No. 21-378

IN THE
Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, AND MORONGO BAND OF MISSION INDIANS

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QUESTIONS PRESENTED

In 1978, Congress enacted the Indian Child Welfare Act ("ICWA") to remedy the "alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children by nontribal public and private agencies." 25 U.S.C. §1901(4). ICWA—just the latest chapter in the federal government's centuries of efforts to protect Indian children—establishes standards for child-welfare proceedings involving an "Indian child," including placement preferences. ICWA ties its definition of "Indian child," and its placement preferences, to membership in federally recognized Tribes. Many families that are not racially Indian can receive ICWA's highest preference (because they are an Indian child's extended family), even as ICWA grants no preference to many racially Indian families (because they are not enrolled members). The questions presented are:

1. Whether Congress has Article I authority to enact ICWA's procedural and substantive standards.
2. Whether the ICWA provisions upheld below violate equal protection or instead validly classify based on tribal status under *Morton v. Mancari*, 417 U.S. 535 (1974).
3. Whether the ICWA provisions upheld below violate the anti-commandeering doctrine by preempting state-law standards in state courts.
4. Whether ICWA violates the nondelegation doctrine by giving effect to Indian Tribes' own placement preferences.

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INTRODUCTION

In 1978, after extensive hearings, Congress found that Tribes and their members faced a crisis: More than a quarter of Indian children found themselves sundered from their families and Tribes, often due to the ignorance and contempt of case workers who did not understand Tribes and believed their children should be raised elsewhere. In response, pursuant to its trust obligation to Indians and Tribes, Congress enacted the Indian Child Welfare Act ("ICWA").

ICWA is based on a simple idea: All else equal, children are better off when they can stay with their families and communities. By implementing that simple idea, ICWA aims to both "protect the best interests of Indian children" and to "promote the stability and security of Indian tribes and families." §1902.[1] And because it implements that idea, ICWA has become the "gold standard" for child-welfare practices generally—not just for Indians. Pet. App. 10a.

The *en banc* Fifth Circuit correctly rejected Texas's challenges. Its decision warrants no further review—and indeed, Texas does not even have standing to *raise* its arguments.

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[1] Unless otherwise specified, statutory citations are to Title 25 of the U.S. Code.

First, Texas avers that ICWA is beyond Congress's Article I powers, which it depicts as narrowly limited to "commerce" with "Indian Tribes." But as Texas admits, this Court's precedents "recognize … that Congress has 'plenary power' over 'Indian affairs.'" Pet. 11-12. That is why no appellate court has accepted Texas's argument. Its claim that the "Court's Indian-law decisions have been the subject of scholarly critique," Pet. 12, is not the stuff of certiorari.

Second, Texas makes inflammatory claims that ICWA constitutes "race discrimination" that racially classifies children and "prevent[s] the adoption of Indian children by non-Indians." Pet. 4, 22. But again, no appellate court has accepted Texas's argument that ICWA is facially invalid as race discrimination. That is because ICWA is tied to membership in Indian Tribes—which is about politics, not race. Indeed, many non-Indian families can receive ICWA's *highest* preference (whenever they are members of the child's "extended family," §1915(a)(1), as often occurs). And racially Indian families as such receive *zero* preference. Absent enrollment in a recognized Tribe, ICWA treats such families the same as the Brackeens, Librettis, and Cliffords. Indeed, the only tribal preference at issue here is for members of the child's *own Tribe* (because Texas prevailed below on its challenge to the tertiary preference for "other Indian families," §1915(a)(3)). That is not a racial preference.

Third, Texas claims that ICWA violates the anti-commandeering doctrine by altering procedural and substantive law in state courts. But again, no appellate court has agreed. And that is no surprise: Under the

Supremacy Clause, Congress may require state courts to apply federal-law standards in cases affecting private, state-created rights. Indeed, the *en banc* Fifth Circuit rejected the anti-commandeering arguments Texas presses here unanimously (or nearly so). The provisions that spurred division are those that the decisions below *invalidated* and that are the subject of the separate petitions by Respondents and the Solicitor General.

Last, Texas contends that ICWA violates the nondelegation doctrine by allowing Tribes to set the order of placement preferences for themselves. Indian Tribes, however, are sovereigns with independent sovereign power. The nondelegation doctrine does not prevent Congress from giving effect to the laws they enact—as *United States v. Mazurie*, 419 U.S. 544 (1975), holds. That is why, again, no appellate court agrees with Texas.

None of the questions presented is remotely certworthy, and Texas lacks standing to press them. The petition should be denied.

STATEMENT

A. Statutory Background.

1. Congress's Enactment Of ICWA.

Congress passed ICWA in 1978 in response to the "wholesale removal of Indian children" from their families and Tribes based on "abusive child welfare practices." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). After lengthy hearings, Congress determined that up to a *third* of Indian children were removed by decisionmakers who were either "ignorant of [Indian] cultural values" or actively "contemptful of

the Indian way." *Id.* at 34-35. Due process violations were "commonplace," and Congress found that many of the removals that resulted were "wholly inappropriate." *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 18 (1974) (statement of William Byler).

Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." §1902. ICWA advances these dual purposes by setting procedural and substantive standards for state-court child-welfare proceedings.

ICWA's procedural protections include rights to intervene, §1911(c), have the assistance of counsel, §1912(b), and examine documents, §1912(c). In voluntary proceedings, ICWA also requires that Indian parents or custodians receive an explanation of rights, §1913(a); allows them to withdraw consent before a final decree, §1913(c); and specifies that, if consent "was obtained through fraud or duress," the parent or custodian may move to set aside a decree within two years, §1913(d).

Substantively, ICWA "establish[es] minimum Federal standards for the removal of Indian children." §1902. No foster-care placement or termination of parental rights, for example, "may be ordered in such proceeding in the absence of" an adequate showing that "continued custody … is likely to result in serious emotional or physical damage to the child." §1912(e), (f).

ICWA also sets placement preferences. For adoptions, ICWA grants a preference to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." §1915(a). ICWA defines "extended family" to include aunts, cousins, nephews, grandparents, in-laws, and stepparents (whether or not tribal members or racially Indian). §1903(2). For foster-care and preadoptive placements, ICWA again grants its highest preference to "a member of the Indian child's extended family," followed by "a foster home licensed, approved, or specified by the Indian child's tribe," "an Indian foster home licensed or approved by an authorized non-Indian licensing authority," and an "institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." §1915(b).

