No. 21-___

In the Supreme Court of the United States

THE STATE OF TEXAS, PETITIONER

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

MICHAEL R. ABRAMS
BETH KLUSMANN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

The Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 (ICWA), creates a child-custody regime for "Indian children," a status defined by a child's genetics and ancestry. This regime is designed to make the adoption of Indian children by non-Indians more difficult. To implement this race-based system, Congress required state agencies to provide services "to prevent the breakup of the Indian family" and imposed a placement hierarchy—which may be changed at a child's tribe's direction—favoring Indian-child adoptions by the child's biological relatives, the child's tribe, and then any other Indian. Congress then directed state courts to employ a detailed federal set of procedures in state-law Indian-child-custody proceedings. The questions presented are:

1. Whether Congress has the power under the Indian Commerce Clause or otherwise to enact laws governing state child-custody proceedings merely because the child is or may be an Indian.

2. Whether the Indian classifications used in ICWA and its implementing regulations violate the Fifth Amendment's equal-protection guarantee.

3. Whether ICWA and its implementing regulations violate the anticommandeering doctrine by requiring States to implement Congress's child-custody regime.

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

PARTIES TO THE PROCEEDING

Petitioner the State of Texas was a plaintiff-appellee in the court of appeals.

Respondents Chad Everet Brackeen, Jennifer Kay Brackeen, Altagracia Socorro Hernandez, Jason Clifford, Danielle Clifford, Frank Nicholas Libretti, and Heather Lynn Libretti were plaintiffs-appellees in the court of appeals. They will also separately file a petition for writ of certiorari.

Respondents Deb Haaland, in her official capacity as Secretary of the U.S. Department of the Interior; Bryan Newland, in his official capacity as Acting Assistant Secretary for Indian Affairs; Xavier Becerra, in his official capacity as Secretary of the U.S. Department of Health and Human Services; the Bureau of Indian Affairs; the U.S. Department of the Interior; the U.S. Department of Health and Human Services; and the United States of America were defendants-appellants in the court of appeals.[*]

Respondents Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians were intervenors-defendants-appellants in the court of appeals.

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[*] In the court of appeals, Secretary Haaland was automatically substituted for her predecessor under Federal Rule of Appellate Procedure 43(c)(2). In the courts below, defendants-appellants included Ryan Zinke, David Bernhardt, and Scott de Vaga.

Acting Assistant Secretary Newland is automatically substituted for his predecessor under this Court's Rule 35.3. In the courts below, defendants-appellants included John Tahsuda III, Michael Black, Tara Sweeney, and Darryl LaCounte.

In the court of appeals, Secretary Becerra was automatically substituted for his predecessor under Federal Rule of Appellate Procedure 43(c)(2). Defendants-appellants below included Alex Azar.

Respondent the Navajo Nation intervened in support of appellants in the court of appeals.

Respondents the States of Indiana and Louisiana were plaintiffs-appellees in the court of appeals.

Bryan Rice, in his official capacity as Director of the Bureau of Indian Affairs, was a defendant in the district court.

RELATED PROCEEDINGS

Brackeen v. Zinke, No. 4:17-cv-00868-O, U.S. District Court for the Northern District of Texas. Judgment entered October 4, 2018.

Brackeen v. Haaland, No. 18-11479, U.S. Court of Appeals for the Fifth Circuit. Judgment entered April 6, 2021.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Constitutional Provisions, Statutes, and Rules:

Statutes—Continued: Page(s)

Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

Relying on the Indian Commerce Clause, the Indian Child Welfare Act of 1978 creates a race-based federal child-custody system and requires the States to implement it for all Indian children who appear before their courts in child-custody proceedings. Where ICWA applies, "almost every aspect of the social work and legal case is affected." Pet. App. 550a. ICWA directs when an Indian child may be removed from a dangerous situation, dictates the procedures by which a State may do so, and establishes where that child may be placed. Not only does Congress lack the constitutional authority to regulate the placement of children as "Commerce . . . with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3, many of ICWA's provisions independently violate other constitutional doctrines.

As the en banc Fifth Circuit's eight opinions amply demonstrate, clarification is needed about the limits on Congress's authority to legislate with respect to Indians. No provision of the Constitution gives Congress "plenary power" over Indian affairs, nor does any relax the Constitution's structural and individual protections because an Indian may be involved. Nevertheless, the Court has declared such power exists and issued equal-protection decisions that themselves treat Indians differently than other racial and ethnic groups. Thus, when confronted with ICWA, which concerns issues traditionally left to the States, the Fifth Circuit splintered but ultimately required Texas to treat vulnerable children differently based on ancestry, finding no meaningful limits on Congress's authority. Given that this Court's precedents have created the confusion regarding the scope of Congress's authority, only this Court can address it.

Moreover, the Fifth Circuit's opinions have deviated from the Court's anticommandeering and nondelegation precedents. Although that court correctly held that significant portions of ICWA commandeer state actors, it erroneously permitted ICWA's regulation of state-court procedures in state child-custody cases under the Supremacy Clause. And contrary to the nondelegation doctrine, the Fifth Circuit allowed Congress to delegate to Indian tribes the authority to change the law enacted by Congress.

The significant constitutional questions in this case and their implication on the treatment of numerous vulnerable children deserve the Court's attention. The Court should grant certiorari.

OPINIONS BELOW

The opinions of the en banc court of appeals (Pet. App. 1a-396a) are reported at 994 F.3d 249, and the panel opinion (Pet. App. 400a-467a) is reported at 937 F.3d 406. The opinion of the district court regarding the motions for summary judgment (Pet. App. 468a-527a) is reported at 338 F. Supp. 3d 514, and the opinion of the district court regarding the motions to dismiss (Pet. App. 530a-579a) is unreported but available at 2018 WL 10561971.

JURISDICTION

The Fifth Circuit entered its judgment on April 6, 2021. *See* Sup. Ct. Order of July 19, 2021 (regarding certiorari deadline). Texas invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional provisions, portions of the Indian Child Welfare Act of 1978, and regulations are set forth in the appendix to this brief. Pet. App. 580a-626a.

