No. ____

IN THE

Supreme Court of the United States

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Petitioners,

v.

CHAD EVERET BRACKEEN, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

IAN HEATH GERSHENGORN
Counsel of Record
KEITH M. HARPER
ZACHARY C. SCHAUF
ILLYANA A. GREEN
VICTORIA HALL-PALERM
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

ADAM H. CHARNES
KILPATRICK TOWNSEND
2001 Ross Ave., Suite 4400
Dallas, TX 75201

ROB ROY SMITH
KILPATRICK TOWNSEND
1420 Fifth Ave., Suite 3700
Seattle, WA 98101

KATHRYN E. FORT
MICHIGAN STATE UNIV.
COLLEGE OF LAW,
INDIAN LAW CLINIC
648 N. Shaw Lane
East Lansing, MI 48823

Counsel for Petitioners Cherokee Nation; Oneida Nation; Quinault Indian Nation; Morongo Band of Mission Indians

QUESTIONS PRESENTED

In 1978, Congress enacted the Indian Child Welfare Act ("ICWA") to remedy the "alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children by nontribal public and private agencies." 25 U.S.C. §1901(4). Over the ensuing four decades, state courts have repeatedly sustained ICWA as constitutional, and child-welfare professionals now regard ICWA's procedural and substantive requirements as the gold standard for child welfare. Below, however, the district court struck down much of ICWA. And while the *en banc* Fifth Circuit rejected most of the district court's reasoning, a sharply divided court invalidated several ICWA provisions. The *en banc* court also affirmed, by an equally divided court, the district court's judgment invalidating several additional provisions. The questions presented are:

1. Did the *en banc* Fifth Circuit err by invalidating six sets of ICWA provisions—25 U.S.C. §§1912(a), (d), (e)-(f), 1915(a)-(b), (e), and 1951(a)—as impermissibly commandeering States (including via its equally divided affirmance)?

2. Did the *en banc* Fifth Circuit err by reaching the merits of the plaintiffs' claims that ICWA's placement preferences violate equal protection?

3. Did the *en banc* Fifth Circuit err by affirming (via an equally divided court) the district court's judgment invalidating two of ICWA's placement preferences, 25 U.S.C. §1915(a)(3), (b)(iii), as failing to satisfy the

rational-basis standard of *Morton v. Mancari*, 417 U.S. 535 (1974)?

PARTIES TO THE PROCEEDING

Petitioners in this Court are four federally recognized Indian Tribes: the Cherokee Nation, the Oneida Nation, the Quinault Indian Nation, and the Morongo Band of Mission Indians. These parties were intervenor-defendants in the district court and appellants in the court of appeals.

Deb Haaland, in her official capacity as Secretary of the Interior; Bryan Newland, in his official capacity as Assistant Secretary-Indian Affairs;[1] Bureau of Indian Affairs; United States Department of the Interior; United States of America; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; and United States Department of Health and Human Services were defendants in the district court and appellants in the court of appeals. Navajo Nation also intervened as a defendant on appeal.

Respondents in this Court are the States of Texas, Louisiana, and Indiana, and seven individuals—Chad Everet Brackeen, Jennifer Kay Brackeen, Altagracia Socorro Hernandez, Danielle Clifford, Jason Clifford, Frank Nicholas Libretti, and Heather Lynn Libretti. These States and individuals were the plaintiffs in the district court and appellees in the court of appeals.

---

[1] Bryan Newland is substituted for Darryl LaCounte, former Acting Assistant Secretary-Indian Affairs. *See* Sup. Ct. R. 35.3.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Brackeen v. Zinke, No. 4:17-cv-868 (Oct. 4, 2018)

United States Court of Appeals (Fifth Circuit):

Brackeen v. Bernhardt, No. 18-11479 (Aug. 16, 2019)

Brackeen v. Haaland, No. 18-11479 (Apr. 6, 2021) (*en banc*)

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING iii
RELATED PROCEEDINGS iv
TABLE OF APPENDICES vii
TABLE OF AUTHORITIES viii
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
INTRODUCTION 1
STATEMENT 5
A. Statutory Background 5
1. Unwarranted Removals Of Indian Children 5
2. ICWA 7
B. Factual And Procedural Background 10
1. This Suit 10
2. The District Court's Decision 11
3. The Panel's Decision 12
4. *En Banc* Decision 12
REASONS FOR GRANTING THE WRIT 16
I. The Court Should Follow Its Normal Practice And Review The Lower Courts' Invalidation Of An Act Of Congress 16

II. The Decisions Below Erred By Invalidating Provisions Of ICWA As Violating The Anti-Commandeering Doctrine 19

A. ICWA's Substantive Provisions Do Not Violate The Tenth Amendment 20

B. ICWA's Procedural And Records Provisions Do Not Violate The Tenth Amendment 25

C. Alternatively, ICWA's Requirements Are Lawful Spending Clause Conditions 29

III. The Decisions Below Erred By Invalidating Parts Of ICWA As Violating Equal Protection 30

A. The Decisions Below Should Not Have Reached The Merits 30

B. The Decisions Below Should Have Upheld The Two Placement Preferences They Invalidated 35

CONCLUSION 38

TABLE OF APPENDICES

Appendix A
Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) 1a

Appendix B
Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019) 425a

Appendix C
Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018) 494a

Appendix D
Constitutional, Statutory, And Regulatory Provisions Involved 555a

TABLE OF AUTHORITIES

CASES

In re A.B., 663 N.W.2d 625 (N.D. 2003) 10

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 21

In re Angus, 655 P.2d 208 (Or. Ct. App. 1982) 10

In re Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187 (Ariz. Ct. App. 1981) 10

In re Armell, 550 N.E.2d 1061 (Ill. App. Ct. 1990) 10

In re Baby Boy L., 103 P.3d 1099 (Okla. 2004) 10

Bowsher v. Synar, 478 U.S. 714 (1986) 27

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 34

Clapper v. Amnesty International USA, 568 U.S. 398 (2013) 34

Connick v. Thompson, 563 U.S. 51 (2011) 17

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 7

In re Custody of A.K.H., 502 N.W.2d 790 (Minn. Ct. App. 1993) 24

Davis v. Federal Election Commission, 554 U.S. 724, 734 (2008) 33

Department of Transportation v. Ass'n of American Railroads, 575 U.S. 43 (2015) 17