Courts may depart from the preferences for "good cause." §1915(a)-(b). ICWA also allows Tribes to change the preferences. §1915(c).

ICWA pegs its applicability to membership in federally recognized Tribes. An "Indian" is "any person who is a member of an Indian tribe." §1903(3). An "Indian child" is anyone under 18 who is either "a member of an Indian tribe" or both "eligible for membership in an Indian tribe" and "the biological child of a member." §1903(4).

2. ICWA's Success.

ICWA has become the "gold standard for child welfare," Pet. App. 10a, and many States have "directly incorporated ICWA's provisions into state law." Br. for

California et al. as Amici Curiae Supporting Petitioners at 8, *Haaland v. Brackeen*, Nos. 21-376 & 21-377. Today, Indian children have the highest rate of kinship placements for foster care, the lowest rate of institutional placements, and one of the lowest rates of aging out of foster care without adoption. Casey Family Programs 5th Cir. Br. 21-22.

Meanwhile, ICWA provides a buffer against dysfunctional state child-welfare systems. In Texas, courts have found that the foster-care system is "broken" and lamented that "children … almost uniformly leave State custody more damaged than when they entered." *M.D. v. Abbott*, 152 F. Supp. 3d 684, 828 (S.D. Tex. 2015), *aff'd in part, rev'd in part and remanded sub nom. M. D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237 (5th Cir. 2018). Texas courts thus placed the system under conservatorship—yet two years later, "the Texas child welfare system continue[d] to expose children … to an unreasonable risk of serious harm." First Court Monitors' Report 2020 at 11, *M.D. ex rel. Stukenberg v. Abbott*, No. 2:11-cv-84 (S.D. Tex. June 16, 2020), ECF No. 869.

3. The 2016 Final Rule.

In 2016, Interior promulgated implementing regulations. Interior found that, despite ICWA's successes, its "implementation and interpretation … has been inconsistent." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,779 (June 14, 2016). Interior promulgated a Final Rule to "clarify" aspects of ICWA. 25 C.F.R. §23.101.

B. Factual And Procedural Background.

1. This Suit.

This petition arises from attempts by Texas and several individuals to bypass the state courts that adjudicate ICWA issues and shop for a federal forum they deemed more favorable. Chad and Jennifer Brackeen, a Texas couple, fostered and sought to adopt A.L.M., an Indian child, in Texas state court. Pet. App. 48a. On October 25, 2017, two days before state court records memorialized that all barriers to A.L.M.'s adoption had been lifted, the Brackeens filed a sweeping federal lawsuit seeking to declare ICWA unconstitutional (and to invalidate the 2016 Final Rule) top to bottom—even parts of the statute that never applied to them. Texas and two other States joined. Respondents' Br. in Opp. 8 & n.3 *Brackeen v. Haaland*, No. 21-380 ("*Brackeen* Opp.").

By the time the plaintiffs filed their operative complaint—the second amended complaint—the Brackeens had finalized A.L.M.'s adoption. Pet. App. 49a. Two other couples were then recruited as plaintiffs. Their state-court child-welfare proceedings, however, have also concluded. *Brackeen* Opp. 8-9.

2. Decisions Below.

The district court invalidated nearly all of ICWA. Pet. App. 468a-528a. A panel, however, reversed in full. Pet. App. 400a-467a. The panel was unanimous on nearly all points, except that Chief Judge Owen would have invalidated three provisions on anti-commandeering grounds. Pet. App. 459a-464a.

En banc, the Fifth Circuit again upheld virtually all of ICWA and rejected virtually all of Petitioners' arguments, often unanimously.

Standing. The majority reached the merits of Petitioners' challenges over Judge Costa's dissent; he would have held that Article III standing was absent at least as to the equal-protection claims. The majority's "argument for redressability," Judge Costa explained, was that "the family court judge[s]" adjudicating the individual plaintiffs' custody proceedings "may, or even say[] [they] will, follow our constitutional ruling." Pet. App. 373a. But "[t]here is a term for a judicial decision that does nothing more than opine on what the law should be," in the hope others will follow it: "an advisory opinion." Pet. App. 372a.

Article I. The Fifth Circuit recognized, as this Court has held, that Congress has "plenary power … to deal with the special problems of Indians." Pet. App. 73a (quoting *Mancari*, 417 U.S. at 551-52). The court carefully analyzed whether ICWA falls within Congress's power and concluded it did. Pet. App. 67a-105a.

Judge Duncan would have found an Article I violation under the theory that Congress's Indian-affairs power does not permit "regulat[ing] a state sovereign function like child-custody proceedings." Pet. App. 243a.

Equal Protection. Classifications based on tribal status draw political classifications and "will not be disturbed" "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Pet. App. 143a (Dennis,

J.) (quoting *Mancari*, 417 U.S. at 555). The *en banc* majority applied this settled rule and upheld ICWA's "Indian child" definition, its first two adoptive placement preferences, and three of its four foster-care and preadoptive placement preferences. Pet. App. 154a-57a.

Judge Duncan dissented and would have invalidated ICWA's "Indian child" definition and all of its placement preferences on equal-protection grounds. He did not, however, conclude that ICWA is race-based. Pet. App. 268a-70a. He applied rational-basis review and concluded that ICWA's classifications do not satisfy that standard. Pet. App. 270a-80a.

The court equally divided as to ICWA's adoptive preference for "other Indian families" and its foster-care and preadoptive preference for "an Indian foster home." §1915(a)(3), (b)(iii); *see* Pet. App. 4a. The district court's judgment invalidating the provisions was thus affirmed. Pet. App. 4a. Because Texas prevailed below as to those provisions, they are not relevant here.

Anti-Commandeering. The *en banc* court unanimously rejected most of Texas's anti-commandeering arguments.

All sixteen judges agreed that there was no anti-commandeering problem with most of ICWA's provisions—including the Tribes' right to intervene; the Indian family's right to appointed counsel; the parties' rights to examine documents; the family's rights to have consent explained, withdraw consent, or seek invalidation; the family's right to seek return of custody after a foster placement terminates; and the child's right

to obtain tribal information. §§1911(c), 1912(b),[2] 1912(c), 1913(a), 1913(b)-(d), 1916, 1917. All sixteen judges also agreed that ICWA's provisions requiring the testimony of "qualified expert witnesses" in foster-care and termination proceedings, §1912(e)-(f), and its placement preferences, §1915(a)-(b), are constitutional insofar as applicable to state courts. These provisions, the Fifth Circuit unanimously held, simply provide rules of decision for state courts and validly preempt state law. Pet. App. 111a (Dennis, J.); *id.* 312a-13a (Duncan, J.).

