No. 21-380

In the Supreme Court of the United States

CHAD EVERET BRACKEEN, ET AL., PETITIONERS

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
TODD KIM
Assistant Attorney General
RACHEL HERON
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.*, "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. 1902. The provisions of 25 U.S.C. 1915(a) and (b) establish default preferences for the placement of Indian children in adoptive or foster homes. The questions presented are:

1. Whether ICWA's placement preferences impermissibly discriminate on the basis of race.

2. Whether ICWA's placement preferences exceed Congress's plenary power over Indian affairs.

3. Whether ICWA's placement preferences impermissibly commandeer state judges.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 4a-409a) is reported at 994 F.3d 249. The opinion of a panel of the court of appeals (Pet. App. 410a-480a) is reported at 937 F.3d 406. The order of the district court granting in part and denying in part the plaintiffs' motions for summary judgment (Pet. App. 485a-544a) is reported at 338 F. Supp. 3d 514. The order of the district court denying the defendants' motions to dismiss is not published in the Federal Supplement but is available at 2018 WL 10561971.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2021. The petition for a writ of certiorari was filed on September 3, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.*, "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 642 (2013) (citation omitted); see *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32-35 (1989) (discussing congressional hearings). To "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. 1902. Those standards preempt contrary state-law standards, except to the extent that state law "provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child." 25 U.S.C. 1921.

One set of standards, found in 25 U.S.C. 1912, governs the removal of Indian children from their families. In particular, Section 1912 governs two types of "involuntary" proceedings in state court, 25 U.S.C. 1912(a): "action[s]" to remove Indian children from their families for placement in foster homes, 25 U.S.C. 1903(1)(i); and "action[s] resulting in the termination of the parent-child relationship," 25 U.S.C. 1903(1)(ii). Section 1912(a) requires "the party seeking the foster care placement of, or termination of parental rights to, an Indian child" to "notify" the child's parent or Indian custodian and the child's tribe of the pending proceedings. 25 U.S.C.

1912(a). Section 1912(d) further requires "[a]ny party seeking to effect a foster care placement" or "termination of parental rights" to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. 1912(d). And Section 1912(e) and (f) provide that no foster-care placement or termination of parental rights "may be ordered * * * in the absence of a determination," supported by "testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. 1912(e) (requiring "clear and convincing evidence" for a foster-care placement); see 25 U.S.C. 1912(f) (requiring "evidence beyond a reasonable doubt" for the termination of parental rights).

Once a court has made the decision to remove an Indian child from his or her family, another set of standards, found in 25 U.S.C. 1915, governs the placement of the Indian child in an adoptive or foster home. Section 1915(a) requires that "[i]n any adoptive placement," "preference" be given, "in the absence of good cause to the contrary," to placement with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. 1915(a). Section 1915(b) similarly requires that, "[i]n any foster care or preadoptive placement," "preference" be given, "in the absence of good cause to the contrary," to placement with "(i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) 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." 25 U.S.C. 1915(b).

Under ICWA, "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) 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). "'Indian tribe,'" in turn, "means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43." 25 U.S.C. 1903(8).

ICWA authorizes the Secretary of the Interior to "promulgate such rules and regulations as may be necessary to carry out the provisions of [ICWA]." 25 U.S.C. 1952. Pursuant to that authority, the Secretary promulgated non-binding guidance in 1979. 44 Fed. Reg. 67,584 (Nov. 26, 1979). After state courts "interpreted the Act in different, and sometimes conflicting, ways," the Secretary promulgated a rule in 2016. 81 Fed. Reg. 38,778, 38,782 (June 14, 2016) (2016 Rule). The 2016 Rule provides, among other things, that "[t]he party seeking departure from the placement preferences [in Section 1915(a) and (b)] should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." 25 C.F.R. 23.132(b).

2. In March 2018, the State of Texas, two other States, and seven individuals filed in federal district court the operative complaint in this case against the United States, the Department of the Interior, the Department of Health and Human Services, the Bureau of

Indian Affairs (BIA), and various federal officials (federal defendants). See D. Ct. Doc. 35, at 7-10 (Mar. 22, 2018) (Second Am. Compl. ¶¶ 19-34). The individual plaintiffs are three non-Indian couples—the Brackeens, the Librettis, and the Cliffords—and Altagracia Socorro Hernandez, the biological mother of an Indian child, Baby O., whom the Librettis eventually adopted. *Id.* ¶¶ 19-22; Pet. App. 53a (opinion of Dennis, J.).

In their complaint, the plaintiffs challenged various provisions of ICWA as unconstitutional on their face, alleging violations of Article I, the anticommandeering doctrine of the Tenth Amendment, the equal protection component of the Fifth Amendment, substantive due process, and the nondelegation doctrine. Second Am. Compl. ¶¶ 18, 266-338, 350-376. The plaintiffs also challenged the 2016 Rule as unconstitutional, contrary to the statute, and arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Second Am. Compl. ¶¶ 247-265, 339-349. The plaintiffs sought declaratory and injunctive relief. *Id.* at 83-84.

Four Indian tribes—the Cherokee Nation, the Oneida Nation, the Quinault Indian Nation, and the Morongo Band of Mission Indians (Tribes)—intervened as defendants. D. Ct. Doc. 45 (Mar. 28, 2018). The federal defendants and the Tribes moved to dismiss the complaint for lack of standing, see Pet. App. 530a, and the plaintiffs moved for summary judgment, see *id.* at 469a.

