Nos. 21-378, 21-380

In the Supreme Court of the United States

TEXAS, ET AL.

Petitioners,

v.

DEB HALLAND, ET AL.

Respondents.

CHAD EVERET BRACKEEN, ET AL.

Petitioners,

v.

DEB HAALAND, ET AL.

Respondents.

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

---

BRIEF OF *AMICUS CURIAE* STATE OF OHIO SUPPORTING PETITIONERS

DAVE YOST
Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
ZACHERY KELLER
SYLVIA MAY DAVIS
Deputy Solicitors General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@ohioago.gov

Counsel for Amicus Curiae State of Ohio

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

STATEMENT OF *AMICUS* INTEREST

The Indian Child Welfare Act, or "ICWA," is a federal law that dictates the operation of child-adoption proceedings in state courts.* Typically, state courts decide child-placement issues based on the child's best interests. But in cases involving children with Native American ancestry, ICWA requires that States set aside the best-interests test. ICWA requires that States instead strive to place these children with "other members of the Indian child's tribe" or "other Indian families." 25 U.S.C. §1915; *see also Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658 (2013) (Thomas, J., concurring). The result? Children can be ripped from the only parents they have ever known—sometimes foster parents who want to adopt the children permanently—and sent far away to live with people they do not know in a tribe to which they have no personal connection. ICWA commands each State to help facilitate these outcomes *without regard* to what the State's law would require in a case involving a child without Native American ancestry.

This ought to sound strange. Congress lacks any authority to regulate state adoption proceedings. When the People ratified the Constitution, they reserved to the States the power to regulate "domestic relations." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). True, this Court has said that Congress has "plenary power" over "Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). But

---

* Ohio timely notified counsel for all parties of its intention to file this brief. Sup. Ct. Rules 37.2(a), 37.4.

state-court domestic proceedings—even if they happen to involve someone with Native American ancestry—are not "Indian affairs" over which Congress has "plenary power." The Court should take this case to say so.

Because Ohio has seen firsthand the harm that ICWA does to children, *see In re C.J.*, 108 N.E.3d 677 (Ohio Ct. App. 2018), and because the Act unconstitutionally intrudes on a matter reserved to the States, Ohio urges this Court to grant *certiorari* and hold that Congress exceeded its constitutional authority when it enacted ICWA.

SUMMARY OF ARGUMENT

For two reasons, the Court should grant *certiorari* to decide whether ICWA violates the Constitution.

The first is that ICWA inflicts immense harm on innocent children. In exercising their reserved power over domestic relations, States make sensitive child-custody decisions by focusing on each child's best interests. *See Determining the Best Interests of the Child*, U.S. Dep't of Health & Human Servs. (June 2020), https://perma.cc/AP2Z-U63J. ICWA "substantially transform[s]" that process by mandating procedures and criteria that favor tribal placements for children with Native American ancestry. *See* Cohen's Handbook of Federal Indian Law §11.01. That favoritism can prolong child-custody proceedings for years. *See In re C.J.*, 108 N.E.3d 677 (Ohio Ct. App. 2018). It can require removing children from their homes and placing them in the custody of strangers. *See In re Alexandria P.*, 1 Cal. App. 5th 331 (Cal. Ct. App. 2016). And, in extreme cases, it endangers children's lives. *See* George F. Will, *The blood-*

stained Indian Child Welfare Act, Wash. Post (Sept. 2, 2015), https://perma.cc/F3UQ-T3EL.

The second reason to hear this case is that ICWA unconstitutionally intrudes upon state authority. In our system of dual sovereignty, Congress possesses "only certain enumerated powers"; all other powers are reserved to the States and the People. *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). This Court, however, has said that Congress has "plenary power" over "Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). In fact, Congress has no such power. No doubt, various clauses give Congress *some* power over *some* matters pertaining to Native Americans. The Indian Commerce Clause, for example, empowers Congress to regulate "Commerce … with the Indian Tribes." U.S. Const. art. I, §8, cl. 3. And Congress's power to "make all needful Rules and Regulations' respecting the Territory or other Property belonging to the United States," *id.*, art. IV, §3, cl.2, gives it power to regulate Native Americans on federal land. But nothing in the Constitution gives Congress anything approaching "plenary power" over *all* "Indian affairs." This case offers a chance for clarity: the Court can either overrule its cases recognizing a "plenary power" over "Indian affairs," or else make clear that the scope of Congress's "plenary power" is not so broad that it permits Congress to set the rules for state-court domestic proceedings.