The Fifth Circuit's more divided conclusions—concerning the placement preferences and qualified-expert-witness requirements (as supposedly applied to "state agencies"), active-efforts requirements, and three notice and record-keeping provisions—are not at issue here because Texas prevailed below. Pet. App. 4a-5a. They are the subject of separate petitions filed by Respondents and the Solicitor General.

Nondelegation. The *en banc* court also rejected Petitioner's narrow non-delegation challenge to §1915(c), which permits Tribes to establish their own preferences. Pet. App. 6a.

This petition followed. The individual plaintiffs also petitioned. *Brackeen v. Haaland*, No. 21-380.

REASONS FOR DENYING THE PETITION

The Fifth Circuit's application of settled law implicates no split or division of authority. In fact, *no*

[2] Judge Jones did not join the portion of the opinion upholding §1912(b). Pet. App. 306a n.124.

Fifth Circuit judge below endorsed most of the arguments Texas presses here—which, indeed, the Court cannot even *reach* given the absence of Article III jurisdiction. The Court should deny review.

I. Texas's Article I Arguments Do Not Warrant Review.

The Fifth Circuit properly rejected the argument that ICWA exceeds Congress's Article I powers. That holding presents no certworthy issue.

A. The Fifth Circuit's Application Of Settled Law Implicates No Conflict.

1. Texas would narrowly limit Congress's Indian-affairs power to regulating "commerce"—by which it means something like "trade"—with "Indian tribes" and to exclude non-commercial matters involving individual Indians. Pet. 13-14. But for hundreds of years and without exception, this Court has held that Congress has "plenary power … to deal with the special problems of Indians," "drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *see, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive." (quotation marks omitted)); *United States v. McGowan*, 302 U.S. 535, 539 (1938) ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States.").[3] The

[3] *See also, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011);

decision below properly followed this settled law to reject Texas's arguments.

2. With Texas's arguments so squarely foreclosed, it is no surprise that Texas identifies no split. The courts to have considered similar arguments have rejected them. *E.g.*, *In re Beach*, 246 P.3d 845, 849 (Wash. Ct. App. 2011); *In re Welfare of Child of S.B.*, No. A19-0225, 2019 WL 6698079, at *5 (Minn. App. Ct. Dec. 9, 2019); *In re N.B.*, 199 P.3d 16, 23 (Colo. App. 2007); *In re A.B.*, 663 N.W.2d 625, 636-37 (N.D. 2003). Indeed, Texas does not cite *any* split on *any* issue concerning *any* aspect of Congress's Indian-affairs power. In the only appellate cases Texas cites, courts rejected Article I challenges and held that Congress may authorize the Department of the Interior to take land into trust for Indians. *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1152-53 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2792 (2021); *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 567-68 (2d Cir. 2016), *cert. denied*, 140 S. Ct. 2587 (2017).

3. Texas asserts that review is necessary to remedy "confusion," to avoid "absurd possibilities," or to ensure that Congress's powers remain limited to those enumerated in Article I. Pet. 13, 17-18 (quotation marks omitted). Rhetoric, however, is no match for reality. If confusion reigned or absurdities resulted, Texas would be able to cite *cases* reaching conflicting or absurd

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United States v. Wheeler, 435 U.S. 313, 319 (1978); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *United States v. Kagama*, 118 U.S. 375, 384-85 (1886); *accord Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

conclusions. But it has not. And if this Court's precedents allowed Congress to legislate beyond its enumerated powers, Pet. 14, Texas would cite *examples* of such laws.

Texas also ignores the myriad other limits on Congress's Indian-affairs powers, which courts enforce. This Court, for example, has invalidated Indian-affairs legislation that violated state sovereign immunity, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996), and has required just compensation when such legislation effected a taking, *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935). Indeed, below some of the same judges who rejected Texas's broad Article I arguments accepted its narrower anti-commandeering arguments. Although Respondents of course disagree with how some judges below interpreted and applied the Court's anti-commandeering precedents, Fifth Circuit law certainly does not hold that Congress may "directly regulate States in the exercise of state functions so long as an Indian child is involved." Pet. 17.

B. The Decision Below Is Correct.

The Fifth Circuit's decision rejecting Texas's Article I arguments is not just uncertworthy but clearly correct. Texas's contrary arguments lack merit.

1. First, Texas contends that Congress's authority under the Indian Commerce Clause stretches no farther than its authority over "commerce" under the Interstate Commerce Clause. Pet. 13-14. The Fifth Circuit unanimously rejected this argument, with Judge Duncan agreeing that "Congress has ample power to legislate respecting Indians, and also that the Supreme Court has

described that power in broad terms that go beyond trade." Pet. App. 224a. The Fifth Circuit was unanimous for good reason: This Court has squarely rejected Texas's argument. It is "well established," this Court has explained, "that the Interstate Commerce and Indian Commerce Clauses have very different applications"—and that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *accord*, *e.g.*, *Lara*, 541 U.S. at 200; *Seminole Tribe*, 517 U.S. at 62.

Indeed, Texas fails to grapple with the consequences of accepting its unprecedented position. In reliance on this Court's settled law, Congress has repeatedly enacted—and this Court has repeatedly endorsed—laws concerning Indians that do not fit within Texas's cramped view. That includes, as Judge Duncan observed, "[l]ongstanding … federal legislation … in … fields like criminal law, education, probate, health care, and housing assistance." Pet. App. 225a-26a (footnotes omitted); *e.g.*, 18 U.S.C. §1153; 25 U.S.C. §§1601, 2000, 2205, 4101-4243. Like the argument rejected in *Mancari*, Texas's argument here would invalidate whole swaths of federal legislation addressing Indians and Tribes. 417 U.S. at 553.