The district court denied the motions to dismiss, upholding the plaintiffs' standing to bring each of their claims. D. Ct. Doc. 155 (July 24, 2018). In addition, the court granted summary judgment to the plaintiffs on all of their claims except their substantive due process claims, which the court rejected on the merits. *Id.* at

485a-544a. The court then entered final judgment, declaring various provisions of ICWA and the 2016 Rule unconstitutional. *Id.* at 545a-546a.

3. The federal defendants and the Tribes appealed, and the court of appeals granted a stay pending appeal. Pet. App. 481a-482a. The court of appeals also permitted the Navajo Nation to intervene in support of the appellants. C.A. Order 2 (Jan. 25, 2019).

A divided panel of the court of appeals affirmed the district court's judgment that the plaintiffs have standing, but reversed the district court's grant of summary judgment and rendered judgment in the defendants' favor on all claims. Pet. App. 410a-466a. Judge Owen concurred in part and dissented in part, expressing the view that several provisions of ICWA violate the anti-commandeering doctrine "because they direct state officers or agents to administer federal law." *Id.* at 467a.

4. The court of appeals granted rehearing en banc and issued a fractured decision affirming in part and reversing in part. Pet. App. 4a-409a.

a. The en banc court of appeals affirmed the district court's judgment that at least one plaintiff had standing to bring each of the plaintiffs' claims. Pet. App. 6a-7a; *id.* at 63a-71a (opinion of Dennis, J.); *id.* at 221a-230a (opinion of Duncan, J.); *id.* at 355a-361a (Owen, C.J., concurring in part, dissenting in part); *id.* at 376a (Haynes, J., concurring).

As relevant here, a majority of the en banc court held that at least some of the individual plaintiffs had standing to challenge ICWA's placement preferences. Pet. App. 6a-7a. Judge Duncan, joined by seven other judges, concluded that "ICWA's unequal treatment of non-Indians" had "burdened, in various ways," the individual plaintiffs' adoptions, *id.* at 225a; that "[t]hose

unequal burdens are injuries-in-fact for equal protection purposes," *id.* at 226a; and that a favorable decision would redress the individual plaintiffs' injuries by "mak[ing] overcoming ICWA's preferences easier," *id.* at 229a. Judge Dennis, joined by two other judges, concluded that the Brackeens had suffered "increased regulatory burdens" from application of ICWA's placement preferences in Texas state-court proceedings to adopt an Indian child, Y.R.J., *id.* at 63a; that the Cliffords had suffered "injury" from application of Section 1915(b)'s placement preferences in Minnesota state court, *id.* at 67a; and that even though the Texas and Minnesota state courts would not be bound by a Fifth Circuit decision, the possibility that they would follow such a decision was sufficient to establish redressability, *id.* at 65a-67a.

Judge Wiener dissented on the issue of whether the individual plaintiffs had standing to challenge ICWA's placement preferences. Pet. App. 366a-375a. In his view, the Brackeens lacked standing to challenge those preferences because they "did not move to supplement the record with information relating to [their] attempted adoption of Y.R.J. until" after the district court had already entered final judgment, *id.* at 373a, and the Cliffords likewise lacked standing because they "could have appealed their case to the Minnesota Supreme Court but did not do so," *id.* at 366a.

Judge Costa, joined by four other judges (including Judge Wiener), also dissented on this issue. Pet. App. 383a-397a. He explained that because a state court could simply decline to follow any Fifth Circuit decision, the individual plaintiffs could not satisfy the redressability requirement and no plaintiff had standing to challenge ICWA on equal protection grounds. *Id.* at 386a-387a & n.2.

b. On the merits of the plaintiffs' equal protection claims, a majority of the en banc court held that ICWA's Indian classifications are political, not racial, in nature and are thus subject to rational-basis review under the standard set forth in *Morton* v. *Mancari*, 417 U.S. 535 (1974). See Pet. App. 144a-161a; *id.* at 363a (Owen, C.J., concurring in part, dissenting in part). No judge disagreed with that holding. See *id.* at 272a (opinion of Duncan, J.) (declining to "decide whether ICWA classifies by race").

Applying *Mancari*'s deferential standard of review, the majority upheld the constitutionality of ICWA's definition of "Indian child" and Section 1915's preferences for placements with an Indian child's extended family or tribe, finding them to be rationally connected to "Congress's goal of fulfilling its broad and enduring trust obligations to the Indian tribes." Pet. App. 162a; see *id.* at 161a-171a & n.58; *id.* at 363a (Owen, C.J., concurring in part, dissenting in part); *id.* at 376a (Haynes, J., concurring) (concluding that "the first two prongs of ICWA § 1915(a) * * * withstand even strict scrutiny"). An equally divided en banc court, however, affirmed the district court's judgment that Section 1915(a)(3)'s third-ranked preference for adoptive placement with "other Indian families," and Section 1915(b)(iii)'s third-ranked preference for foster-care placement with licensed "Indian foster home[s]," violate equal protection. *Id.* at 7a (citations omitted).

c. On the merits of the plaintiffs' Article I claim, the en banc court held that ICWA is a valid exercise of Congress's plenary power over Indian affairs. Pet. App. 75a-110a. The court explained that the Constitution's "Treaty, Property, Supremacy, Indian Commerce, and Necessary and Proper Clauses, among other provisions,

operate to bestow upon the federal government supreme power to deal with the Indian tribes." *Id.* at 76a-77a. And the court emphasized that "[a]s a consequence of the Indians' partial surrender of sovereign power, the federal Government naturally took on an attendant duty to protect and provide for the wellbeing of the 'domestic dependent Indian nations.'" *Id.* at 80a (brackets and citation omitted). The court held that ICWA "falls within Congress's 'plenary powers to legislate on the problems of Indians' in order to fulfill its enduring trust obligations to the tribes." *Id.* at 87a (citation omitted).