In re Dependency of Z.J.G., 471 P.3d 853 (Wash. 2020) 7, 18

Empson-Laviolette v. Crago, 760 N.W.2d 793 (Mich. Ct. App. 2008) 24

Franklin v. Massachusetts, 505 U.S. 788 (1992) 31, 32

Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66 (2013) 31

In re Guardianship of D.L.L., 291 N.W.2d 278 (S.D. 1980) 10

In re Guardianship of Eliza W., 938 N.W.2d 307 (Neb. 2020) 24

In re Guardianship of J.C.D., 686 N.W.2d 647 (S.D. 2004) 26

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 28

J.W. v. R.J., 951 P.2d 1206 (Alaska 1998) 26

Jacobson v. Florida Secretary of State, 974 F.3d 1236 (11th Cir. 2020) 32

Jennings v. Rodriguez, 138 S. Ct. 830 (2018) 23, 28

Lewis v. Governor of Alabama, 944 F.3d 1287 (11th Cir. 2019) 32

In re Marcus S., 638 A.2d 1158 (Me. 1994) 10

Maricopa County v. Lopez-Valenzuela, 574 U.S. 1006 (2014) 16

Matal v. Tam, 137 S. Ct. 1744 (2017) 16

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) 5, 6, 7, 17, 27, 37

Morton v. Mancari, 417 U.S. 535 (1974) 4, 14, 35

Murphy v. NCAA, 138 S. Ct. 1461 (2018) 3, 21, 23, 24, 28

National Council for Adoption v. Jewell, No. 15-cv-675, 2015 WL 12765872 (E.D. Va. Dec. 9, 2015) 10

National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) 29

New York v. Hendrickson Brothers, Inc., 840 F.2d 1065 (2d Cir. 1988) 22

New York v. United States, 505 U.S. 144 (1992) 20, 23, 26

Nova Health Systems v. Gandy, 416 F.3d 1149 (10th Cir. 2005) 32

In re Phoenix L., 708 N.W.2d 786 (Neb. 2006) 10

Printz v. United States, 521 U.S. 898 (1997) 3, 20, 26, 27

Reno v. Condon, 528 U.S. 141 (2000) 23, 24, 25

Rice v. Cayetano, 528 U.S. 495 (2000) 38

Rostker v. Goldberg, 453 U.S. 57 (1981) 16

South Carolina v. Baker, 485 U.S. 505 (1988) 22, 23

In re Termination of Parental Rights to K.M.O., 280 P.3d 1203 (Wyo. 2012) 10

Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645 (2017) 33

TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) 30

United States v. Bajakajian, 524 U.S. 321 (1998) 16

United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011) 17

United States v. Kebodeaux, 570 U.S. 387 (2013) 17

United States v. Salerno, 481 U.S. 739 (1987) 5, 37-38

United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020) 16

Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183 (7th Cir. 1998) 32-33

In re Y.J., No. 02-19-00235-CV, 2019 WL 6904728 (Tex. App. Dec. 19, 2019) 33-34

Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1 (2015) 16-17

Zuni Public School District No. 89 v. Department of Education, 550 U.S. 81 (2007) 17

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. VI, cl. 2 20
22 U.S.C. §9003 19
25 U.S.C. §1901(2) 17
25 U.S.C. §1901(3) 17
25 U.S.C. §1901(4) 1, 17, 18
25 U.S.C. §1902 .... 2, 4, 7, 8, 17, 18, 36, 37
25 U.S.C. §1903(1) 8
25 U.S.C. §1903(4) 8, 11
25 U.S.C. §1911 8
25 U.S.C. §1912(a) 8, 12, 13, 18, 25
25 U.S.C. §1912(d) 3, 8, 12, 18, 20, 21, 23
25 U.S.C. §1912(e) 9, 12, 18, 20, 21, 24
25 U.S.C. §1912(f) 9, 12, 18, 20, 21, 24
25 U.S.C. §1915(a) 3, 12, 13, 18, 20, 21, 24, 30, 37
25 U.S.C. §1915(a)(1) 34
25 U.S.C. §1915(a)(3) 15, 30, 33, 34, 35
25 U.S.C. §1915(b) 12, 13, 18, 20, 21, 24, 27, 37
25 U.S.C. §1915(b)(i) 34
25 U.S.C. §1915(b)(ii) 36
25 U.S.C. §1915(b)(iii) 4, 15, 30, 34, 35
25 U.S.C. §1915(e) 8, 12, 13, 14, 18, 25, 26, 27
25 U.S.C. §1951(a) 8, 12, 13, 14, 18, 25, 26, 27

25 U.S.C. §1963 28

42 U.S.C. §622(a) 29

42 U.S.C. §622(b)(9) 29

42 U.S.C. §671(a)(15)(B) 9

42 U.S.C. §671(a)(19) 9

42 U.S.C. §675(5)(G) 9

42 U.S.C. §14932 19

50 U.S.C. §3931(b) 19

Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 26

Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132 26-27

Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 548 27

Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567 26

LEGISLATIVE MATERIALS

H.R. Rep. No. 95-1386 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530 6

Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs, 95th Cong. (1977) 7, 37

Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93d Cong. (1974) 6, 7

OTHER AUTHORITIES

25 C.F.R. §23.141(b) 27

25 C.F.R. §23.141(c) 28

45 C.F.R. §1355.34(b)(2)(ii)(E) 29

45 C.F.R. §1355.36 29

Child Welfare Information Gateway, *Community-Based Resources: Keystone to the System of Care* (Oct. 2009) 37

Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016)..................6, 22-23

Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235 (Jan. 30, 2018)..36

National Indian Child Welfare Ass'n, *Attachment and Bonding in Indian Child Welfare: Summary of Research* (2016), https://tinyurl.com/NICWA-Final-Brief..37

OPINIONS BELOW

The *en banc* opinion is reported at 994 F.3d 249. Pet. App. 1a. The vacated panel opinion is reported at 937 F.3d 406. Pet. App. 425a. The district court opinion is reported at 338 F. Supp. 3d 514. Pet. App. 494a.

JURISDICTION

The Fifth Circuit issued its *en banc* opinion on April 6, 2021. Pet. App. 1a. On March 19, 2020, this Court extended the deadline to file petitions for writs of certiorari due after that date to 150 days from the date of the lower court judgment or order denying rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the U.S. Constitution and the Indian Child Welfare Act, 25 U.S.C. §1901 *et seq.*, are reproduced in an appendix to this petition. Pet. App. 555a.