ARGUMENT

I. The Indian Child Welfare Act reshapes child-custody proceedings, often changing lives in the process.

1. The "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). And as the sovereigns in charge of domestic relations, States must make difficult policy calls. For example, they must establish rules regarding when and how to place children with foster or adoptive parents.

In the ordinary course, Ohio and other States decide these matters based on "the 'best interests' of the child." *In re Cunningham*, 391 N.E.2d 1034, 1038 (Ohio 1979). The best-interest standard has its roots in "early English common law," and has grown into "the bedrock of our state custody statutory law." Julia H. McLaughlin, *The Fundamental Truth About Best Interests*, 54 St. Louis L.J. 113, 160 (2009); *see also* 2 J. Story, Commentaries on Equity Jurisprudence §§1339–41 (2d ed. 1839). States, to be sure, define a child's best interests in varying ways. Some States, for example, view a child's best interests through the lens of "overarching goals" like family integrity, child safety, and stability. *Determining the Best Interests of the Child* at 2, U.S. Dep't of Health & Human Servs. (June 2020), https://perma.cc/AP2Z-U63J. Ohio instructs its courts to consider "all relevant factors," including the relationship between child and caregiver, a child's wishes, and the child's "custodial history." Ohio Rev. Code §2151.414(D)(1). Even with these slight variations, at day's end, "all States" employ some version of the best-interest in-

quiry, with the goal of determining "who is best suited to take care of a child." *Determining the Best Interests of the Child* at 1–2, https://perma.cc/AP2Z-U63J.

ICWA overrides the best-interest inquiry. The Act applies to any custody proceeding involving an "Indian child." An "Indian child" is any child who is "eligible for membership in an Indian tribe" and has a biological parent who is a tribe member. 25 U.S.C. §1903(4). Federal guidelines direct state agencies to "conduct an investigation" in "every child custody proceeding" to determine whether the child is an "Indian child" subject to ICWA. 80 Fed. Reg. 10146, 10152 (Feb. 25, 2015). And state courts must inquire into a child's ancestry during every case, even if no participant raises the issue. 25 C.F.R. §23.107(a).

If a proceeding involves an "Indian child," ICWA dictates the applicable procedures and standards. 25 U.S.C. §§1911–22. ICWA presumes that state courts should transfer custody proceedings to tribal courts. 25 U.S.C. §1911(b). And that remains so even when the child in question does not live on a reservation. *See id.* ICWA also creates placement preferences. For example, state agencies must strive to place children with a member of a "child's tribe" or "other Indian families." 25 U.S.C. §1915(a)–(b).

For matters that reach state courts, ICWA imposes heightened burdens on the State. Under ICWA, state agencies cannot place a child in a suitable foster home without clear and convincing evidence, including expert testimony, that the placement is necessary for the child's well-being. 25 U.S.C. §1912(e). And ICWA prohibits the termination of parental rights unless the State is able to prove "beyond a

reasonable doubt," through "qualified expert witnesses," that such action is needed to protect the child. 25 U.S.C. §1912(f). State agencies must also make "active efforts" before placing a child in a foster home or terminating parental rights. 25 U.S.C. §1912(d). Such efforts include providing "rehabilitative programs" to unfit parents. *Id.*

A leading treatise aptly summarizes ICWA's force. While "state child welfare systems" focus on a child's "bond[] with" the caregiver, ICWA prefers "protect[ing] Indian families" over state-law considerations. Cohen's Handbook of Federal Indian Law §11.01. To achieve that preference, ICWA utilizes a combination "of jurisdictional allocation, procedural requirements, and substantive criteria for child placement." *Id.* That combination "substantially transform[s] the way that Indian child welfare proceedings are carried out in the state court systems." *Id.* This has the effect of "inserting federal and tribal law into family matters long within the domain of the states." *Id.*