2. Texas feigns confusion over how the Treaty Clause—which this Court and the Fifth Circuit have also cited, *Lara*, 541 U.S. at 200; Pet. App. 223a-24a—supports Congress's Indian-affairs powers. Pet. 15-16. But there is no mystery. The United States "exercised [its] war and treaty powers" to "overc[o]me the Indians

and [take] possession of their lands … leaving them ... dependent." *Mancari*, 417 U.S. at 552; Pet. App. 76a. Then, it entered "countless" treaties that promised "to protect[] the tribes," Pet. App. 29a-30a, and undertook to "act[] as [tribes'] guardian and trustee," *Solem v. Bartlett*, 465 U.S. 463, 473 (1984); *see United States v. Kagama*, 118 U.S. 375, 384 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). The United States had authority to make those promises—and it has power to keep them too. *Kagama*, 118 U.S. at 384; *Worcester*, 31 U.S. (6 Pet.) at 551, 555, 561.[4]

3. Finally, Texas contends that Congress cannot act "where traditional state interests are implicated." Pet. 14. But to begin, this Court has rejected the argument that Article I contains some nontextual limit preventing Congress from legislating in some ill-defined sphere of "traditional governmental functions." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985). And certainly, *Indian children* have never been an exclusive state sphere. The federal government has long legislated for Indian children (as, of course, have Tribes). Pet. App. 34a-39a; *see Brackeen* Opp. 27 (citing promises made to Tribes regarding their children, including to Respondents).

Nor, contra Petitioners, is ICWA unprecedented in regulating family-law proceedings in state courts.

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[4] This Court has rejected Texas's arguments regarding *Missouri v. Holland*, 252 U.S. 416 (1920). *E.g.*, *Lara*, 541 U.S. at 201. Regardless, again, this case does not raise the question of whether "a treaty could overcome a Tenth Amendment objection" or other constitutional limit, Pet. 15 & n.3: The Fifth Circuit *invalidated* aspects of ICWA on Tenth Amendment grounds. *Supra* 9-10.

Congress has enacted such statutes time and again. It has done so generally—for example, regulating division of assets following the divorces of service members, *McCarty v. McCarty*, 453 U.S. 210, 235-36 (1981), and railroad workers, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979); *accord* International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988). And Congress has done so for Indians specifically, like when it has set probate rules in state courts. *E.g.*, §375.[5]

4. Respondents recognize that one Justice has offered a more limited interpretation of Congress's power. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658-66 (2013) (Thomas, J., concurring). But respectfully, that understanding conflicts with this Court's cases—and indeed, later work has identified errors in the scholarship on which that opinion relied. Ablavsky 5th Cir. Amicus Br. at 12-15.

II. Texas's Equal-Protection Arguments Do Not Warrant Review.

The Fifth Circuit rejected Texas's arguments that ICWA "racially discriminate[s]" in violation of equal protection, Pet. 22, in a decision implicating neither disagreement nor error.

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[5] Texas mischaracterizes *Lara* as implying that Congress's plenary power is limited "where traditional state interests are implicated." Pet. 14. *Lara*, however, merely noted that a "change[] in *tribal status*" that "interfere[d] with the power or authority of [a] State" was not before the Court. 541 U.S. at 205 (emphasis added). Moreover, ICWA is also authorized under Congress's Spending Clause powers, rendering it constitutional even under Texas's Article I theory. Pet. App. 69a-70a n.20.

A. The Fifth Circuit's Application Of Settled Law Implicates No Conflict.

1. The decision below applied a simple, settled rule to reject Texas's claims of "race discrimination": When Congress classifies based on tribal status, it draws a political—not racial—classification. Hence, such classifications are permissible if they satisfy the usual rational-basis test: "the special treatment [must] be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 554-55; *see, e.g.*, *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979). Indeed, "classifications expressly singling out Indian tribes … are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians." *United States v. Antelope*, 430 U.S. 641, 645 (1977). If such laws "were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Mancari*, 417 U.S. at 553.

The Fifth Circuit properly held that both of ICWA's key classifications—the "Indian child" definition and the placement preferences—classify based on tribal status. The "Indian child" definition reaches only children who (a) are tribal members or (b) are "eligible for membership in an Indian tribe and [are] the biological child[ren] of a member." §1903(4). Both prongs classify based on tribal membership. And both "operate[] to exclude many individuals who are racially to be classified as 'Indians,'" *Mancari*, 417 U.S. at 553 n.24,

while simultaneously encompassing some children who are *not* racially Indian, such as Cherokee Freedmen.[6] Hence, children "[a]re not subjected to [ICWA] because they are of the Indian race but because" of tribal membership. *Antelope*, 430 U.S. at 646.

The Fifth Circuit correctly reached the same result as to ICWA's placement preferences. The first adoptive preference, for members of the Indian child's extended family, §1915(a)(1), reaches *any* such family member regardless of race. *E.g.*, *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 622 (Ct. App. 2016). And the second preference, for members of a child's Tribe, §1915(a)(2), is directly tied to membership.[7] The Fifth Circuit properly concluded that these preferences—the only adoptive preferences at issue here, *supra* 8-9—rationally further Congress's twin goals of "protect[ing] the best interests of Indian children" and "promot[ing] the stability and security of Indian tribes." §1902. Texas never argues otherwise. *Cf.* Pet. 24. (As Judge Haynes observed, these preferences would survive even strict scrutiny. Pet. App. 363a.)

2. Texas's petition implicates no split or conflict. For 40 years, state courts have applied *Mancari* to reject similar facial challenges.[8] And as Texas concedes, no

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[6] *See* Press Release, U.S. Dep't of Interior, *Secretary Haaland Approves New Constitution for Cherokee Nation, Guaranteeing Full Citizenship Rights for Cherokee Freedmen* (May 12, 2021), https://on.doi.gov/3rH659e.

[7] The same is true of ICWA's foster-care and preadoptive placement preferences, which Texas barely mentions.

[8] *E.g.*, *In re Welfare of Child of S.B.*, 2019 WL 6698079, at *4-5; *In re Termination of Parental Rights of K.M.O.*, 280 P.3d 1203, 1214-

Fifth Circuit judge endorsed its argument that ICWA draws race-based classifications triggering strict scrutiny. Pet. 24 n.5; *see* Pet. App. 278a-79a.

Texas fails with its half-hearted effort to show a split. First, Texas cites *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 154 F.3d 1117 (9th Cir. 1998). *Dawavendewa*, however, was a *Title VII* case that did not address when a classification is racial. *Id.* at 1119-20. Next, Texas cites *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997). But *Williams* merely posited, in interpreting "the Reindeer Act of 1937," that statutes unrelated to "uniquely Indian interests"—like "giv[ing] Indians a complete monopoly on … Space Shuttle contracts"—"would not pass *Mancari*'s rational-relation test." *Id.* at 665. *Williams* does not address when a classification is racial or cast doubt on ICWA's constitutionality. Whether Indian children will remain with their families and Tribes is a "uniquely Indian interest[]," *id.*, of the highest order, and one that Congress deemed "vital to the continued existence and integrity of Indian tribes," §1901(3).