INTRODUCTION

In 1978, Indian children, families, and Tribes faced a crisis. An "alarmingly high percentage of Indian families" were "broken up by the removal, often unwarranted, of their children," with an "alarmingly high percentage … placed in non-Indian" homes. 25 U.S.C. §1901(4). More than *a quarter* of Indian children found themselves sundered from family and Tribe, often due to the ignorance and contempt of case workers who believed Indian children were better off raised by non-Indian families. Survival itself—for families, and for Tribes—was at stake.

Congress responded with the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§1901-1963. ICWA aimed "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." §1902.[2] It did so by "establish[ing] minimum Federal standards for the removal of Indian children." *Id.* And for four decades, these standards have dramatically reduced unwarranted removals. While work remains to be done, ICWA has become the "gold standard" for child-welfare practices generally—not just for Indians. Pet. App. 11a. Meanwhile, lower courts have repeatedly sustained ICWA against challenge.

In the decision below, the *en banc* Fifth Circuit again turned aside the most far-reaching challenges to ICWA. But in fragmented opinions, a majority invalidated important aspects of ICWA. An equally divided court also affirmed the district court's invalidation of other important provisions. Now, certiorari is warranted. The decisions below invalidate critical parts of a groundbreaking federal statute protecting Indian children, families, and Tribes. And they do so on grounds that conflict with this Court's cases and that place at risk many federal statutes.

First, the *en banc* court held that aspects of ICWA impermissibly "commandeer" state actors. Most of the relevant provisions, however, merely provide rules of decision in state-court proceedings affecting private rights. For example, ICWA requires "[a]ny party" seeking certain relief to "satisfy the court that active

---

[2] Unless otherwise specified, statutory citations are to Title 25 of the U.S. Code.

efforts have been made to provide remedial services and rehabilitative programs." §1912(d). This is bread-and-butter preemption under the Supremacy Clause. *Printz v. United States*, 521 U.S. 898, 907 (1997). States are not unconstitutionally commandeered just because, to obtain relief, they—like private parties—must satisfy substantive standards set by federal law.

Even if (counterfactually) ICWA imposed a freestanding duty to undertake "active efforts," it would not violate the Tenth Amendment. Its requirements apply equally to States, private agencies, and individuals. "[W]hen Congress evenhandedly regulates an activity in which both States and private actors engage," the "anticommandeering doctrine does not apply." *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

The decisions below also invalidated ICWA's provisions requiring States to maintain and provide records. But as *Printz* noted, Founding-era Congresses imposed myriad similar requirements. 521 U.S. at 905-07. Such records requirements do not implicate the anti-commandeering doctrine's concerns with "command[ing] the States' officers … to administer or enforce a federal regulatory program." *Id.* at 935.

Second, the *en banc* Fifth Circuit affirmed by an equally divided court the district court's invalidation of two of ICWA's "placement preferences" on equal-protection grounds. ICWA provides that, absent "good cause," courts should prefer adoptive placements with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." §1915(a). Judge Duncan, writing for eight judges, concluded that the adoptive preferences for

"other Indian families"—as well as the foster-care and preadoptive preferences for "Indian foster home[s]," §1915(b)(iii)—do not satisfy the rational-basis test of *Morton v. Mancari*, 417 U.S. 535 (1974). Under *Mancari*, statutes classifying based on Indian status are valid if "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians." *Id.* at 555.

Even *reaching* the merits was error: No plaintiff had Article III standing to challenge these provisions. Although some of the individual plaintiffs are (or have been) involved in state-court custody proceedings, the preferences for "other Indian families" and "Indian foster home[s]" are not *at issue* in those proceedings. So, no plaintiff has an injury-in-fact. Nor would any (nonexistent) injury be redressable by the decisions below. That is because these federal-court decisions do not bind the judges adjudicating the state-court custody proceedings. The majority found standing, at bottom, because a state-court judge might *decide* to follow the Fifth Circuit's views. But as Judge Costa's dissent observed, there is a term for pronouncements that carry no legal effect but merely hope to persuade: "advisory opinions." Pet. App. 398a. If the Fifth Circuit's decision stands, Article III's redressability requirement will become a timid guardian indeed.

On the merits, ICWA's placement preferences rationally advance both of ICWA's twin aims—to "protect the best interests of Indian children" and to "promote the stability and security of Indian tribes and families." §1902. ICWA's preferences recognize that many Indian Tribes have deep linguistic, cultural, and

religious ties—so that placing a child from the Cherokee Nation with (say) a family from the Eastern Band of Cherokee Indians will help maintain that child's connections with community, culture, and Tribe. And these preferences recognize that Indian children placed in Indian homes often *do better*. Meanwhile, ICWA authorizes departure from these preferences if "good cause" exists, or if no qualifying placement is available.

Particularly given this safety valve, it was indefensible for the decisions below to invalidate these preferences *on their face*. The plaintiffs hypothesized that these preferences might operate irrationally in some future case. With the "good cause" safety valve, that is hard to imagine. But regardless, such concerns cannot satisfy the stringent standard for facial challenges, which require showing that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

This Court's settled practice is to grant *certiorari* when Acts of Congress are invalidated. The Court should do so here and correct the lower courts' invalidation of important parts of a landmark federal statute protecting Indian children, families, and Tribes.

STATEMENT

A. Statutory Background.

1. Unwarranted Removals Of Indian Children.

In the 1970s, Indians and Indian Tribes faced a crisis: "[t]he wholesale removal of Indian children from their homes." *Miss. Band of Choctaw Indians v. Holyfield*,

490 U.S. 30, 32 (1989) (quotation marks omitted). "[A]busive child welfare practices … resulted in the separation of … Indian children from their families and tribes" at shocking rates. *Id.* In many States, one-third of Indian children were separated from families. *Id.*; Pet. App. 41a-42a. Too often, these children also lost their communities: "Approximately 90% of the … placements were in non-Indian homes." *Holyfield*, 490 U.S. at 33.

The crisis was "the most tragic aspect of Indian life." *Id.* at 32 (quotation marks omitted). It reflected, in part, a failure of understanding. Those who removed Indian children often had "no basis for intelligently evaluating the cultural and social premises underlying Indian home life"; many were "at best ignorant of [Indian] cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." *Id.* at 34-35. The result was decisions that were "wholly inappropriate" and found neglect or abandonment where none existed. *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 18 (1974) (statement of William Byler) ("1974 Hearings"); H.R. Rep. No. 95-1386, at 9-10 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7531-32.

