No. 21-380

IN THE
Supreme Court of the United States

CHAD EVERET BRACKEEN, *et al.*,

Petitioners,

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

REPLY BRIEF FOR PETITIONERS

MARK D. FIDDLER
FIDDLER OSBAND, LLC
5200 Willson Rd.
Ste. 150
Edina, MN 55424
(612) 822-4095

MATTHEW D. MCGILL
Counsel of Record
LOCHLAN F. SHELFER
DAVID W. CASAZZA
AARON SMITH
ROBERT A. BATISTA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

I. THIS COURT SHOULD REVIEW INDIVIDUAL PETITIONERS' QUESTIONS PRESENTED 2

II. THE UNITED STATES' AND TRIBES' BASELESS ARTICLE III ASSERTIONS DO NOT RENDER THIS CASE AN INAPPROPRIATE VEHICLE FOR REVIEW OF INDIVIDUAL PETITIONERS' QUESTIONS..... 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Adoptive Couple v. *Baby Girl*,
570 U.S. 637 (2013).....2, 3

Ballard v. *Comm'r*,
544 U.S. 40 (2005).....5

Bennett v. *Spear*,
520 U.S. 154 (1997).....6, 7, 11

Carney v. *Adams*,
141 S. Ct. 493 (2020).....9

City of Richmond v. *J.A. Croson Co.*,
488 U.S. 469 (1989).....6

FEC v. *Akins*,
524 U.S. 11 (1998).....11

FEC v. *Wis. Right to Life, Inc.*,
551 U.S. 449 (2007).....9

Franklin v. *Massachusetts*,
505 U.S. 788 (1992).....11

Lehman v. *Lycoming Cnty. Children's Servs. Agency*,
458 U.S. 502 (1982).....9

Lujan v. *Defs. of Wildlife*,
504 U.S. 555 (1992).....11

Meyer v. *Grant*,
486 U.S. 414 (1988) 10

Murphy v. *NCAA*,
138 S. Ct. 1461 (2018) 6

Nat'l Fed'n of Indep. Bus. v. *Sebelius*,
567 U.S. 519 (2012) 3

Rumsfeld v. *FAIR*,
547 U.S. 47 (2006) 9

Summers v. *Earth Island Inst.*,
555 U.S. 488 (2009) 9

Susan B. Anthony List v. *Driehaus*,
573 U.S. 149 (2014) 9

Utah v. *Evans*,
536 U.S. 452 (2002) 10, 11

Statutes

5 U.S.C. § 702 10

25 U.S.C. § 1903(4) 5

25 U.S.C. § 1915(a) 5, 6

25 U.S.C. § 1915(b) 5

28 U.S.C. § 1254 7

Other Authorities

Indian Child Welfare Act Proceedings,
81 Fed. Reg. 38,778 (June 14, 2016) 8

REPLY BRIEF FOR PETITIONERS

This case undisputedly presents constitutional questions of great importance. All parties agree that this Court should review the decision of the en banc Fifth Circuit. All agree that the Court should determine whether the Indian Child Welfare Act ("ICWA") violates the Constitution's equal-protection guarantees. And all agree that the Court should review whether ICWA impermissibly upends the federal-state balance of power struck by the Constitution.

But the United States and the Tribes seek to cabin this Court's review only to those portions of the judgment below that they lost, and to leave unresolved every other constitutional question that deeply divided the court below. The Court should not limit its review in this way. Even under the United States' and the Tribes' questions presented, all of Individual Petitioners' equal-protection arguments are in play, including those that implicate more than just ICWA's third placement preference. And rightly so, because ICWA's entire sorting scheme—both its separation of "Indian child[ren]" from other children and its hierarchy of placement preferences—must be reviewed "as a whole." Pet. App. 286a (Duncan, J.).

Similarly, ICWA's two independent violations of state sovereignty—its "unheard-of" intrusion into the state-regulated domain of "domestic relations" and its "co-opt[ing]" of state courts and agencies, Pet. App. 207a–08a (Duncan, J.)—raise foundational federalism concerns that should be answered in full.