Judge Duncan, joined by six other judges, dissented on the issue. Pet. App. 230a-269a. They acknowledged that "[a]mple founding-era evidence shows that Congress's Indian affairs power was intended to be both broad in subject matter and exclusive of state authority." *Id.* at 253a-254a. In their view, however, Congress's power over Indian affairs does not include the authority to "regulate state child-custody proceedings involving Indian children." *Id.* at 230a.

d. On the merits of the plaintiffs' Tenth Amendment claims, the en banc court held that many of ICWA's provisions validly preempt contrary state law and present no anticommandeering problem. See Pet. App. 89a, 315a-317a, 320a-324a, 327a. The court observed that, in various places, "ICWA enacts substantive child-custody standards applicable in state child-custody proceedings." *Id.* at 322a. "For instance," the court explained, "ICWA requires courts to place Indian children with certain persons (§ 1915), and also requires courts to make specific findings under a heightened standard of proof before an Indian child may be placed in a foster home or his parents' rights terminated (§ 1912(e) and (f))." *Ibid.* The court held that, "[t]o the extent those

substantive standards compel state *courts* (as opposed to state *agencies*)," "they are valid preemption provisions." *Ibid.*

A majority of the en banc court, however, held that, to the extent Section 1912(e) and (f) "require state agencies and officials to bear the cost and burden of adducing expert testimony to justify placement of Indian children in foster care, or to terminate parental rights," they impermissibly "commandeer states." Pet. App. 299a-300a. A majority also held that, to the extent Section 1912(d) requires state agencies to engage in "'active efforts'" to provide remedial services to Indian families "as a condition to" placing Indian children in foster care or terminating parental rights, *id.* at 296a (citation omitted), it likewise "commandeers states," *id.* at 298a. A majority further held that that by "requir[ing] 'the State' to 'maintain[] . . . [a] record' of any Indian child placements under state law," *id.* at 302a (citation omitted; second and third sets of brackets in original), Section 1915(e) impermissibly "co-opt[s]" a State's agencies or courts "into administering a federal program," *id.* at 305a n.108.

In addition, an equally divided en banc court affirmed the district court's judgment that Section 1912(a) violates the anticommandeering doctrine to the extent it requires state agencies to provide notice of pending child-custody proceedings to Indian parents and tribes, Pet. App. 8a; that ICWA's placement preferences violate the anticommandeering doctrine "to the extent they direct action by state agencies and officials," *ibid.*; and that 25 U.S.C. 1951(a) violates the anticommandeering doctrine by "requir[ing] state courts to provide the Secretary with a copy of an Indian child's

final adoption decree, 'together with . . . other information,'" Pet. App. 324a-325a (opinion of Duncan, J.).

e. With respect to the plaintiffs' remaining claims, a majority held that 25 U.S.C. 1915(c) does not violate the nondelegation doctrine. Pet. App. 9a. A majority deemed invalid portions of the 2016 Rule that implement certain statutory provisions that the court held "unconstitutional." *Id.* at 10a. And a majority held that the Secretary's decision to promulgate a "binding" rule did not violate the APA, while a different majority held that the rule's provision regarding the burden of proof for demonstrating "good cause" under Section 1915 is contrary to ICWA. *Id.* at 9a-10a & nn.12, 14.

ARGUMENT

"Recognizing the special relationship between the United States and the Indian tribes and their members," 25 U.S.C. 1901, Congress enacted ICWA forty years ago "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," 25 U.S.C. 1902. ICWA's provisions have been routinely applied in state courts across the country since that time, affording vital protection to Indian children, their families, and their tribes.

Petitioners nevertheless now contend (Pet. 17-32) that ICWA's placement preferences impermissibly discriminate on the basis of race, exceed Congress's power over Indian affairs, and impermissibly commandeer state judges. But this case would be a poor vehicle for this Court's review because none of petitioners' challenges to ICWA's placement preferences presents an Article III case or controversy. In any event, the en banc court of appeals correctly rejected each of petitioners' contentions, and its resolution of those issues

does not conflict with any decision of this Court, another court of appeals, or any state court of last resort.

The federal government and the Tribes have sought this Court's review of the portions of the en banc court's decision invalidating various provisions of ICWA. While that request urges the Court to follow its usual course of granting certiorari when a lower court has held an Act of Congress unconstitutional, petitioners' request here satisfies none of this Court's traditional criteria for review. Accordingly, the petition for a writ of certiorari should be denied.

1. This petition would be a poor vehicle for this Court to address any of petitioners' challenges to the constitutionality of ICWA's placement preferences because none of petitioners' challenges presents an Article III case or controversy. That is so for two independent reasons.

a. First, petitioners have not shown that they have the requisite "personal interest in the dispute." *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021). To establish such an interest, petitioners would have to demonstrate that their asserted injury from enforcement of ICWA's placement preferences "is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted). And petitioners "bear[] the burden of establishing standing as of the time [they] brought this lawsuit and maintaining it thereafter." *Carney* v. *Adams*, 141 S. Ct. 493, 499 (2020).

