Nos. 21-376, 21-377, 21-378

IN THE

Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*, *Petitioners*,

v.

CHAD EVERET BRACKEEN, *et al.*

CHEROKEE NATION, *et al.*, *Petitioners*,

v.

CHAD EVERET BRACKEEN, *et al.*

THE STATE OF TEXAS, *Petitioner*,

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF INDIVIDUAL RESPONDENTS

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 Individual Respondents

QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901–1963, creates a separate child-custody system for Indian children. Most children's adoptive placements are governed by state law and are based on the child's best interests. For Indian children, however, things are different. Under ICWA, state courts must, "under State law," give preference to placing the 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" of any tribe, rather than with non-Indian adoptive parents. *Id.* § 1915(a); *see also id.* § 1915(b). The en banc Fifth Circuit fractured over the constitutionality of these placement preferences, affirming in part the lower court's decision striking them down as unconstitutional. Multiple parties have asked this Court to review the decision below.

The questions presented are:

1. Whether ICWA's placement preferences and other provisions violate the anticommandeering doctrine and exceed Congress's Article I authority.

2. Whether ICWA's placement preferences violate the Constitution's guarantee of equal protection.

3. Whether at least one of the ten plaintiffs has standing to bring an equal-protection challenge to ICWA's placement-preference regime, as the district court, a panel of the court of appeals, and the en banc court all held.

4. Whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress.

RULE 29.6 STATEMENT

Individual Respondents Chad Everet Brackeen; Jennifer Kay Brackeen; Danielle Clifford; Jason Clifford; Altagracia Socorro Hernandez; Frank Nicholas Libretti; and Heather Lynn Libretti were plaintiffs in the district court and appellees before the court of appeals. Individual Respondents are all individuals.

RULE 14.1(b)(iii) STATEMENT

Individual Respondents are not aware of any directly related cases not identified in the petitions.

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Individual Respondents Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, and Heather Lynn Libretti respectfully submit this response to the petitions for writs of certiorari filed by Deb Haaland in her official capacity as Secretary of the Department of the Interior et al. (collectively, "United States") (No. 21-376); the Cherokee Nation et al. (collectively, "Tribes") (No. 21-377); and the State of Texas (No. 21-378). Because all three petitions seek review of the same decision of the en banc U.S. Court of Appeals for the Fifth Circuit, this consolidated brief responds to all of them. All three of those petitions are related to Individual Respondents' own petition for a writ of certiorari (No. 21-380) ("Brackeen Pet.").

INTRODUCTION

Pending before this Court are four related petitions that together present the ideal vehicle to resolve whether key provisions of the Indian Child Welfare Act ("ICWA") are unconstitutional on Article I, anti-commandeering, equal-protection, and nondelegation grounds. All four petitions arise out of the same en banc Fifth Circuit decision, which produced six opinions—none of which garnered a majority in full—that sharply disagreed on ICWA's constitutionality. That fractured outcome confirms the need for a definitive ruling from this Court. The 325-page decision fully examined all of the constitutional arguments. And the four petitions provide the Court with a range of perspectives on the constitutional questions: The federal government that enacted the law; state governments that are forced to carry out ICWA's commands; tribes that seek to uphold ICWA's child-placement re-

gime; a biological parent of an Indian child whose personal wishes for her child's placement were jeopardized by ICWA; and non-Indian adoptive parents whose efforts to adopt children subject to ICWA's mandates have been hindered because the statutory placement preferences put those parents on unequal footing. The Court should grant all four petitions, frame the questions presented as proposed by Individual Respondents and Texas, and consolidate the cases.

Collectively, the United States, the Tribes, and Texas present five questions, several of which Individual Respondents also presented in their own petition. *See* Brackeen Pet. i. Individual Respondents agree that four of those questions warrant certiorari.

