Nos. 21-376, 21-377 & 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.

CHAD EVERET BRACKEEN, ET AL.,
PETITIONERS

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

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

CONSOLIDATED BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

As Texas (21-378) and the Individual Plaintiffs (21-380) agree, the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63 (ICWA), creates a child-custody regime for Indian children that is determined by a child's genetics and ancestry. Though the United States (21-376) and the Tribes (21-377) try to minimize its implications, this race-based system is designed to make the adoption and fostering of Indian children by non-Indian families a last resort through various legal mechanisms that play favorites based on race. This Court should reject the United States' and Tribes' efforts to artificially narrow this Court's review of these mechanisms. Instead, the Court should grant the questions presented in Texas's petition:

1. Whether Congress has the power under the Indian Commerce Clause or otherwise to enact laws governing state child-custody proceedings merely because the child is or may be an Indian.

2. Whether the Indian classifications used in ICWA and its implementing regulations violate the Fifth Amendment's equal-protection guarantee.

3. Whether ICWA and its implementing regulations violate the anticommandeering doctrine by requiring States to implement Congress's child-custody regime.

4. Whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Constitutional Provisions, Statutes, and Rules:

Statutes—Continued: Page(s)

Miscellaneous:

INTRODUCTION

ICWA has disrupted state child-custody proceedings for over four decades. Its devaluation of the "best interests of the child" standard and state laws that protect children in child-custody proceedings often has devastating results.[1] To promote deliberatively race-based ends, ICWA forces States to abandon their sovereign control over matters of domestic relations long reserved to the States, all through an unconstitutional expansion of Congress's Article I powers. ICWA's unconstitutional machinery is worse than the sum of its parts.

All parties to this case—as well as the 26 other States, the District of Columbia, and the over 180 Indian tribes who have submitted briefs as amici curiae—agree that this case presents questions of national importance requiring this Court's attention. The only disagreement relates to how deeply this Court should look into ICWA's constitutionality. Although the en banc Fifth Circuit attempted to resolve the critical constitutional issues implicated by ICWA, it could not, instead affirming the district court's judgment on some major issues by an equally divided court and erring by reversing the district court's judgment on others. As ICWA affects every State and the well-being of thousands of children, this Court should grant review of the questions as formulated in Texas's and the Individual Plaintiffs' petitions, which allow it to examine the constitutional issues presented to the Fifth Circuit in their entirety.

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[1] *See* Amicus Br. of Christian Alliance for Indian Child Welfare and ICWA Children and Families ("Christian Alliance") at 8-14, *Texas v. Haaland*, No. 21-378 (U.S. Oct. 8, 2021) (providing examples of children who, subject to ICWA's placement preferences, suffered substantial emotional and physical harm).

STATEMENT

The factual and legal background in this case has now been thoroughly canvassed by four petitions for writ of certiorari and numerous amicus briefs. To avoid needless repetition, Texas adopts the description of the statements of the case from its original petition, *see* Texas Pet. 7-8,[2] and in the petition by the Individual Plaintiffs at 5-8. Texas will provide only an abbreviated summary of those issues here.

I. Statutory and Regulatory Framework

A. ICWA "establishes federal standards that govern state-court child custody proceedings" so long as those proceedings involve an "Indian child," *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 642 (2013), a term that ICWA defines entirely based on ancestry—namely, whether the child is "a member of an Indian tribe," or "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

If a state court "knows *or has reason to know* that an Indian child is involved" in a state child-custody proceeding, the court is placed under a series of procedural and substantive obligations designed to discourage removing that child from a potentially unsafe environment. *Id.* § 1912(a) (emphasis added). To start, the court must notify any "parent or Indian custodian and the Indian child's tribe" to allow them to participate in proceedings. *Id.* It must then require a party seeking a foster-care placement for the child to prove by "clear and convincing evidence," including expert witness testimony, that continued custody by the parent is "likely to result in serious

[2] Texas Pet. refers to Texas's petition for a writ of certiorari in *Texas v. Haaland*, No. 21-378 (U.S. Sept. 3, 2021), and Pet. App. refers to Texas's petition appendix.

emotional or physical damage to the child." *Id.* § 1912(e). Similarly, the court cannot terminate parental rights without "evidence beyond a reasonable doubt" that continued custody by the parent "is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(f).