The Brackeens failed to establish standing as of the time they brought this suit. When they filed the operative complaint in March 2018, the Brackeens had already "successfully petitioned to adopt" one Indian child, A.L.M. Second Am. Compl. ¶ 152. To establish a

threat of future injury from ICWA's placement preferences, they alleged that they "intend[ed] to provide foster care for, and possibly adopt, additional children in need." *Id.* ¶ 154. But "such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be"—are too vague "to support a finding of the 'actual or imminent' injury that [this Court's] cases require." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992); see Pet. App. 369a (Wiener, J., dissenting in part) (finding that the Brackeens' "stated desires to adopt or provide foster care for other Indian children were too vague to constitute an injury in fact").

One week after the district court entered final judgment in October 2018, the Brackeens moved to supplement the record with evidence that they were engaged in efforts to adopt another Indian child, Y.R.J. Pet. App. 373a (Wiener, J., dissenting in part); see D. Ct. Doc. 170 (Oct. 10, 2018). But this Court has previously declined to consider such post-judgment evidence of standing, explaining that if the plaintiffs "had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009). The Brackeens therefore must rely on their allegations alone, and as explained above, those allegations were insufficient to establish any certainly impending injury from ICWA's placement preferences.

The Cliffords have failed to maintain the requisite personal interest throughout this suit. In the operative complaint, the Cliffords alleged that they had moved to adopt an Indian child, Child P., in Minnesota state court. Second Am. Compl. ¶ 176. They further alleged that "Child P. was removed from the Cliffords' home in

January 2018, and placed in the care of her maternal grandmother." *Ibid.* But "Child P. has now been adopted by" her maternal grandmother, Pet. 7 n.1, rendering the Cliffords' challenge to ICWA's placement preferences moot.

Moreover, the "exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review" does not apply here. *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (citation omitted). "A dispute qualifies for that exception only 'if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.'" *Ibid.* (citation omitted). The Cliffords cannot satisfy the first prong, because they could have fully litigated their challenge to ICWA's placement preferences in the Minnesota state-court proceeding itself. Yet they did not seek further review of the Minnesota Court of Appeals' decision rejecting their arguments that ICWA "violates equal protection," "exceeds Congress's Article I authority," and "violates the anticommandeering doctrine." *In re S.B.*, No. A19-225, 2019 WL 6698079, at *1 (Dec. 9, 2019); see Pet. App. 366a (Wiener, J., dissenting). The Cliffords also cannot satisfy the second prong, because their stated intention (Pet. 7 n.1) "to seek to foster and adopt children in the future" is too vague to establish a reasonable expectation that they will be subjected to ICWA's placement preferences again.

The Librettis have likewise failed to maintain the requisite personal interest throughout this suit. In the operative complaint, the Librettis alleged that they were in the midst of efforts to adopt Baby O. Second

Am. Compl. ¶¶ 156-168. But in December 2018, a Nevada state court "issued a decree of adoption," declaring them to be Baby O.'s lawful parents. Pet. App. 53a (opinion of Dennis, J.). Thus, any threatened injury from the application of ICWA's placement preferences in Baby O.'s adoption proceedings is now moot. The Librettis alleged in the operative complaint that they "intend[ed] to provide foster care for, and possibly adopt, additional children in need." Second Am. Compl. ¶ 170. But as explained above, such allegations are too vague to sustain this suit.

b. Second, petitioners have not shown that any injury from ICWA's placement preferences is likely to be redressed by "the judicial relief requested." *California* v. *Texas*, 141 S. Ct. 2104, 2115 (2021) (citation omitted). In the operative complaint, petitioners requested declaratory and injunctive relief against the federal defendants. Second Am. Compl. 84. The district court granted only declaratory relief, Pet. App. 545a, and the plaintiffs did "not cross-appeal[] seeking to modify the district court's judgment," *id.* at 352a (opinion of Duncan, J.). The question, then, is whether the declaratory relief requested is likely to redress any injury to petitioners.

As Judge Costa (joined by four other judges) explained, the answer is no. Pet. App. 384a-397a. Any injury from the placement preferences can arise only from their application in state court. The federal defendants are not parties to state child-custody proceedings and have no role in enforcing any of the statutory provisions applicable in such proceedings. And state courts are not bound by a federal district court's declaration that a statutory provision is unconstitutional. *Id.* at 384a-385a, 388a-389a; see *Arizonans for Official*

English v. *Arizona*, 520 U.S. 43, 58 n.11 (1997). No state judges were defendants in this case, and the declaratory judgment against the federal defendants has no preclusive effect on any state child-custody proceedings. See Pet. App. 392a (Costa, J., concurring in part and dissenting in part) (noting, among other things, that "the state court judge who will decide Y.R.J.'s case" is not a defendant in this case and that there is "no mutuality of parties").

The district court's declaration that the placement preferences violate equal protection thus could do nothing more than "advise" state judges on how to decide this particular equal protection issue should it arise in a concrete manner before them in a future foster-care or adoption proceeding covered by ICWA. Pet. App. 386a (Costa, J., concurring in part and dissenting in part) (emphasis omitted). And the mere possibility that a state judge might find the declaration of a federal district court persuasive does not make it any less advisory. See *id.* at 387a-388a. Thus, even if petitioners could establish the requisite injury, they cannot establish redressability.

Of course, petitioners can challenge the constitutionality of ICWA's provisions in state court, as applied to any particular child-custody proceeding in which they may be involved. Indeed, petitioners have done just that. See *In re S.B.*, 2019 WL 6698079, at *1; Pet. App. 389a-390a (Costa, J., concurring in part and dissenting in part). What they cannot do, however, is seek ICWA's facial invalidation in federal court in the absence of any Article III case or controversy.