First, the federalism questions. Texas (like Individual Respondents) asks this Court to decide (1) whether Congress had the constitutional power to enact ICWA in the first place, as well as (2) whether ICWA's placement preferences and other provisions—including 25 U.S.C. §§ 1912(a), (d)–(f), 1914, 1915(e), and accompanying regulations—violate the anticommandeering doctrine by forcing States to carry out the federal program of routing Indian children to Indian adults. The United States and Tribes, too, ask whether ICWA violates the anticommandeering doctrine. Individual Respondents agree that this Court should review these federalism issues. But the Court should grant the questions as framed by Texas (Questions Presented 1 and 3) and Individual Respondents (Question Presented 2) in order to squarely consider not only whether ICWA's provisions violate the anticommandeering doctrine, but also whether they exceed Congress's Article I powers. Congress invoked its power to "regulate Commerce ... with Indian tribes" as the source of its authority to enact ICWA.

25 U.S.C. § 1901(1). ICWA, however, does not regulate commerce, as neither children nor state-court adoption proceedings are articles of commerce. Nor does ICWA regulate commerce with Indian Tribes; rather, the placement preferences govern the relationship between prospective parents (including non-tribal members) and "Indian children" (including non-tribal members). Whether Congress has the power to invade this traditionally state domain presents a critical federalism question that independently merits review, in addition to the anticommandeering question.

Second, the equal-protection question. Texas (like Individual Respondents) asks whether ICWA's classifications—including its definition of "Indian child" that turns on ancestry and "biolog[y]," 25 U.S.C. § 1903(4), and its system of placement preferences that categorically disadvantages non-Indian parents, *id.* § 1915(a)–(b)—violate equal protection. The United States and Tribes attempt to gerrymander the question presented, asking the Court to decide only whether ICWA's third-ranked placement preference violates equal protection, and only under rational-basis review. But the Court should not grant a question presented that assumes the lowest tier of scrutiny applies. The parties vigorously contested that issue, and Judge Duncan's opinion below assumed *arguendo* that rational basis applied only because ICWA's placement preferences fail under *any* standard of review. Moreover, the third-ranked placement preference is only one part of ICWA's overall scheme of racial classifications. Rather than reviewing one slice of the statute's race-based preferences, this Court should grant the question presented by Texas (Question Presented 2) and Individual Respondents (Question Presented 1)—which asks the Court to review the constitutionality of the placement-preference regime as a whole—and

definitively resolve the "equal protection concerns" with ICWA that the Court has already identified. *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 656 (2013).

Third, the United States and Tribes ask the Court to grant a separate question presented to decide whether any one of the ten plaintiffs has standing to challenge ICWA's placement preferences on equal-protection grounds. But the question of standing here is not difficult, and there is no need to grant a separate question on the issue. Individual Respondents' standing has been clear from the outset, and the United States' and Tribes' repeated attempts to evade review of ICWA's merits have been resoundingly rejected at every step of this litigation. The district court, a unanimous panel, and 11 members of the en banc court all agreed that Individual Respondents plainly have standing under this Court's precedents.

Finally, Texas asks whether ICWA violates the nondelegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress. Individual Respondents agree that review of this question is warranted for all of the reasons given by Texas.

Individual Respondents agree with all Petitioners that this Court should follow its "usual" course "when a lower court has invalidated a federal statute" and "grant[] certiorari" here. *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019); *see also* U.S. Pet. 31; Tribes Pet. 16. But in so doing, it should review the court of appeals' holdings regarding ICWA as a whole. If significant portions of the en banc court's fractured decision are left unreviewed, thousands of parents and Indian children involved in child-custody proceedings each year

will operate in the shadow of a federal law of questionable constitutionality, leaving them uncertain whether all, some, or none of ICWA's provisions will be applied to their cases. That situation is untenable, and the petitions filed by the United States, Texas, the Tribes, and Individual Respondents give the Court a perfect vehicle to provide desperately needed clarity. This Court should grant the four petitions, adopt the questions presented as formulated by Texas and Individual Respondents, and consolidate the cases for argument.

