18-11479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAD EVERET BRACKEEN, *ET AL.*, Plaintiffs-Appellees, v. DAVID BERNHARDT, *ET AL.*, Defendants-Appellants, CHEROKEE NATION, *ET AL.*, Intervenor Defendants-Appellants	:	On Appeal from the United States District Court for the Northern District of Texas Case No. 4:17-CV-00868-O

BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Deputy Solicitor
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers
@ohioattorneygeneral.gov

Counsel for Amicus Curiae
State of Ohio

SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

No. 18-11479

Chad Everett Brackeen, et al. v. David Bernhardt, et al.

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities have an interest in this *amicus curiae* brief. These representations are made so the judges of this court may evaluate potential disqualification or recusal.

Amicus Curiae State: Ohio

Counsel for *Amicus Curiae* State: Ohio Attorney General Dave Yost

/s/ Benjamin M. Flowers
Benjamin M. Flowers
Counsel for Amicus Curiae
State of Ohio

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Ohio, just like every other State, regulates the domestic relationships of those living within its borders, including the relationships between parents and children. This "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). As the governments in charge of domestic relations, States must resolve difficult policy questions, such as when and how to place children in foster care and when and how to approve an adoption. Ohio has long chosen to resolve these questions with its "time-honored precedent" looking to "the 'best interests' of the child." *See In re Cunningham*, 391 N.E.2d 1034, 1038 (Ohio 1979) (citing cases).

The federal government, however, has displaced many of the States' domestic-relations policy choices in child-custody proceedings that involve children of Native American ancestry. The Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*. (ICWA), commands a State to ignore its usual standards, such as Ohio's best-interests-of-the-child test, if the child has Native American ancestry—no matter how minimal in degree or how minimal the child's contacts with the Native American

tribe. *See, e.g.*, *id.* § 1915(a). ICWA's commands thus "often lead to different outcomes than would result under state law." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658 (2013) (Thomas, J., concurring). Specifically, the commands generate outcomes different from those that would result from Ohio's test focused on the child's best interests.

Neither the Commerce Clause nor anything else in the Constitution authorizes this federal displacement of a State's standards governing the family relationships of state citizens living within the State. It should go without saying that the regulation of domestic relations is not the regulation of commerce. *United States v. Morrison*, 529 U.S. 598, 615–16 (2000). And ICWA does not merely displace Ohio's best-interests-of-the-child test; it affirmatively compels state actors to implement the federal government's competing discriminatory policies. But "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

A recent Ohio case shows Ohio's unique interests in this dispute. *In re C.J.*, 108 N.E.3d 677 (Ohio Ct. App. 2018). In *C.J.*, Franklin County Children Services took custody of C.J., a two-year-old

boy, and placed him with an Ohio foster family. *Id.* at 682. Born in Ohio to parents domiciled there, C.J. had lived in the State since his birth. *Id.* at 681. After a year in foster care, he "strongly bonded with his foster parents," and the Ohio court considered a motion to give them permanent custody. *Id.* at 682, 684. The primary issue at that point *should* have been whether this decision would advance C.J.'s best interests. *See Cunningham*, 391 N.E.2d at 1038.

Because of ICWA, however, the juvenile court disregarded C.J.'s best interests. When the court considered the motion to award custody to the foster parents, an Arizona tribe (the Gila River Indian Community) intervened. *C.J.*, 108 N.E.3d at 682–83. The tribe asserted that C.J. was Native American based on his father's ancestry. *Id.* at 683 n.2. C.J. may have been "eligible" for membership in the tribe because he had "at least one-fourth Indian blood" and had a father who might have been a member. Gila River Const. art. III § 1 (1960), *available at* http://thorpe.ou.edu/IRA/gilacons.html. Yet the father's absence from the tribe's reservation for more than 20 years placed his membership into doubt, *id.* art. III, § 3, and no "documentation" had been offered to prove his membership, *C.J.*, 108

N.E.3d at 683 n.2. Nor had the child ever "set foot" on the reservation. *Id.* at 696. Despite these facts, the tribe claimed that Arizona offered the "*only* proposed placement" that would satisfy ICWA. Br. of the Gila River Indian Cmty. at 26 n.6, *In re C.J.*, 108 N.E.3d 677 (Ohio Ct. App. 2018) (Nos. 17AP-162 and 17AP-191).

