce "with Indian tribes," however, is a "limitation upon federal power to situations involving the existence of a tribe." Felix Cohen, *Handbook of Federal Indian Law* 89 n.3 (1942). ICWA sweeps far beyond this limitation by regulating non-tribal-member children and parents.

Respondents' atextual theory offers no serious constraints on Congress's power, despite this Court's emphasis that constitutionally permissible exercises of the Indian Commerce Clause cannot involve "interference with the power or authority of any State," *United States* v. *Lara*, 541 U.S. 193, 203-05 (2004), "unjustifiable encroachment upon a power obviously residing in the state," *Perrin* v. *United States*, 232 U.S. 478, 486 (1914), "nullif[ication] or substantial[] impair[ment]" of States' rights "over all persons and things within its jurisdiction," *Dick* v. *United States*, 208 U.S. 340, 353 (1908), or "interfere[nce] with the process of the state courts" or "with the operation of state laws," *United States* v. *Kagama*, 118 U.S. 375, 383 (1886). As with the Interstate Commerce Clause, the Court should confirm that, no matter how broadly the Constitution has been interpreted before, it has limits.

Second, upholding ICWA under the anticommandeering doctrine would give Congress remarkably broad authority. Congress did not make generally applicable substantive law that preempts contrary state law in all forums—federal, tribal, or state—but rather

directed state courts alone to functionally amend "State law." 25 U.S.C. § 1915(a). That is a transparent attempt to take control of state organs.

Congress took this unprecedented approach because it could not direct state legislatures to rewrite family law generally. *See Murphy* v. *NCAA*, 138 S. Ct. 1461, 1476 (2018). But the alternative decision to conscript state courts trades one problem for another. It was "evident" to the Framers that if Congress, through "some forced construction[] of its authority," "should attempt to vary the law of descent in any State," it would "exceed[] its jurisdiction, and infringe[] upon that of the State." *The Federalist* No. 33, at 206 (C. Rossiter ed. 1961) (Hamilton). Indeed, the Convention rejected proposals that "would have enabled Congress" to "revise" the laws of a state. 1 Elliot's Debates 149, 400-01. And early federal statutes directing state courts to record naturalization applications "could not be enforced against the consent of the states." *United States* v. *Jones*, 109 U.S. 513, 520 (1883). ICWA's placement preferences do what could not "easily be imagined" by the Founding generation: "vary the law of" child-custody placements in each State against their will.

CONCLUSION

This Court should reverse the judgment below in relevant part.

Respectfully submitted.

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