STATEMENT

Individual Respondents concur with Texas's Statement. *See* Texas Pet. 3–11. Individual Respondents also respectfully refer the Court to the Statement in their own petition. *See* Brackeen Pet. 4–13.

ARGUMENT

Individual Respondents agree with all Petitioners that certiorari is warranted to review the questions of ICWA's constitutionality that are set forth in the four separate petitions. ICWA touches the lives of parents, children, States, and tribes, implicating "interests that could not be more important." Tribes Pet. 2, 17. This Court should dispel the uncertainty surrounding ICWA's constitutionality as soon as possible—particularly given the paramount need for clarity and predictability in child-custody decisions across the country. *See* Texas Pet. 32–33.

In particular, Individual Respondents respectfully submit that the Court should grant all four petitions, adopt the questions as presented by Texas and Individual Respondents, and consolidate the cases for argument. It should review whether ICWA's placement preferences (and other challenged provisions)

exceed Congress's Article I authority and unconstitutionally commandeer the States. And it should review whether ICWA's separate child-custody scheme—including the definition of "Indian child" and the placement preferences as a whole—violates equal protection. There is no need, however, to grant review on the question regarding Individual Respondents' standing to bring their equal-protection claim; the question of plaintiffs' standing is not difficult, and the district court below, the panel, and the en banc court all easily rejected the United States' and Tribes' arguments on that score.

I. THE COURT SHOULD REVIEW WHETHER ICWA'S PLACEMENT PREFERENCES EXCEED CONGRESS'S AUTHORITY AND COMMANDEER STATES.

ICWA trenches upon state authority in two independent ways: It exceeds Congress's enumerated powers and commandeers States to carry out a federal statutory regime.

In enacting ICWA, Congress invoked its Article I power to "regulate Commerce ... with Indian tribes." 25 U.S.C. § 1901(1). Seven judges on the en banc court below, however, correctly recognized that Congress lacks the Article I power to enact ICWA's provisions, Texas Pet. App. 260a–61a (Duncan, J.). ICWA regulates children, not objects of commerce. ICWA also regulates individuals (tribal members and non-members alike), not tribes. And ICWA regulates in the area of state-court child-placement proceedings—a subject that belongs to the States, not the federal government. *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890).

Additionally, the anticommandeering doctrine prevents Congress from foisting onto States the obligation to implement a federal statutory regime. When Congress regulates, "it must do so directly; it may not conscript state governments as its agents." *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1477 (2018). But ICWA commands States to follow Congress's preferred child-placement preferences "under State law" in state child-custody proceedings. 25 U.S.C. § 1915(a).

The United States and the Tribes agree that this Court should review whether ICWA unconstitutionally commandeers the States. U.S. Pet. 15–21; Tribes Pet. 18. The Court, however, should consider the question as formulated by Individual Respondents and Texas: whether Congress exceeded its powers by (1) enacting ICWA without Article I authority, or (2) commandeering States to implement ICWA's statutory regime. Brackeen Pet. i; Texas Pet. i. Because "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution," the question whether ICWA stretches beyond Congress's "defined and limited" Article I powers is independently worthy of review. *United States* v. *Morrison*, 529 U.S. 598, 607 (2000) (internal quotation marks omitted).

Indeed, even under the commandeering question as formulated by the United States and the Tribes, the Court would have to decide the question of Congress's authority to enact ICWA. Both the United States and the Tribes argue that the placement preferences do not commandeer States because they are valid preemption provisions. 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*, 138 S. Ct. at

1479. Thus, to evaluate the United States' and the Tribes' preemption argument, the Court would have to determine whether Congress possessed the power to enact those placement preferences in the first place, and Individual Respondents contend that Congress lacked that power.