After intervening in the Ohio proceedings, the tribe even obtained an ex parte order from its tribal court declaring C.J. to be a ward of that court. *C.J.*, 108 N.E.3d at 685. This order claimed to place C.J. under the control of the Gila River Indian Community Tribal Social Services, and decreed that he should live with individuals that he had never met. *Id.* Over the objection of C.J.'s now-deceased mother (who was not Native American), the Ohio court transferred jurisdiction to the tribal court. *Id.* at 683, 686. Fortunately for C.J., an Ohio appellate court reversed on jurisdictional grounds, concluding that the tribe's ex parte order "bootstrap[ped]" its own jurisdiction and violated due process. *Id.* at 696-97. Yet the case remains ongoing in state courts, and ICWA's substantive standards may continue to have discriminatory effect. *Cf. Adoptive Couple*, 570 U.S. at 655-56.

Aside from diverting attention from C.J.'s best interests, ICWA turned an ordinary custody proceeding into a procedural quagmire. The tribe's intervention resulted in "pervasive" "procedural anomalies," including two juvenile-court cases, an ex parte tribal court proceeding, and multiple appeals, each involving motions to dismiss on non-merits grounds. *See C.J.*, 108 N.E.3d at 698. While these proceedings were purportedly about the custody of one child, ICWA diverted the Ohio courts' attention to questions about the Native American tribe's intervention, the validity of ex parte orders by the tribal court, and the effect of the mother's objection. *Id.* at 700 (Luper-Schuster, J., concurring in part and concurring in the judgment in part). These issues consumed the resources of Ohio's courts—which proceeded "without any analysis" of C.J.'s best interests. *Id.* at 697 (lead opinion).

Ohio submits this brief to explain why Congress's alleged "plenary" power to legislate with respect to *Native American tribes* does not extend so far as to permit ICWA's broad intrusion into the traditional authority of the *States*. That is particularly true when, as was the case in *C.J.*, the intrusion relates to state citizens with threadbare connections to Native American tribes or territory.

ARGUMENT

I. The Constitution leaves to each State the power to regulate the domestic relations of state citizens living within the State's borders

A. Given the federal appellants' assertion of seemingly unlimited federal power in this case, this amicus brief starts with what "every schoolchild learns." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "The Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995). This "enumeration of powers is also a limitation of powers, because [the] 'enumeration presupposes something not enumerated.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) ("*NFIB*") (Roberts, C.J.) (citation omitted). To quell any doubt about this narrow view of Congress's powers, the People passed the Tenth Amendment to make the view express: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The States, by contrast, retain "numerous and indefinite" powers under the Constitution, *The Federalist No. 45*, p. 289 (C. Rossiter ed. 1961), powers that are often called "police powers." *Morrison*, 529 U.S. at 618–19. "States can and do perform many . . . vital functions of

modern government" that are not catalogued in the Constitution, including "punishing street crime, running public schools, and zoning property for development, to name but a few." *NFIB*, 567 U.S. at 535 (Roberts, C.J.); *Bond v. United States*, 572 U.S. 844, 854 (2014). Thus, "our system of government is said to be one of 'dual sovereignty'" because "both the Federal Government and the States wield sovereign powers." *Murphy*, 138 S. Ct. at 1475 (quoting *Gregory*, 501 U.S. at 457).