STATEMENT

I. Statutory and Regulatory Background

Congress enacted ICWA to "displace" state child-custody laws and procedures that Congress viewed as insufficiently "protective" of Indian children, and to favor "the placement of children in foster or adoptive homes which will reflect the unique values of Indian culture." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,851 (June 14, 2016). Motivated by its conclusion that "an alarmingly high percentage of [Indian] children are placed in non-Indian foster and adoptive homes and institutions," Congress, through ICWA, set a series of "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. §§ 1901(4), 1902.

Congress understood that ICWA regulated state child-custody proceedings. It therefore expressly relied on its purportedly "plenary power over Indian affairs," which Congress derived from its power under the Indian Commerce Clause, to "regulate Commerce . . . with Indian [T]ribes" and "other constitutional authority." *Id.* § 1901 (citing U.S. CONST. art. I, § 8, cl. 3). Congress intervened in the States' child-care systems because, in its view, "the States . . . often failed to recognize the essential tribal relations of Indian people." *Id.* § 1901(5).

A. The Indian Child Welfare Act

ICWA broadly applies to any state "child custody proceeding" involving an "Indian child," including the termination of parental rights as well as foster-care, preadoptive, and adoptive placements for Indian children living outside of a reservation. *Id.* § 1903(1). ICWA does not apply to tribal courts, 25 C.F.R. § 23.103(b)(1), which generally speaking have jurisdiction when an Indian

child resides on a reservation, 25 U.S.C. § 1911(a), or when, absent objection, a parent, custodian, or tribe requests the case be transferred to tribal court, *id.* § 1911(b). Where ICWA applies, it controls nearly every aspect of a child-custody proceeding both substantively and procedurally. Pet. App. 550a.

1. Whether an individual is an Indian for ICWA's purposes depends on that person's ancestry and genetics. An "Indian child" is "any unmarried person who is under age eighteen" who is either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). An "Indian" is a member of an Indian tribe or certain Alaskan natives. *Id.* § 1903(3). There are currently 574 federally recognized Indian tribes. Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs; Correction, 86 Fed. Reg. 18,552, 18,552 (Apr. 9, 2021).

2. ICWA is designed to prevent the adoption of Indian children by non-Indians. It does so through two major components.

First, ICWA directs state agencies and state courts to apply heightened standards and federal procedures in state-law child-custody proceedings. These heightened standards discourage the termination of parental rights to an Indian child and make placement of an Indian child in foster care more difficult.

Before foster-care placement or termination of parental rights may be ordered, ICWA requires courts to find that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d).

Through this provision, "Congress intended to require States to affirmatively provide Indian families with substantive services." 81 Fed. Reg. at 38,791.

ICWA then sets a heightened burden of proof: for foster-care placement, there must be "clear and convincing evidence" that the "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e). The evidence must include testimony from "qualified expert witnesses." *Id.* Termination of parental rights under ICWA requires similar proof, but the standard is "evidence beyond a reasonable doubt." *Id.* § 1912(f).

ICWA also mandates that state courts meet certain standards for a parent's voluntary consent to foster-care placement and termination of parental rights. *Id.* § 1913(a). And it allows a parent to withdraw consent to a foster-care placement, termination of parental rights, and final adoption under specified circumstances. *Id.* § 1913(b)-(d).

If the foster-care placement or termination of parental rights failed to comply with the relevant sections of ICWA, the child, parents, or tribe may collaterally attack that placement or termination by "petition[ing] any court of competent jurisdiction to invalidate such action." *Id.* § 1914.

Second, ICWA creates a set of placement preferences that States must follow in any adoptive, preadoptive, or foster-care placement of an Indian child. *Id.* § 1915(a)-(b). Specifically, in an adoptive placement, preference "shall" be given to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *Id.* § 1915(a). ICWA also

mandates similar preferences for foster-care and preadoptive placements. *Id.* § 1915(b).

ICWA authorizes an Indian tribe to reorder the preferences, and the state agency or court "shall follow such order" as long as it is the least-restrictive setting appropriate to the needs of the child. *Id.* § 1915(c). But any party seeking a placement that deviates from these preferences must show "good cause" to do so. *Id.* § 1915(a)-(b).

ICWA also directs States to maintain records demonstrating their efforts to comply with ICWA's preferences and to make those records available for inspection at any time by the Secretary of the Interior or the Indian child's tribe. *Id.* § 1915(e).

3. Other rules require state courts to give notice to the Indian child's parents and tribe or the Secretary, delay proceedings until ten days after the notice is given, and grant a twenty-day extension upon request. *Id.* § 1912(a). Further, state courts must allow the child's Indian tribe to intervene. *Id.* § 1911(c). States must also provide the Secretary with a copy of final adoption decrees and certain information about the child, biological parents, and adoptive parents, as well as the identity of any agency having information relating to the adoption. *Id.* § 1951(a).

B. The Final Rule

ICWA instructs the Secretary to promulgate rules as necessary. *Id.* § 1952. In 1979, the Department of the Interior promulgated Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979). The Guidelines were "not intended to have binding legislative effect" and left "[p]rimary responsibility" of implementing and interpreting ICWA "with the courts that decide Indian child custody cases." *Id.* at

67,584. As the Department noted, "[a]ssignment of supervisory authority over the courts to an administrative agency is a measure . . . at odds with concepts of both federalism and separation of powers." *Id.*

In 2016, dissatisfied with how some state courts were applying ICWA, the Department reversed course and promulgated the Final Rule with the specific intent to bind state courts and agencies that implement ICWA. 81 Fed. Reg. at 38,782. While largely tracking ICWA, the Final Rule expanded on some provisions, such as defining "active efforts" and requiring clear-and-convincing evidence to establish good cause to deviate from the placement preferences. 25 C.F.R. §§ 23.2, .132.

