No. 21-378

In the Supreme Court of the United States

THE STATE OF TEXAS, PETITIONER

v.

DEB HAALAND, SECRETARY OF THE U.S. DEPARTMENT OF THE INTERIOR, ET AL.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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By requiring the States to implement a federal race-based child-custody scheme, the Indian Child Welfare Act of 1978 violates the Constitution in numerous ways, running the gamut from exceeding Article I's limits on congressional authority to compelling the States to deny Indian children the equal protection of their child-custody laws. But while respondents find nothing in ICWA worthy of this Court's attention—nothing save the issues on which they lost, of course—this Court's review should not be so conveniently circumscribed. Texas, parents in Texas, and Indian children in Texas are each harmed by Congress's interference in state child-custody proceedings, especially by the requirement that States treat Indian children as resources to be managed for the benefit of their race, rather than in accordance with their best interests. This case is an ideal vehicle to resolve those issues. This Court should grant certiorari on each of the questions Texas and the Individual Plaintiffs have presented.

I. The Constitutional Questions Raised by ICWA Require Resolution from This Court.

A. No respondent identified any constitutional text that gives Congress the authority to impose ICWA's child-custody regime for Indian children on the States. That is because none exists. Instead, respondents group together "Commerce," treaties, a historical narrative, "preconstitutional" powers, and a sense of moral obligation to create a virtually limitless and atextual power over Indian affairs that includes controlling any state

child-custody proceeding involving an Indian child.[1] Fed. BIO 12-16; Tribes BIO 13-16; Navajo BIO 29-33.

But domestic relations are not a form of "commerce," *United States v. Lopez*, 514 U.S. 549, 564 (1995); treaties do not expand Congress's Article I authority, *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality op.); and neither history, "preconstitutional" powers, nor moral obligations can add to Article I's limited scope, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012). Instead, the Court has indicated that a law that "interfere[s] with the power or authority of any State" could exceed Congress's Indian authority. *United States v. Lara*, 541 U.S. 193, 205 (2004).

ICWA plainly interferes with the power and authority of the States regarding child-custody proceedings. If there are any limits on Congress's power regarding Indians, as *Lara* strongly suggests, only this Court can conclusively identify them. The Court could indeed restrict the Indian Commerce Clause to "commerce," *see Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658-66 (2013) (Thomas, J., concurring), in keeping with its text. But that is not the only possible principled limit on Congress's power, nor has Texas limited itself to only that argument. Another option is the analysis taken by the Fifth Circuit dissenters, who sought (and did not find) Founding-era evidence that the Indian Commerce power included the power to regulate state-court proceedings that involved Indians. Pet. App. 223a-261a. But what is certain is that respondents' "anything goes" position is wrong: the Constitution does not grant Congress open-

[1] The Tribes make a one-sentence Spending Clause argument, Tribes BIO 16 n.5, but ICWA applies regardless of any federal spending. Pet. 7 n.1.

ended authority to interfere in state-court proceedings merely because an Indian is involved.

Respondents assert that the Article I question is unworthy of the Court's time because there is no circuit split. Fed. BIO 18-20; Tribes BIO 11-13. But that is Texas's point: the Court's "plenary" power standard has no discernible limits, leaving lower courts with little choice but to approve every Indian-specific law that comes before them. *See, e.g.*, *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 567-68 (2d Cir. 2016) (holding that Supreme Court decisions foreclosed arguments that would limit Congress's authority regarding Indians). Absent any indication of some limit on Congress's power regarding Indians, there is unlikely to ever be a circuit split.

The Article I question Texas presents will arise in any event. After all, both the federal government and Tribes ask this Court to hold that ICWA permissibly preempts various state laws. Pet. 16-20, *Haaland v. Brackeen*, No. 21-376 (U.S. Sept. 3, 2021) ("Fed. Pet."); Pet. 20-26, *Cherokee Nation v. Brackeen*, No. 21-377 (U.S. Sept. 3, 2021) ("Tribes Pet."). Congress could not have properly preempted state law if it lacked the power to legislate in that area in the first place. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018) (holding that preemption must "represent the exercise of a power conferred on Congress by the Constitution"). Thus, granting any of the related petitions will put the Article I question before the Court.