Moreover, the Court would need to confront the Article I question in any event because Individual Respondents (and Texas) "may legitimately defend their judgment on any ground properly raised below." *Reno* v. *Flores*, 507 U.S. 292, 300 n.3 (1993). The district court declared 25 U.S.C. § 1915 unconstitutional, *see* Texas Pet. App. 528a, and the en banc court of appeals affirmed in part, *id.* at 5a. At every stage of litigation, Texas and Individual Respondents have argued that ICWA exceeds Congress's delegated authority. Thus, Individual Respondents (and Texas) are entitled to defend their judgment by arguing that Congress had no Article I authority to enact the placement preferences at all. *See*, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997) (United States properly "advance[d] several alternative grounds" for affirming because it was "entitled … to defend the judgment on any ground supported by the record").

The Court should therefore squarely place the question of Congress's power to enact ICWA at issue by granting the question as formulated by Individual Respondents and Texas. *See* Brackeen Pet. i, 27–32; Texas Pet. i, 12–19, 24–28; *see also* Ohio Amicus Br. 3, Nos. 21-378, 21-380 ("ICWA unconstitutionally intrudes upon state authority," and "[t]his case offers a chance for clarity").

II. THE COURT SHOULD REVIEW WHETHER ICWA'S PLACEMENT-PREFERENCE SCHEME VIOLATES THE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION.

ICWA operates as a unified scheme that places "Indian child[ren]" in a disfavored position, depriving them of a placement decision based on their best interests, and instead requiring placements based on the child's "biolog[y]." 25 U.S.C. § 1903(4). And it categorically places non-Indian adoptive parents such as Individual Respondents last in line to adopt an Indian child, behind (1) a member of the child's extended family, (2) "other members of the Indian child's tribe," and (3) "other Indian families" from any one of the other 573 Indian tribes, regardless of whether the tribe has any connection to the child. *Id.* § 1915(a); *see also id.* § 1915(b). These "requirements often lead to different outcomes than would result under state law," *Adoptive Couple*, 570 U.S. at 658 (Thomas, J., concurring), because state law asks what placement would serve the child's best interests—not what placement would place the child in the "Indian community," H.R. Rep. No. 95-1386, at 23 (1978).

As a result, ICWA disadvantages vulnerable children because of their ancestry—even if they have no other connection to the tribe—making it more difficult for those children to find permanent, loving homes. *See* Christian Alliance for Indian Child Welfare and ICWA Children and Families Amicus Br. 8–14 (Nos. 21-378, 21-380) (detailing Amici's personal stories that demonstrate how ICWA results in "Indian children regularly [being] denied loving and safe homes—and often put into dangerous or otherwise inappropriate custody situations that would not otherwise be allowed—simply because of their race"); Goldwater Inst.

Amicus Br. 4 (Nos. 21-376, 21-377, 21-378, 21-380) ("ICWA strips states of the ability to protect at-risk 'Indian children,' limits these children's options for foster care, and effectively bars their adoption into permanent, loving homes.").

Congress, however, may not establish a "scheme" that prefers (or disfavors) "a class of tribal Indians, to the exclusion of all non-Indian citizens." *Rice* v. *Cayetano*, 528 U.S. 495, 520 (2000). Otherwise, a State would be permitted, "by racial classification, to fence out whole classes of its citizens" from "critical state affairs." *Id.* at 522; *see* Brackeen Pet. 14–27; Texas Pet. 19–24; *see also* Project on Fair Representation Amicus Br. 3 (Nos. 21-378, 21-380) (ICWA's placement preferences unconstitutionally "elevat[e] race as a trump card," and the "serious real world harms caused by ICWA weigh heavily in favor of this Court's review").

Individual Respondents agree with the United States, the Tribes, and Texas that, given the "importance" of the placement preferences, there is a "need for this Court's review" of the equal-protection question. U.S. Pet. 31. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," *Rice*, 528 U.S. at 517 (internal quotation marks omitted), and this Court should determine whether ICWA is consistent with that mandate.