Bad procedures made matters worse. Removals often occurred without notice to Indian families or Tribes; due process violations were "commonplace." 1974 Hearings at 67 (testimony from Bertram Hirsch); *see* H.R. Rep. No. 95-1386, at 9, 11, 1978 U.S.C.C.A.N. at 7531, 7533; Indian Child Welfare Act Proceedings, 81

Fed. Reg. 38,778, 38,781 (June 14, 2016). That lack of notice made it impossible for Indian families and Tribes to correct the blind spots endemic in the child-welfare system. And when removals occurred, shoddy recordkeeping often thwarted attempts to *find* children who were shuttled among foster homes—sundering forever connections among child, parent, and Tribe. 1974 Hearings at 66, 370.

The consequences were devastating. Children removed to non-Indian homes struggled with "assum[ing] a cultural identity … [without] having around them other Indians, extended family, who c[ould] support them through this difficult stage." 1974 Hearings at 49 (statement of Dr. Joseph Westermeyer). Children encountered "serious adjustment problems … during adolescence." *Holyfield*, 490 U.S. at 33 & n.1; *accord In re Dependency of Z.J.G.*, 471 P.3d 853, 861 (Wash. 2020). Meanwhile, unwarranted removals "seriously undercut the tribes' ability to continue as self-governing communities." *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 157 (1977) (statement of Calvin Isaac) ("1977 Hearings").

2. ICWA.

After exhaustive hearings, Congress in 1978 enacted ICWA as an exercise of its "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). ICWA embodies a two-prong policy seeking to "protect the best interests of Indian children and to promote the safety and security of Indian tribes and families." §1902.

ICWA targets unwarranted removals in part by establishing "minimum Federal standards" governing child-custody proceedings involving an "Indian child"—*i.e.*, concerning foster care, termination of parental rights, preadoption, and adoption—in state court. §§1902, 1903(1), 1903(4).[3]

Procedurally, ICWA requires notice. Any "party seeking the foster care placement of, or termination of parental rights to, an Indian child" must provide notice to Indian parents, custodians, and Tribes of the proceeding and their rights to intervene. §1912(a). ICWA also imposes two records requirements: (1) a recordkeeping requirement mandating that placement records "be maintained" and "made available at any time" to Interior or to the child's Tribe, §1915(e); and (2) a record-transmittal requirement mandating that state courts provide Interior with copies of final decrees for the adoptive placements, §1951(a).

Substantively, ICWA combats the lack of understanding that spurred its enactment. The "active efforts" provision requires "[a]ny party" seeking a foster-care placement or termination of parental rights to "satisfy the court that active efforts have been made … to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." §1912(d). Under ICWA's qualified-expert-witness provisions, foster-care placements and parental-rights terminations may not be ordered by a court "absent a determination" supported by "testimony of qualified expert witnesses,

[3] ICWA also delineates when tribal courts have jurisdiction. §1911.

that … continued custody … is likely to result in serious emotional or physical damage." §1912(e), (f).[4]

Since ICWA's enactment, mainstream child-welfare law has slowly evolved to incorporate ICWA's standards, which are now widely regarded as the "gold standard … for *all* children and families." Casey Family Programs 5th Cir. Br. 3. Indeed, Congress has imposed similar requirements on States' foster-care systems generally. As an example, for *all* foster-care cases, Congress changed the state-law placement preferences, *see* 42 U.S.C. §671(a)(19); required "reasonable efforts … to preserve and reunify families," *id.* §671(a)(15)(B); and imposed notice requirements, *id.* §675(5)(G). Today, removals of Indian children are far less common. And Indian children have the highest rate of kinship placements for foster care, the lowest rate of institutional placements, and one of the lowest rates of aging out of foster care without adoption. Casey Family Programs 5th Cir. Br. 21-22; *see* States California et al., 5th Cir. Br. 26-27.

[4] Sections 1912(e) and 1912(f) do two things. They (1) establish general standards governing foster-care placements and terminations of parental rights (requiring that the determinations be supported by "clear and convincing evidence" or "evidence beyond a reasonable doubt"); and (2) require specific evidence to satisfy those standards ("testimony of qualified expert witnesses"). The *en banc* majority invalidated the "qualified expert witness" requirement but not the general standards. Hence, the petition refers to the invalidated clauses as the "qualified-expert-witness provisions."

B. Factual And Procedural Background.

1. This Suit.

Over the past four decades, litigants in state courts—where child-welfare proceedings occur—have sometimes challenged ICWA as unconstitutional. State courts have routinely rejected those challenges. *See, e.g.*, *In re Appeal in Pima Cnty. Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981) (equal protection); *In re Armell*, 550 N.E.2d 1061, 1067-68 (Ill. App. Ct. 1990) (same); *In re Marcus S.*, 638 A.2d 1158, 1158-59 (Me. 1994) (same); *In re Phoenix L.*, 708 N.W.2d 786, 799-805 (Neb. 2006) (same), *disapproved of on other grounds by In re Destiny A.*, 742 N.W.2d 758 (Neb. 2007); *In re A.B.*, 663 N.W.2d 625, 634-37 (N.D. 2003) (equal protection and due process); *In re Baby Boy L.*, 103 P.3d 1099, 1106-07 (Okla. 2004) (same); *In re Angus*, 655 P.2d 208, 213 (Or. Ct. App. 1982) (equal protection); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980) (Tenth Amendment and equal protection); *In re Termination of Parental Rights to K.M.O.*, 280 P.3d 1203, 1214-15 (Wyo. 2012) (equal protection and due process); *see also Nat'l Council for Adoption v. Jewell*, No. 15-cv-675, 2015 WL 12765872, at *7 (E.D. Va. Dec. 9, 2015) (anti-commandeering), *vacated as moot*, 2017 WL 9440666 (4th Cir. Jan. 30, 2017).