The United States and the Tribes further contend that their own Article III objections make this case an inappropriate vehicle, yet they agree that the case is a good enough vehicle for *their* questions. In any

event, the Article III objections are baseless, as both courts below concluded.

The constitutional questions presented by Individual Petitioners should be resolved without delay. Every day, state courts across the country must determine whether a child's placement will be governed by state law—with an individualized best-interests analysis—or by ICWA's federal regime. Those rulings dictate the destinies of "vulnerable children" in need of a home. *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 655 (2013). Only this Court can settle whether ICWA and its placement preferences violate the constitutional rights of children with Indian ancestry and of the families who seek to foster and adopt them. The Court should grant all four petitions and adopt the questions as presented by Individual Petitioners and Texas.

I. THIS COURT SHOULD REVIEW INDIVIDUAL PETITIONERS' QUESTIONS PRESENTED.

ICWA's placement preferences violate the Constitution's equal-protection guarantee, exceed Congress's enumerated powers, and commandeer States. Pet. 17–32. Respondents do not and cannot dispute the importance of the questions presented. Instead, they devote the bulk of their responses to arguing the merits. *See* U.S. Opp. 16–30, 32–33; Tribes Opp. 16–23, 28–31; Navajo Opp. 25–34. But this merits argument, coupled with an en banc decision of hundreds of pages across six opinions, Pet. App. 4a–409a, simply underscores that this Court's review is necessary to resolve Individual Petitioners' questions.

Respondents agree that questions of ICWA's constitutionality justify this Court's attention, and have themselves sought review of equal-protection and anti-commandeering questions. U.S. Pet. i, No. 21-

376; Tribes Pet. i, No. 21-377. The United States and the Tribes, however, ask this Court to consider the decision below only to the extent that the Fifth Circuit invalidated certain provisions. U.S. Opp. 12; Tribes Opp. 4. But when a lower court has invalidated some parts of a statute and upheld others, this Court has not hesitated to review the entire decision, including all arguments raised by the challengers. *See*, *e.g.*, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 541–42 (2012). Doing so is especially appropriate here. Petitioners seek review of statutory provisions that are interrelated with those held unconstitutional below. Plenary review of both the equal-protection and the federalism questions is appropriate.

A. This case "squarely raises the 'equal protection concerns' forecast by" this Court nearly a decade ago in *Adoptive Couple*. Pet. App. 284a (Duncan, J.). ICWA "place[s] vulnerable Indian children at a unique disadvantage" (*Adoptive Couple*, 570 U.S. at 653–54) by substituting Congress's preferences for the state-law standards focused on the child's individual best interests. *See* Goldwater Inst. Amicus Br. 4; Project on Fair Representation Amicus Br. 2–4. Yet, rather than defend ICWA's placement preferences as race-neutral, the United States and the Tribes urge this Court to limit its review to ICWA's third-ranked placement preference, and then only under rational-basis review.

That unusual request should be rejected. The equal-protection concerns flagged by this Court in *Adoptive Couple* now have been greatly amplified by the deeply divided decision of the en banc Fifth Circuit. The constitutionality of all of ICWA's placement preferences is in serious doubt. There is no reason why this Court should prolong that uncertainty.

The Brackeens' ongoing case to adopt Y.R.J. shows this in stark relief. If this Court were to *refuse* to consider any question other than whether the third placement preference satisfies rational-basis review, as urged by the United States and the Tribes, Y.R.J. and the Brackeens could face years of further uncertainty before the remaining questions regarding the placement preferences' constitutionality are resolved. It is not only inefficient to split the constitutional questions raised by ICWA's racial-preference scheme into multiple cases, but guarantees years of further litigation to determine whether Indian children's adoptions will be governed by their best interests, or instead by a congressional policy to place Indian children in the Indian community.

In any event, constitutional review of ICWA's third placement preference necessarily includes review of the constitutionality of ICWA's preference scheme as a whole. It also necessarily implicates the classification of "Indian child[ren]" to whom the preference applies. Individual Petitioners argued below that the "Indian child" classification is impermissibly race-based. Brackeens Br. 27–38, No. 18-11479 (5th Cir. Jan. 8, 2020). And if they prevail on that argument, all of ICWA's placement preferences necessarily would fall.