ICWA's impact may be felt potentially years after the child is placed in a new home. Even if the child's parent initially consents to a foster-care placement, he can withdraw consent "at any time," *id.* § 1913(b), and he can withdraw consent to the termination of his parental rights "for any reason at any time prior to the entry of a final decree of termination or adoption," *id.* § 1913(c). Placements of Indian children may be revoked on ICWA-compliance grounds for years afterward. For example, a foster-care placement or termination of parental rights can be invalidated at any point if the parent, former Indian custodian, or an Indian tribe shows that the court or involved parties violated ICWA's burdensome procedural requirements. *Id.* § 1914.

B. Perhaps most pernicious of all, the placement preferences in section 1915 use race-based distinctions to prevent unrelated non-Indians from adopting Indian children. State courts are instructed to prioritize a request from any family member, member of the child's Indian tribe, or any other Indian family to adopt the child over a request from an unrelated non-Indian family. *Id.* § 1915(a). Similar preferences also apply to foster-care or pre-adoptive placements. *Id.* § 1915(b)(i)-(iv). The only Congress-delineated exception to this "preference" for Indians over unrelated non-Indians in adoption or foster-care proceedings is "good cause to the contrary." *Id.* § 1915(a)-(b). ICWA does, however, allow the Indian child's *tribe* to change the "order of preference" that state courts must apply. *Id.* § 1915(c).

C. Finally, ICWA also imposes recordkeeping and reporting requirements on the States. States must maintain records demonstrating their efforts to comply with ICWA's race-based placement preferences and make those records available for inspection by the Secretary of the Interior or the child's tribe at any time. *Id.* § 1915(e). Following adoption of an Indian child, States must also provide to the Secretary a copy of the final adoption decree, the name and tribal affiliation of the child, the names and addresses of the biological and adoptive parents, and the identity of every agency that possesses files or information relating to the adoption. *Id.* § 1951(a).

D. Perhaps recognizing that it is antithetical to federalism for a federal agency to superintend a state court, the Department of the Interior originally left the "[p]rimary responsibility" for implementing and interpreting ICWA "with the courts that decide Indian child custody cases." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979). But in 2016, dissatisfied with how some States were applying ICWA, the Department adopted the Final Rule and made it binding on state courts. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016).

Among other things, the Rule established that "good cause" to remove an Indian child must be supported by "clear and convincing evidence." 25 C.F.R. § 23.132(b). Moreover, the Rule directed that a court making a "good cause" inquiry cannot consider the "ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." *Id.* § 23.132(e). Nor may the state court consider "factors such as the participation of the parents or Indian child"—or lack thereof—"in Tribal cultural, social,

religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum" when deciding whether ICWA applies. *Id.* § 23.103(c).

II. Procedural History

The State of Texas, along with two other States and the Individual Plaintiffs (six individuals who sought to adopt or foster Indian children and one who sought to have her Indian child adopted by a non-Indian family) filed this lawsuit to challenge the constitutionality of certain provisions of ICWA and the parts of the Final Rule relating to those provisions. Pet. App. 47a-48a. Following extensive litigation that has been described elsewhere, the en banc Fifth Circuit reached multiple rulings on five issues that are relevant to this response:

A. *Congress's Article I Power.* The en banc court unanimously held that at least one plaintiff had standing to challenge whether Congress had authority under Article I to enact ICWA. Pet. App. 3a. By a 9-7 majority, the en banc court held that Congress had such power. Pet. App. 3a-4a.

B. *Equal Protection.* The en banc Fifth Circuit also held that at least one plaintiff had standing to assert an equal-protection challenge to ICWA's adoption and foster-care placement preferences. 25 U.S.C. § 1915(a)-(b); Pet. App. 3a. And an equally divided court affirmed that at least one plaintiff had standing to challenge whether the "collateral attack" provisions, 25 U.S.C. §§ 1913, 1914, violated equal protection. Pet. App. 3a. Beginning with the "threshold definition" of "Indian child," 25 U.S.C. § 1903(4), a majority of the en banc court held the definition did not violate equal protection because, in its view, tribal membership was a political, not racial,

distinction. Pet. App. 139a-166a (Dennis, J.). The court equally divided, however, on whether ICWA's adoption preference for "other Indian families" and foster-care preference for a "licensed Indian foster home" violated equal protection. Pet. App. 4a; Pet App. 261a-280a (Duncan, J.). As the en banc court could not break the tie, it again affirmed by an equally divided court the district court's ruling that those provisions were unconstitutional. Pet. App. 4a.