2. ICWA's real-life applications can be horrifying. Three stories from three different States illustrate the point.

C.J. One poignant example of ICWA's consequences comes from Ohio. *In re C.J.*, 108 N.E.3d 677 (Ohio Ct. App. 2018). Over six years ago, Franklin County officials took custody over a then-two-year-old boy, C.J., based on allegations of child neglect. *Id.* at 681–82. C.J. was born in Ohio. He had lived there all his life. *Id.* at 681. At the recommendation of C.J.'s court-appointed guardian, C.J. was placed in the temporary custody of a foster family. *Id.* at 682. In that setting, C.J. developed "a close bond with his

foster parents and foster siblings." *Id.* at 683. Meanwhile, C.J.'s biological parents were continually homeless, showed "signs of ongoing drug addiction," and found "themselves in and out of jail." *Id.* Faced with these circumstances, C.J.'s guardian moved the juvenile court to award C.J.'s foster parents permanent legal custody. *Id.* Under Ohio law, the primary issue at that point *should* have been whether awarding permanent custody would advance C.J.'s best interests. *See Cunningham*, 391 N.E.2d at 1038.

Because of ICWA, C.J.'s best interests were set aside. With the custody motion pending, an Arizona tribe (the Gila River Indian Community) intervened. *C.J.*, 108 N.E.3d at 682–83. The tribe asserted that ICWA applied based on the ancestry of C.J.'s father. *Id.* at 683 n.2. To be more precise, C.J. may have been "eligible" for membership in the tribe because he had "at least one-fourth Indian blood" and had a father who *might* have been a member. *See* Gila River Const. art. III, §1 (1960), https://perma.cc/3DK3-3SFM. Yet the father's absence from the tribe's reservation for more than twenty years placed his membership in doubt, *id.* art. III, §3, and no "documentation" had been offered to prove the father's membership, *C.J.*, 108 N.E.3d at 683 n.2. Nor had C.J. ever "set foot" on the reservation. *Id.* at 696. Despite these facts, the tribe claimed that Arizona offered the "*only* proposed placement" that would satisfy ICWA. Br. of the Gila River Indian Cmty. 26 n.6, *In re C.J.*, 108 N.E.3d 677 (Ohio Ct. App. 2018) (Nos. 17AP-162 and 17AP-191).

The tribe's efforts initially succeeded. It obtained an *ex parte* order from its own tribal court declaring C.J. to be a ward of that court. *C.J.*, 108 N.E.3d at 685. Then, over the objections of C.J.'s now-deceased

mother (who was not Native American), the tribe moved to transfer jurisdiction to the tribal court. *Id.* at 683. The juvenile court, "without any analysis of" C.J.'s best interests, granted the motion, transferring C.J.'s custody "to strangers" he had "never met." *Id.* at 697. Luckily for C.J., an Ohio appellate court reversed on jurisdictional grounds, concluding that the tribe's *ex parte* order "bootstrap[ped]" its own jurisdiction and violated due process. *Id.* at 696–97. So C.J. barely avoided being taken from the only real home he has ever known.

Eleanor. Now consider an Illinois case from decades ago. *In re Armell*, 194 Ill. App. 3d 31 (Ill. Ct. App. 1990). *Armell* involved a three-year-old girl, Eleanor, who was found rummaging through a garbage can in a Chicago alley. *Id.* at 34. At the time, Eleanor was suffering from untreated tuberculosis. *Id.* To rectify these problems, local officials placed Eleanor with a foster family. *Id.* Over the next four years she lived with that family, and she became "highly adverse" to leaving them. *Id.* at 36.