II. Procedural History

A. District Court

1. Petitioner the State of Texas, along with Indiana, Louisiana, and seven individual plaintiffs filed this lawsuit to challenge both ICWA and the Final Rule. Pet. App. 47a-48a. Texas has a legal code designed to ensure the safety and welfare of children within its borders, as well as a state agency and employees dedicated to carrying out that mission. *See* Tex. Fam. Code tit. 5. States are required to comply with ICWA and, though ICWA is not Spending Clause legislation, may lose federal funding if they do not. 42 U.S.C. § 622(b)(9).[1]

The Individual Plaintiffs all want to provide loving homes to Indian children but have faced opposition from Indian tribes. At the time they filed suit, the Brackeens were attempting to adopt A.L.M., whose mother is a

[1] Congress linked federal funding to compliance with ICWA in 1994, *see* Social Security Act Amendments of 1994, Pub. L. 103-432, § 204, 108 Stat. 4398, 4456 (1994), but ICWA's provisions remain binding regardless of any funding.

member of the Navajo Nation and whom they had fostered for sixteen months. Pet. App. 48a. The Librettis were seeking to adopt Baby O., whose mother Altagracia Hernandez consented to the adoption but whose father is a member of the Ysleta del Sur Pueblo Tribe. Pet. App. 49a-50a. The Cliffords sought to adopt Child P., whose maternal grandmother is a member of the White Earth Band of Ojibwe Tribe. Pet. App. 50a. While two of the three couples were ultimately able to adopt the children after the tribes dropped their objections, they have been deterred from providing homes to additional Indian children—in the case of the Brackeens, A.L.M.'s own half-sister. Pet. App. 210a.

Defendants are the United States, several federal agencies, and several federal officers, as well as four Indian tribes that intervened to defend ICWA's constitutionality. Pet. App. 51a.

2. The plaintiffs alleged that ICWA exceeds Congress's powers under Article I, violates the Fifth Amendment's equal-protection guarantee, and runs afoul of the anticommandeering and nondelegation doctrines. Pet. App. 470a-471a. They also alleged that the Final Rule violates the Administrative Procedure Act in several respects, including that it is unconstitutional to the same extent as ICWA. Pet. App. 470a-471a; 5 U.S.C. § 706.

Defendants moved to dismiss on standing grounds, which the district court denied. Pet. App. 530a. Following a summary-judgment hearing, the district court determined that ICWA violated the (1) Fifth Amendment's equal-protection guarantee by establishing race-based preferences in domestic-relations proceedings, Pet. App. 493a-504a; (2) nondelegation doctrine by allowing Indian tribes to reorder the placement preferences, Pet. App. 504a-508a; and (3) anticommandeering doctrine by

requiring state courts to apply federal standards to state-created causes of action, Pet. App. 509a-516a. The district court also concluded that the Indian Commerce Clause did not give Congress the authority to enact ICWA. Pet. App. 526a-527a. Finally, the district court determined that the Final Rule violated the APA and implemented an unconstitutional statute. Pet. App. 516a-517a. The district court therefore declared portions of ICWA (25 U.S.C. §§ 1901-23, 1951-52) and the Final Rule (25 C.F.R. §§ 23.106-22, .124-32, .140-41) unconstitutional. Pet. App. 528a-529a.

Defendants appealed, and a panel of the Fifth Circuit stayed the judgment pending appeal. Pet. App. 412a. The Navajo Nation intervened on appeal to defend ICWA. Pet. App. 411a.

B. Court of Appeals

1. A divided panel of the Fifth Circuit reversed the district court's merits rulings. Pet. App. 402a. A partial dissent argued that the active-efforts, expert-witness, and recordkeeping provisions of ICWA unconstitutionally commandeered the States, calling them "a transparent attempt to foist onto the States the obligation to execute a federal program and to bear the attendant costs." Pet. App. 460a; *see also* Pet. App. 460a-463a (explaining how 25 U.S.C. §§ 1912(d), 1912(e), and 1915(e) commandeer state actors).

Plaintiffs moved for rehearing en banc, which was granted. Pet. App. 397a-399a.

2. The en banc court fractured into eight total opinions—a per curiam summary of the court's holdings followed by seven other opinions, none of which garnered a majority. The two main opinions, by Judges Dennis and

Duncan, were each part majority, part dissent, and part 8-8 tie. Pet. App. 3a.[2]

A clear majority of the en banc court held that at least one plaintiff had standing to bring each constitutional and APA challenge, with one exception in which it affirmed, by an evenly divided court, the district court's standing holding with respect to an equal-protection challenge. Pet. App. 3a.

By a 9-7 majority, the court held that Congress had authority under Article I to enact ICWA. Pet. App. 3a-4a. Rather than the text of any particular provision of Article I, a plurality relied on language from this Court suggesting that Congress has "plenary power over Indian affairs" and a lengthy historical narrative. Pet. App. 71a-105a (Dennis, J.). The dissent, however, concluded that there was no evidence contemporaneous to the Founding suggesting that the Constitution permits congressional interference in state proceedings just because they involve Indians. Pet. App. 223a-261a (Duncan, J.).

A majority of the en banc court held that ICWA's Indian-child classification (25 U.S.C. § 1903(4)) did not violate equal protection because, in its view, tribal membership was a political, not racial, distinction. Pet. App. 139a-166a (Dennis, J.). Using the rational-basis test, the court was equally divided on whether the adoption preference for "other Indian families" and the foster-care preference for a "licensed Indian foster home" violated equal protection. Pet. App. 261a-280a (Duncan, J.) (regarding 25 U.S.C. § 1915(a)(3), (b)(iii)). The court therefore affirmed the district court's ruling that those provisions were unconstitutional. Pet. App. 4a.

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[2] For clarity, this petition will identify each opinion by its author, except for the per curiam opinion.

The court described its anticommandeering holding as "more intricate." Pet. App. 4a. A majority held that ICWA's active-efforts, expert-witness, and recordkeeping requirements unconstitutionally commandeered state actors. Pet. App. 4a-5a; *see also* Pet App. 285a-297a (Duncan, J.) (regarding 25 U.S.C. §§ 1912(d)-(f), 1915(e)). The court equally divided as to whether the placement preferences as applied to state officials, notice provisions, and placement-record provisions unconstitutionally commandeered state actors, so the equally divided en banc court affirmed the district court's anticommandeering holding. Pet. App. 5a; *see also* Pet. App. 290a-297a, 314a-316a (Duncan, J.) (regarding 25 U.S.C. §§ 1912(a), 1915(a)-(b), 1951(a)). But the en banc court held that the foster-care and termination standards as well as the placement preferences were valid when applied to state courts. Pet. App. 5a-6a; *see also* Pet App. 309a-314a (Duncan, J.) (regarding 25 U.S.C. §§ 1912(e)-(f), 1915(a)-(b)).