C. *Anticommandeering.* The en banc Fifth Circuit was unanimous that at least one plaintiff had standing to challenge whether ICWA's active-efforts, expert-witness, and recordkeeping requirements unconstitutionally commandeered state actors. Pet. App. 3a. A majority further held that they were unlawful commandeering. Pet. App. 4a-5a; *see also* Pet. App. 285a-297a (Duncan, J.). The court was equally divided as to whether the placement preferences, the notice provisions, and the placement-record provisions unconstitutionally commandeered state actors, so the equally divided en banc court affirmed the district court's anticommandeering holdings regarding these provisions. Pet. App. 5a; *see also* Pet. App. 290a-297a, 314a-316a (Duncan, J.). But the en banc court held that the foster-care and termination standards as well as the placement preferences, to the extent that they were directed at state *courts*, did not commandeer state officials, because federal law preempted state law. Pet. App. 5a-6a; *see also* Pet App. 309a-314a (Duncan, J.).

D. *Nondelegation*. The en banc court next unanimously held that at least one plaintiff had standing to raise a nondelegation challenge concerning the provision in ICWA that allows Indian tribes to change the order of the placement preferences. 25 U.S.C. § 1915(c); Pet. App.

3a. A majority held that Congress did *not* unconstitutionally delegate legislative power but instead permissibly incorporated the laws of a separate sovereign—the Indian tribe. Pet. App. 166a-179a (Dennis, J.).

E. *Administrative Procedure Act.* Finally, the court unanimously held that plaintiffs had standing to challenge whether the Final Rule complied with the APA. Pet. App. 3a. A majority of the en banc court affirmed in part and reversed in part the district court's ruling that the Final Rule was unconstitutional and violated the APA. Pet. App. 6a-7a. The court held that the Bureau of Indian Affairs (BIA) did not violate the APA by concluding that its regulations could bind state courts, but it did violate the APA through its regulations implementing parts of ICWA the en banc Fifth Circuit found unconstitutional and by requiring clear and convincing evidence to deviate from the placement preferences. Pet. App. 6a-7a.

ARGUMENT

All parties agree that this Court's review is needed in this case, as demonstrated by the four petitions for certiorari. The en banc Fifth Circuit was unable to resolve many of the critical issues that will determine ICWA's continued application. *See supra* pp. 5-7. But while the United States and the Tribes propose an unnecessarily narrow set of questions for this Court's review, the most straightforward approach would be to grant certiorari based on Texas's and the Individual Plaintiffs' petitions, which squarely present all of the relevant substantive issues that were before the en banc Fifth Circuit.

As discussed below, though this Court must always examine the parties' standing to the extent necessary to assure itself of jurisdiction, plenary review of the question (as requested by the United States and the Tribes)

is unnecessary in this case. Both the district court and the en banc Fifth Circuit found standing to challenge the provisions the parties ask this Court to review; the en banc Fifth Circuit splintered only on the merits of those challenges. It is these merits questions—and not the broadly agreed-upon standing questions—that require this Court's urgent review.

I. Challenges to Plaintiffs' Standing Have Been Rejected at Every Stage of This Litigation and Are Not Certworthy.

A. The United States and the Tribes each question plaintiffs' standing to bring equal-protection challenges to ICWA's placement preferences. U.S. Pet. I; Tribes Pet. i. Texas does not dispute that this Court is always under an obligation to assess a plaintiff's standing. *E.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006). But that is a non-sequitur: this Court grants plenary review routinely without asking for briefing on the merits of threshold jurisdictional questions. Plenary review is unnecessary for that jurisdictional question here because, as the en banc court held, at least one plaintiff can raise the constitutional challenges to the statute and Final Rule addressed to this Court. That is all this Court requires. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). There is nothing novel about either Texas's or the Individual Plaintiffs' standing requiring this Court's clarification.