This case began when seven individuals decided to mount a facial challenge to ICWA in federal court, instead of in the state-court proceedings to which they were parties. The Brackeens, for example, sought to adopt A.L.M. (and ultimately were able to do so while their federal suit was pending). Pet. App. 51a-52a. The Cliffords sought to adopt Child P. in Minnesota court;

the state court and the White Earth Band of the Ojibwe Tribe believed Child P. should be placed with an immediate family member—her maternal grandmother, who was also a member of the White Earth Band (and who ultimately adopted Child P.). Pet. App. 224a-225a. Indiana, Louisiana, and Texas joined as plaintiffs. Petitioners Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians intervened as defendants in the district court; Navajo Nation intervened as a defendant on appeal.

2. The District Court's Decision.

The district court invalidated most of ICWA in a sweeping opinion. Pet. App. 494a-495a.

In relevant part,[5] the district court first invalidated ICWA essentially in its entirety on Tenth Amendment grounds. It held that ICWA violates the anti-commandeering doctrine by requiring state courts "to apply federal standards to state created claims." Pet. App. 537a.

The district court also held that much of ICWA violates equal protection. It found that ICWA's "Indian child" definition, §1903(4), is a racial classification because it includes not only tribal members but also individuals who are "eligible for membership" and are "the biological child of a [tribal] member." Pet. App. 452a. Applying strict scrutiny, the court found that ICWA is not narrowly tailored. Pet. App. 530a-531a.

---

[5] Because the decisions below are so voluminous and addressed so many issues and arguments, petitioners focus on the aspects of those decisions that are relevant to their petition.

3. The Panel's Decision.

A three-judge panel reversed and upheld ICWA in its entirety, and largely unanimously. Pet. App. 482a. Judge Owen agreed with "much of the majority opinion" but would have held that three discrete ICWA provisions (the active-efforts provision, §1912(d), the qualified-expert-witness provisions, §1912(e)-(f), and a records provision, *id.* §1915(e)) violated the anti-commandeering doctrine. Pet. App. 483a.

4. *En Banc* Decision.

En banc, the Fifth Circuit broadly rejected the district court's reasoning. In sharply divided opinions, however, the *en banc* court also invalidated significant provisions of ICWA. It divided, 8-8, on several provisions the district court invalidated, leaving the judgment intact.

Anti-commandeering. The *en banc* court unanimously rejected the district court's conclusion that ICWA impermissibly commandeers States by applying federal standards to state-created claims. Pet. App. 333a. The court also unanimously held that many ICWA provisions do not violate the anti-commandeering doctrine but permissibly "supersede state standards." Pet. App. 334a-335a; *see* Pet. App. 116a-117a.

The court fractured over six sets of provisions: "active efforts," §1912(d), qualified expert witnesses §1912(e)-(f), notice, recordkeeping, and record retention, §§1912(a), 1915(e), 1951(a), and placement preferences, §1915(a)-(b).

Judge Duncan, writing for a majority, held that the "active efforts" and qualified-expert-witness requirements, although facially applicable to "any party," violate the anti-commandeering doctrine because in practice they impose requirements on States "in their sovereign capacity." Pet. App. 317a, 320a. Even Judge Duncan, however, agreed that the qualified-expert-witness requirement is a valid preemption provision "[t]o the extent [it] compel[s] state *courts* (as opposed to state *agencies*)." Pet. App. 333a.

Judge Duncan also held for a majority that §1915(e)'s recordkeeping requirement violates the anti-commandeering doctrine because it directly commands States. Pet. App. 313a.

Writing for just eight judges, Judge Duncan found that the placement preferences, §1915(a)-(b), violate the anti-commandeering doctrine because they implicitly require efforts by States to identify eligible foster-care and adoptive placements (though, again, even Judge Duncan upheld these provisions insofar as applicable to state courts). Pet. App. 310a-311a. Judge Duncan also concluded that the notice, §1912(a), and record-transmittal requirements, §1951(a), unconstitutionally commandeer States—even though the first requirement facially applies to any party in state-court proceedings and the second expressly applies only to state courts. Pet. App. 316a-317a, 336a-338a. The district court's judgment invalidating these provisions was thus affirmed by an equally divided court.

Judge Dennis would have rejected the anti-commandeering challenge entirely. He concluded that most of the challenged provisions simply provide federal

standards that preempt conflicting state law, Pet. App. 119a-121a (discussing §§1912(e)-(f), 1915(a)-(b)), or impose modest recordkeeping requirements on state courts, Pet. App. 121a-125a (discussing §§1915(e), 1917, 1951(a)). He also concluded that insofar as ICWA applies to "state actors other than state courts," it applies to *all* participants in the child-welfare system—both States and others—and does not violate the anti-commandeering doctrine. Pet. App. 126a. Judge Dennis would have upheld ICWA's records requirements, §§1915(e), 1951(a), as permissibly imposing ministerial duties on courts. Pet. App. 121a.

Equal protection. An *en banc* majority reached the merits of the individual plaintiffs' equal-protection challenge, over a dissent by Judge Costa, who would have held that the plaintiffs lacked Article III standing. The majority's "argument for redressability," Judge Costa explained, was that "the family court judge[s]" adjudicating the individual plaintiffs' custody proceedings "may, or even say[] [they] will, follow our constitutional ruling." Pet. App. 400a. But "[t]here is a term for a judicial decision that does nothing more than opine on what the law should be," in the hope that others will follow it: "an advisory opinion." Pet. App. 398a.

On the merits, the majority rejected the equal-protection challenge nearly in full. It held that ICWA draws political (not racial) classifications based on Indian status and that, under *Mancari*, Congress may "single[] out Indians for … special treatment" so long as the distinction "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Pet. App. 152a (quoting 417 U.S. at 554-55). The majority

rejected the district court's view that ICWA's "Indian child" definition draws racial classifications. This provision, the majority explained, merely acknowledges that children often do not have the "capacity to initiate the formal, mechanical procedure necessary to become enrolled"—and that "recognizing the realities of tribal membership" does not turn ICWA into a racial classification. Pet. App. 164a. Applying *Mancari*, a majority sustained virtually all of ICWA's provisions.

The court equally divided on two provisions—the adoptive-placement preference for "other Indian families," §1915(a)(3), and the foster-care preference for licensed "Indian foster home[s]," §1915(b)(iii). Judge Duncan and seven others believed that these provisions failed *Mancari*'s test because the provisions, by preferring individuals who are "not members of the [Indian] child's tribe," do not "further ICWA's stated aim of ensuring that Indian children are linked to their tribe." Pet. App. 298a. The judgment invalidating these provisions was thus affirmed.