This separation of powers between separate sovereigns protects Americans' liberty just as much as the Bill of Rights does. *Bond v. United States*, 564 U.S. 211, 220–22 (2011). By allowing each State's citizens to make local decisions over the many policy debates left to the States, federalism enhances our right to govern ourselves. *Id.*

B. This case specifically concerns the policy choices that should govern domestic relations. Article I of the Constitution lists no "domestic relations" power granting Congress the authority to regulate family law, including child custody. *See* U.S. Const. art. I, § 8. This lack of an enumerated domestic-relations power shows that the States retain the authority to regulate domestic relations. *Id.* amend. X.

Longstanding Supreme Court precedent confirms this point. *Sosna*, 419 U.S. at 404 (citing cases). As one decision put it, "[t]he whole subject of the domestic relations of . . . parent and child[] belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593–94 (1890). Indeed, the Supreme Court has even adopted a "domestic relations exception" to diversity jurisdiction in federal courts. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *Rykers v. Alford*, 832 F.2d 895, 899–900 (5th Cir. 1987). This exception shows that family law falls even more within the central province of the States than other areas that they regulate. Most state-law matters, such as tort or contract, may be heard in diversity cases, so long as the federal courts apply state substantive law. But the domestic-relations exception means that domestic-relations issues are left both to state substantive law *and* to state courts.

Just as importantly, the Supreme Court has refused to read Congress's enumerated powers so broadly that they would swallow up the States' retained authority over domestic relations. *Lopez*, 514 U.S. at 564. In particular, a pair of recent decisions rejected the federal government's broad interpretation of Congress's power to "regulate

Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3; *Morrison*, 529 U.S. at 617; *Lopez*, 514 U.S. at 567–68. The federal government in these cases had argued that it could regulate the noneconomic activities that were at issue because they substantially affected commerce in the aggregate. *Lopez*, 514 U.S. at 563–64. The Court rejected this reasoning because of its far-reaching consequences, explaining that the reasoning could "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Morrison*, 529 U.S. at 615–16.

C. This case concerns not only the scope of Congress's powers, but also the means by which it may exercise them. Nothing in the Constitution gives Congress the ability to order States to execute its federal policy choices—even choices that flow out of enumerated Article I powers. *Printz v. United States*, 521 U.S. 898, 918–25 (1997); *New York v. United States*, 505 U.S. 144, 166 (1992). Instead, the Founders made "the decision to withhold from Congress the power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475. Even if, for example, the Commerce Clause allows the federal government to

regulate gambling, the federal government may not order the States to do so or use them to enforce its policy decisions on the amount and types of gambling to prohibit. *Id.* at 1478.

The Founders made this choice to "promote[] political accountability." *Id.* at 1477. When the federal government decides to regulate certain activities (such as the possession of firearms), federal officials must bear the political consequences for the costs or unpopularity of the federal law. *Printz*, 521 U.S. at 930. If, by contrast, the federal government could command States to implement its choices, state actors would be "put in the position of taking the blame for [the law's] burdensomeness and for its defects." *Id.*

II. These constitutional principles limit ICWA's broad interference with the States' domestic-relations policies

The federal government's "plenary" power over *Native American tribes and tribal lands* does not—as the federal appellants suggest—give it unlimited power to intrude on traditional state functions within *the States themselves*. Thus, no federal constitutional power permits ICWA's expansive intrusion into state domestic-relations law or its command to state actors to carry out its mandates.

A. The federal government's "plenary" authority over *Native American tribes* does not allow it to interfere with the traditional powers of the *States* acting within their borders

The Supreme Court has stated that the Constitution "grants Congress broad general powers to legislate in respect to Indian tribes, powers that [it has] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted). Yet the Constitution "is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders." *United States v. Kagama*, 118 U.S. 375, 378 (1886). So "the constitutional basis of this power"—not to mention the power's outer bounds—remains "unclear." Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201, 204 (2007); *Lara*, 541 U.S. at 230 (Souter, J., dissenting).