B. The Tribes (at 30-34) and the United States (at 21-22) nevertheless argue that the Individual Plaintiffs do not have standing to challenge the "third-ranked" placement preferences in sub-sections 1915(a)(3) and (b)(iii) for "other Indian families" and "Indian foster homes," because their cases involved only first-ranked and

second-ranked placement preferences (§ 1915(a)(1)-(2) and 1915(b)(i)-(ii)).

But the United States and Tribes misunderstand the nature of the Individual Plaintiffs' injury.[3] The Individual Plaintiffs' "injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995)). As they intend to attempt to adopt or foster an Indian child in the future, subjecting them to ICWA's placement preferences, they have standing to sue. *See id.*

Regardless, Texas has standing to raise an equal-protection challenge to the placement preferences, and that is sufficient for jurisdictional purposes, as only one party with standing is needed. *Rumsfeld*, 547 U.S. at 52 n.2. Like the Individual Plaintiffs, Texas is an object of the Final Rule and therefore has standing to challenge it on any grounds—including the unconstitutionality of the statute on which it is based. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Contender Farms, LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015); *see also* 5 U.S.C. § 706. Moreover, ICWA harms Texas's quasi-sovereign interest in the well-being of its citizens, specifically in the well-being of vulnerable children in dangerous domestic situations. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) ("[A] State has a quasi-sovereign interest in the health and well-being . . . of its residents."). ICWA injures Texas residents by setting aside the best interests of

[3] For the avoidance of doubt, by providing a brief response here, Texas does not intend to indicate any disagreement with the more detailed explanation of standing contained in the Individual Plaintiffs' response.

Indian children and forcing all participants into a child-custody regime that judges them based on their race. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children."). This is more than sufficient to give Texas standing and to secure this Court with jurisdiction.

C. The Tribes also insist (at 31-32) that upholding the Fifth Circuit's conclusion that a federal-court ruling would redress plaintiffs' harm would "transform standing law" because state courts are not bound by the Fifth Circuit's interpretation of ICWA and may not "abide by the Fifth Circuit's decision." The Tribes are correct that a state court is not bound by a lower federal court's interpretation of federal law. *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam). Nevertheless, that does not defeat standing for at least two reasons.

First, all that is required to establish standing is that a favorable ruling be "substantially likely" to address the plaintiff's harm—not absolute certainty. *Utah v. Evans*, 536 U.S. 452, 459-60 (2002). The Tribes (at 32) and the United States (at 25) argue that declaratory and injunctive relief against the governmental defendants will not redress plaintiffs' injuries, as the governmental defendants have "no role in enforcing any of the statutory provisions applicable in" "state foster-care or adoption proceedings." That argument, however, underscores that state officials, agencies, and courts are required to enforce those provisions (albeit under unconstitutional duress). As Texas is a party to the litigation, if it receives a favorable result and this Court holds that the placement preferences violate equal protection, Texas could and

would direct its agencies and officers to cease enforcing a provision that is unconstitutional without risking federal funding that depends on compliance with ICWA.[4] *E.g.*, *New York v. United States*, 505 U.S. 144 (1992).

Second, and perhaps more fundamentally, the Tribes' argument ignores the fact that Texas state courts are bound by *this* Court's interpretation of federal law. *Penrod Drilling Corp.*, 868 S.W.2d at 296. And the Tribes cite nothing that requires an injury to be immediately redressable by a *lower* court's ruling to satisfy standing. Indeed, such a rule would preclude any claim that would ultimately result in a request to this Court to reconsider its prior rulings as the lower courts would presumptively be bound to the earlier decision. Since such cases do occasionally happen, *E.g.*, *Adarand Constructors, Inc.*, 515 U.S. at 231-32; *Khan v. State Oil Co.*, 93 F.3d 1358, 1362-63 (7th Cir. 1996), *vacated*, 533 U.S. 3 (1997),standing cannot assess redressability based solely on the impact of a trial.

Each of these points are already long settled. None merits this Court's review, which should be reserved for the complex constitutional questions that are irreparably unsettled within the Fifth Circuit.