The need for review is particularly pressing because lower courts do not agree whether ICWA complies with equal-protection principles, contrary to the United States' and Tribes' portrayal of courts as unified on the issue. *See* U.S. Pet. 30; Tribes Pet. 10; *compare In re Santos Y.*, 112 Cal. Rptr. 2d 692, 730 (Cal.

Ct. App. 2001) (ICWA draws distinctions "based on 'blood'" and "constitutes a violation of equal protection"), *with In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003) ("ICWA does not deny [the child's] right to equal protection[.]"); *see also* Brackeen Pet. 15–16. The en banc Fifth Circuit exemplified that fissure, splitting over the extent to which ICWA's placement preferences violated equal protection. Only this Court can bring needed clarity.

The United States and the Tribes, however, attempt to limit this Court's review by asking it to assume that the lowest tier of scrutiny applies and to consider only one portion of ICWA's scheme: Whether ICWA's "third-ranked placement preferences" violate equal protection under the assumption that rational-basis review applies. U.S. Pet. 26 (citing 25 U.S.C. § 1915(a)(3), (b)(iii)); *see also* Tribes Pet. i–ii.

The Court should not limit its review to this gerrymandered question presented. First, the Court should not grant a question presented that assumes rational basis as the appropriate standard of review. Eight members of the court below applied rational-basis review only "*arguendo*" because the placement preferences fail even that relaxed standard. Texas Pet. App. 277a (Duncan, J.); *see also id.* at 363a (Haynes, J., concurring). But this Court should not predetermine the appropriate standard at this stage, particularly because applying rational-basis review to a race-based classification is contrary to this Court's precedents. *See Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 207–08, 213 (1995). Indeed, even though Judge Duncan's opinion did not need to decide the tier-of-scrutiny question, it did note that ICWA's distinctions "come[] queasily close to a racial classification." Texas Pet. App. 269a; *see also id.* at 499a–

500a (district court concluding that ICWA "uses ancestry as a proxy for race and therefore must be analyzed by a reviewing court under strict scrutiny" (internal quotation marks omitted)).

Moreover, even if the Court were to grant the question as presented by the United States and the Tribes, Individual Respondents (and Texas) would still be "entitled" to challenge the assumption that rational-basis review applies in "defend[ing] the judgment" below. *Jones* v. *United States*, 527 U.S. 373, 396–97 (1999) (government could challenge question presented's "assumption that" aggravating factors were invalid). Accordingly, the question presented by Individual Respondents and Texas more accurately captures the issues that would be presented to this Court on certiorari.

Second, the Court should not review the third-ranked placement preference in isolation. ICWA's placement regime works as a coordinated, interlocking scheme. *See* Texas Pet. App. 277a (Duncan, J.) ("Plaintiffs challenge ICWA's placement preferences as a whole[.]"). The third-ranked placement preference applies only if the child is first classified as an "Indian child," and that threshold determination raises equal-protection concerns of its own. *See ibid.* (explaining that "ICWA's 'Indian child' classification violates the equal protection component of the Fifth Amendment"). And the third-ranked placement preference works together with the first two placement preferences to place Individual Respondents on "[un]equal footing in the [adoption] process"—specifically, in last place. *Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993).

To be sure, Congress's racial discrimination is "most evident" in ICWA's third placement preference, Texas Pet. App. 277a (Duncan, J.), which bluntly favors *any* "Indian famil[y]" from *any* of 574 tribes over any non-Indian family, 25 U.S.C. § 1915(a)(3). But the third placement preference is simply the smoking gun demonstrating beyond peradventure that the entire scheme violates equal protection. The placement preferences collectively establish an impermissible "naked preference for Indian over non-Indian families." Texas Pet. App. 279a (Duncan, J.). As Texas correctly explains, the placement preferences "operate individually and jointly" to disadvantage non-Indian parents seeking to adopt an Indian child. Texas Pet. 20. ICWA must be analyzed in a "holistic endeavor." *Adoptive Couple*, 570 U.S. at 652 (internal quotation marks omitted); *see also id.* at 670 (Sotomayor, J., dissenting) ("[It is b]etter to start at the beginning and consider the operation of [ICWA] as a whole."). The Court should review ICWA's scheme of race-based discrimination as a whole, rather than examine a single strand on its own.