2. Even if petitioners' challenges to ICWA's placement preferences presented an Article III case or controversy, their petition for a writ of certiorari should be

denied. Their contention (Pet. 17-24) that ICWA's placement preferences impermissibly discriminate on the basis of race is incorrect and does not warrant this Court's review.

a. The en banc court of appeals correctly held that ICWA draws political, not racial, classifications, which are subject to rational-basis review. Pet. App. 144a-171a; *id.* at 363a (Owen, C.J., concurring in part, dissenting in part).

i. "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citations and internal quotation marks omitted). Members of Indian tribes are thus members of "distinct political communities." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (Marshall, C.J.). When Congress enacts legislation addressing Indian affairs, the distinct treatment of Indians generally reflects a "political rather than racial" classification. *Morton* v. *Mancari*, 417 U.S. 535, 553 n.24 (1974). Indeed, "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution." *United States* v. *Antelope*, 430 U.S. 641, 645 (1977); see U.S. Const. Art. I, § 8, Cl. 3. And this Court has consistently upheld such laws on the ground that they are "not based upon impermissible racial classifications." *Antelope*, 430 U.S. at 645; see, *e.g.*, *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479-480 (1976); *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976) (per curiam); *Mancari*, 417 U.S. at 554-555; see also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (treaty).

In *Mancari*, for example, the Court upheld the constitutionality of a law extending a preference for employment in the BIA to individuals who were "one-fourth or more degree Indian blood and * * * member[s] of a Federally-recognized tribe." 417 U.S. at 553 n.24 (citation omitted); see *id.* at 551-555. "Although the classification had a racial component, the Court found it important that the preference was 'not directed towards a "racial" group consisting of "Indians,"' but rather 'only to members of "federally recognized" tribes.'" *Rice* v. *Cayetano*, 528 U.S. 495, 519-520 (2000) (quoting *Mancari*, 417 U.S. at 553 n.24). "In this sense," the Court held, "the preference [wa]s political rather than racial in nature." *Mancari*, 417 U.S. at 553 n.24; see *id.* at 554 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."). The Court concluded that because the preference could "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," it did not violate the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at 555; see *id.* at 551.

The classifications drawn in ICWA's placement preferences are "political" in the same sense as in *Mancari*. 417 U.S. at 553 n.24. ICWA's placement preferences apply in state child-custody proceedings involving an "Indian child." 25 U.S.C. 1915(a). ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) 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). "Indian tribe," in turn, means a federally recognized tribe, 25 U.S.C. 1903(8)—*i.e.*, a tribe

that "has entered into 'a government-to-government relationship with the United States.'" *Yellen* v. *Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434, 2440 (2021) (brackets and citation omitted). Thus, whether a child qualifies as an "Indian child" under ICWA turns on the child's connection to a distinct political community. The classification is therefore "political," not "racial." *Mancari*, 417 U.S. at 553 n.24.

Nor are the other classifications drawn in ICWA's placement preferences racial in nature. Section 1915(a) establishes default preferences for the adoptive placement of an Indian child with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. 1915(a). The second preference turns on a person's membership in a particular tribe and thus in a particular political community. See 25 U.S.C. 1903(5). As for the third preference, "the term 'Indian family' in this context * * * refers to a family with one or more individuals that meet" ICWA's definition of an "Indian." 81 Fed. Reg. at 38,798. An "Indian," in turn, means "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43." 25 U.S.C. 1903(3). Thus, the third preference likewise turns on a person's membership in a particular political community.

ii. Petitioners do not contend that *Mancari* should be overruled. Instead, petitioners contend (Pet. 23) that *Mancari*'s deferential standard of review is inapplicable in this case because "ICWA's placement preferences apply *only* in state-court proceedings." In petitioners' view (Pet. 19), *Mancari* applies only in cases involving "tribal self-government over Indian lands." But in *Mancari*, the Court concluded that the Indian

classification was "political" in the sense that it applied to "members of 'federally recognized' tribes." 417 U.S. at 553 n.24. That conclusion rested on the nature of the classification itself, see *ibid.*—not on whether the classification "advanced tribal self-government on or near Indian lands," Pet. 18. And here, the classifications in ICWA are political for the same reason: they are based on the person's connection to a federally recognized tribe, a distinct political community.

Contrary to petitioners' contention (Pet. 21-22), this Court's decision in *Rice* does not suggest otherwise. *Rice* did not disturb *Mancari*'s holding or its underlying reasoning concerning the political nature of Indian classifications and the applicability of rational-basis review. See *Rice*, 528 U.S. at 518-520. Rather, *Rice* concluded that the interests in "Indian self-government" that the Court had recognized in upholding the particular Indian classification in *Mancari*, 417 U.S. at 555, would not permit "a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens," *Rice*, 528 U.S. at 520. That conclusion regarding whether particular interests would be sufficient to justify such a law in that unique context has no application to the question here whether Congress has discriminated on the basis of race in the first place.

Petitioners contend that, at the very least, the second prong of ICWA's definition of "Indian child" is race-based because it applies only when the child "is the *biological child* of a member of an Indian tribe." 25 U.S.C. 1903(4) (emphasis added); see Pet. 21. But given that an "Indian tribe" under ICWA is not a racial classification, the category of biological children of members of an "Indian tribe" is not a racial classification either.

Indeed, it is no more a racial classification than the category of biological children of citizens of New York—or of any other political community.