Last, Texas cites cases applying the "existing Indian family" doctrine. Pet. 23. This doctrine (where

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15 (Wyo. 2012); *In re Phoenix L.*, 708 N.W.2d 786, 795-98 (Neb. 2006), *disapproved of on other grounds by In re Destiny A.*, 742 N.W.2d 758 (Neb. 2007); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 326 (N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Marcus S.*, 638 A.2d 1158, 1158-59 (Me. 1994); *In re Armell*, 550 N.E.2d 1060, 1067-68 (Ill. App. Ct. 1990); *In re Application of Angus*, 655 P.2d 208, 212 (Or. Ct. App. 1982); *In re Appeal in Pima Cnty. Juv. Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980).

recognized) posits only that ICWA should not apply "to situations in which a child is not being removed from an existing Indian family." *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715 (Ct. App. 2001); *cf. Brackeen* Opp. 15 & n.7 (citing cases rejecting that doctrine). The doctrine is irrelevant to Texas's facial challenge. Indeed, even in petitions concerning that doctrine, this Court has repeatedly denied review.[9]

3. Texas's cursory assertion of conflict with *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), likewise fails. Pet. 24. *Adoptive Couple* merely suggests that certain ICWA interpretations could "raise equal protection concerns," 570 U.S. at 656, not that ICWA is facially suspect. Nor, even, does this case present any of the questions that *Adoptive Couple* suggested might raise an as-applied concern.

B. The Decision Below Is Correct.

Texas fails to show error in the Fifth Circuit's application of settled law.

1. Texas begins by characterizing *Mancari* as limited to its facts and avers that the Fifth Circuit erred in deeming "all Indian classifications … political." Pet. 20-21. That claim, however, mangles both the decision below and this Court's cases. The Fifth Circuit held that ICWA's classifications are political because they are tied to tribal status. It did not hold or suggest that it would reach the same result as to any classification relating in

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[9] *E.g.*, *R.P. v. L.A. Cnty. Dep't of Children & Family Servs.*, 137 S. Ct. 713 (2017); *Hoots ex rel. A.B. v. K.B.*, 541 U.S. 972 (2004); *Dry Creek Rancheria v. Bridget & Lucy R.*, 520 U.S. 1181 (1997).

any way whatsoever to Indians. Pet. App. 149a-52a; *cf.*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205, 207–08, 213 (1995) (plurality op.) (applying strict scrutiny to preference for "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities").

Nor is there anything to Texas's argument that *Mancari* is narrowly limited to classifications that promote "Indian self-government" or are restricted "to positions within the [Bureau of Indian Affairs]." Pet. 20-21. To begin, ICWA *does* directly advance tribal self-government—by helping Indian Tribes protect themselves against the existential threat they face from unwarranted removals of Indian children from families and communities.[10] More important, this Court has rejected exactly the limits Texas invents. *Antelope* acknowledged that some of this Court's cases had "involved preferences or disabilities directly promoting Indian interests in self-government." 430 U.S. at 646. But *Antelope* explained that this Court's cases "point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications." *Id.* And based on that broad principle, *Antelope* upheld a law that dealt "*not* with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests." *Id.* (emphasis added).

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[10] Pet. App. 144a-46a; *Brackeen* Opp. 4-5; *accord Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 385, 390-91 (1976) (per curiam).

Nor does *Antelope* stand alone. Other decisions have readily applied *Mancari* beyond Texas's invented limits.[11] For good reason: The questions Texas would ask (whether a classification promotes, for example, Indian self-government) have nothing to do with the question the equal-protection clause asks (whether the classification is racial or political).

2. *Rice v. Cayetano*, 528 U.S. 495 (2000)—on which Texas relies heavily, Pet. 19, 21—imposed no limit on *Mancari* relevant here. *Rice* was a 15th-Amendment challenge to a state classification that was expressly racial and singled out individuals "solely because of their ancestry or ethnic characteristics." 528 U.S. at 515 (citation omitted). As Texas concedes, *Rice* held only that States may not "*by racial classification* … fence out whole classes of its citizens from decisionmaking in critical state affairs" governed by the 15th Amendment. Pet. 21 (emphasis added) (quoting *Rice*, 528 U.S. at 522). As just explained, ICWA does not classify by race. Nor does it implicate the 15th Amendment or "fence out" non-Indians "from decisionmaking." It is a federal statute that directly advances the federal government's trust obligation to Indians and Tribes.

Rice certainly does not create threshold inquiry into whether a classification affects "an internal affair or a

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[11] *E.g.*, *Yakima Nation*, 439 U.S. at 500-02 (state regulation of criminal conduct within Indian country); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 466, 479-80 & n.16 (1976) (preemption of state taxes of on-reservation sales by tribal members); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20, 668-89 (1979) (off-reservation fishing rights).

state affair," as Texas suggests. Pet. 22. Such an inquiry would make no sense—because, again, it is irrelevant to the question *Mancari* asks (whether a classification is political or racial). Nor is there anything *unusual* about federal Indian legislation impacting state affairs, so that such classifications are somehow suspect. Federal Indian legislation routinely impacts state affairs—as when Congress creates reservations (where state laws have limited application), *United States v. John*, 437 U.S. 634, 646-49, 652-53 (1978), or reserves other tribal rights and "exempt[s] them from … state laws," *Winters v. United States*, 207 U.S. 564, 577 (1908); *see, e.g.*, *Arizona v. California*, 373 U.S. 546, 596-98 (1963). And again, *Indian children* are certainly not purely a "state affair."

3. Texas also cites *Rice* for the proposition that, to avoid strict scrutiny, a statute must be "nonracial in purpose and operation." Pet. 19 (quoting *Rice*, 528 U.S. at 516). As courts have repeatedly held, however, ICWA is just that: It employs nonracial classifications, *supra* 17-18, to further nonracial goals: to "protect the best interests of Indian children" and "promote the stability and security of Indian tribes," §1902. Texas's scattershot attempts to show otherwise, Pet. 19-24, lack merit.