But it was eventually discovered—over two years after Eleanor's foster placement—that Eleanor's mother was a member of a Native American tribe (the Potawatomi). *Id.* at 35. The tribe sought to transfer Eleanor's custody proceedings to a tribal court. *Id.* And the Illinois courts agreed to that transfer. An Illinois appellate court held that there was no good cause to block transfer of Eleanor's case. *Id.* at 40. It did not matter, in that court's view, that transfer to the tribal court would likely disrupt Eleanor's life. *See id.* at 45. ICWA "expressed a preference for the tribal court to determine these matters regardless of any psychological impact upon the child." *Id.* at 40.

Lexi. When Lexi was seventeen months old, officials removed her from her parents based on several child-welfare concerns, including her parents' substance abuse. *In re Alexandria P.*, 1 Cal. App. 5th 331, 338–39 (Cal. Ct. App. 2016). After bouncing through different foster homes, Lexi eventually came to live with the Pages. And she lived with them for over four years, forming "a strong primary bond and attachment with the entire [Page] family." *Id.* at 339.

ICWA broke that bond. It did so because Lexi is "*1/64th* Choctaw" and falls within ICWA's definition of an "Indian child." *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1330 (Cal. Ct. App. 2014) (emphasis added). The Choctaw tribe thus became involved in Lexi's proceedings and, after Lexi's father abandoned reunification efforts, the tribe sought to place Lexi with distant family members in Utah. *In re Alexandria P.*, 1 Cal. App. 5th at 340–41. In light of ICWA's preferences for tribal placements, the Pages—to avoid losing custody over Lexi—needed to prove "by clear and convincing evidence that there was good cause to depart from" the tribe's wishes. *Id.* at 335. According to the California courts, they did not meet that burden. *See id.* Lexi's best interests took a backseat to ICWA. Indeed, a California appellate court specifically cautioned lower courts against using "the best interests concept … as sufficient reason to depart from … ICWA's placement preferences." *Id.* at 351.

All of this culminated in a tragic scene: a six-year-old girl being taken from the people she viewed as her parents and siblings. Charlotte Alter, *Inside the Agonizing Custody Fight Over Six-Year-Old Lexi*, Time (Mar. 28, 2016), https://perma.cc/8GEX-Q7F7.

The Pages continued to fight Lexi's removal from their home. But their legal battle ended the next year when this Court denied review. *R.P. v. L.A. Cnty. Dep't of Child. & Fam. Servs.*, 137 S. Ct. 713 (2017).

3. The bottom line is that ICWA is meant to significantly alter child-custody proceedings. It does exactly that. Each year, and just counting cases that make it to appellate courts, ICWA affects hundreds of child-custody disputes. *See* Kathryn E. Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 7 American Indian L.J. 21, 27–28 (2019). The three stories above provide only a sampling. There are many more such stories—some with fatal endings. *See, e.g.*, Clint Bolick, *The Wrongs We Are Doing Native American Children*, Newsweek (Nov. 2, 2015), https://perma.cc/6LNU-L3CW; George F. Will, *The blood-stained Indian Child Welfare Act*, Wash. Post (Sept. 2, 2015), https://perma.cc/F3UQ-T3EL; Nolan Clay & Randy Ellis, *U.S. law pushed boy home before he died Tribal statute advocates reunifying split families*, The Oklahoman (Oct. 4, 2007), https://perma.cc/WE8B-UPJY; *In re Welfare of the Children of: S.R.K.*, 911 N.W.2d 821 (Minn. 2018); *Diego K. v. Alaska*, 411 P.3d 622 (Alaska 2018); *In re L.D.*, 391 Mont. 33 (Mont. 2018); *S.S. v. Stephanie H.*, 241 Ariz. 419 (Ariz. Ct. App. 2017); *Michelle M. v. Dep't of Child Safety*, 243 Ariz. 64 (Ariz. Ct. App. 2017); *In re Adoption of T.A.W.*, 383 P.3d 492 (Wash. 2016); *Nebraska v. David H.*, 846 N.W.2d 668 (Neb. Ct. App. 2014); *Dep't of Human Servs. v. J.M.*, 266 Ore. App. 453 (Or. Ct. App. 2014); *In re Zylena R. v. Elise M.*, 825 N.W.2d 173 (Neb. 2012); *Bruce L. v. W.E.*, 247 P.3d 966 (Alaska 2011); *In re Santos Y.*, 92 Cal. App. 4th 1274 (Cal. Ct.