II. This Court Should Grant Certiorari on the Merits Questions Addressed by the En Banc Fifth Circuit.

By contrast, the merits of this dispute *do* require this Court's attention—albeit not through the artificially narrow lens that the United States and Tribes seek to

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[4] The Tribes do not dispute that Texas courts are constitutionally and statutorily barred from considering race in child custody proceedings. *See, e.g.*, Tex. Fam. Code § 162.015(a), (b). As a result, the only reason why a state court would consider race is ICWA.

superimpose. Adopting their framing of the questions presented will not fully resolve the constitutional issues raised by the Fifth Circuit's opinion and will leave significant confusion over the legality of ICWA. Indeed, the framing proposed by the United States and Tribes would obscure resolution of these questions.

A. Adopting the United States' and Tribes' narrow questions presented will *create* vehicle problems.

For the reasons Texas and the Individual Plaintiffs have already explained, this Court should grant certiorari to review all—or at least substantially all—of the merits questions addressed by the en banc Fifth Circuit. The United States and Tribes would prefer that the Court narrow its review only to the precise issues on which they did not prevail: whether the en banc Fifth Circuit erred by finding that (1) some parts of sections 1912, 1915, and 1951 impermissibly commandeered state officials and agencies; and (2) the "third-ranked" placement preferences, sections 1915(a)(3) and (b)(iii), violate equal protection. *See* U.S. Pet. I; Tribes Pet. i-ii.[5]

Granting certiorari only on those limited questions would be an inefficient use of this Court's time and create vehicle problems of the sort that this Court typically tries to avoid. Under the circumscribed, self-serving review the United States and Tribes propose, questions that would determine ICWA's constitutionality in the Fifth Circuit would remain undecided and undecidable, failing to provide guidance for the courts for whom the en banc opinion provides neither precedent nor clarity. For example, reviewing only parts of sections, such as

[5] They also raise discrete standing questions, which are addressed *supra* pp. 8-11.

two placement preferences *within* the overall placement preferences section, will likely generate more questions about the constitutionality of the provisions for which this Court denies certiorari. A ruling finding section 1915(a)(3) unconstitutional, for example, may implicate the constitutionality of sections 1915(a)(1) and (2), as the Court will need to determine whether the Indian classifications in ICWA are subject to strict scrutiny as racial classifications or some less-demanding standard under *Morton v. Mancari*, 417 U.S. 535 (1974). There is no need for this Court to constrain its ability to address the decision below by granting certiorari on only the questions the United States and the Tribes would like to see reversed. The questions presented by Texas and the Individual Plaintiffs provide the Court the opportunity to resolve the larger constitutional issues raised by ICWA without engaging in a disfavored, piecemeal approach to merits review.

B. The en banc Fifth Circuit's opinion establishes erroneous precedent on key constitutional issues.

As described in the petitions filed by Texas and the Individual Plaintiffs, the en banc Fifth Circuit's constitutional holdings merit this Court's attention. The Fifth Circuit erred on the Commerce Clause and nondelegation questions, did not go far enough in its equal-protection analysis, and created a gap in anticommandeering jurisprudence through which Congress could easily commandeer state officials. The result is confusion on what, if anything, States must do to implement the remnants of ICWA, when a mistake by state officials or state courts could detrimentally affect child-custody proceedings. It is critical that this Court step in and provide clarity.

1. The Fifth Circuit erroneously found that Congress could rely on a "bundle" of powers to pass ICWA.

The question of whether Congress has Article I power to regulate state child-custody proceedings is important and merits this Court's review. Congress could point to no specific constitutional provision or treaty explicitly empowering it to intervene in state child-custody proceedings involving Indian children. *See Adoptive Couple*, 570 U.S. at 658 (Thomas, J., concurring). Instead, it relied on its non-textual "plenary power" over the Indian tribes and its "Power" "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. Const., art. I, § 8, cl. 3, as well as other inapplicable provisions, *see* Texas Pet. 12-16. Rather than relying on the text of any particular provision of Article I, a plurality recited a lengthy historical narrative and language from this Court suggesting that Congress has "plenary power over Indian affairs." Pet. App. 71a-105a (Dennis, J.). Instead of text within the U.S. Constitution, the en banc opinion's introduction claims that Congress's authority results from a "bundle of interrelated powers that functioned synergistically" to give Congress "supreme authority over Indian affairs." Pet. App. 26a (Dennis, J.).