Nor does the fact that biological parents may decline "to enroll their child in a tribe" (Pet. 21-22) alter the nature of the classification. The parents' decision would itself be a political one—reinforcing that membership in a tribe is a political classification. See 81 Fed. Reg. at 38,783 (explaining that tribal membership "is voluntary and typically requires an affirmative act by the enrollee or her parent"). And contrary to petitioners' suggestion (Pet. 7, 22, 24), the fact that tribes make ancestry or blood quantum a part of their membership criteria is immaterial. An Indian tribe remains a "political community" regardless of its use of such a factor in exercising its "right to define its own membership for tribal purposes." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n.32 (1978). Indeed, at the time the Constitution was adopted, the term "tribe"—the term used in the Indian Commerce Clause—meant a "distinct body of the people *as divided by family* or fortune, or any other characteristic[]." Thomas Sheridan, A *Complete Dictionary of the English Language* (2d ed. 1789) (emphasis added); see 2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (same).

Petitioners argue (Pet. 24) that "ICWA's placement preferences cannot survive any level of scrutiny." But to the extent petitioners contend that ICWA's placement preferences would be unconstitutional even if they were evaluated under *Mancari*'s deferential standard for political classifications, that contention is not fairly included within the question presented, which asks only whether those preferences "discriminate on the basis of *race* in violation of the U.S. Constitution." Pet. i

(emphasis added); see Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

b. Petitioners' contention that ICWA's placement preferences impermissibly discriminate on the basis of race does not warrant this Court's review. The en banc court of appeals *upheld* the constitutionality of ICWA's definition of "Indian child" and the first two placement preferences, see Pet. 10-11, and no member of the court accepted petitioners' view that the statute discriminates or draws distinctions on the basis of race. See Pet. App. 145a-161a; *id.* at 363a (Owen, C.J., concurring in part, dissenting in part); *id.* at 272a (opinion of Duncan, J.) (declining to decide "whether ICWA classifies by race").

Contrary to petitioners' assertion (Pet. 15), the en banc court of appeals' decision does not implicate any conflict warranting this Court's review. The en banc court rejected a facial challenge to the constitutionality of ICWA's "Indian child" definition. See Pet. App. 160a-161a (opinion of Dennis, J.). None of the state-court decisions that petitioners cite (Pet. 15) held that ICWA's "Indian child" definition is facially race-based or unconstitutional. Rather, some of the decisions addressed only whether ICWA would be unconstitutional as applied in particular circumstances. See *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 723 (Cal. Ct. App. 2001) (finding ICWA to be "unconstitutional as applied," while "declin[ing] to address the general constitutionality of the statute"); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 528 (Cal. Ct. App. 1996) (addressing whether "a particular application of ICWA creates a racially based classification"), cert. denied, 519 U.S. 1060, and 520 U.S. 1181 (1997). And other decisions held merely that ICWA

should be construed "on a case-by-case basis to avoid results that are counter to the ICWA's policy goal of protecting the best interest of a Native American child." *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); see *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at *16 (Tenn. Ct. App. Nov. 19, 1997) ("finding that the ICWA was not meant to apply to [particular] situations"). In any event, to the extent petitioners rely (Pet. 15) on the decisions of intermediate state courts, any tension between those decisions and the decision below would not warrant this Court's review. See Sup. Ct. R. 10(a).

The federal government and the Tribes have asked this Court to grant review of the question whether two of ICWA's placement preferences—for "other Indian families," 25 U.S.C. 1915(a)(3), and for "Indian foster home[s]," 25 U.S.C. 1915(b)(iii)—are rationally related to legitimate governmental interests. See 21-376 Pet. I, 26-30; 21-377 Pet. i, 35-38. Review of that question would not require the Court to revisit the en banc court's determination—which no member of the en banc court contested—that *Mancari*'s deferential standard of review applies here. See p. 22, *supra*. Accordingly, there is no sound reason to grant review of the racial-discrimination issue that petitioners raise.

3. Petitioners also contend (Pet. 27) that Congress lacked "the power to enact ICWA's placement preferences in the first place." That contention lacks merit and does not warrant this Court's review, even assuming that it presented an Article III case or controversy.

a. The Constitution vests Congress with "plenary and exclusive power over Indian affairs." *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). In "an unbroken

current of judicial decisions," this Court has repeatedly reaffirmed that power. *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913); see, *e.g.*, *United States* v. *Cooley*, 141 S. Ct. 1638, 1643 (2021); *Puerto Rico* v. *Sanchez Valle*, 579 U.S. 59, 70 (2016); *Bay Mills*, 572 U.S. at 788; *United States* v. *Lara*, 541 U.S. 193, 200 (2004); *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998); *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 84 (1977); *Mancari*, 417 U.S. at 551; *United States* v. *Hellard*, 322 U.S. 363, 367 (1944); *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 718 (1943); *Winton* v. *Amos*, 255 U.S. 373, 391 (1921); *Choate* v. *Trapp*, 224 U.S. 665, 671 (1912); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 306 (1902).

As the Court has recognized, the "plenary power of Congress" over Indian affairs derives "explicitly" from the text of the Constitution itself. *Mancari*, 417 U.S. at 551; see Pet. App. 76a-77a (opinion of Dennis, J.). "That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*." *Worcester*, 31 U.S. (6 Pet.) at 559; see U.S. Const. Art. I, § 8; U.S. Const. Art. II, § 2, Cl. 2. "These powers comprehend all that is required for the regulation of [the United States'] intercourse with the Indians." *Worcester*, 31 U.S. (6 Pet.) at 559; see also U.S. Const. Art. I, § 8, Cl. 18 (authorizing Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers). Indeed, the Indian Commerce Clause alone "provide[s] Congress with plenary power to legislate in

the field of Indian affairs." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989).