With respect to section 1915(c), which allows Indian tribes to change the order of the placement preferences, a majority held that it did not violate the nondelegation doctrine but instead permissibly incorporated the laws of a separate sovereign. Pet. App. 166a-179a (Dennis, J.).

A majority also affirmed in part and reversed in part the district court's ruling that the Final Rule was unconstitutional and violated the APA. Pet. App. 6a-7a.

REASONS FOR GRANTING THE PETITION

As demonstrated by the lengthy, conflicting opinions from the Fifth Circuit, ICWA presents significant, unresolved constitutional questions. Some questions arise from this Court's precedents, which purport to recognize in different contexts that Congress has "plenary power" over "Indian affairs," and which enable at least some

Indian-specific classifications to avoid equal-protection challenges by deeming them political, not racial. Other questions result from the Fifth Circuit's misapplication of established principles limiting Congress's ability to commandeer state actors and to delegate its authority.

The Court's Indian-law decisions have been the subject of scholarly critiques for years. Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1074-75 & nn.21-25 (2004) (gathering articles). This case demonstrates that clarity is needed in a context where delay will irreparably harm the most vulnerable among us: children residing in dangerous circumstances. And it presents the Court with an excellent vehicle to provide that clarity.

I. This Court Should Grant Certiorari to Clarify that Congress Cannot Regulate State Child-Custody Proceedings Through the Indian Commerce Clause.

This Court's precedents—and not the Constitution's text or history—have derived from the Indian Commerce Clause a "plenary power" over "Indian affairs." *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *see also United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring). Congress enacted ICWA expressly pursuant to that purported power. 25 U.S.C. § 1901(1). And at least one of the Fifth Circuit's lead opinions has understood this power as "unimpeded," "synergistic," and "comprehensive," Pet. App. 24a, 87a (Dennis, J.), even in domestic-relations cases, "an area that has long been regarded as a virtually exclusive province of the States," *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

If allowed to stand, the Fifth Circuit's rule would mean that Congress's regulatory scope would be

virtually limitless so long as an Indian is involved. The question of the limits on Congress's authority regarding Indians arises not only here, but in other contexts. *See, e.g.*, *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 566-68 (2d Cir. 2016), *cert. denied*, 140 S. Ct. 2587 (2017). Because the source of this confusion about Congress's power is this Court's opinions, only this Court can provide the necessary clarity.

A. This Court has not clearly defined Congress's authority over Indians.

As Justice Thomas has explained, the notion that Congress has plenary power over some vaguely defined area of "Indian affairs" "rests on shak[y] foundations." *Bryant*, 136 S. Ct. at 1968 (Thomas, J., concurring). Although this Court has cited the Indian Commerce Clause and Treaty Clause as potential sources for this sweeping authority, *United States v. Lara*, 541 U.S. 193, 200 (2004), neither permits it. Because both Congress and the lower courts have read this Court's opinions as creating a power far broader than that present in the Constitution's text, this Court should grant review to clarify its past statements.

1. The Commerce Clause allows Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Under ordinary rules of construction, such closely related provisions "should be construed in pari materia" to "mean substantially the same thing." *Patton v. United States*, 281 U.S. 276, 298 (1930). They have not been.

When used with respect to interstate commerce, "[c]ommerce" does not include child-custody cases or domestic-relations issues. *United States v. Morrison*, 529 U.S. 598, 608-09, 613 (2000); *see United States v. Lopez*,

514 U.S. 549, 564 (1995). In contrast, the Court has suggested that regulating "[c]ommerce" with Indian tribes is broader: "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petrol. Corp.*, 490 U.S. at 192. Early references to such a power could be explained by the fact that in the colonial period, most interactions between Indians and American settlers were commercial in nature. *See generally* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1064-1146 (1995).

But moving from "[c]ommerce" to "plenary power" would run contrary to this Court's admonition elsewhere that "[t]he enumeration [of Congress's powers] presupposes something not enumerated." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 74 (1824). The Federal Government "can exercise only the powers granted to it." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012). The Indian Commerce Clause must mean something less than unchecked power over Indians or its text would lose all meaning. *See also* U.S. CONST. art. I, § 2, cl. 3 (excluding "Indians not taxed" from apportionment for Congress); *id.* art. I, § 10, cl. 1 (denying States the ability to make treaties). But this Court has instead implied both broad congressional powers regarding Indians but important limitations on those powers where traditional state interests are implicated. *See Lara*, 541 U.S. at 205 (permitting tribal prosecutions of other Indians on tribal land when the case "involve[d] no interference with the power or authority of any State").

2. The Court has also cited the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2, as a putative source for Congress's supposed plenary power. *Lara*, 541 U.S. at 200.

But the Court has not explained how hundreds of different treaties with different tribes containing different provisions could create a single plenary power over all Indian affairs. *See Bryant*, 136 S. Ct. at 1968 (Thomas, J., concurring) (criticizing the Court for "treating all Indian tribes as an undifferentiated mass"). Indeed, this Court interprets a treaty the way it does any other source of federal law: by reference to its text and history. *E.g.*, *Medellin v. Texas*, 552 U.S. 491, 506-07 (2008). Hundreds of varying treaties can no more be aggregated into a plenary federal power than hundreds of federal statutes can be.

The Court has also not explained how any treaty with any tribe can give Congress a power over Indian affairs broader than that granted by Article I. To the contrary, a plurality of the Court has previously stated that "no agreement with a foreign nation can confer power on the Congress . . . which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality op.); *see also Bond v. United States*, 572 U.S. 844, 876-81 (2014) (Scalia, J., concurring in the judgment) (similar). If a treaty with a "foreign nation" cannot "confer power on the Congress," a treaty with an Indian tribe cannot do so, either.[3] And any such power remains subject to the Constitution's other guarantees, including the Fifth and Tenth Amendments.