This mode of analysis makes a mockery of the axiom that the federal government is one of enumerated powers. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 74 (1824). Any powers that were not specifically granted to it are reserved to the States. U.S. Const. amend. X. The Constitution admits of synergies no more than it does penumbras. These extraconstitutional constructs—essentially arguments that the Constitution does not contain a given provision, but that it really should be read to do so,

cannot create a new Article I power. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring) (commenting on "rights that some of [the judiciary] have found hiding in the Constitution's penumbras"); *see also Obergefell v. Hodges*, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting) ("the central point seems to be that there is a 'synergy between' the Equal Protection Clause and the Due Process Clause"). This approach is particularly troubling where, as here, the Fifth Circuit did not even attempt to articulate a limiting principle of when Congress may rely on a conglomeration of powers to create a new authority that it does not otherwise possess.

This Court has granted certiorari in cases presenting such core constitutional concerns without regard to whether the lower courts divided on that question. *E.g.*, *New York*, 505 U.S. 144. This Court should do so here to address this long-claimed but never-supported aggregation of power to Congress to reach into the heartland of a State's sovereign authority over domestic relations.

2. The Fifth Circuit misapplied the equal-protection doctrine.

A similar need to enforce constitutional limitations on federal power counsels in favor of review of the Fifth Circuit's decision to uphold a law that expressly discriminates based on race. An equally divided court affirmed the district court's ruling that sections 1915(a)(3) and (b)(iii) violate equal protection by instructing courts to elevate "other Indian families" and "Indian foster home[s]" over non-Indian potential adoptive and foster families. Pet. App. 277a-280a (Duncan, J.). But that ruling is too narrow and permits the broader constitutional injury to persist.

Under ordinary rules, ICWA must have a "legitimate, nonracially based goal." *Mancari*, 417 U.S. at 554. It does not. The goal of ICWA is, at bottom, to grow a specific race. *See* 25 U.S.C. § 1901(3) (finding that Indian children are a "resource" that is "vital to the continued existence and integrity of Indian tribes").[6]

This Court has occasionally held that current race-based efforts to remedy "entrenched racial discrimination" permit Congress to take "a drastic departure from basic principles of federalism." *Shelby County v. Holder*, 570 U.S. 529, 534-35 (2013). But even under the rare circumstances where that is permissible, a statute remains constitutional only so long as ICWA "continue[s] to satisfy constitutional requirements" today. *Id.* at 536.

Whatever may have been ICWA's intent forty years ago, it is not functioning today to maintain the integrity of tribes as independent political units. Instead, decisions about whether a child is a member of or eligible for membership in a tribe thrust tribal membership on children *in that proceeding* at the say-so of tribes—even if the child had no prior contact or involvement with the tribe, and even if the child desires no such contact or involvement. *See* Amicus Br. of Christian Alliance at 11 (describing forced placement with Indian tribe of child despite mother's intentional decision not to enroll child in her tribe). The tribe's membership decision is unassailable, and even when parents have avoided ties to Indian tribes, their children are forced into that system solely because of their race. *See id.*

Indeed, ICWA's preference for any Indian family over an unrelated non-Indian family, 25 U.S.C. § 1915(a),

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[6] Nor are children resources to be allocated under the Commerce Clause, whether to favored tribes or otherwise. *See* U.S. Const. amend. XIII.

shows a racial, not political, motive, as does the Final Rule's prohibition on consideration of factors such as the participation of the Indian child's parents in tribal activities and culture when deciding whether ICWA even applies. *See, e.g.*, 25 C.F.R. § 23.103(c). It is unclear why applying such strict measures that hinder a court's ability to consider the best interests of the child will redress the harm that Congress thought justified ICWA's passage. The United States and Tribes make no effort to disprove the common-sense conclusion that today, the high numbers of adoptions and fostering of Indian children are often a *sign*, not the *cause*, of the high risk of neglect, violence, gang activity, drug abuse, alcoholism, and suicide among Indian children. *See* Goldwater Amicus Br. 6-8. The Fifth Circuit's decision that this race-based classification is political misapplies this Court's equal-protection jurisprudence, Texas Pet. 19-24, and merits this Court's review.