Indeed, this Court has recognized that equal-protection claims should not be assessed by reviewing statutory provisions in isolation. *See Stanton* v. *Stanton*, 429 U.S. 501, 502 (1977) (per curiam) (explaining, in equal-protection challenge to statute establishing age of majority, that the "portion of the statute setting the age for females" could not be "viewed in isolation from the portion setting the age for males"); *cf. Bethune-Hill* v. *Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (in equal-protection challenge to legislative district boundaries, a "holistic analysis is necessary"

rather than "[c]oncentrating on particular portions in isolation").[1]

Instead, the Court should grant review of the question as presented by Individual Respondents and Texas: whether ICWA's placement-preference regime—including the definition of "Indian child" and all three placement preferences—violates equal protection under any standard of review. *See* Brackeen Pet. i, 14–27; Texas Pet. i, 19–24. This Court has already noted the "equal protection concerns" that ICWA raises. *Adoptive Couple*, 570 U.S. at 656 (declining to adopt an interpretation that would allow a biological parent to "play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests"). "This [case] squarely raises th[os]e 'equal protection concerns.'" Texas Pet. App. 275a (Duncan, J.). To resolve those concerns, the Court should grant review of the equal-protection question as presented by Individual Respondents and Texas.

III. THE QUESTION OF STANDING DOES NOT MERIT A SEPARATE QUESTION PRESENTED.

The United States and the Tribes ask this Court to review, as a standalone question, whether Individual Respondents have standing to challenge ICWA's

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[1] The United States further contends (at 29–30) that the preferences should not be declared facially unconstitutional. But whenever a provision impermissibly discriminates on the basis of race, it is invalid on its face. *See City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (plurality) (striking down racial preference even though a preference could have been granted to "identified" victims of past racial discrimination); *id.* at 526–27 (Scalia, J., concurring in the judgment) (same). And in any event, Individual Respondents have also challenged ICWA as applied to them. *See* Ct. App. ROA.511–15.

placement preferences. U.S. Pet. i; Tribes Pet. i. The question does not merit a separate question presented. Individual Respondents' standing has been resoundingly reaffirmed throughout the litigation: The district court held that it was "clear that the Individual [Respondents]" met Article III requirements. Texas Pet. App. 559a. The Court of Appeals panel unanimously held that the Brackeens "have standing to assert an equal protection claim as to" the placement preferences. Texas Pet. App. 414a. And at the en banc stage, 11 judges agreed that Individual Respondents had standing to challenge the placement preferences. Texas Pet. App. 59a–63a (Dennis, J.); *id.* at 217a–23a (Duncan, J.). That question is not certworthy, and this Court should decline to grant it. *See*, *e.g.*, *Dobbs* v. *Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (granting question of statute's constitutionality but declining to grant question regarding third-party standing).

A. First, Individual Respondents have standing to challenge ICWA's compliance with the Constitution's equal-protection guarantee through their Administrative Procedure Act ("APA") claim, which asks the Court to set aside ICWA's implementing regulations, *see Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778 (June 14, 2016), on the basis that ICWA itself—the source of the Federal Respondents' authority to issue the regulations—violates equal protection. *See* Texas Pet. App. 2a, 180a, 223a n.19. There can be no doubt that Individual Respondents—as well as Texas—have standing to bring this claim: The implementing regulations directly regulate them, governing their ability to adopt, and they therefore seek to set aside those regulations by suing the federal officials responsible for promulgating them. Even the dissent below conceded that Individual Respondents

have standing to assert their APA challenge. Texas Pet. App. 381a. And this APA claim can be brought in federal court alone, 5 U.S.C. § 702, and cannot be litigated through a state-court adoption proceeding.