Congress's plenary power over Indian affairs is also "implicit[]" in the Constitution's structure. *Mancari*, 417 U.S. at 551-552. "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them * * * [a] dependent people, needing protection"—including from the States. *Id.* at 552 (quoting *Seber*, 318 U.S. at 715); see *United States* v. *Kagama*, 118 U.S. 375, 384 (1886) (observing that "[b]ecause of the local ill feeling, the people of the States where [Indian tribes] are found are often their deadliest enemies"). "Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic." *Mancari*, 417 U.S. at 552 (quoting *Seber*, 318 U.S. at 715).

Under the Constitution, the federal government thus enjoys "the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders." *Sandoval*, 231 U.S. at 46. That power and duty are "'necessary concomitants of nationality,'" part of the "Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government." *Lara*, 541 U.S. at 201 (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-322 (1936)). And they reflect the nature of the federal government's relationship with Indian tribes—a relationship that "has been characterized as akin to a guardian-ward relationship, or, in more contemporary parlance, a trust relationship." Pet. App. 81a n.23; see

Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, C.J.) (describing the Indian tribes' "relation to the United States" as "that of a ward to his guardian"); *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) (explaining that "[t]hroughout the history of the Indian trust relationship," this Court has "recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress").

Congress's plenary power over Indian affairs finds further confirmation in "long continued legislative and executive usage." *Sandoval*, 231 U.S. at 46; see *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020) (explaining that "'a regular course of practice' can 'liquidate & settle the meaning of' disputed or indeterminate 'terms & phrases'" in the Constitution) (citation omitted). "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 234 (1985). "In 1790, at the urging of President Washington and Secretary of War Knox, Congress passed the first Indian Trade and Intercourse Act." *Id.* at 231; see Act of July 22, 1790, ch. 33, 1 Stat. 137. That "legislation provided exclusively for federal management of essential aspects of Indian affairs," including the "federalization of crimes committed by non-Indians against Indians" in Indian territory. Pet. App. 79a (opinion of Dennis, J.). And it was merely the first of a "series of Acts * * * designed to regulate trade and other forms of intercourse between the North American Indian tribes and non-Indians." *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979); see Pet. App. 79a (opinion of Dennis, J.) (citing statutes). The federal government's plenary power over Indian affairs has

thus "always been recognized by the Executive and by Congress, and by this [C]ourt, whenever the question has arisen." *Kagama*, 118 U.S. at 384. That shared understanding, reflected in "[l]ong settled and established practice" dating to the Founding, removes any doubt about the existence of the power. *Chiafalo*, 140 S. Ct. at 2326 (citation omitted).

In light of the text, structure, and history of the Constitution, the en banc court of appeals correctly held that ICWA—including its placement preferences—represents a valid exercise of Congress's plenary power over Indian affairs. See Pet. App. 75a-110a (opinion of Dennis, J.). In enacting ICWA, Congress specifically relied upon its "plenary power over Indian affairs," which it traced to the Indian Commerce Clause and "other constitutional authority." 25 U.S.C. 1901(1). In addition, Congress invoked its "responsibility for the protection and preservation of Indian tribes and their resources"—a responsibility Congress found evident in "statutes, treaties, and the [United States'] general course of dealing with Indian tribes." 25 U.S.C. 1901(2). And Congress expressly articulated how ICWA was connected to that responsibility, explaining that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," 25 U.S.C. 1901(3); that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," 25 U.S.C. 1901(4); and that by establishing "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes," ICWA "protect[s] the best interests of Indian children"

and "promote[s] the stability and security of Indian tribes and families," 25 U.S.C. 1902.

The judges who dissented on this issue did not dispute that "Congress has ample power to legislate respecting Indians," including on matters "that go beyond trade." Pet. App. 231a (opinion of Duncan, J.). Indeed, they acknowledged that "[a]mple founding-era evidence shows that Congress's Indian affairs power was intended to be both broad in subject matter and exclusive of state authority." *Id.* at 253a-254a. The dissent nevertheless concluded that ICWA exceeds Congress's "Indian affairs power" on the theory that it "trespass[es] on state child-custody proceedings." *Id.* at 268a. But Congress's Indian affairs power includes a duty to protect Indians from other sovereigns, including "the people of the States." *Kagama*, 118 U.S. at 384; see Pet. App. 82a (opinion of Dennis, J.) ("Chief among the external threats to the Indian tribes were the states and their inhabitants."). And there is nothing remarkable about the fact that ICWA does so by establishing minimum federal standards that apply in state-court proceedings. See Pet. App. 102a (opinion of Dennis, J.) (citing "ample Supreme Court precedent supporting Congress's authority to enact laws applicable in state proceedings"); cf., *e.g.*, 42 U.S.C. 14932(b) (establishing similar minimum federal standards, applicable in state-court proceedings, for international adoptions). After all, the Constitution expressly provides that "the Judges in every State shall be bound" by federal law. U.S. Const. Art. VI, Cl. 2.

Petitioners contend (Pet. 27-28) that "commerce" should have the same meaning under the Indian Commerce Clause as it does under the Interstate Commerce Clause. No member of the en banc court adopted that

view, and for good reason. See, *e.g.*, Pet. App. 90a (opinion of Dennis, J.) (finding petitioners' "construction of the Indian Commerce Clause unduly cramped, at odds with both the original understanding of the clause and the Supreme Court's more recent instructions"); *id.* at 256a (opinion of Duncan, J.) (accepting, in light of founding-era evidence, that "Congress's [Indian affairs] power goes beyond regulating tribal trade").