3. The Fifth Circuit erred in allowing Congress to use state courts to commandeer state agencies and officials.

Similarly worthy of this Court's review is the Fifth Circuit's internally inconsistent view of when the federal government may and may not commandeer state officials. The en banc Fifth Circuit correctly held that ICWA's "active efforts" (§ 1912(d)), expert witness (§ 1912(e) and (f)), and recordkeeping requirements (§ 1915(e)), unconstitutionally commandeer state actors. Pet. App. 4a. The court was equally divided, and therefore affirmed, that ICWA's notice provision (§ 1912(a)) commandeered state agencies and officials, the record provision (§ 1951(a)) commandeered state courts, and the placement preferences (§1915(a)-(b)) commandeered state agencies and officials. Pet. App. 5a, 285a-297a

(Duncan, J.). But it incomprehensibly concluded that some of those same provisions—§§ 1912(e) and (f), 1915(a) and (b)—did *not* improperly commandeer state officials "to the extent they apply to state courts." Pet. App. 5a-6a. These rulings cannot be reconciled with each other, let alone with the basic constitutional principles they purport to apply. As Texas argued in its petition, the en banc Fifth Circuit's holding creates a significant loophole in anticommandeering doctrine. Texas Pet. 27-28.

Congress "may not conscript state governments as its agents." *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018) (quoting *New York*, 505 U.S. at 178). Nor may it "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). But those prohibitions are toothless if Congress may direct state courts to *require* state officials to "enforce [the] regulatory program." *Id.* This Court has approved congressional legislation providing States with a choice: regulate according to federal standards or allow their citizens to be subject to federal regulation. *Id.* at 174. In the latter case, "any burden caused by a State's refusal to regulate will fall on those" citizens who defy the regulation. *Id.* But here, whichever option the State chooses, the "burden" still falls on state officials, who must enforce a federal regulatory program through state child-custody proceedings.

In commandeering state officials, agencies, and courts, ICWA interferes not only with States' longstanding sovereign authority over domestic relations, but with their ability to protect the constitutional rights of their citizens. Texas has concluded that its historical

treatment of Indians and its Constitution prevent it from treating Indians differently than other Texans. Tex. Op. Att'y Gen. No. JM-17 at 9-10 (Mar. 22, 1983); *see also* Tex. Const. art. I, § 3a (prohibiting denying or abridging "[e]quality under the law . . . because of sex, race, color, creed, or national origin"). And in its Family Code, Texas forbids its courts from denying or delaying an adoption "on the basis of race or ethnicity of the child or the prospective adoptive parents." Tex. Fam. Code § 162.015(a). ICWA forces Texas to do just that, pressganging state officials into setting up and enforcing a distinct federal child-custody regime at odds with state law. *See id.* § 162.015(b) (making an exception for ICWA). ICWA's suppression of State sovereignty—and Texas's ability to treat its citizens constitutionally—is unjustifiable and unconstitutional.

4. The Fifth Circuit improperly allowed Indian tribes to set the content of federal law.

Finally, this Court should review the en banc court's rejection of Texas's nondelegation challenge. *See* 25 U.S.C. § 1915(c); *see also* 25 C.F.R. § 23.13. Article I, § 1 of the Constitution vests "[a]ll legislative Powers herein granted" to Congress and "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Thus "the lawmaking function belongs to Congress, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996) (citation omitted).

Yet that is precisely what happened here. Under section 1915(c), Indian tribes can set aside the placement preferences established by Congress in sections 1915(a) and (b). As this Court has recognized, the placement preferences are the "most important substantive

requirement imposed on state courts." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). In other words, Congress has empowered Indian tribes to re-write one of the most important provisions in ICWA.

The en banc Fifth Circuit held that Congress could extend its "constitutional legislative power" (but see *supra* pp. 14-15) to Indian tribes because they are sovereigns. Pet. App. 168a-172a. While the court cited cases holding that Indian tribes may be sovereigns on their reservations, or over their members, *id.*, ICWA also extends to children "eligible for membership" in a tribe, 25 U.S.C. § 1903(4), and impacts non-Indians who seek to adopt them. In state child-custody cases, Indian tribes are no more than private parties. And this Court has long held that Congress's transfer of substantive lawmaking authority to such unaccountable entities is the "most obnoxious form" of delegation. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

CONCLUSION

The Court should deny the United States' and Tribes' petitions on the questions of standing but should otherwise grant all petitions (including Texas's and the Individual Plaintiffs' petitions) on the constitutional questions presented.

Respectfully submitted.

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