Individual Respondents' APA challenge encompasses each of the Individual Respondents' constitutional arguments, including their argument that the regulations must be set aside because ICWA's "Indian child" definition, 25 U.S.C. § 1903(4), and ICWA's placement-preference system, *id.* § 1915, are "contrary to constitutional right," 5 U.S.C. § 706(2)(B), and therefore cannot be the basis for valid federal regulation, *see* Ct. App. ROA.654–57, 661; *see also Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2196 (2020) (holding that standing exists when "challenger 'sustain[s] injury' from an executive act that allegedly exceeds the official's authority" (quoting *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986) (alteration in original)). Because Individual Respondents have Article III standing to bring the APA claim, they have standing to raise all arguments in support of that claim, including that ICWA itself violates equal protection.

B. Even setting aside Individual Respondents' APA claim, they have standing to seek declaratory and injunctive relief in a direct challenge to ICWA's unlawful provisions. Individual Respondents are suffering injury in fact, and the United States does not argue otherwise. *See* U.S. Pet. 21–26. As prospective parents seeking to adopt or foster an "Indian child" subject to ICWA, Individual Respondents face impediments and delays that they would not face but for ICWA. 25 U.S.C. § 1903(4). Take, for example, the Brackeens—they have been and are required to satisfy statutory hurdles in their attempts to adopt

A.L.M. and Y.R.J. that exist solely because ICWA classifies these children as Indian children.[2]

Additionally, Individual Respondents are injured because ICWA's placement preferences treat them unequally. The preferences categorically placed Individual Respondents last in line to adopt or foster a child because they were not a member of any of the preferred groups—including the third-ranked preference. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," the "'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit" because of the barrier. *Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 666; *see also* Texas Pet. App. 218a (Duncan, J.) ("As persons seeking to adopt Indian children, the Individual [Respondents] are objects of the contested provisions, and the ordinary rule is that they have standing to challenge them." (internal quotation marks omitted)).

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[2] The United States suggests that the Brackeens' efforts to adopt Y.R.J. cannot be "considered" because "those efforts postdated the commencement of this suit and were not brought to the district court's attention until after final judgment." U.S. Pet. 23. But the Brackeens' efforts to adopt Y.R.J. serve as proof positive that their stated intentions to adopt another child, *see* Texas Pet. App. 60a n.15, were concrete and real, rather than hypothetical, and that their challenge was not moot. Thus, the Brackeens were entitled to submit documentation of those efforts as those events were unfolding. *See Davis* v. *FEC*, 554 U.S. 724, 736 (2008) (taking note of plaintiff's "public statement expressing his intent to" self-finance another campaign, which post-dated the government's brief in this Court, to confirm the Court's jurisdiction); *Mathews* v. *Diaz*, 426 U.S. 67, 75 (1976) (similar).

C. Individual Respondents' injuries are also fairly traceable to the challenged actions of the defendants. Under Article III, "no more than *de facto* causality" is required, and the injury need only be attributable "at least in part" to the government's action. *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2566 (2019) (internal quotation marks omitted). Because the federal defendants "bear some responsibility for the regulatory burdens imposed by ICWA," the Individual Respondents' injuries are "fairly traceable to the[ir] actions." Texas Pet. App. 60a (Dennis, J.); *see also id.* at 220a–21a (Duncan, J.) ("injuries are traceable, in part, to the Federal Defendants' implementing ICWA … and to their inducing state officials to apply ICWA"). If not for ICWA's federal placement preferences, Individual Respondents would have "the opportunity to compete" for selection as adoptive or foster parents "on an equal basis." *Gratz* v. *Bollinger*, 539 U.S. 244, 262 (2003).