App. 2001); *In re C.H.*, 997 P.2d 776 (Mont. 2000); *In re Bridget R.*, 41 Cal. App. 4th 1483 (Cal. Ct. App. 1996); *In re Robert*, No. 95-2, 1995 Ohio App. LEXIS 6084 (Ohio Ct. App. Dec. 26, 1995); *In re Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994); *D.S. v. Cnty. Dep't of Pub. Welfare*, 577 N.E.2d 572 (Ind. 1991); *In re N.S.*, 474 N.W.2d 96 (S.D. 1991).

One final point before pressing on. None of this calls into question the motive behind ICWA. Preventing the unwarranted break up of Native American families, *see* 25 U.S.C. §1901, is no doubt a laudable goal. But in seeking to address that problem, ICWA creates others. No matter how well intentioned, ICWA tips the scales of child-custody proceedings in ways that, far too often, immensely harm the very people that child-placement proceedings are supposed to protect: children.

II. The Court should accept this case to clarify the scope of Congress's power over Native American affairs.

Given ICWA's sizeable effect on child-custody proceedings, quite a bit rides on whether the Act is constitutional. Before ICWA's enactment, then-Assistant Attorney General Patricia Wald acknowledged serious constitutional doubts. She explained that "the federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude[] the wholesale invasion of State power contemplated by" ICWA. H.R. Rep. No. 95-1386, at 40 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7563. Over forty years later, that "wholesale invasion" persists. This case provides an opportunity to change that.

1. Begin with first principles. The "Federal Government" has only those "limited powers" that the Constitution expressly confers upon it. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *accord* The Federalist No. 45, p.313 (Madison, J.) (Cooke, ed., 1961). Congress, in particular, possesses "not plenary legislative power but only certain enumerated powers." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). In sharp contrast, all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Because States retain the "numerous and indefinite" powers not listed in the Constitution, The Federalist No. 45 at p.313, the Constitution's "enumeration of powers is also a limitation of powers," *NFIB v. Sebelius*, 567 U.S. 519, 534 (2012) (op. of Roberts, C.J.). For example, since the Constitution grants Congress no power over "family law" or "child custody," it follows that the States retain, and Congress lacks, authority to regulate domestic relations. *See Sosna*, 419 U.S. at 404; *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890).

This Court's jurisprudence on Native American affairs shows little regard for these basic principles. As the Court has at times conceded, the Constitution's text "is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders." *United States v. Kagama*, 118 U.S. 375, 378 (1886). Yet this Court has said that the Constitution "grants Congress broad general powers to legislate in respect to Indian tribes, powers that [it has] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (citation omitted); *ac-*

cord Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). Despite those statements, the Court has never given a "cogent answer" regarding the "source of congressional power" over *all* affairs related to Native Americans. *Lara*, 541 U.S. at 226 (Thomas, J., concurring in the judgment). With no explanation as to the "constitutional basis" for that power, the boundaries of the power remain "unclear." Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201, 204 (2007).

The *en banc* Fifth Circuit's analysis below illustrates the confusion this lack of clarity has caused. Judge Dennis's opinion—the lead opinion on the topic of congressional authority—interpreted Congress's "plenary power" over "Indian affairs … in the broadest possible terms." Pet.App.72a (Dennis, J., op.); *see also id.* at 385a (Costa, J., op.). (All "Pet.App." citations refer to the appendix filed in case number 21-378.) That power, Judge Dennis said, "totally displace[s] the states from having any role in these affairs." *Id.* at 73a (Dennis, J., op.). Judge Dennis could not locate this broad power in any single constitutional provision. He instead concluded that the power rested on the "holistic interplay" between several constitutional provisions. *Id.* at 85a.