B. Next, despite seeking review of the equal-protection issues on which they lost, Fed. Pet. 26-30; Tribes Pet. 35-38, respondents assert that no review of Texas's equal-protection claim is necessary because all tribal distinctions are political, not racial, and therefore not

subject to strict scrutiny. Fed. BIO 20-26; Tribes BIO 20-25. But this Court has already recognized that the question is not that simple. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974) (stating that exempting all Indians from civil service exams would be a "difficult question"). Instead, tribal classifications must have a "legitimate, nonracially based goal." *Id.* And allowing someone to play an "ICWA trump card" to "override . . . the child's best interests" is not a legitimate, nonracial goal. *See Adoptive Couple*, 570 U.S. at 656 (finding this interpretation raises equal-protection concerns).

ICWA's tribal distinctions are hopelessly bound up in racial distinctions, especially as tribal membership is often linked to race and ancestry. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (noting that "[a]ncestry can be a proxy for race"). To be a member of an Indian tribe, "a person generally must possess a threshold amount of Indian or tribal 'blood,' expressed as one-half, one-quarter, or some other fractional amount" which serves as "a metaphor for ancestry." Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D.L. Rev. 1, 1 (2006). The Tribes also admit that many Indian tribes consider descent when determining membership in the tribe. Tribes BIO 24; *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,783 (June 14, 2016) (describing tribal membership requirements).

Thus, obtaining tribal membership is not akin to naturalizing a child on the basis of his parents' citizenship. Tribes BIO 24 (citing 8 U.S.C. § 1401). Rather, Indian tribes fence potential members *out* because of their *lack* of Indian ancestry. The Brackeens, for example, can never be treated as equal to Navajo families when attempting to adopt an Indian child because they lack the

requisite blood quantum—in other words, explicitly because of their race. *See* 1 Navajo Nation Code tit. 1, § 701 (limiting membership to those with one quarter Navajo blood); *contra* Tribes BIO 23-24 (asserting that ICWA does not disfavor anyone on account of their race). Equal protection does not permit fencing out individuals from critical state affairs, such as child-custody proceedings, on the basis of race. *See Rice*, 528 U.S. at 522.

Consequently, a statute that classifies individuals by tribal membership is not necessarily political. *See, e.g.*, *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997) (reasoning that the government could not give Indians a monopoly on Space Shuttle contracts). The Court has permitted tribal classifications when the law pertains to tribal matters as such: a tribe's self-government, *Mancari*, 417 U.S. at 554-55; activity on its lands, *United States v. Antelope*, 430 U.S. 641, 645-49 (1977); and treaties relating to a tribe, *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979).

ICWA's purpose, however, is racial—the brazenly racial goal of ensuring that Indian children are raised by Indians and *not* by unrelated members of another race. The Tribes assert that ICWA allows Indian children to remain in their communities, Tribes BIO 1, but the federal government has taken pains to make clear that ICWA's application is not based on the child's or parents' involvement in any Indian community. 25 C.F.R. § 23.103(c) (prohibiting a court from considering the child's or parents' participation in "Tribal cultural, social, religious, or political activities"). And, of course, placing a child in a different tribe altogether, *see* 25 U.S.C. § 1915(a)(3), is unlikely to further any community connections. But it is likely to advance ICWA's racial goal:

to discourage parents without Indian blood from raising children with it.

The experiences of the Individual Plaintiffs bear this out. Rather than allow the Brackeens to adopt A.L.M. and keep him near his biological family, the Navajo Nation demanded that he be sent to live with an unrelated Navajo couple in New Mexico. Pet. App. 48a; ROA.2684. Baby O. began living with the Librettis (who are not Indian) three days after she was born. Pet. App. 210a. Yet the Ysleta del Sur Pueblo Tribe sought to remove her from the Librettis' community and place her on a reservation in Texas. Pet. App. 210a; ROA.2692. In other words, Indian tribes have relied on ICWA to demand that state courts deny placements of Indian children near their family or in the community in which they have lived—all so that they may be raised by tribal members who have the requisite blood quantum or ancestry. This odious racial sorting system demands the Court's attention.