Judge Dennis disagreed. He explained that ICWA reasonably recognizes that "many contemporary tribes descended from larger historical bands and continue to share close relationships and … traditions," and thus "placing a child with another Indian family could conceivably further the interest in maintaining the child's ties with his or her tribe." Pet. App. 175a. Judge Dennis also emphasized that ICWA aims to protect Indian children's best interests—and that these preferences further this goal by helping children "avail [themselves] of the numerous benefits … that come from

being raised" within a culture supportive of their identity. Pet. App. 176a.

REASONS FOR GRANTING THE WRIT

Congress enacted ICWA to carry out its trust obligations to Indians and to protect Indian children and families. The decisions below invalidate important aspects of that statute. They do so for reasons that are irreconcilable with this Court's cases and—as to equal protection—in a case where no plaintiff faces any concrete, redressable injury from the provisions that the decisions below invalidated. This Court's review is warranted to erase the lower-court decisions improperly invalidating aspects of a major federal statute.

I. The Court Should Follow Its Normal Practice And Review The Lower Courts' Invalidation Of An Act Of Congress.

Judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court"—or any court—"is called upon to perform." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Hence, this Court applies "a strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa Cnty. v. Lopez-Valenzuela*, 574 U.S. 1006 (2014) (statement of Thomas, J., respecting denial of application for stay); *see United States v. Bajakajian*, 524 U.S. 321, 327 (1998) ("Because the Court of Appeals' holding … invalidated a portion of an Act of Congress, we granted certiorari."); *accord, e.g.*, *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020); *Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017) (same); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576

U.S. 1, 9 (2015); *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 46 (2015); *United States v. Kebodeaux*, 570 U.S. 387, 391 (2013). That rule accords proper respect to Congress, which should not find its work invalidated without this Court's review.[6]

This rule applies to any federal statute—but ICWA is not just any statute. Congress enacted ICWA pursuant to its fiduciary "responsibility for the protection and preservation of Indian tribes." §1901(2); *see United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) ("The Government … has charged itself with moral obligations of the highest responsibility and trust, obligations to the fulfillment of which the national honor has been committed."). It did so, moreover, to vindicate interests that could not be more important: the welfare of children, Indian families, and the "continued existence and integrity of Indian tribes." §1901(3). Congress acted based on evidence that "an alarmingly high percentage of Indian families are broken up" by removals that are "often unwarranted." §1901(4); *accord Holyfield*, 490 U.S. at 32. And it responded to this crisis by "establish[ing] minimum Federal standards" governing removals (while retaining an important role for state courts in conducting child-welfare proceedings). §1902. Courts have repeatedly sustained

[6] This principle applies to the provisions on which the *en banc* court equally divided. This Court has often reviewed equally-divided affirmances, *e.g.*, *Connick v. Thompson*, 563 U.S. 51, 54 (2011), *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 89 (2007), and doing so is especially appropriate where the district court's judgment invalidated a statute.

these standards against challenge in the state courts where ICWA issues are properly raised. *Supra* p. 10.

The provisions that the Fifth Circuit and the district court invalidated—in conflict with those state-court decisions—are key aspects of ICWA's scheme:

- The notice provision, §1912(a), ensures that Indian families and Tribes *know* about child-welfare proceedings. "Without notice, tribes cannot exercise the[] rights" ICWA grants. *Z.J.G.*, 471 P.3d at 861.
- The active-efforts and qualified-expert-witness provisions, §1912(d)-(f), require state courts to find that "active efforts" were made to protect the Indian family and allow removal only based on "clear and convincing evidence" supported by a "qualified expert witness." *Id.* These provisions make concrete Congress's determination to combat "unwarranted" removals. §1901(4).
- If removal is warranted, ICWA's non-dispositive placement preferences, §1915(a)-(b), embody Congress's judgment about how best to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." §1902.
- Once children have been placed, ICWA's records provisions, §§1915(e), 1951(a), ensure that Indian children can find their Tribes and vice-versa—so that placements do not disrupt these relationships more than necessary.

Indeed, the decisions below also threaten other federal statutes imposing similar requirements. *E.g.*, 42 U.S.C. §14932 (Intercountry Adoption Act imposing "reasonable efforts," recordkeeping, and record-transmittal requirements); 22 U.S.C. §9003 (International Child Abduction Remedies Act imposing similar requirements); 50 U.S.C. §3931(b) (Servicemembers Civil Relief Act imposing affidavit requirement on plaintiffs in civil proceedings, including custody proceedings).

Certiorari is thus warranted.

II. The Decisions Below Erred By Invalidating Provisions Of ICWA As Violating The Anti-Commandeering Doctrine.

Review is especially warranted because the decisions below are incorrect. In the majority's view, ICWA grievously intruded on state sovereignty for 40 years without anyone noticing. That view certainly surprised the States ICWA *actually affects*: Below, 25 States that are collectively home to 94% of federally recognized Indian Tribes affirmed that ICWA does not intrude on their sovereignty and is "an appropriate exercise of Congressional powers." States California et al., 5th Cir. Br. 1; *cf.* Pet. App. 10a (observing that the plaintiff states are home to 1% of federally recognized Tribes). True, the Constitution's meaning is not settled by ballot. But here, the prevailing view is correct. The challenged ICWA provisions are run-of-the-mill preemption provisions that impose substantive and procedural rules on state courts, regulate evenhandedly (to the extent they regulate at all), or place ministerial duties on state

courts of the type Congress has enacted since the Founding.

A. ICWA's Substantive Provisions Do Not Violate The Tenth Amendment.

The decisions below invalidated three sets of substantive ICWA provisions: active efforts, §1912(d), qualified expert witnesses, §1912(e)-(f), and—based on an equally divided affirmance—placement preferences, §1915(a)-(b). These provisions do not commandeer States. They provide rules of decision for state courts and preempt conflicting state law.

1. The anti-commandeering doctrine embodies a structural feature of the Constitution. Congress may not "directly compel[]" state legislative and executive officers "to enact and enforce a federal regulatory program"; rather, the Constitution "confers upon Congress the power to regulate individuals." *New York v. United States*, 505 U.S. 144, 161, 166 (1992) (quotation marks omitted).