This confusion about the constitutional source and scope of the federal government's power concerning Native American tribes stems partially from the Supreme Court's inconsistent search for a textual hook justifying the claimed power. At times, the Court has rooted the asserted plenary authority over tribes within the power to "regulate Commerce . . . with the Indian tribes." U.S. Const. art. I, § 8, cl. 3;

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). At other times, however, it has called this everything-is-commerce view "a very strained construction of this clause," *Kagama*, 118 U.S. at 378, and has rested the claimed authority over tribes on the federal government's power to enter treaties, U.S. Const. art. II, § 2, cl. 2; *Worcester v. Georgia*, 31 U.S. 515, 559–61 (1832).

That said, the Supreme Court's cases are best read as distinguishing between two types of federal laws. On the one hand, the federal government has broad power to enact federal regulations governing conduct on the lands of federally recognized tribes—regulations that "involve no interference with the power or authority of any State." *See Lara*, 541 U.S. at 205. On the other hand, the federal government's power must be firmly rooted in an express constitutional source whenever it seeks to regulate conduct on lands subject to the *States'* authority and otherwise within the jurisdiction of the States' "police powers." *See Morrison*, 529 U.S. at 618–19.

1. *Native American Lands.* The federal government's power to legislate with respect to Native American tribes reaches its apex for conduct on federally recognized tribal lands. The Supreme Court has

indicated that "Indian reservations are 'a part of the territory of the United States,'" so Native Americans "'hold and occupy [these lands] with the assent of the United States.'" *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 208–09 (1978) (citation omitted). Indeed, many of the enabling laws that created States retained federal jurisdiction over Native American lands within the States. *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 67 (1962). The Native American tribes even hold *federal* common-law rights to possess their lands, *Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234–35 (1985). So the federal government's regulation of Native American lands can be viewed as an exercise of Congress's constitutional authority to "make all needful rules and regulations respecting the territory . . . belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

Unless federal legislation clearly says otherwise, the Supreme Court has long presumed that Congress intended to grant tribal governments broad "authority" within these federally controlled lands. *Williams v. Lee*, 358 U.S. 217, 223 (1959). "For nearly two centuries," the Court has treated "tribes as 'distinct, independent political communities,' . . . qualified to exercise many of the powers and

prerogatives of self-government" on their lands. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (citations omitted). Tribes have the "power to legislate and to tax activities on the reservation, including certain activities by nonmembers, . . . to determine tribal membership, . . . and to regulate domestic relations among members." *Id.* (citations omitted). They may also prosecute crimes committed on tribal lands by tribe members, *United States v. Wheeler*, 435 U.S. 313, 322 (1978), and by non-member Indians, *Lara*, 541 U.S. at 200, but not by non-Indians, *Oliphant*, 435 U.S. at 195.

Conversely, ever since Chief Justice Marshall's decision in *Worcester*, the Supreme Court has presumed that the States' authority over tribal members on tribal lands is more limited than its jurisdiction outside those tribal lands. 31 U.S. at 559–61; *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112–13 (2005). State authority will not extend to tribal lands whenever it would "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220; *see McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 168–72 (1973). This rule applies even to the domestic-relations context and adoption proceedings for tribal members living on

tribal lands. *Fisher v. Dist. Ct. of the Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 386–89 (1976).

Yet the tribal government's authority over tribal lands comes with two important caveats. For one thing, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). So even though "[t]he Bill of Rights does not apply to Indian tribes," *Plains Commercial Bank*, 554 U.S. at 337, Congress may impose similar protections on tribal lands, *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016). And even though tribal courts originally had exclusive jurisdiction over crimes committed by tribal members against tribal members on tribal lands, *Ex Parte Crow Dog*, 109 U.S. 556, 570-72 (1883), Congress may enact federal criminal laws to address those kinds of crimes, *Kagama*, 118 U.S. at 377–78, or extend the States' jurisdiction over crimes on tribal lands, *Bryant*, 136 S. Ct. at 1960.