3. The Fifth Circuit also cited the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, and the Supremacy Clause,

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[3] The Court has previously indicated that a treaty could overcome a Tenth Amendment objection to congressional action. *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920). This Court has suggested *Holland* is no longer good law and has limited it to its facts. *Cf. Reid*, 354 U.S. at 18 (plurality op.); *Bond*, 572 U.S. at 873-74 (Scalia, J., concurring in the judgment).

id. art. VI, cl. 2, as empowering Congress to pass ICWA. Pet. App. 19a (Dennis, J.). But even though ICWA describes Indian children as tribal "resource[s]," 25 U.S.C. § 1901(3), they are not property, *see* U.S. CONST. amend. XIII. And the Supremacy Clause merely provides a rule of decision, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015), not an additional congressional power.

4. The only source for Congress's putative "plenary power" over "Indian affairs" is this Court's opinions. But even those make clear that Congress's power over Indian affairs "is not absolute." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977). While not delineating the limits of Congress's power over Indian affairs, this Court has held that other constitutional doctrines can limit Congress's exercise of that power. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (holding Congress's power does not overcome state sovereign immunity); *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935) (examining taking of Indian lands under Takings Clause).

Beyond that, Congress's power over Indian affairs remains largely undefined. This Court has not elaborated on what an "Indian affair" is—whether it is any matter anywhere that concerns an Indian, or whether it must affect issues involving a tribe as such, or whether it must affect the relationship between a tribe and the federal government. The Court has previously described the power as one "over tribes," *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014), and indicated that Congress may "limit, modify or eliminate the powers of local self-government" of tribes, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), or "legislate . . . directly for the protection of the tribal property," *Cherokee*

Nation v. Hitchcock, 187 U.S. 294, 306 (1902). But to date, courts of appeals have been left to interpret "Indian affairs" as narrowly or as broadly as they see fit.

B. Courts have taken an overbroad view of Congress's authority over Indians.

1. The Fifth Circuit's en banc opinions are illustrative of the mischief this Court's approach has allowed. One plurality admitted that it viewed "the federal government's Indian affairs power in the broadest possible terms." Pet. App. 72a (Dennis, J.). By concluding Congress's authority over Indian affairs extends to any child-custody proceeding whenever the child is—or may be—an Indian, 25 U.S.C. § 1903(4), that plurality treated "Indian affair" as any litigation concerning the interests of an Indian, regardless of whether it involves questions of commerce, treaties, or larger sovereign issues. Because a majority concurred in the conclusion reached by that plurality, Pet. App. 351a (Owen, C.J.), 363a (Haynes, J.), nothing is off limits to Congress in the Fifth Circuit if an Indian is involved.

That approach stretches this Court's precedents beyond their breaking point. To date, the Court has upheld Indian-specific laws concerning commerce, federal-Indian relations, and Indian sovereignty. *See, e.g.*, *Lara*, 541 U.S. at 202 (recognizing Congress's authority to restrict tribal sovereignty); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684-85 (1979) (preserving fishing rights pursuant to a treaty); *United States v. Mazurie*, 419 U.S. 544, 545-46 (1975) (concerning the sale of liquor in Indian country). But the Fifth Circuit has understood this Court's directions as authorizing Congress to directly regulate States in the exercise of state functions so long as an Indian child is involved.

Reading those precedents so broadly "raises absurd possibilities." *See Adoptive Couple v. Baby Girl*, 570 U.S. 637, 666 (2013) (Thomas, J., concurring). Under that approach, Congress could require different punishments in state criminal trials involving Indians or mandate different distributions of property in divorce proceedings involving an Indian. Or it could allow Congress to "substitute federal law for state law when contract disputes involve Indians." *Id.* None of these possibilities square with either the limited powers given by the Framers to Congress or the remaining provisions in the Constitution circumscribing the use of those powers.

2. This is not the first time that the lower courts have been required to address the scope of Congress's "plenary power" over Indian affairs. *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1152-53 (9th Cir. 2020), *cert. denied*, No. 20-846, 2021 WL 2519101 (U.S. June 21, 2021); *Upstate Citizens for Equal.*, 841 F.3d at 567-68. In both cases, the courts of appeals relied on Congress's supposedly plenary power to permit the federal government to oust States from jurisdiction over non-reservation land by taking the land into trust for an Indian tribe. *Club One Casino*, 959 F.3d at 1152-53; *Upstate Citizens for Equal.*, 841 F.3d at 567-68. Justice Thomas's dissent from the denial of certiorari in *Upstate Citizens* explained how such a broad understanding of Congress's authority is inconsistent with the Constitution. 140 S. Ct. at 2587-88 (Thomas, J., dissenting from denial of certiorari).

This case stretches Congress's authority even further—to state child-custody proceedings in which the child may have only the most attenuated biological connection to an Indian tribe. *See Adoptive Couple*, 570 U.S. at 641 (child was 3/256 Cherokee). ICWA goes beyond

regulating commerce with Indians to govern state-court proceedings, state officials, agencies, and courts, as well as potential non-Indian parents. This Court should grant review to hold that Congress cannot authorize ICWA's intrusion into state affairs.

II. The Fifth Circuit's Decision Conflicts with This Court's Equal-Protection Precedents.

This Court should also grant review to hold that even if Congress has the Article I authority to regulate the adoption of Indian children under state law, that authority remains subject to other provisions of the Constitution, including the Fifth Amendment's equal-protection guarantee. No government may categorize children or their potential parents based on their race. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Yet that is what ICWA does, and what it directs States to do. Because a "blood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe," H.R. Rep. No. 95-1386 at 20 (1978) (cleaned up), ICWA's classifications draw racial distinctions.

Relying on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), a majority of the en banc Fifth Circuit erroneously concluded that Congress may require others to treat Indian children differently than non-Indian children because the relevant distinction—membership or potential membership in an Indian tribe—is political, not racial. Pet. App. 140a-166a (Dennis, J.). But distinctions based on tribal membership are not always acceptable political classifications: they must prove to be "nonracial in purpose and operation," as this Court confirmed in *Rice v. Cayetano*, 528 U.S. 495, 516 (2000).

ICWA designed a different child-custody regime to ensure that state courts do not use "white, middle-class standard[s]" when adjudicating child-custody cases involving Indian children. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989). ICWA's provisions operate individually and jointly to discourage the adoption of Indian children by non-Indians. A more transparently racial purpose or operation is hard to imagine. This Court should grant the petition to hold that such a goal violates the Fifth Amendment's guarantee of equal protection.