Review of ICWA's third placement preference also necessarily will involve arguments over the standard of review to be applied. The United States and the Tribes cannot pretermit this Court's ability to decide the standard of review by assuming the answer in their question presented; the correct standard of review is "anterior" and therefore "fairly included" in their question. *See Ballard* v. *Comm'r*, 544 U.S. 40, 47 n.2 (2005); Brackeens Resp. Br. 11–12, Nos. 21-376,

21-377, 21-378. Here, eight members of the en banc court applied rational-basis review only "*arguendo*" because, as Petitioners had argued in the alternative, the placement preferences fail even that relaxed standard. Pet. App. 286a (Duncan, J.). This Court could not reverse that ruling without addressing Petitioners' argument that strict scrutiny applies.[1]

The reality is that Section 1915's placement preferences are a unified scheme enacted to implement a federal policy of placing Indian children in the Indian community. It does this by sorting out "Indian child[ren]" from other children, and then mandating preferences that undisputedly draw distinctions based on race. 25 U.S.C. §§ 1903(4), 1915(a)–(b). Individual Petitioners seek review of the question whether that scheme impermissibly discriminates on the basis of race. This Court should grant Individual Petitioners' petition and thereby make clear that it is reviewing the whole of ICWA's placement-preference regime, and not just the fragment that the United States and Tribes wish to restore.[2]

---

[1] The United States contends that, because Petitioners' question presented asks whether ICWA discriminates "on the basis of race," Petitioners somehow have forfeited the ability to argue that ICWA fails rational-basis review. U.S. Opp. 21. That is a puzzling argument given that the United States' own petition asks whether the placement preferences survive rational-basis review. U.S. Pet. i. In any event, the United States concedes that Petitioners argued "ICWA's placement preferences cannot survive any level of scrutiny." U.S. Opp. 21 (quoting Pet. 24).

[2] The United States mistakenly suggests that this case raises only a facial challenge, and that the Court should await an "as applied" challenge. U.S. Opp. 16, 22. In fact, Petitioners did challenge ICWA as applied to them. Ct. App. ROA.511–15. In

B. Similarly, this Court should not cabin its review of ICWA's violation of the Constitution's federalist structure. Respondents have asked this Court to review whether "various provisions of ICWA," including "the placement-preference provisions," "violate the anti-commandeering doctrine." U.S. Pet. i; *see also* Tribes Pet. i. Now they argue that Petitioners' request for review of whether "ICWA's placement preferences ... commandeer[] state courts and state agencies" should be denied. Pet. i. But whether the anti-commandeering doctrine has a loophole for state courts—particularly where Congress purports to modify "State law," 25 U.S.C. § 1915(a)—is independently worthy of review. *See* Ohio Amicus Br. 2–3. Even if this Court granted only the United States' and Tribes' petitions, Petitioners would be entitled to raise the full anti-commandeering argument in defense of their judgment below. *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997).

For similar reasons, the Court also should review whether ICWA exceeds Congress's enumerated powers, as seven judges on the en banc court concluded. This question will arise even if the Court grants only the United States' and Tribes' petitions. Both argue that ICWA's placement preferences are valid because they preempt state law. U.S. Pet. 19; Tribes Pet. 19. But for a federal law "to preempt state law ... it must represent the exercise of a power conferred on Congress by the Constitution." *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1479 (2018). ICWA does not. Pet. 28; Texas

---

any event, statutes that violate equal protection are facially "invalid" even if they might be permissibly applied to certain "identified" individuals. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 509, 520 (1989) (plurality); *see also id.* at 526–27 (Scalia, J., concurring in the judgment).

Pet. 12–18. In any event, Petitioners would again be entitled to defend their judgment on any ground, including that Congress lacks the enumerated power to enact ICWA. *Bennett*, 520 U.S. at 166; Pet. App. 207a, 230a–68a (Duncan, J.). There is no reason for the Court to artificially constrain its review.