The flip side, however, is that Congress *may* provide rules governing *state courts* in proceedings implicating individual interests. That principle comes from the Supremacy Clause's command that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. Hence, "the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907. Applying that rule, this Court has repeatedly recognized that federal

law may provide "substantive principles" for state courts. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (quotation marks omitted).

The substantive ICWA provisions invalidated below do just what this Court's cases permit. They provide rules of decision for state courts adjudicating individual rights. *Murphy*, 138 S. Ct. at 1480-81. The active-efforts requirement—in §1912, entitled "Pending court proceedings"—prohibits *courts* from removing Indian children unless the "party seeking" to do so "satisf[ies] the court that active efforts have been made" to avoid that result. §1912(d). The foster-care and termination provisions specify that "[n]o foster care placement" or termination of parental rights "may be ordered" absent a sufficient showing, including the testimony of a "qualified expert witness[]," that continued custody "is likely to result in serious emotional or physical damage." §1912(e)-(f). And the placement preferences identify for courts, in the "[c]hild [c]ustody [p]roceedings" to which ICWA applies, the placements to which "a preference shall be given." §1915(a)-(b).

It is of no moment that some of these provisions are phrased in terms of what the "party seeking" placement or termination must show, or that States are sometimes the party seeking such relief (though often not, *infra* p. 24). As this Court has emphasized, "it is a mistake to be confused by the way in which a preemption provision is phrased." *Murphy*, 138 S. Ct. at 1480. The question is how a provision "operates." *Id.* And ICWA's substantive provisions operate just like other valid preemption provisions that "impose[] restrictions or confer[] rights on private actors." *Id.* These provisions

grant Indian children the right to remain with their families and communities unless certain conditions are met. And they grant Indian families and Tribes rights to retain connections with their children to the greatest extent consistent with the children's best interests.

The decisions below invalidated these provisions on the theory that they "demand action by" and "impose duties on state agencies." Pet. App. 315a, 329a. These provisions do so, however, only in the sense that *all* rules of decision "demand action" and "impose duties": If state agencies want relief from state courts, they must make the efforts required to satisfy federal-law standards. If States seek an injunction under the Sherman Act, for example, they must take "extensive action[]," Pet. App. 330a, to fulfill the requirements of the Sherman Act's cause of action. *See, e.g.*, *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1076 (2d Cir. 1988). That is not commandeering. It is the practical result of Congress's authority to set federal standards, which States and private parties must satisfy if they desire to obtain relief. *See South Carolina v. Baker*, 485 U.S. 505, 509 (1988) (no anti-commandeering problem with statute that "provid[ed] powerful incentives" to States).

Judge Duncan went especially wrong when he cited legislative history and regulatory preambles trying to prove that ICWA's substantive standards "demand efforts by state agencies and officials" independently of court proceedings. Pet. App. 311a. Mostly, these sources simply recognize the same pragmatic point just described: State agencies desire to obtain relief from state courts and will want to satisfy ICWA's prerequisites for doing so. *E.g.*, 81 Fed. Reg. at 38,782,

38,839. And regardless, Judge Duncan's approach inverts the "cardinal principle" that if it is "fairly possible" to construe a statute to avoid a "serious" constitutional question, courts must do so. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quotation marks omitted). Courts do not cherrypick legislative and regulatory history to *create* a constitutional problem.

2. Even if ICWA directly regulated States, it would be constitutional. To the extent ICWA regulates at all, it regulates all parties—States and private actors alike—evenhandedly.

As *Murphy* reaffirmed, "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." 138 S. Ct. at 1478. That is because the anti-commandeering doctrine's core rationale—that Congress may not directly regulate States *as States*, *New York*, 505 U.S. at 162-63—does not apply when Congress enacts rules that apply to both private parties and States. Hence, Congress could restrict States from disclosing information in driver's-license applications, because the "law applied equally to state and private actors." *Murphy*, 138 S. Ct. at 1479; *see Reno v. Condon*, 528 U.S. 141, 151 (2000). And Congress could limit States' issuance of bearer bonds, so long as the law "treat[ed] state bonds the same as private bonds." *Murphy*, 138 S. Ct. at 1478-79; *see Baker*, 485 U.S. at 514-15.

That is exactly what ICWA does. "Any party" seeking to terminate parental rights or effect a foster-care placement must satisfy the active-efforts provision, §1912(d). Likewise, the qualified-expert-witness

provisions and placement preferences apply to any proceeding—whether or not a State is involved—to terminate parental rights or effect a foster-care placement, §1912(e)-(f), §1915(a)-(b).

All that is true, moreover, not just in theory but in practice. Private parties routinely bring actions to terminate parental rights—for example, when step-parents seek to adopt—and state courts routinely apply ICWA's standards to those proceedings. Pet. App. 133a-134a (citing cases from Alaska, Arizona, Colorado, and Washington applying the active-efforts and qualified-expert-witness provisions in private proceedings). Actions to appoint guardians or conservators—which ICWA specifically defines as "foster care placement[s]"—are often brought by private parties. Pet. App. 132a-133a (citing cases from Alaska, South Dakota, and Washington); *accord In re Guardianship of Eliza W.*, 938 N.W.2d 307, 316 (Neb. 2020); *Empson-Laviolette v. Crago*, 760 N.W.2d 793, 799 (Mich. Ct. App. 2008); *In re Custody of A.K.H.*, 502 N.W.2d 790, 793 (Minn. Ct. App. 1993).

Judge Duncan appears to have assumed that States *more often* find themselves subject to ICWA. That assumption is dubious given how often private proceedings implicate ICWA. But regardless, nose-counting cannot change the dispositive point, which is that the activity is one "in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. In *Condon*, private parties could become subject to the Driver's Privacy Protection Act only if they obtained driver's-license information from state departments of motor vehicles and resold it. 528 U.S. at 146. This Court,

however, correctly deemed it irrelevant that the statute fell more directly, or more often, on States. What mattered was that the statute applied evenhandedly. *Id.* at 151.

Judge Duncan also averred that, supposedly unlike the statute in *Condon*, ICWA regulates States "as sovereigns" and "compels them to regulate private parties." Pet. App. 321a. That is incorrect—and the proof is that, as just explained, ICWA's substantive provisions apply equally to private parties engaged in the same activities. If private parties engage in the same activities, States are not regulated "as sovereigns."