A. The Fifth Circuit's decision misreads this Court's precedents regarding when Indian classifications are political.

1. The Fifth Circuit's conclusion that all Indian classifications are political is based entirely on the Court's opinion in *Mancari*. There, the Court upheld a policy of the Bureau of Indian Affairs giving preferences in promotions to individuals who were members of federally recognized Indian tribes who had at least 25% Indian blood. 417 U.S. at 538, 553 n.24. The Court determined that distinction was political because the preference was specifically granted to Indians "whose lives and activities are governed by the BIA in a unique fashion," and not to all members of "a discrete racial group." *Id.* at 553-55 & n.24. The Court concluded that the preference had "a legitimate, nonracially based goal"—Indian self-government—which the Court held differentiated it from other racial preferences. *Id.* Concluding that the preference was "reasonable and rationally designed to further Indian self-government," the Court held it was constitutional. *Id.* at 555.

The Court did not, however, hold that all Indian classifications would be deemed "political." It noted the

preference was limited to positions within the BIA, and specifically observed that "obviously [a] more difficult question . . . would be presented by a blanket exemption for Indians from all civil service examinations." *Id.* at 554. But the Court did not elaborate further.

2. The Court reiterated the limits on *Mancari* in *Rice*, where the Court examined a law that limited voting for certain state officials to Hawaiians who descended from people who inhabited the islands in 1778. 528 U.S. at 509-10. Because the relevant state officials were charged with the betterment of native Hawaiians, Hawaii compared its law to the preference in *Mancari*, arguing that "Hawaiians," like Indian tribes, were entitled to some portion of self-government. *Id.* at 518.

The Court assumed Hawaiians could be treated like an Indian tribe but still rejected the law as race based, observing that "[a]ncestry can be a proxy for race" and "is that proxy here." *Id.* at 514, 519. The Court agreed that tribal elections may be limited to members of the tribe because they are the "internal affair of a quasi sovereign." *Id.* at 520. But State elections are the "affair of the State of Hawaii." *Id. Mancari*, the Court explained, did not permit a State "by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id.* at 522.

3. The Fifth Circuit misapplied *Mancari*'s language permitting "special treatment" of Indians that "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Pet. App. 143a (Dennis, J.) (quoting *Mancari*, 417 U.S. at 555).[4] Indeed, the Fifth

[4] The en banc Fifth Circuit majority's reasoning ignores that the Court in *Mancari* made that statement after determining that the classification was political and not racial—and therefore subject to

Circuit's view is incompatible on its face with *Rice*, which instructed courts to inquire first whether the matter was an internal affair or a state affair. 528 U.S. at 520. As relevant here, ICWA governs state child-custody proceedings, not tribal child-custody proceedings concerning Indian children domiciled on reservations. *Rice*'s restrictions therefore apply. *See also United States v. Antelope*, 430 U.S. 641, 646 (1977).

Further, the Fifth Circuit's decision is troubling because it leaves the courts to determine the content of Congress's supposed "obligation toward the Indians." Pet. App. 143a (Dennis, J.). And it runs afoul of this Court's long-established rule that supposedly benign race discrimination is still race discrimination. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995). The Fifth Circuit's test provides no meaningful check on Congress's ability to racially discriminate with respect to Indians aside from its political will to do so.

B. The Fifth Circuit's approach breaks with other courts' treatment of Indian classifications.

In contrast to the Fifth Circuit, the Ninth Circuit has articulated some limits on *Mancari*. That court has recognized that the preference in *Mancari* was "based on a racial classification" but was constitutional because "there was a legitimate non-racial purpose underlying the preference," namely, "Native Americans' interests in self-governance." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998) (finding preference for a particular tribe

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rational-basis review. 417 U.S. at 555. The statement is of no use in determining whether the distinction was political or racial to begin with.

was national-origin discrimination under Title VII). The Ninth Circuit has also distinguished *Mancari* as implicating uniquely Indian interests, such as Indian land and self-government. *Williams v. Babbitt*, 115 F.3d 657, 663-65 (9th Cir. 1997) (questioning whether Congress could prevent non-natives from participating in the reindeer industry in Alaska).

Some state courts, concerned about ICWA's impact on Indian children with no connection to their tribe other than a biological parent, developed the "existing Indian family" doctrine, which limited ICWA's application to circumstances in which the child had a significant political or cultural connection to an Indian tribe, rather than a mere genetic link. *See, e.g.*, *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715-16 (Cal. Ct. App. 2001); *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990); *In re Interest of S.A.M.*, 703 S.W.2d 603, 608-09 (Mo. Ct. App. 1986).

The Final Rule attempted to abrogate these state-court decisions by prohibiting courts from declining to apply ICWA based on factors such as the "participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum." 25 C.F.R. § 23.103(c). The Final Rule's deliberate exclusion of these cultural, political, and familial factors confirms that ICWA and the Rule treat Indian children based on ancestry: a forbidden racial classification. Similarly, the placement preferences that prefer unrelated tribal members over unrelated non-members also evidence Congress's intent to

prioritize an Indian child's ancestry over his best interests. 25 U.S.C. § 1915(a)-(b); 25 C.F.R. §§ 23.130-31.[5]

Even before the Final Rule, this Court had called ICWA into question to the extent it could "put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple*, 570 U.S. at 655. But as the Final Rule and the experiences of the Individual Plaintiffs show, Pet. App. 48a-50a, that is what ICWA does. The Fifth Circuit stretched *Mancari* well beyond its limits to avoid applying strict scrutiny, under which ICWA would undoubtedly fall. This Court's guidance is necessary to prevent lower courts from excusing blatant racial classifications regarding Indians as mere political ones.

III. The Fifth Circuit Created a Loophole in the Anticommandeering Doctrine.

In addition to violating the Fifth Amendment's equal-protection guarantee, ICWA's effort to "compel the States to . . . administer" federal child-custody policy violates the States' sovereignty under the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 188 (1992).