The United States and the Tribes claim that Individual Respondents have not shown an injury traceable specifically to "Section 1915(a)(3) or (b)(iii)." U.S. Pet. 22; Tribes Pet. 33–34. But ICWA's entire scheme of placement preferences as a whole imposes a discriminatory preference for Indian families over non-Indian families. The injury arises not from the application of any one placement preference, but from the fact that ICWA subjects Individual Respondents' adoptions to different standards than apply under state law. The third-ranked placement preference is one part of a larger "barrier that makes it more difficult for members of one group to obtain a benefit." *Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 666.

D. Individual Respondents' injuries would also be redressed by "the judicial relief requested," *California* v. *Texas*, 141 S. Ct. 2104, 2115 (2021), which includes a request for a declaration, injunctive relief, and any further relief deemed proper, *see* Ct. App. ROA.662.[3] Redressability is satisfied if "the practical consequence" of a decision "would amount to a significant increase in the likelihood that the plaintiff would obtain relief." *Utah* v. *Evans*, 536 U.S. 452, 464 (2002).

Here, a favorable decision "would redress the Individual [Respondents'] injuries in numerous ways." Texas Pet. App. 221a (Duncan., J.). "Victory," even in the lower courts, "would mean a declaration" that ICWA's preferences violate constitutional rights, and it is "substantially likely that" state courts conducting adoption proceedings would consider such a ruling "an authoritative interpretation." *Utah*, 536 U.S. at 463–64; *see also*, *e.g.*, *FEC* v. *Akins*, 524 U.S. 11, 25 (1998) (plaintiffs had standing to obtain a declaration notwithstanding agency's "discretionary powers" to disregard ruling). Redressability turns on whether an injury "will '*likely*' be redressed," not whether an injury is guaranteed to be redressed. *Bennett*, 520 U.S. at 170–71 (emphasis added) (redressability satisfied even though agency was "free to disregard" court). It is sufficient to show that "third parties will likely react in predictable ways." *Dep't of Commerce*, 139 S.

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[3] The United States argues that only the request for declaratory relief is relevant to the standing inquiry because the district court did not order injunctive relief. U.S. Pet. 25. But the Article III analysis looks to the relief "requested," *California*, 141 S. Ct. at 2115, not the relief entered to date. And the district court remains free to issue additional remedies at any time. *See* 28 U.S.C. § 2201(a) (declaratory judgment may be precursor to "further relief").

Ct. at 2566. Indeed, a Texas trial court deciding whether to apply ICWA to the Brackeens' efforts to adopt Y.R.J. already has stated that it would look to the federal courts' "ruling on the Brackeens' federal constitutional claims." Texas Pet. App. 60a (Dennis, J.). And, of course, a favorable ruling from *this* Court would bind *all* courts. *See ibid*.

In addition, state officials would no longer have the same "obligations to implement the preferences," and the federal government "would be barred from inducing state officials to implement ICWA, including the preferences, by withholding funding." Texas Pet. App. 222a (Duncan., J.).

Under the United States' and Tribes' view, a federal lawsuit against federal defendants challenging a federal law under the federal Constitution could not be heard by a federal court solely because Congress commandeered separate sovereigns—the States—to implement ICWA. That disconnect underscores ICWA's unique anticommandeering defects, but it does not defeat Individual Respondents' standing under this Court's precedents.

IV. THE COURT SHOULD REVIEW WHETHER ICWA VIOLATES THE NONDELEGATION DOCTRINE.

Finally, Texas asks whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing tribes to alter the placement preferences enacted by Congress. Texas Pet. i. Individual Respondents agree that this Court should review that question.

CONCLUSION

This Court should grant the petitions of Texas, the United States, the Tribes, and the Brackeens; adopt the questions presented as formulated by Texas and

the Brackeens; and consolidate the four cases for argument.

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 Individual Respondents

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