Judge Duncan, in dissent, concluded that, "to the extent ICWA governs child-custody proceedings under state jurisdiction, it exceeds the Congress's power." Pet.App.224a (Duncan, J., op). In reaching that conclusion, he did not feel free to explore "original constitutional meaning." *Id.* at 226a. Rather, he thought his hands were tied by this Court's cases interpreting Congress's power "to legislate on Indian affairs" as a plenary power "extend[ing] beyond regu-

lating commerce with the Indian tribes." *Id.* at 225a. But some cases from this Court indicate that there are indeed limits to Congress's power over Native Americans. *Id.* at 226a–231a (discussing, among other cases, *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977) and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)). And, relying on one such case, Judge Duncan concluded that "Congress's Indian affairs power" does not permit "interfere[nce] with the power or authority of any State." *Id.* at 224a (quoting *Lara*, 541 U.S. at 205).

Tallying the votes (9 to 7), the *en banc* Fifth Circuit came "within a whisker of" holding that ICWA exceeds Congress's authority. Pet.App.384a (Costa, J., op.). The close vote and the court's fractured analysis are sure signs that the lower courts need guidance regarding the nature and source of Congress's power over Native American affairs.

2. Under any sensible clarification of Congress's authority, ICWA is unconstitutional. *Stare decisis* requires "deep respect" for this Court's prior holdings, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020), including this Court's earlier cases about Congress's power over Native American affairs. But *stare decisis* "has never been treated as an inexorable command." *Id.* (quotation omitted). The Court can, and does, overrule erroneous decisions. And it is especially likely to do so when those cases interpret the Constitution. *See id.*; *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2177 (2019); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019). As alluded to above, and as explained in more depth below, the Court's cases giving Congress a "plenary power" stray far afield from the text and history of the Constitution. Worse still, the "inadequate constitutional

analysis" and "doubtful assumptions" within these cases have created a confusing body of law. *Lara*, 541 U.S. at 214–15 (Thomas, J., concurring in the judgment); *see also id.* at 230 (Souter, J., dissenting). The Court should therefore consider overruling its plenary-power cases.

But the Court need not even go that far in order to hold ICWA unconstitutional. Respect for precedent does not require extending precedent "to the limits of its logic." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 615 (2007) (plurality op.). To the contrary, "fidelity to original meaning counsels against further extension of" precedents when doing so would put the case law at odds (or further at odds) with the Constitution's text. *Hester v. United States*, 139 S. Ct. 509, 509 (2019) (Alito, J., concurring in the denial of *certiorari*); *accord Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Scalia, J., dissenting). Courts should instead resolve unanswered questions regarding the scope of their precedent "in light of and in the direction of the constitutional text and constitutional history." *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); *accord Alden v. Maine*, 527 U.S. 706, 741 (1999).

These principles matter here. Everyone seems to agree that there is no decision from this Court "squarely addressing" whether Congress's power to regulate the affairs of Native Americans includes the power to regulate state proceedings concerning domestic relations. Pet.App.98a (Dennis, J., op.). Thus, this case presents an unresolved question. That, in turn, means the Court can, without offending *stare decisis*, answer the question with reference to the Constitution's original meaning. After all,

even if the Court is unwilling to *overrule* its "plenary power" precedents, it can look to the Constitution and history when considering whether to *extend* those precedents any further. Here, the Constitution and history point to the following limiting principle: Congress's "plenary power" over "Indian affairs" does not enable it to override the States' regulation of domestic affairs. In particular, Congress's "plenary power" does not extend to "child-custody proceedings under state jurisdiction." Pet.App.224a (Duncan, J., op.).

3. The constitutional analysis must start with the Indian Commerce Clause. U.S. Const. art. I, §8, cl. 3, That is the only constitutional provision that "grants Congress … explicit constitutional authority to deal with Indian tribes." Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Neb. L. Rev. 121, 137 (2006). The Court has frequently relied on the Clause in support of its "plenary power" statements. *See, e.g.*, *Lara*, 541 U.S. at 200; *Cotton Petroleum Corp.*, 490 U.S. at 192; *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974); *but see Kagama*, 118 U.S. at 378. And indeed, Congress expressly invoked the Indian Commerce Clause—alongside other unnamed "constitutional authority"—in claiming the power to enact ICWA. 25 U.S.C. §1901(1).