Although correctly affirming that portions of ICWA unconstitutionally commandeer state actors, Pet. App. 285a-297a (Duncan, J.), the Fifth Circuit did not go far enough. And its decision relies on federal preemption—

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[5] As part of an 8-8 tie, the Fifth Circuit affirmed the district court's judgment that ICWA's preferences for "other Indian families" and "Indian foster home[s]" violated equal protection. Pet. App. 277a-280a (Duncan, J.) (referring to 25 U.S.C. § 1915(a)(3), (b)(iii)). But those judges who found an equal-protection violation did so under the rational-basis test and did not decide whether ICWA made a political or racial classification. Pet. App. 277a-280a (Duncan, J.).

a characteristic of all laws within Congress's Article I powers—to categorically require state courts to enforce state actors' compliance with federal mandates. If the only characteristic a law must have in order to command state agencies is that it must be a federal law, then this Court's admonition that state officials may not be "dragooned . . . into administering federal laws," *Printz v. United States*, 521 U.S. 898, 928 (1997), is empty.

A. Congress no doubt believed it needed to act regarding the removal and adoption of Indian children. 25 U.S.C. § 1901. Yet even "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018) (quoting *New York*, 505 U.S. at 178). The anticommandeering doctrine forbids the federal government from "compel[ling] the States to implement, by legislation or executive action, federal regulatory programs." *Printz*, 521 U.S. at 925; *see also Murphy*, 138 S. Ct. at 1477. The Framers chose to "withhold from Congress the power to issue orders directly to the States," *Murphy*, 138 S. Ct. at 1475, instead granting it only "the power to regulate individuals," *New York*, 505 U.S. at 166. Thus, while the States surrendered some power to the federal government, they "remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 918-19, 928.

ICWA invades that retained state sovereignty by replacing state mandates with federal ones in state-law child-custody cases involving Indian children. If a state employee needs to remove a non-Indian child from a dangerous home, he must do so according to state law. Under ICWA, if the same employee needs to remove an Indian child from the same dangerous home, he must

execute a specific and extensive list of congressional commands. These include, at a minimum, providing notice to the Indian child's tribe, ensuring active efforts have been made (often through state programs) to avoid breaking up the family, finding qualified expert witnesses to testify, satisfying the federal burdens of proof, seeking out placements that comply with ICWA, and documenting and keeping records showing compliance with ICWA. 25 U.S.C. §§ 1912(a), (d)-(f), 1915(a)-(b), (e); 25 C.F.R. §§ 23.111, .120-22, .129-31. The comments to the Final Rule record the many thousands of dollars and hours that the federal government anticipated would be spent by States to comply with only some of ICWA's commands. 81 Fed. Reg. at 38,863-64. Regardless of what branches of the state government are subject to these requirements, they are far more burdensome than the background checks found to be unconstitutional commandeering in *Printz*. 521 U.S. at 933.

The Fifth Circuit correctly affirmed that Congress had conscripted state actors at least in some instances, Pet. App. 285a-297a (Duncan, J.), which should prevent the federal government from withholding funding from States if they do not comply with those commands. But a decision from this Court is needed, or state agencies and courts will likely continue to administer ICWA's voluminous requirements. *See, e.g.*, *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (stating that Texas courts are obligated to follow the Supreme Court, but not the Fifth Circuit).

B. This Court's intervention is also necessary to correct the Fifth Circuit's preemption holding. The Fifth Circuit's ruling was mixed, holding that some provisions of ICWA violated the anticommandeering doctrine, some merely preempted state law, and some violated the

anticommandeering doctrine when applied to state agencies but were permissible preemption when applied to state courts. Pet. App. 4a-5a. The last category, if left in place, would create a significant loophole in the anticommandeering doctrine.

After affirming that the foster-care standards, 25 U.S.C. § 1912(e), termination standards, *id.* § 1912(f), and placement preferences, *id.* § 1915, unconstitutionally commandeer state officials, the Fifth Circuit then held that state courts still had to apply those standards under the Supremacy Clause. Pet. App. 309a-314a (Duncan, J.). In other words, state actors must still comply with ICWA's directives if they wish to help vulnerable Indian children. This puts Texas in a no-win situation: acquiesce to ICWA's commandeering of its courts or leave children in abusive or unstable homes. And even if a state court declined to obey ICWA's commands, the child, parent, or tribe may petition "any court of competent jurisdiction" to reverse a foster-care placement or termination of parental rights if those actions violated ICWA. 25 U.S.C. § 1914; *see also* Pet. App. 306a-307a (Duncan, J.) (upholding section 1914). Congress cannot use preemption to accomplish indirectly what the Tenth Amendment forbids it from accomplishing directly. *Cf. Seminole Tribe of Fla.*, 517 U.S. at 73 ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

If it violates "the very *principle* of separate state sovereignty" to force state officials to fulfill federal mandates, *Printz*, 521 U.S. at 932 (emphasis in original), the violation is even greater when Congress forces *state courts* to ensure that state officials fulfill federal mandates. The anticommandeering doctrine precludes the federal government from issuing orders to any branch of

state government. *Cf. Mother & Father v. Cassidy*, 338 F.3d 704, 711 (7th Cir. 2003); Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L.J. 319, 366 (1998) ("[I]t makes little sense to conclude that Congress can commandeer the state courts but not the other branches of state government.").

The Fifth Circuit believed that the Court's preemption rulings did not provide a clear answer in the circumstances presented by ICWA. Pet. App. 311a (Duncan. J.). But it is black-letter law that preemption derives from the Supremacy Clause. *See Murphy*, 138 S. Ct. at 1479. And the Supremacy Clause provides a rule of decision—not an additional grant of power to Congress. *Armstrong*, 575 U.S. at 324. It could not have empowered Congress to commandeer state governments. *Murphy*, 138 S. Ct. at 1479. The Court should grant the petition and close the loophole created by the Fifth Circuit.

IV. The Fifth Circuit's Nondelegation Ruling Conflicts with This Court's Precedents.

Similarly problematic is the Fifth Circuit's ruling that Congress may delegate the authority to alter ICWA's placement preferences to Indian tribes. This Court has recognized that ICWA's adoptive placement preferences are the "most important substantive requirement imposed on state courts." *Holyfield*, 490 U.S. at 36. But Congress granted Indian tribes the unilateral authority to reorder them. 25 U.S.C. § 1915(c); *see also* 25 C.F.R. § 23.130(b). That delegation violates Article I of the Constitution, which vests "[a]ll legislative Powers" in Congress. U.S. CONST. art. I, § 1, cl. 1.