As this Court has recognized, "the Interstate Commerce and Indian Commerce Clauses have very different applications." *Cotton Petroleum*, 490 U.S. at 192; cf. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 446-447 (1979) (rejecting the premise "that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved"). "In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, 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*, 490 U.S. at 192 (citations omitted). "The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Ibid.*; see *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."). Petitioners' attempt to equate the two clauses therefore lacks merit.

Petitioners also argue that because the Indian Commerce Clause grants Congress the power to regulate commerce "with the Indian *Tribes*," it does not grant Congress the power to regulate matters involving individual Indians. Pet. 28 (citation omitted). But this Court has rejected that reading of the Clause, holding that "commerce with the Indian tribes[] means commerce with the individuals composing those tribes." *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 417 (1866). And in any event, the Indian Commerce Clause is not the only "constitutional authority" on which Congress's plenary power over Indian affairs rests. 25 U.S.C. 1901(1); see pp. 23-28, *supra*. Congress thus had ample authority to enact ICWA's placement preferences.

b. Petitioners' contrary contention does not satisfy any of this Court's established criteria for review. The court of appeals *upheld* ICWA's placement preferences as a valid exercise of Congress's plenary power over Indian affairs. Cf. *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019) (explaining that this Court "usual[ly]" grants review "when a lower court has *invalidated* a federal statute") (emphasis added). And the court of appeals' decision upholding ICWA's placement preferences on that ground does not conflict with any decision of this Court, another court of appeals, or any state court of last resort.

Nor have petitioners asked this Court to overrule any of its longstanding precedents recognizing Congress's plenary power over Indian affairs. See pp. 23-24, *supra* (citing precedents). Rather, petitioners have asked (Pet. 27) this Court to grant review merely to resolve "uncertainty" about the scope of Congress's power. That is not a basis for granting review of the en banc court of appeals' decision sustaining an Act of Congress that was enacted more than forty years ago and

that has served to protect Indian children, their families, and their tribes since that time.

Moreover, the question whether Congress's Indian affairs power encompasses the authority to enact ICWA's placement preferences presents an issue distinct from the anticommandeering issue on which the federal government and the Tribes have sought certiorari. See 21-376 Pet. I, 15-21; 21-377 Pet. i, 19-29. The anticommandeering issue raised by the federal government and the Tribes turns on whether ICWA "issue[s] direct orders to the governments of the States." *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). That question is separate from whether ICWA falls within Congress's Indian affairs power. Indeed, the court of appeals understood the issues to be distinct. See Pet. App. 105a (opinion of Dennis, J.) ("first address[ing] Congress's Article I authority to legislate over ICWA's subject matter and then separately consider[ing] whether ICWA is consistent with the anticommandeering doctrine"); *id.* at 230a-269a, 289a-327a (opinion of Duncan, J.) (similar). And petitioners likewise address the issues separately in their petition for a writ of certiorari. See Pet. 27-29 (Article I); Pet. 29-32 (anticommandeering). Given that the issues are distinct and the question of Congress's power to enact ICWA does not satisfy this Court's standards for review, there is no sound reason for the Court to grant review of that question.

4. Petitioners further contend (Pet. 29-32) that ICWA's placement preferences impermissibly commandeer state judges. That contention likewise lacks merit and does not warrant this Court's review, even assuming that it presented an Article III case or controversy.

a. Section 1915(a) establishes a default order of preference for adoptive placements, while Section 1915(b) does the same for foster-care and preadoptive placements. 25 U.S.C. 1915(a) and (b). Those preferences "are inapplicable in cases where no alternative party * * * has come forward." *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 654 (2013). If, however, an "alternative party that is eligible to be preferred" does "come forward," *ibid.*, Section 1915(a) and (b) require the court to give that party "preference," unless another party demonstrates "good cause" to depart from the order of preference, 25 U.S.C. 1915(a) and (b).

Section 1915(a) and (b) thus establish "substantive child-custody standards applicable in state child-custody proceedings." Pet. App. 312a. And the Supremacy Clause requires state judges to apply "federal standards" "even in realms of traditional state authority such as family and community property law." *Ibid.* Thus, as every member of the en banc court correctly recognized, "ICWA's substantive standards requiring state courts to observe placement preferences * * * are valid preemption provisions." *Id.* at 313a; see *id.* at 111a-114a (opinion of Dennis, J.) (concluding that "§ 1915(a) and (b)'s placement's preferences simply supply substantive rules enforceable in state court and do not violate the Tenth Amendment").

Petitioners assert (Pet. 31) that there is "no basis" for directing state judges to apply ICWA's placement preferences. But the Supremacy Clause provides that "the Laws of the United States * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. Art. VI, Cl. 2. Thus, although "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce

them," that "sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York* v. *United States*, 505 U.S. 144, 178-179 (1992).

Petitioners argue (Pet. 32) that, unlike other federal statutes enforceable in state court, ICWA's placement preferences do not "regulat[e] private actors." That contention is incorrect. As this Court has recognized, Section 1915 "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 37 (1989) (citation omitted). Section 1915 thus "confers rights on private actors." *Murphy*, 138 S. Ct. at 1480. And the text of 25 U.S.C. 1921, which refers to "the rights provided under this subchapter," confirms that Section 1915 does so. 25 U.S.C. 1921.

b. Petitioners' contention that ICWA's placement preferences impermissibly commandeer state judges does not warrant this Court's review. The en banc court unanimously *upheld* the constitutionality of those provisions as applied to state judges, and that decision does not conflict with any decision of this Court, another court of appeals, or any state court of last resort.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
TODD KIM
Assistant Attorney General
RACHEL HERON
Attorney

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