The Court cannot address the federal government's and Tribes' equal-protection questions without addressing the larger question raised here—whether ICWA draws political or racial lines. Fed. Pet. I; Tribes Pet. i. While the Fifth Circuit held that the third-ranked placement preferences did not satisfy rational basis, Pet. App. 261a-280a, should this Court disagree, it will have to confront Texas's and the Individual Plaintiffs' argument that the preferences are race-based classifications that must survive strict scrutiny.

C. Although seeking review of the Fifth Circuit's ruling that some provisions of ICWA violate the anticommandeering doctrine, Fed. Pet. I; Tribes Pet. i, the federal government and Tribes oppose the larger scope of review that would include the anticommandeering issues

raised by Texas. Fed. BIO 27-28; Tribes BIO 25-29. But those merit review as well, in part because any anticommandeering holding would implicate other provisions in ICWA. Under ICWA, state officials must send notice to the Indian child's tribe of child-custody proceedings, 25 U.S.C. § 1912(a); make active efforts to prevent the breakup of the Indian family through the provision of remedial services and rehabilitative programs, *id.* § 1912(d); find expert witnesses on the prevailing social and cultural standards of the Indian child's tribe, *id.* § 1912(e), (f); 25 C.F.R. § 23.122(a); meet ICWA's burden of proof, 25 U.S.C. § 1912(e), (f); and seek placements that comply with ICWA, *id.* § 1915. And if they fail to do this correctly, the child's placement may be undone. Stated more simply, Texas has been required to "administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992). The Tenth Amendment forbids this. *Id.*; *see also Printz v. United States*, 521 U.S. 898, 928 (1997).

Addressing only one piece of ICWA's regulatory program, the federal government now asserts that, contrary to the preamble of the 2016 Final Rule, the 2013 *Adoptive Couple* decision means that States no longer have an obligation to search for alternative, ICWA-compliant placements when none have come forward. Fed. Pet. 20 n.2. But that is not the experience of the Individual Plaintiffs: the Ysleta del Sur Pueblo Tribe demanded that government officials investigate over forty tribe members, none of whom sought to adopt Baby O., as potential placements rather than permit the Librettis to adopt her. ROA.2692.

No respondent explains why it is permissible for Congress to require state courts to enforce federal commandeering of state officials. Pet. 26-28. And, as with the

previous issues discussed, if the Court grants the federal government's and Tribes' petitions, it will have to confront Texas's larger anticommandeering and preemption arguments.

The Fifth Circuit's mixed decision, which parsed subsections and state entities, will serve only to create further confusion. The Court should grant Texas's petition and bring clarity to this issue as a whole, not just to the limited subsections in the respondents' petitions.

D. With respect to nondelegation, respondents argue that delegation is permissible when the entity has independent authority over the matter. Fed. BIO 29-30; Tribes BIO 29-30. But Indian tribes retain only limited sovereignty that "centers on the land held by the tribe and on tribal members within the reservation." *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). ICWA does not apply to tribal courts or to children domiciled on reservations. 25 U.S.C. § 1911(a); 25 C.F.R. § 23.103(b)(1). Consequently, Indian tribes do not have independent authority over state child-custody proceedings and cannot be given authority to change the law that Congress enacted.

The federal government's attempt to downplay section 1915(c) as a choice-of-law provision fails for similar reasons. Fed. BIO 30. Section 1915(c) does not select between multiple valid forms of law to apply in a case; it empowers another body to, on an ad hoc basis, change the substantive rule of decision provided by a federal statute. As a consequence, it forces Texas to follow a law enacted by a party with no sovereign authority over the matter in question. The Court should grant certiorari and hold that Congress cannot delegate the authority to legislate state child-custody issues to Indian tribes.