II. THE UNITED STATES' AND TRIBES' BASELESS ARTICLE III ASSERTIONS DO NOT RENDER THIS CASE AN INAPPROPRIATE VEHICLE FOR REVIEW OF INDIVIDUAL PETITIONERS' QUESTIONS.

Persisting in their campaign to evade review of ICWA's merits, the United States, Tribes, and Navajo Nation claim that this *petition* is a "poor vehicle" for review of Individual Petitioners' questions because of manufactured and repeatedly rejected challenges to Petitioners' standing. U.S. Opp. 12; Tribes Opp. 31; Navajo Opp. 21. But by filing their own petitions, Respondents concede that this "case" (28 U.S.C. § 1254) is an appropriate vehicle for review of closely related questions arising from Petitioners' claims for relief. If this case is a good enough vehicle to carry the United States' and the Tribes' gerrymandered questions, it is good enough to carry Individual Petitioners' questions arising from the same judgment on the same claims for relief.

In any event, Respondents' standing arguments have been rejected by the district court, a unanimous Fifth Circuit panel, and 11 judges of the en banc court, and it fares no better today. Petitioners' Article III standing has been "clear" from the outset. Texas Pet. App. 559a.

First, all parties agree that Petitioners have standing to bring their Administrative Procedure Act

("APA") claim, which challenges ICWA's implementing regulations by arguing that both the rule and ICWA itself are unconstitutional. *See Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778 (June 14, 2016). "[T]o decide that APA claim, we would in any event have to address whether the relevant parts of ICWA violate equal protection." Pet. App. 230a n.19 (Duncan, J.). Even the dissent below "concede[d] the [Petitioners] have standing to bring APA claims." *Ibid.*; *see also* Pet. App. 394a (Costa, J.). Petitioners' APA claim alone puts to rest any dispute over standing or the propriety of a federal-court proceeding.

Even apart from their APA claim, Petitioners clearly satisfy Article III's injury-in-fact and redressability requirements.[3]

Injury in fact. The Brackeens have been injured twice over by ICWA. When this action was filed, their efforts to adopt a child—A.L.M.—had been rebuffed because of ICWA's placement preferences. Ct. App. ROA.2706. After the Brackeens adopted A.L.M., they alleged in an amended complaint that they "intend[ed]" to foster and adopt "additional children in need." Pet. App. 64a n.15 (Dennis, J.) (alteration in original).

Some Respondents deride these as "some day" assertions, *e.g.*, Navajo Opp. 17, but the Brackeens in fact *are now* attempting to adopt Y.R.J., A.L.M.'s sibling, while the Navajo Nation—again—is opposing the adoption. The Brackeens' real-life experiences confirm their allegations that "they had [tried to adopt] in the past, there were regular opportunities available with relevant frequency, and they were 'able and

---

[3] Respondents do not challenge traceability.

ready' to apply for [adoption]" again. *Carney* v. *Adams*, 141 S. Ct. 493, 503 (2020). Under a "straightforward application of precedent," no more is needed. *Ibid.* A plaintiff has standing to bring a pre-enforcement challenge where she "'actively engaged'" in proscribed conduct and "alleged 'an intention to continue'" that conduct "in the future." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 160 (2014). The Brackeens easily satisfy that standard.[4]

Respondents also argue that the Cliffords' and Librettis' claims are moot. U.S. Opp. 14; Tribes Opp. 35. Of course, one plaintiff with standing is sufficient to satisfy Article III. *Rumsfeld* v. *FAIR*, 547 U.S. 47, 52 n.2 (2006). Moreover, these are classic examples of claims that are capable of repetition yet evading review. Pet. App. 225a (Duncan, J.). This doctrine "applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (internal quotation marks omitted). Adoption proceedings typically are short in duration, given that "a speedy resolution of disputes in cases involving child custody" is preferred. *Lehman* v. *Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 515 (1982).

---

[4] That the Brackeens became foster parents to Y.R.J. only after the district court entered judgment is of no moment. *Contra* Tribes Opp. 35. As the district court correctly held, "Plaintiffs already met the challenge to their standing at the time of judgment." Ct. App. ROA.4313 n.3 (distinguishing *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009)).