For another thing, the Constitution places limits on Congress's ability to "subject[] nonmembers to tribal regulatory authority without commensurate consent." *Plains Commercial Bank*, 554 U.S. at 337. After all, U.S. citizens have consented to be governed by the

Constitution's federalist structure, which does not include any "jurisdiction of a third," tribal government. *Lara*, 541 U.S. at 212 (Kennedy, J., concurring in judgment). It is "a most troubling proposition to say that Congress can relax the restrictions on inherent tribal sovereignty in a way that extends that sovereignty beyond those historical limits." *Id.*

2. *State Lands.* The federal government's power to legislate with respect to Native Americans raises far different concerns when the legislation extends outside tribal lands into areas falling within a *State's* domain. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Ward v. Race Horse*, 163 U.S. 504, 515–16 (1896). In that context, federal legislation *does* "interfere[] with the power or authority of [the] State[s]," *Lara*, 541 U.S. at 205, and *does* intrude on their reserved powers under the Constitution, U.S. Const. amend. X.

Thus, absent contrary federal legislation, the Court presumes that Native Americans "going beyond reservation boundaries" *are* "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe*, 411 U.S. at 148–49. For example, "States have criminal jurisdiction over reservation Indians for crimes

committed . . . off the reservation." *Nevada v. Hicks*, 533 U.S. 353, 362 (2001); *e.g.*, *United States v. Sa-Coo-Da-Cot*, 27 F. Cas. 923 (Cir. Ct. D. Neb. 1870). States also may regulate activities that could be characterized as commercial—such as hunting or fishing—when Native Americans undertake them on state lands. *Egan*, 369 U.S. at 75–76. And States may tax the income of tribal members living outside tribal lands. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462–67 (1995); *see Wagnon*, 546 U.S. at 112–13.

In the few instances where federal regulation concerning Native American tribe members has clearly extended outside tribal lands into the States' jurisdiction, the federal regulation has rested on an explicit source of constitutional power. The Supreme Court, for example, has repeatedly said that federal laws regulating alcohol sales to tribe members reach transactions on state land, and has upheld these laws under the Commerce Clause (as applied to trade with "Indian tribes"). *United States v. Mazurie*, 419 U.S. 544, 554–55 (1975). Indeed, the first Court to permit such regulations notably supported its holding by pointing to the famous (interstate) commerce clause decision in *Gibbons v. Ogden*, 22 U.S. 1 (1824). *United States v. Holliday*, 70 U.S. 407, 416–

18 (1866); *cf. In re Heff*, 197 U.S. 488, 508–09 (1905) (holding that the federal law exceeded Congress's power as applied to trade with a Native American who lost his tribal membership and became U.S. citizen), *overruled on statutory grounds as noted by United States v. Nice*, 241 U.S. 591, 601 (1916).

Similarly, federal treaties in which Native Americans ceded their federal rights to tribal lands often preserved certain hunting or fishing rights on the ceded lands. *See, e.g.*, *Or. Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 764–65 (1985). But insofar as Congress burdened state land by preserving such rights over the ceded territory, it did so under its treaty power. U.S. Const. art. II, § 2, cl. 2. Cases permitting that exercise of the treaty power do not imply broad federal authority, independent of the treaty power, to limit state authority over state land whenever tribal interests are implicated.

B. ICWA exceeds Congress's power whenever it trumps a State's domestic-relations choices and commandeers the State's agents for children living within the State

ICWA regulates state child-custody proceedings that involve an "Indian child," a phrase defined to include children who are merely eligible for tribal membership and have one tribal-member parent. 25

U.S.C. § 1903(4). Congress claimed that it could exercise this novel authority over traditional state functions because of its "plenary power over Indian affairs," which, it said, flowed out of the Commerce Clause and "other [unidentified] constitutional authority." 25 U.S.C. § 1901(1).