II. There Is No Standing Problem Preventing This Court's Review.

A. Contrary to the arguments of respondents, the Court has jurisdiction to hear the equal-protection issues raised by Texas and the Individual Plaintiffs. Fed. BIO 26-27; Tribes BIO 33. Because the Individual Plaintiffs have standing to bring their equal-protection claim, Brackeen BIO 14-20, nothing more is necessary to give the Court jurisdiction. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (finding standing when individuals were "forced to compete in a race-based system that may prejudice" them).

Regardless, Texas has standing to bring an equal-protection claim. Texas is entitled to special solicitude in the standing analysis and need show only (1) a procedural right to challenge ICWA, and (2) an impact on a quasi-sovereign interest. *Massachusetts v. EPA*, 549 U.S. 497, 516-20 & n.17 (2007); *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015). As an object of the 2016 Final Rule, Texas has the statutory right to challenge it under the Administrative Procedure Act—including on the grounds that the statute underlying the Final Rule is unconstitutional. 5 U.S.C. §§ 702, 706(2); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992).

And Texas has a quasi-sovereign interest in the health and well-being of its residents. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). ICWA sets aside Indian children's best interests and co-opts the machinery of the State to impose race-based child-custody decisions on children and adoptive parents. Texas has an interest in preventing such harm to its residents. *See Palmore v. Sidoti*, 466 U.S. 429, 433

(1984) (noting that States have a "duty of the highest order to protect the interests of minor children"). Consequently, Texas has standing to challenge the constitutionality of the statute that brings about that injury.[2]

B. Respondents also question Texas's standing to bring a nondelegation claim regarding 25 U.S.C. § 1915(c). Fed. BIO 30-32; Tribes BIO 33-34. But the Fifth Circuit was unanimous that Texas had standing to bring its nondelegation challenge. Pet. App. 3a. The Alabama-Coushatta Tribe has changed the placement preferences enacted by Congress. Pet. App. 66a. Texas courts must now apply a different law whenever an Indian child from that tribe is part of a child-custody proceeding.

The federal government also asserts that Texas cannot complain about nondelegation because the Alabama-Coushatta Tribe did not displace state law, but federal law. Fed. BIO 31. That misunderstands the nondelegation doctrine. Even assuming Congress can legislate where Texas places Indian children (which Texas disputes), it cannot give that authority to another party. *See Loving v. United States*, 517 U.S. 748, 758 (1996). Texas did not cede any of its sovereign authority over child-custody proceedings to Indian tribes. Requiring Texas to follow an Indian tribe's order of preference is an injury.

C. The Tribes alone raise the issue of redressability, arguing that Texas cannot obtain relief for its courts in their adjudicatory capacity and citing Texas's briefing in *Whole Woman's Health v. Jackson*. Tribes BIO 34-37 (citing Texas Br. 21, *Whole Woman's Health v. Jackson*, Nos. 21-463 & 21-588 (U.S. Oct. 27, 2021)). But unlike the

[2] Texas is also directly injured by ICWA, as the preamble to the Final Rule recognizes the thousands of hours and dollars that States will have to spend complying with ICWA. 81 Fed. Reg. at 38,863-64.

Whole Woman's Health plaintiffs, Texas is not seeking to enjoin its courts from hearing ICWA cases. Texas sought a declaration that ICWA is unconstitutional and, if necessary, an injunction preventing the federal government from withdrawing any funding from Texas for failure to comply with ICWA. ROA.661-62. Determining the constitutionality of a law that is applied in state courts is vastly different from enjoining state courts from hearing cases in the first place.

The claims against Texas are redressable generally because federal funding is based on Texas's compliance with ICWA. 42 U.S.C. § 622(b)(9). The federal government makes the technical point that federal law requires States only to "*describe*" their compliance. Fed. BIO 5 n*. If the official position of the federal government is that Texas could discharge its obligations by describing its noncompliance, it should say so explicitly. Regardless, a favorable ruling from any court would guarantee that funding could not be revoked based on Texas's noncompliance. A favorable ruling from this Court would ensure state courts no longer apply ICWA, ending all harms that Texas endures by being commandeered to violate its residents' equal-protection rights. That is more than sufficient for Article III.

CONCLUSION

The Court should grant Texas's petition for a writ of certiorari.

Respectfully submitted.

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