As for the second prong, Petitioners all stated their intention to foster and adopt children again. *See* Pet. 7 n.1; Ct. App. ROA.615, 618–19. Such "plan[ned] future attempts" to adopt show a "reasonable expectation" of recurrence, *Meyer* v. *Grant*, 486 U.S. 414, 417 n.2 (1988), as "confirmed by [the Brackeens'] later attempted adoption of Y.R.J.," Pet. App. 65a n.15 (Dennis, J.).[5]

Redressability. As the court below correctly held, Petitioners' injuries would be redressed by a favorable decision "in numerous ways." Pet. App. 229a (Duncan, J.). Petitioners could more readily "overcom[e] ICWA's preferences," child-welfare officials would no longer need "to implement the preferences" against Petitioners, federal defendants could not "induc[e] state officials to implement ICWA," and adoptions would be "less vulnerable to being overturned." *Ibid.*

In addition, Petitioners' injuries were likely to be redressed by a favorable decision because state courts were likely to accord some deference to the federal court's determination of ICWA's conflict with the U.S. Constitution; indeed, at the time of the en banc Fifth Circuit's decision, a state court already had stated that it would defer to a ruling in this case. Pet. App. 64a (Dennis, J.). That a federal decision is not "binding on ... state courts" (Navajo Opp. 19; *see also* U.S. Opp. 15) is irrelevant. Redressability exists where an "authoritative interpretation" would "significant[ly] increase" the "likelihood that the plaintiff would obtain relief," *Utah* v. *Evans*, 536 U.S. 452, 464 (2002),

---

[5] Respondents' arguments that challenges to ICWA can be litigated in state court ignores that APA actions must be brought in federal court. 5 U.S.C. § 702.

even where the named defendant had discretion to disregard the court's opinion, *see FEC* v. *Akins*, 524 U.S. 11, 25 (1998).

The Navajo Nation incorrectly claims that "Justice Scalia explained *for the Court* that redressability" is not satisfied here, but it actually cited Justice Scalia's lone opinion *disagreeing with* all eight other Justices who found standing. Navajo Opp. 19 (emphasis added) (citing *Franklin* v. *Massachusetts*, 505 U.S. 788, 824–25 & n.1 (1992) (Scalia, J., concurring in part and in the judgment)). The plurality, by contrast, explained that "redress[ability]" exists where non-party actors are "substantially likely" to "abide by an authoritative interpretation of the [federal] statute and constitutional provision[s] by the District Court, *even though they would not be directly bound*." *Franklin*, 505 U.S. at 803 (plurality) (emphasis added). The Court later confirmed this conclusion as binding precedent. *Utah*, 536 U.S. at 460.

In any event, all state courts would certainly be bound by *this Court's* interpretation of ICWA. The Tribes argue that the Court cannot consider the precedential force of its own opinion because it was uncertain whether "the suit would reach this Court" when it was filed. Tribes Opp. 33–34 (citing *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 570 n.5 (1992) (plurality)). But once again Respondents miscite a nonbinding separate opinion as a majority opinion. In reality, all that Petitioners need to show is that their injuries would likely be redressed "by a favorable judicial ruling," *Bennett*, 520 U.S. at 168, including one by this Court.

Further underscoring how insubstantial Respondents' justiciability arguments are, the Tribes now concede that their own Article III arguments "are not independently certworthy." Tribes Opp. 32. On that

much, Petitioners agree: Respondents' manufactured standing arguments do not warrant this Court's review.

CONCLUSION

This petition—together with the three other related petitions—cleanly present this Court with the perfect opportunity to protect the constitutional rights of vulnerable adoptive children and their parents. The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK D. FIDDLER
FIDDLER OSBAND, LLC
5200 Willson Rd.
Ste. 150
Edina, MN 55424
(612) 822-4095

MATTHEW D. MCGILL
Counsel of Record
LOCHLAN F. SHELFER
DAVID W. CASAZZA
AARON SMITH
ROBERT A. BATISTA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Petitioners

December 22, 2021