As an original matter, the Indian Commerce Clause does not give Congress a "plenary power" over Native American affairs. It says that "Congress shall have Power … To regulate *Commerce* with foreign Nations, and among the several States, and *with the Indian Tribes*." U.S. Const. art. I, §8, cl. 3 (emphases added). For at least two reasons, this language can-

not be read as giving Congress the "plenary power" on which it relied when enacting ICWA.

First, the Clause limits Congress's regulatory power to interactions "with the Indian *tribes*." U.S. Const. art. I, §8, cl. 3 (emphasis added). On a "straightforward reading" of that language, it does not empower Congress "to regulate commerce with all Indian *persons*," no matter how remote their connection to a tribe. *Adoptive Couple*, 570 U.S. at 660 (Thomas, J., concurring). Reading the Clause as conferring a plenary power over Native American affairs ignores this limitation.

Second, the Clause gives Congress regulatory power *only* over "Commerce." And as a matter of both original meaning and precedent, the power to regulate "Commerce" is not a "plenary power" to regulate issues (like adoption proceedings) with an at-most-tangential connection to commercial activity.

Consider first the original meaning. "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring) (collecting authority); *accord* Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. at 214. And while founding-era speakers "sometimes" used commerce to describe "other social relationships," "the ordinary and common meaning of 'commerce,' both in common discourse and in legal language, was mercantile trade and traditionally associated activities." Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A response to Jack Balkin*, 109 Mich. L. Rev. First Impressions 55, 56 (2010). So, as an

original matter, the Commerce Clause empowers Congress to regulate mercantile trading and activities with Native American tribes—it does not empower Congress to regulate *everything* having to do with Native Americans and tribes.

The textual analysis finds support in the country's history. Often, "the most telling indication" that Congress lacks the power to do something "is the lack of historical precedent." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010) (quoting *Free Enter. Fund*, 537 F.3d at 699 (Kavanaugh, J., dissenting)). And there are no "founding-era examples" of Congress using its commerce "power to intrude on state government functions as ICWA does." Pet. App.260a (Duncan, J., op.). Nor is there any other indication that Congress understood its commerce power to confer plenary power over Native American affairs. Instead, a broad review of "eighteenth century documents" reveals that expressions like "'commerce with Indian tribes' … almost invariably meant 'trade with the Indians' and nothing more." Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. at 215 & n.97 (collecting examples).

An omission from the Constitution's text adds still more support for the view that Congress has no "plenary power" over Native American affairs. The Articles of Confederation had empowered Congress to "regulat[e] the trade and manag[e] *all affairs* with the Indians, not members of any of the States." Articles of Confederation of 1781, art. IX (emphasis added). As those words suggest, "Indian affairs and trade," though related, "were … treated separately and distinctly within the law" in the lead up to the Constitution. Lorianne Updike Toler, *The Missing*

Indian Affairs Clause, 88 U. Chi. L. Rev. 413, 430 (2021). A working draft of the Constitution omitted Indian affairs language, likely by mistake. *See id.* at 444–54. But James Madison caught the omission and proposed adding an express reference to Indian affairs within Congress's powers. *Id.* at 464. The drafters rejected that proposal; they "instead grafted 'Indians' into the Commerce Clause." *Id.* at 465. The drafters, in other words, gave Congress "power over Indian trade but not [Indian] affairs." *Id.* Thus, although the Constitution "was ostensibly designed to enlarge" federal power, "the totality of federal powers shrank" with respect to the affairs of Native Americans. *Id.* at 443. And with the omission of that power, any claim of "plenary power is constitutionally wanting." *Id.* at 476.

Even if an originalist analysis did not compel the conclusion that the Indian Commerce Clause confers no plenary power over Native American affairs, precedent concerning the meaning of "commerce" would. Remember, the Commerce Clause refers to "Commerce" just once and modifies that noun with three prepositional phrases: "with foreign Nations," "among the several States," and "with the Indian Tribes." U.S. Const. art. I, §8, cl. 3. The noun, which appears one time, must mean the same thing without regard to the prepositional phrase with which it is used; the same word cannot "be interpreted" to mean different things "at the same time." *Clark v. Suarez Martinez*, 543 U.S. 371, 378 (2005); *see also* Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. at 215 & n.96.