By a slim majority, the Fifth Circuit rejected Texas's nondelegation arguments, reasoning that "Congress may incorporate the laws of another sovereign into federal law." Pet. App. 168a-170a (Dennis, J.); *see also*

United States v. Sharpnack, 355 U.S. 286, 293-94 (1958). But ICWA does not incorporate the laws of Indian tribes; it gives them the power to change the law enacted by Congress. And because a tribe's decision to reorder the preferences changes the rights of non-Indians who are not on Indian lands, the tribe is not acting as a sovereign but rather as akin to a private actor with no political accountability for the consequences of its actions. Such a delegation cannot be squared with Article I's vesting clause.

A. As an initial matter, the Fifth Circuit erred by treating Indian tribes as "sovereign" for purposes of ICWA's delegation. Pet. App. 176a-178a (Dennis, J.). That may be true where the tribe is acting within its own territory. *Mazurie*, 419 U.S. at 556-57. But in state-court child-custody matters, tribes are politically unaccountable entities with no independent constitutional authority. *See Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 61-62 (2015) (Alito, J., concurring) (explaining that delegations to the Executive are acceptable due to their accountability and independent grants of authority). In this context, tribes are on par with private parties, and delegation to a private party is the "most obnoxious form" of delegation. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *see also Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (explaining the accountability problems presented by delegation).

Tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation." *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). ICWA, however, does not apply to Indian children residing on reservations. 25 U.S.C. § 1911(a) (setting exclusive jurisdiction over such children in tribal court). It applies only to non-members of

the tribe that seek to foster or adopt Indian children in state proceedings. The concept of tribal sovereignty does not extend to controlling non-members who are not on Indian land; in fact, this Court has recognized such efforts by tribes are "presumptively invalid." *Plains Com. Bank*, 554 U.S. at 330. Consequently, Indian tribes that choose to change the order of preferences under section 1915(c) are not acting in their capacities as sovereigns, but as private parties.

The Court's decision in *Mazurie* is not to the contrary. There, the Court explained that the limits on delegation are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter," such as regulations applicable to tribal lands. 419 U.S. at 556-57. But Indian tribes do not have independent authority over state child-custody proceedings, even if they involve Indian children.

B. Even if the tribes were somehow sovereign regarding Indian children off tribal land and outside of tribal courts, the delegation would fail. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The "fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). Congress may not transfer to another branch "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825).

The Court has approved delegations of authority to federal agencies to "fill up the details" after Congress makes the general rules. *Id.* at 43. But Congress must

"'lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Gundy*, 139 S. Ct. at 2123 (plurality op.) (quoting *Mistretta*, 488 U.S. at 372).

ICWA does not lay down an intelligible principle for tribes to follow: section 1915(c) is an invitation to change the preferences that Congress enacted in subsections 1915(a) and (b), not to implement them. The Court has explained that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372. But Congress did its job in ICWA—it set the order of preferences. 25 U.S.C. § 1915(a)-(b). Even if it could somehow invite Indian tribes to alter that set of preferences, it provided absolutely no guidance as to what principles tribes must apply when doing so.

Congress could not change the preferences in ICWA without following the proper constitutional procedures, including bicameralism and presentment. *See INS v. Chadha*, 462 U.S. 919, 944-51 (1983) (describing constitutional process of enacting a law). Yet ICWA allows individual tribes to do precisely that, circumventing restrictions on Congress's lawmaking power. Pet. App. 320a (Duncan, J.). ICWA's delegation therefore does not incorporate the laws of a sovereign to fill in a statutory gap, but allows Indian tribes to change what Congress enacted. The Fifth Circuit's conclusion that this is a permissible delegation allows Congress to shirk its obligation to "weigh and accommodate the competing policy" implicated when state and Indian sovereign interests intersect. *Bay Mills Indian Cmty.*, 572 U.S. at 801.

V. This Court Should Resolve the Questions Presented Now.

A. The multiple, conflicting opinions from the Fifth Circuit demonstrate why certiorari is not only appropriate but necessary in this case. The opinions reflect the lack of clarity in the Court's precedents or are contrary to principles this Court has already established. While these issues have not arisen in other federal courts, the discussion among the sixteen Fifth Circuit judges thoroughly sets out the various arguments. No further percolation is necessary.

Indeed, the confusion created by the opinions themselves is a reason that certiorari should be granted. No opinion garnered a majority of votes, and hardly anyone can say with certainty what the law is; after all, the two main opinions alternate between being majority, dissenting, and non-precedential ties. Pet. App. 3a. There is no further avenue for relief in the Fifth Circuit, and lower courts attempting to parse the Fifth Circuit's ruling need clarity about what the law is.

This is particularly problematic given the context: by definition, the children impacted by ICWA are in vulnerable positions. Dragging out child-custody cases is never in the best interest of any child. For example, as the Court noted when reversing an adoption decree three years after the fact, "[t]hree years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain." *Holyfield*, 490 U.S. at 53; *accord Adoptive Couple*, 570 U.S. at 641.

B. This case is a good vehicle for answering these constitutional questions. Texas deals with these issues in its child-custody proceedings on regular basis. Other States who take a contrary view on the value and burdens of ICWA have also participated in the litigation as

amici supporting defendants in the Fifth Circuit, Pet. App. 9a-10a, 72a n.22 (Dennis, J.). Moreover, the Individual Plaintiffs' experiences show the practical effect of ICWA on individual families and the barrier that ICWA poses to those who seek to foster or adopt additional Indian children. Pet. App. 209a-211a (Duncan, J.). All petitioners and amici are well represented by counsel who both have experience in this Court and have litigated this issue from the outset.

The only alternative vehicles that could present these issues are various child-custody proceedings, which could (in theory) work their way through state courts to this Court. That is a daunting task for individuals who just want to adopt a child and may lack the resources necessary to mount a successful constitutional challenge in the Supreme Court.

There is no need to burden additional Indian children with the pain of prolonged litigation while other cases percolate. The sooner the Court can resolve the constitutional questions presented here, the sooner all Indian children will have the best opportunity to find permanent, stable, and loving homes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

MICHAEL R. ABRAMS
BETH KLUSMANN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

SEPTEMBER 2021