First, when Texas claims that ICWA classifies by race by "discourag[ing] the adoption of Indian children by non-Indians," Pet. 20, Texas badly misstates how ICWA works. On the one side, ICWA gives many non-Indian families its *highest* preference (whenever they are members of a child's extended family). On the other, ICWA treats all other non-tribal members the same regardless of race—because ICWA turns on tribal

membership, not race. True, by granting a preference to members of a child's extended family and Tribe, ICWA in some sense disfavors others. But not *based on race*.

Second, Texas tortures two snippets of legislative history to try to show that ICWA has race-based goals. Neither attempt succeeds. The House Report refers to "white, middle-class standard[s]," H.R. Rep. No. 95-1386, at 24 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7546; *see* Pet. 20, because state courts were applying racist standards to effect "often unwarranted" removals of Indian children from their families, §1901(4). *Preventing* the application of racist standards, as ICWA does, is not a racial goal. Then, when the same report references "blood relationship" as "the touchstone" of rights "to share in the cultural and property benefits of an Indian tribe," H.R. Rep. No. 95-1386 at 20, 1978 U.S.C.C.A.N. at 7543; *see* Pet. 19, it merely recognizes that descent is an important part of many Tribes' citizenship laws. That is hardly unusual: Many countries' citizenship laws consider whether someone is a citizen's biological child. 8 U.S.C. §1401(c)-(e), (g)-(h); *see* Pet. App. 150a n.51 (Dennis, J.). ICWA does not become racial legislation simply because some Tribes—separate sovereigns with their own citizenship laws—consider descent.

Last, Texas's argument based on the Final Rule, Pet. 23, shows how badly Texas must strain to turn ICWA into racial legislation. The Final Rule rejected state decisions applying the existing Indian family doctrine. 25 C.F.R. §23.103(c). That provision, in Texas's telling, means that ICWA "treat[s] Indian children based on ancestry: a forbidden racial classification." Pet. 23. To

state this argument, however, is to refute it. Nothing the *Department of the Interior* said in *2016* could show that *Congress* in *1978* had a race-based purpose. Nor, anyway, does this provision reflect anything besides Interior's good-faith view that courts applying ICWA should stick to the criteria set forth in ICWA's text and not add extra-statutory criteria. Advocating fidelity to the text, *see* 25 C.F.R. §23.103(c), does not render the Final Rule a racial classification.

III. Texas's Anti-Commandeering Arguments Do Not Warrant Review.

Texas's anti-commandeering arguments are similarly unworthy of review. ICWA "establish[es] … minimum Federal standards" governing child-welfare proceedings involving Indian children. §1902. The Fifth Circuit *unanimously* rejected Texas's theory that the procedural and substantive protections at issue here impermissibly "dragoon" state courts. Pet. 25-26. That decision implicates no split and is clearly correct.

1. When ICWA establishes federal standards that preempt conflicting state-law standards, it does the one thing that Congress can *most obviously* do without violating the anti-commandeering doctrine. True, "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them." *New York v. United States*, 505 U.S. 144, 178-79 (1992). But "this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *Id.* This Court has repeatedly held that such bread-and-butter preemption poses no Tenth Amendment problem. *Murphy v.*

NCAA, 138 S. Ct. 1461, 1479 (2018); *Printz v. United States*, 521 U.S. 898, 907 (1997).

2. Texas, unsurprisingly, cites no conflict on this settled point. Indeed, even the Fifth Circuit judges who agreed that ICWA impermissibly commandeers state executive agencies in certain respects rejected the sweeping theory Texas presses here. *Supra* 9-10. In fact, Texas cites no appellate decision under *any statute* holding that Congress violates the anti-commandeering doctrine by "requiring state courts to apply federal standards to state-created causes of action." Pet. 9. That is not because the issue is novel. For hundreds of years, Congress has enacted federal standards that preempt state law in state courts, including in family law and under state-law causes of action. And for just as long, as Judge Duncan explained, this "Court has ruled that federal standards may supersede state standards even in realms of traditional state authority such as family and community property law." Pet. App. 312a (Duncan, J.); *see also id.* 305a-07a; *Boggs v. Boggs*, 520 U.S. 833, 845 (1997); *McCarty*, 453 U.S. at 232.

3. For much the same reasons, Texas's uncertworthy arguments comprehensively fail on the merits.

Principally, Texas mischaracterizes what the relevant ICWA provisions do. It depicts ICWA as enacting standalone requirements that "state employee[s] … execute a specific and extensive list of congressional commands" and then compelling "state courts to enforce state actors' compliance." Pet. 25-26. The reality, however, is different. ICWA merely provides that if any party—private or state—desires relief governed by ICWA, then it must follow ICWA's

procedural rules and "satisfy[] the federal burdens of proof." Pet. 26; *see, e.g.*, §1915(a), (e)-(f); *accord* Pet. 24, *Cherokee Nation v. Brackeen*, No. 21-377 ("*Cherokee Nation* Pet."). If a private party seeks a foster-care placement, for example, it must satisfy ICWA's requirement that "[n]o foster care placement may be ordered" absent clear and convincing evidence. §1912(e). And if Texas seeks the same relief, it must do the same. Congress does not *commandeer* Texas by setting federal rules that all parties seeking relief must satisfy. *Cf. New York*, 505 U.S. at 166 (Congress may "hold out incentives to the States as a method of influencing a State's policy choices").[12]

This same point answers most of Texas's remaining arguments. First, Texas complains that ICWA "puts [it] in a no-win situation" by requiring it to either "acquiesce to ICWA's commandeering of its courts or leave children in" existing homes. Pet. 27. But that's just a rhetoric-heavy way of saying that if Texas wants relief governed by federal law, then it—like all parties—must satisfy the standards federal law sets.[13]

Second, Texas avers that ICWA's standards are "more burdensome than the background checks found to

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[12] Texas avers that it must "seek[] out placements that comply with ICWA." Pet. 26. The Solicitor General, however, has explained that the Department of the Interior interprets *Adoptive Couple* to hold that the preferences "cannot be read to require a state agency (or other party) to make efforts to search for [an] 'alternative'" placement. Pet. 20 n.2, *Haaland v. Brackeen*, No. 21-376.