That is wrong, at least as applied to children like C.J. who are not tribe members and who have lived exclusively within a single State far away from tribal lands. As Justice Thomas explained recently, the Constitution does not "grant[] Congress [the] power to override state custody law whenever an Indian is involved." *Adoptive Couple*, 570 U.S. at 658 (Thomas, J., concurring). And, as President Carter's Department of Justice explained before ICWA's enactment, "the federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by" ICWA. H.R. Rep. No. 95-1386, at 40 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7563 (Letter of Patricia M. Wald, Assistant Attorney General).

1. ICWA exceeds Congress's enumerated powers

ICWA exceeds Congress's constitutional authority as applied to children like C.J. who have always lived within the States' jurisdiction.

a. To begin with, the Commerce Clause does not authorize ICWA's application in this context. The Commerce Clause allows Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This language refers to "Commerce" just once and modifies that noun with three prepositional phrases: "with foreign Nations, "among the several States," and "with the Indian Tribes." As a matter of ordinary meaning, it would make no sense to treat the word "Commerce" as a chameleon whose scope changes depending on whether Congress regulates foreign, interstate, or Indian trade. Thus, the portion of this clause addressing commerce "with the Indian Tribes" does not enact a freestanding power devoted to any and all issues related to Native Americans. It is part of a single grant of authority to regulate *commerce*—not to regulate *all things*.

Thus, the word "Commerce" must bear the same meaning for all three components. The Supreme Court has at times suggested as much; for example, it has relied on interstate Commerce Clause cases like *Gibbons v. Ogden* in the Indian Commerce Clause context. *See Holliday*, 70 U.S. at 417–18; *cf. Hicks*, 533 U.S. at 363 (noting that

Kagama "expressed skepticism that the Indian Commerce Clause" provided a constitutional basis for a federal criminal law on tribal lands). Indeed, at the time of the Commerce Clause's adoption, a "rule of construction [held] that the same word normally had the same meaning when applied to different phrases in an instrument." Natelson, *supra*, at 215 & n.96 (citing cases). Unsurprisingly, then, "'commerce with Indian tribes'" "was invariably used during the time of the founding to mean 'trade with Indians.'" *Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring) (citing authorities) (some internal quotation marks omitted).

This dooms Congress's reliance on the Commerce Clause to justify ICWA. Neither child-custody proceedings nor children are "commerce." However broad one's conception of that word, it cannot reach the termination of parental rights, the approval of an adoption, or the granting of custody to foster parents. Indeed, as noted in Part I, the Supreme Court has already made this precise point when interpreting the part of the Commerce Clause about trade "among the several States." In that context, the Court has rejected an interpretation that would allow Congress to regulate "family law (including marriage,

divorce, and child custody)" simply because those issues were "related to the economic productivity of individual citizens." *Lopez*, 514 U.S. at 564. If the part of the clause governing trade "among the several States" does not allow Congress to regulate child-custody hearings, neither does the part of the clause governing trade with "Indian tribes."

Any other reading of the Commerce Clause would massively expand federal power as applied to individuals who have Native American heritage and who are living off tribal lands within the States. If Congress may command that state child-custody proceedings treat Native Americans differently based on their ethnicity (even for individuals who are not members of a tribe), it could also change state substantive law in *any* area reserved to the States. Congress might, for example, require States to adopt special contract or tort rules for cases involving state citizens with Native American heritage. *Cf. id.* The sheer novelty of such a power shows that it does not exist. As the Supreme Court has explained, "sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *NFIB*, 567 U.S. at 549 (Roberts, C.J.) (quoting

Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 505 (2010)). That precedent is lacking here.

b. Nor can any "other constitutional authority" support ICWA's application to children like C.J. 25 U.S.C. § 1901(1); *Adoptive Couple*, 570 U.S. at 658 (Thomas, J., concurring). Most notably, Congress's so-called "'plenary'" authority to legislate with respect to Native American tribes, *see Lara*, 541 U.S. at 200 (citation omitted), has never extended far enough to justify ICWA's intrusion into traditional state authority over state citizens.