The single meaning of "Commerce" matters because this Court has made clear that the word does not encompass all human activity. Most relevant

here, the power to regulate "Commerce" does not include the power to regulate "family law and other areas of traditional state regulation." *United States v. Morrison*, 529 U.S. 598, 615–16 (2000). *Those* matters—which are the very same matters ICWA addresses—fall outside the scope of Congress's power to regulate "commerce." Put differently, because the power to regulate "Commerce … among the several States" is not a plenary power to regulate affairs in the several States, *id.*; *Lopez*, 514 U.S. at 567; *NFIB*, 567 U.S. at 551 (op. of Roberts, C.J.), the power to regulate "Commerce … with the Indian tribes" cannot be a plenary power to regulate Native American affairs.

Notably, even those critical of originalist analyses in this area recognize that the Indian Commerce Clause supplies an imperfect source for broad federal power. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1017, 1050 (2015). That is likely why Judge Dennis concluded that "Congress does not derive its plenary power solely from the Indian Commerce Clause, but rather from the holistic interplay" of various constitutional provisions. Pet.App.85a (Dennis, J., op.); *see also* Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. at 1021, 1041. More precisely, the Fifth Circuit's lead opinion said that Congress's "plenary power in regulating Indian affairs" derives from the combined powers of the "Treaty, Property, Supremacy, Indian Commerce, and Necessary and Proper Clauses." Pet. App.72a (Dennis, J., op.).

But in a constitution of express and limited federal power, congressional authority must derive from a particular clause, not from penumbras emanating from a holistic reading of clauses having nothing to

do with the issue. And the clauses Judge Dennis cited, even when read "holistically," do not support the existence of any "plenary power." *See* Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. at 207–10. It is hard to see, for example, how the Necessary and Proper Clause or the Supremacy Clause move the ball in any significant way. *Contra* Pet.App.72a (Dennis, J., op.). The Necessary and Proper Clause grants Congress only "incidental powers …, it does not license the exercise of any great substantive and independent powers beyond those specifically enumerated." *NFIB*, 567 U.S. at 559 (op. of Roberts, C.J.) (alteration accepted, quotation omitted). And the Supremacy Clause has *no effect* unless Congress is exercising "its enumerated powers." *Collins v. Virginia*, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring).

The Treaty and Property Clauses do increase federal power over Native American affairs in certain ways. But those Clauses come with natural limits. The Treaty Clause empowers the President—subject to "the Advice and Consent of the Senate"—"to make Treaties" with Native American tribes. U.S. Const. art. II, §2, cl. 2. That Clause certainly "bolster[ed] federal treaty power," which had been a key point of contention under the Articles of Confederation. Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. at 1038. But the Treaty Clause just gives Congress a role to play in the treaty-making process; it does not empower Congress to regulate Native American affairs, domestic relations, or anything else *outside* the treaty-making process.

The Property Clause, for its part, gives Congress rulemaking power over federal property. U.S. Const. art. IV, §3, cl. 2. That gives Congress broad authori-

ty over Native Americans living on federal land. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976). But the Clause does not empower Congress to regulate the affairs of Native Americans living on state land. *See* Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. at 209. And that is what ICWA purports to do.

4. In sum, this Court's cases referring to Congress's "plenary power" over Native American affairs contradict the Constitution's text and the Court's Commerce Clause jurisprudence. The Court should grant *certiorari* and say so. That analysis *could* justify overruling the "plenary power" cases completely. Alternatively, the Court can hold that, because those cases were wrongly decided, they may not be extended so as to permit the regulation of family law within the States.

CONCLUSION

This Court should grant the petitions for writs of *certiorari*.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
ZACHERY KELLER
SYLVIA MAY DAVIS
Deputy Solicitors General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@ohioago.gov

Counsel for Amicus Curiae
the State of Ohio

OCTOBER 2021