[13] Hence, even if ICWA directly regulated States, it would not constitute impermissible commandeering because it regulates

be unconstitutional commandeering in *Printz*." Pet. 26. *Printz*, however, turned not on the *degree* of burden but on *how* the law imposed it: by "conscripting the State's [executive] officers directly." 521 U.S. at 935. And *Printz* emphasized that state courts were "viewed distinctively in this regard," because "unlike … legislatures and executives, they applied the law of other sovereigns all the time." *Id.* at 907. This is not a "loophole in the anticommandeering doctrine." Pet. 27. It stems from the bedrock principle "that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause" and its directive that "'the Judges in every State shall be bound [by federal law].'" *Printz*, 521 U.S. at 928-29 (alteration in original).

Texas also vaguely asserts that ICWA's standards do not constitute "permissible preemption when applied to state courts." Pet. 27. ICWA, however, readily meets this Court's standard for valid preemption. Congress validly preempts state law, and does not commandeer, when it "imposes restrictions or confers rights on private actors." *Murphy*, 138 S. Ct. at 1480. That is just what ICWA does: It confers procedural and substantive rights on Indian children, Indian families, and Indian Tribes. Indian families and Tribes have (for example) rights to intervene, to receive court-appointed counsel,

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evenhandedly. *Murphy*, 138 S. Ct. at 1478; *see Cherokee Nation* Pet. 23-24.

and to remain with their children unless ICWA's substantive standards are met.[14]

IV. Texas's Nondelegation Arguments Do Not Warrant Review.

ICWA allows Tribes to "establish a different order of preference by resolution" and requires state courts to apply those preferences. §1915(c); *see* 25 C.F.R. §23.130. The Fifth Circuit correctly applied this Court's settled law to reject Texas's nondelegation challenge and hold that §1915(c) "validly integrates tribal sovereigns' decision-making into federal law, … whether it is characterized as a prospective incorporation of tribal law or an express delegation by Congress under its Indian affairs authority." Pet. App. 179a. Texas's contrary arguments warrant no further review.

1. Texas does not even try to show that this narrow nondelegation challenge is certworthy. It is not. No appellate court, anywhere, disagrees with the Fifth Circuit's holding that §1915(c) is valid. Nor, even, does Texas show that this issue is important in practice. Indeed, only about 6% of ICWA cases reported over five years (2015-2019) involved *any* of §1915's preferences,[15] much less tribal preferences under §1915(c). The Court should follow its normal practice and deny review.

2. The decision below is also clearly correct, as two of this Court's cases establish. First, in *United States v.*

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[14] §§1911(c), 1912(b), 1912(c), 1913(a), 1913(b)-(d), 1914, 1916, 1917, 1912(e)-(f) (as applied to state courts); 1915(a)-(b) (same).

[15] Kathryn E. Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 8 Am. Ind. L.J. 105, 116 (2020).

Mazurie, 419 U.S. 544 (1975), the Court rejected a nondelegation challenge to a statute applying tribal ordinances to non-Indians selling "alcoholic beverages ... on fee-patented land within … an Indian reservation." *Id.* at 546, 556-58. *Mazurie* explained that nondelegation limitations "are less stringent … where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id.* at 556-57. And *Mazurie* held that regardless of whether Tribes' inherent authority extended to regulating non-Indians on fee land, Tribes' "independent … authority is quite sufficient to protect Congress' decision to vest in [Tribes] [a] portion of its own authority." *Id.* at 557. Second, in *United States v. Sharpnack*, 355 U.S. 286 (1958), this Court rejected a nondelegation challenge to the Assimilative Crimes Act, which prospectively incorporates state law as federal law in federal enclaves. States "of course[] lack[] the power to legislate in [federal] enclaves." Pet. App. 168a. *Sharpnack* nonetheless held that nondelegation principles posed no barrier to the "deliberate continuing adoption by Congress" of state law. 355 U.S. at 294.[16]

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[16] The Fifth Circuit concluded that these decisions (and others) foreclosed Texas's nondelegation challenge based on two related theories—first, that Congress had permissibly "delegat[ted] *its* power" by "incorporat[ing] the laws of another sovereign" (per *Sharpnack*) and second, that Congress may delegate "authority to Indian tribes without reference to federal incorporation of their law" (per *Mazurie*). Pet. App. 167a, 168a, 170a. Both theories are correct (as is the additional theory, which the Fifth Circuit did not reach, that §1915(c) "is not a delegation" at all because it "merely recognizes and incorporates a tribe's exercise of its inherent sovereignty over Indian children"). Pet. App. 167a.

Under *Mazurie* and *Sharpnack*, §1915(c) is perfectly permissible under the nondelegation doctrine. Indian Tribes "possess[] attributes of sovereignty over both *their members* and their territory." *Mazurie*, 419 U.S. at 557 (emphasis added); *accord*, *e.g.*, *Montana v. United States*, 450 U.S. 544, 564 (1981). Every case implicating §1915(c) involves a tribal member, either because the Indian child is a member or because the child is eligible for membership and a parent is a member. §1903(4). Hence, as in *Mazurie* and *Sharpnack*, §1915(c) poses no nondelegation problem when it incorporates tribal law. Similar provisions incorporating tribal or state law are routinely enacted and upheld.[17]

3. Texas's contrary arguments lack merit. First, it says the Fifth Circuit "erred by treating Indian tribes as 'sovereign'" because Tribes supposedly lack "independent constitutional authority" "in state-court child-custody matters" involving 'non-members ... not on Indian land." Pet. 29-30. *Mazurie* and *Sharpnack*, however, foreclose this argument—for the same reasons just explained. *Mazurie* found that it "need not decide whether [the Tribes'] independent authority" extended to regulating non-Indians on fee land; it was enough that the Tribe had "a certain degree of independent authority over matters that affect the internal and social relations of tribal life." 419 U.S. at 557. And in *Sharpnack*, it was *undisputed* that States lacked geographic jurisdiction to

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[17] *E.g.*, *Wisconsin v. EPA*, 266 F.3d 741, 748 (7th Cir. 2001); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (en banc); *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988); *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983); *see also, e.g.*, §2205; 28 U.S.C. §1346(b)(1).

legislate in federal enclaves—but again, that was irrelevant. *Supra* 30. Likewise here, no nondelegation problem arises from ICWA's incorporation of standards set by sovereign Tribes, whose authority over domestic-relations issues involving their members is not remotely "on par with private parties." Pet. 29.