To be sure, this plenary power might permit Congress, through ICWA, to exert federal jurisdiction over children who are members of Native American tribes, who have two tribal-member parents, and who are "domiciled" within tribal lands. *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989). Before ICWA, for example, *Fisher* held that a tribal court could exercise jurisdiction over an adoption proceeding "in which all parties are members of the Tribe and residents of [its] Reservation" situated in Montana. 424 U.S. at 383. The Court added that Montana's state courts could not interfere with the tribal proceedings. *Id.* at 389. As the constitutional basis for this assertion of

tribal (and hence federal) authority, the Court nowhere even hinted that the Commerce Clause gave the federal government roving power over all child-custody proceedings that have any connection to Native Americans. *See id.* at 383–91. Instead, it pointed to a congressionally ratified agreement between the United States and the tribe that gave the federal government jurisdiction over the tribe's lands, and to the enabling legislation that granted Montana statehood, which preserved the federal government's jurisdiction over that land. *Id.* at 386–87 & nn.8–9.

This fact-specific justification for tribal (and federal) jurisdiction on tribal lands cannot justify ICWA's broad federal intrusion into child-custody proceedings across the country. Most notably, ICWA asserts jurisdiction—as in *C.J.*—over lands under state authority and so cannot be based on any inherent federal power over conduct on Native American lands. *See Oliphant*, 435 U.S. at 208–09; *Kagama*, 118 U.S. at 384–85; U.S. Const. art. IV, § 3, cl. 2. Likewise, ICWA applies in the same broad fashion to all Native American children (no matter the tribe that they may be eligible to join), so Congress could not base the statute

on specific language in a specific treaty with a specific tribe. *See* U.S. Const. art. II, § 2, cl. 2.

2. ICWA commandeers state actors

As interpreted by the "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings," which claim to establish "minimum Federal standards," 80 Fed. Reg. 10,146, 10,152 A.5(a) (Feb. 25, 2015) ("Guidelines"), ICWA is also replete with commands to state actors to implement its commands. Even assuming that Congress had limited authority to impose federal policies in certain child-custody disputes, it did not have the additional authority to force the States to implement those policies. *See Murphy*, 138 S. Ct. at 1475. ICWA violates this "anticommandeering doctrine" both by commanding state executive actors to undertake various federal tasks, and by commanding state courts to change the state-court procedures governing state-law claims.

a. ICWA unconstitutionally commands state and local *executive* agencies (such as Franklin County Children Services in *C.J.*) to implement federal standards. *First*, according to the federal government, ICWA commands state agencies to "conduct an investigation" in "every child custody proceeding" to determine whether

the child is a Native American subject to ICWA. *See* Guidelines, 80 Fed. Reg. at 10,152 A.3(c). This investigatory mandate is similar to the mandate struck down in *Printz*, which similarly required state actors to "perform background checks." 521 U.S. at 933.

Second, ICWA commands state agencies to follow detailed procedures when attempting to place Native American children in ICWA's preferred settings. *See* 25 U.S.C. § 1915(a)–(b). State agencies that are unable to place a Native American child in one of the preferred settings must "demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences" "and explain why the preferences could not be met." Guidelines, 80 Fed. Reg. at 10,157 F.1(b). This search allegedly should include sending notifications to four categories of people, including "[a]ll of the known, or reasonably identifiable, members of the Indian child's extended family members" and both "[a]ll foster homes licensed, approved, or specified by the Indian child's tribe" and "[a]ll Indian foster homes located in the Indian child's State of domicile that are licensed or approved by any authorized non-Indian licensing authority." *Id.* F(1)(b)(2), (4).

Third, ICWA commands state agencies to "document their efforts to comply with" the statute. Guidelines, 80 Fed. Reg. at 10,147; *see* 25 C.F.R. § 23.141. The agencies must maintain a central database with "all records of every voluntary or involuntary foster care, preadoptive placement and adoptive placement of Indian children by the courts of that State," and make these records "available within seven days of a request by an Indian child's tribe" or the Department of the Interior. *Id.* at 10,159 G.6(a); *see* 25 U.S.C. § 1915(e); 25 C.F.R. § 23.140.