Second, Texas avers that ICWA's supposed delegation does not "lay down an intelligible principle." Pet. 31. But to begin, no "intelligible principle" is required when Congress incorporates standards set by another sovereign—because that sovereign is exercising its own authority, not merely Congress's powers. Hence, neither *Mazurie* nor *Sharpnack* asked whether the laws there included an "intelligible principle" (and indeed, neither law limited its incorporation of tribal or state law in any way). *Mazurie*, 419 U.S. at 556-57; *Sharpnack*, 355 U.S. at 293.

Regardless, ICWA contains an intelligible principle that readily satisfies the forgiving standard this Court's cases set. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). ICWA furthers twin aims—seeking "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," §1902. In turn, §1915(c) allows Tribes to set their own preferences in order to best effectuate these aims. That "intelligible principle" amply suffices under this Court's cases, particularly given §1915(c)'s narrow scope. *See Whitman*, 531 U.S. at 475 ("the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred" (citing, *e.g.*, *Mazurie*, 419 U.S. at 556-57)).

V. This Case Is An Unsuitable Vehicle Because Texas Lacks Standing.

This case is also an unsuitable vehicle because Texas lacks standing. And because Article III jurisdiction is also absent as to the individual plaintiffs, *see Brackeen* Opp. 31-36, no party has standing.

A. Texas Lacks Standing To Assert Its Equal-Protection Claim.

First, Texas lacks standing to assert its equal-protection claim. States have no rights under the Fifth Amendment: "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States." *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966). True, States may sometimes sue, as *parens patriae*, to assert their citizens' rights. But not here: States lack "standing as the parent of its citizens to invoke … constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen." *Id.* at 324; *see Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007). Hence, States lack standing "to protect [their] citizens from the operation of federal statutes." *Massachusetts*, 549 U.S. at 520 n.17; *accord Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

B. Texas Lacks Standing To Assert Its Non-Delegation Claim.

Second, Texas lacks standing to assert its nondelegation claim. Article III "confines the federal judicial power" to "real controvers[ies] with [a] real impact on real persons." *TransUnion LLC v. Ramirez*,

141 S. Ct. 2190, 2203 (2021). Hence, under Article III, Texas must have suffered an "injury-in-fact," which requires "concrete harm." *Id.* at 2200. And where a party grounds its standing on prospective future harm, it must be "imminent and substantial"; a "mere risk" is not enough. *Id.* at 2210-11.

Under these standards, Texas lacks any injury-in-fact to support its nondelegation argument. The Fifth Circuit incorrectly held that Texas had standing because one Texas tribe, the Alabama-Coushatta Tribe, has adopted its own placement preferences under §1915(c). Pet. App. 66a (Dennis, J.); *id.* at 216a n.11 (Duncan, J.). That fact, however, does not show what this Court's cases require—that Texas faces an injury from these preferences that is "*certainly* impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). No evidence suggests that the Alabama-Coushatta Tribe's preferences have *ever* impacted a single child in Texas. And no evidence identifies any pending case where these preferences might apply. Texas thus falls far short of the "real and immediate threat," *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983), of "imminent and substantial" harm, *TransUnion*, 141 S. Ct. at 2210, required to ground standing on potential future injury.

C. Texas Lacks Standing To Assert Its Claims Concerning ICWA Provisions Applicable In State Courts.

Last, Texas comprehensively lacks standing to challenge ICWA's provisions insofar as they apply to state courts adjudicating child-welfare cases (including based on its Article I and anti-commandeering arguments). That is because Texas cannot show that it is

"'likely,' as opposed to merely 'speculative'" that any injury it incurs from these provisions "will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). As the Respondents explained in their opposition to the individual plaintiffs' petition, "'no state family court [wa]s required to follow what" the decisions below said about ICWA's constitutionality. Pet. App. 371a (Costa, J.); *see Brackeen* Opp. 32-34.

Texas cannot avoid this result by claiming to *represent* its state courts. First, Texas here *does not* represent its courts in their adjudicative capacity: Texas recently argued that plaintiffs suing "Texas" could not obtain relief against state-court judges because they are "neutral adjudicator[s]" whose actions are not attributable to the State. Texas Br. 21, *Whole Woman's Health v. Jackson*, Nos. 21-463 & 21-588 (U.S. Oct. 27, 2021); *accord id.* at 6-7 (endorsing Fifth Circuit's statement that "[w]hen acting in their adjudicatory capacity, judges are disinterested neutrals who lack a personal interest in the outcome of the controversy" before them (quoting *Whole Woman's Health v. Jackson*, 13 F.4th 434, 444 (5th Cir. 2021))).

Second, regardless, the decision below would never have controlled how Texas courts, as adjudicators, decided ICWA cases. As Texas has explained, the "general rule" is that "'the views of [lower federal courts] do not bind' state courts." *Id.* at 25 (quoting *Johnson v. Williams*, 568 U.S. 289, 305 (2013)). Nor can Texas claim that this case is an exception from that "general rule," *id.*, on the theory that its state-court judges could, as prevailing parties, have invoked the

issue-preclusive effect of a favorable judgment below. That is because—as, again, Texas has explained—"State judges … take an oath to follow the U.S. Constitution" and cannot "pre-judge cases in front of them." Texas *Jackson* Br. 23; *accord id.* ("there is no way to know in advance how a [Texas] judge will rule on the constitutionality of a challenged law"). So, even had Texas prevailed below, its judges would still have been obligated to independently weigh ICWA's constitutionality when adjudicating cases before them.[18]

Texas also cannot ground redressability on its assertion that a favorable decision would have "prevent[ed] the federal government from withholding funding" from Texas based on noncompliance with ICWA. Pet. 26. If Texas had prevailed below as to (say) the placement preferences, but thereafter lost the same argument in state court, then the favorable judgment below would not have prevented the federal government from withholding funding. That is because "[w]hen in two actions inconsistent final judgments are rendered, it

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[18] It is irrelevant that a state judge might regard a federal-court decision as *persuasive*: The fact that "a favorable decision in [this] case might serve as useful precedent" does not confer standing. *United States v. Juv. Male*, 564 U.S. 932, 937 (2011) (per curiam). "Redressability requires that a court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part) (emphasis in original). Nor does it matter that Texas now seeks redress before this Court, whose decision *would* bind state courts. Standing is "determined as of the commencement of the suit … [and] at that point it could certainly not be known that the suit would reach this Court." *Lujan*, 504 U.S. at 570 n.5.

is the later, not the earlier, judgment that is accorded conclusive effect in a third action." *Restatement (Second) of Judgments* § 15 (1982).

CONCLUSION

The petition should be denied.

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