Fourth, ICWA commands state agencies to administer a process for informing adopted children about their tribal affiliations when they become adults. *See* Guidelines, 80 Fed. Reg. at 10,159 G.3; *see* 25 C.F.R. § 23.138. This order compels States to work with tribes to identify a tribal designee to "assist adult adoptees statewide with the process of reconnecting with their tribes and to provide information to State judges about this provision on an annual basis." Guidelines, 80 Fed. Reg. at 10,159 G.3(e).

In each of these ways, ICWA "'conscript[s] state governments as its agents,'" in violation of the anticommandeering doctrine. *Murphy*, 138 S. Ct. at 1477 (quoting *New York*, 505 U.S. at 178). ICWA's

commands to state and local officers "to administer or enforce a federal regulatory program" "are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 521 U.S. at 935.

b. ICWA also unconstitutionally commands state courts to change the procedures that they use to adjudicate state-law child-custody proceedings involving Native American children. Ohio law, for example, allows a biological parent to challenge an adoption if that parent did not receive notice, but it generally requires the parent to assert that challenge within six months. *See* Ohio Rev. Code § 3107.16; *In re Zschach*, 665 N.E.2d 1070, 1077–78 (Ohio 1996). ICWA, on the other hand, orders state courts to give biological parents and Tribes two years in which to challenge adoptions based on ICWA violations, even if the challenger's rights were not affected by the ICWA violation. *See* 25 U.S.C. § 1913(d); Guidelines, 80 Fed. Reg. at 10,158-59 G.1(a), G.2(c); *see also, e.g.*, 25 C.F.R. § 23.132 and Guidelines, 80 Fed. Reg. at 10,156 C.3(e) (assigning burden of proof); 25 C.F.R. §§ 23.107, 23.118, 23.120 and Guidelines, 80 Fed. Reg. at 10,156, 10,158 (requiring certain findings to be made on record); 25 C.F.R. § 23.121 and Guidelines, 80 Fed. Reg. at 10,156–57 D.3 (mandating standards of evidence); 25

C.F.R. § 23.122 and Guidelines, 80 Fed. Reg. at 10,157 D.4 (restricting who may serve as expert).

Congress may require state courts to hear some *federal* claims, *see Testa v. Katt*, 330 U.S. 386, 394 (1947); *accord Printz*, 521 U.S. at 928–29, and it "has limited authority" to regulate state-court procedures when state courts hear these claims, *see* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 Yale L.J. 947, 959 (2001) (collecting cases). But Congress may not regulate the procedures that apply in state courts to *state* claims. *See id.* at 980–83 (collecting cases). Rather, "'[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *FERC v. Mississippi*, 456 U.S. 742, 774 (1982) (Powell, J., concurring in part and dissenting in part) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)); *see Howlett v. Rose*, 496 U.S. 356, 372–73 (1990). By regulating the state-court procedures that apply to state child-custody proceedings, ICWA violated the anticommandeering doctrine.

CONCLUSION

The Court should affirm the judgment.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS*
Deputy Solicitor
**Counsel of Record*
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@
ohioattorneygeneral.gov

Counsel for Amicus Curiae
State of Ohio

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1. This document complies with the word limit of Rule 29(a)(5) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 29.3 because, excluding the parts of the document exempted by Federal Rule 32(f) and Fifth Circuit Rule 32.2, this document contains 5,810 words.

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February 6, 2019

/s/ Benjamin M. Flowers
Benjamin M. Flowers
Counsel for Amicus Curiae
State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Brief of Amicus Curiae State of Ohio* has been served through the Court's CM/ECF system on February 6, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Benjamin M. Flowers
Benjamin M. Flowers
Counsel for Amicus Curiae State of Ohio