B. ICWA's Procedural And Records Provisions Do Not Violate The Tenth Amendment.

The decisions below also invalidated three procedural and records provisions: a notice provision, §1912(a), recordkeeping provision, §1915(e), and record-transmittal provision, §1951(a)—the first and last based on an equally divided affirmance. These provisions also do not impermissibly commandeer.

1. The notice provision, §1912(a), requires any "party seeking" an involuntary foster-care placement or termination to "notify the parent or Indian custodian and the Indian child's tribe" of the proceeding and their intervention rights. This provision is constitutional for the same reasons as ICWA's substantive provisions: It merely provides rules for proceedings in state courts that preempt lesser notice requirements that would otherwise apply, as the Supremacy Clause permits. And again, to the extent this provision regulates at all, it

regulates evenhandedly. Private parties and States equally can bring involuntary proceedings subject to ICWA and equally must provide notice. *See J.W. v. R.J.*, 951 P.2d 1206, 1212-13 (Alaska 1998), *disapproved of on other grounds by Evans v. McTaggart*, 88 P.3d 1078 (Alaska 2004); *In re Guardianship of J.C.D.*, 686 N.W.2d 647, 649 (S.D. 2004).

The decisions below, in effect, give States an exemption from a rule of civil practice. The anti-commandeering doctrine, however, does not exist to create such exemptions. If States want relief in federal court, for example, they must comply with the service requirements of Rule 4 of the Federal Rules. That is not commandeering, *see New York*, 505 U.S. at 160, and neither are ICWA's notice rules.

2. The recordkeeping provision, §1915(e), and record-transmittal provision, §1951(a), are constitutional because (for one thing) they merely impose ministerial duties on state courts. In assessing whether laws impermissibly commandeer, this Court weights "historical understanding and practice." *Printz*, 521 U.S. at 905. And here, that practice shows beyond doubt that Congress may impose ministerial tasks on state courts.

The first Congresses commanded state courts to "record applications for citizenship," transmit "naturalization records to the Secretary of State," "resolv[e] controversies between a captain and the crew of his ship" and "report on" the result, and "tak[e] proof of the claims of Canadian refugees." *Id.* at 905-07; *see* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103; Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567; Act of July 20, 1790, ch. 29,

§ 3, 1 Stat. 132; Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 548. Such contemporaneous constructions provide "weighty evidence of the Constitution's meaning." *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986). And here, as *Printz* acknowledged, these provisions provide evidence "that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." 521 U.S. at 907.

ICWA does just what 230 years of congressional practice approves. The record-transmittal requirement, §1951(a), simply requires a "[s]tate court entering a final decree or order" to "provide the Secretary [of the Interior] with" information. And while the recordkeeping provision, §1915(e), does not specify which "State" entity must maintain records, context shows that its object is state courts. This provision requires maintenance of "record[s] of each such placement, under State law, of an Indian child." §1915(e). Those are *court* records. That is why this Court recognized that "Section 1915(e) … requires *the court* to maintain records" of ICWA placements. *Holyfield*, 490 U.S. at 40 n.13 (emphasis added); *see* 25 C.F.R. §23.141(b) (identifying parts of court record that must be maintained).[7]

[7] Even if ICWA's records provisions applied directly to state executive officials, they would be constitutional. *Printz* expressly declined to address the constitutionality of laws "requir[ing] only the provision of information to the Federal Government," even when applicable to "executive" officials. 521 U.S. at 918; *see id.* at 936 (O'Connor, J., concurring). Given *Printz*'s reservation,

Nor does it matter that some States use state agencies for compliance or that ICWA's regulations permit as much. 25 C.F.R. §23.141(c); *see* Pet. App. 315a & n.108. Providing an extra option does not commandeer. If Congress may impose ministerial duties on courts—which it can, *see supra* pp. 26-27—then States lose no sovereignty when they choose to employ executive agencies. *See Murphy*, 138 S. Ct. at 1479 (noting that the law in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), was constitutional because it "offered States [a] choice" to implement a federal program or yield to preemption).

To dodge the clear Founding-era practice, Judge Duncan averred that ICWA "demand[s] more than 'provid[ing] information.'" Pet. App. 314a-315a. But what more? Judge Duncan's objection appears to be that ICWA requires state courts to maintain and provide information "evidencing the efforts to comply with" ICWA's preferences. Pet. App. 315a. But a requirement to provide information about these "efforts" remains a requirement *to provide information*.

Nor is it relevant that, in Judge Duncan's view, the "whole point" of this requirement is to "implement the placement preferences" that he believed violated the anti-commandeering doctrine. *Id.* Whatever one's views on the placement preferences, Congress made ICWA severable. §1963. The records provisions thus

---

however, the avoidance canon should have dictated construing the recordkeeping provisions as addressed to courts. *Jennings*, 138 S. Ct. at 842.

must be judged on their own terms.[8]

C. Alternatively, ICWA's Requirements Are Lawful Spending Clause Conditions.

Below, petitioners showed that ICWA is lawful as an exercise of Congress's Spending Clause power. Judge Duncan did not address this argument, which provides an alternative basis to reverse. Title IV-B of the Social Security Act requires participating states to develop "a plan for child welfare services" that "meets the requirements of subsection (b)." 42 U.S.C. §622(a). Subsection (b), in turn, requires that each plan "contain a description … of the specific measures taken by the State to comply with [ICWA]." *Id.* §622(b)(9). States may lose funds if their programs are not in "substantial conformity" with the Social Security Act, 45 C.F.R. §1355.36, including the "requirements … regarding the State's compliance with [ICWA]," *id.* §1355.34(b)(2)(ii)(E). The State plaintiffs each alleged that they accepted funds subject to these conditions. States' 2d Am. Compl. ¶¶68-81, ECF No. 35. Congress "may condition … a grant upon the States' 'taking certain actions that Congress could not require.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) (opinion of Roberts, C.J.) (citation omitted).

---

[8] The decisions below also invalidated provisions of Interior's 2016 Final Rule to the extent they implemented ICWA provisions that the decisions below deemed unconstitutional. Pet. App. 352a. If the constitutional holdings in the decisions below are reversed, these holdings also cannot stand.

III. The Decisions Below Erred By Invalidating Parts Of ICWA As Violating Equal Protection.

The decisions below erred by reaching the equal-protection challenge. On the merits, they erred again. These decisions invalidating important aspects of ICWA's scheme warrant this Court's review.

A. The Decisions Below Should Not Have Reached The Merits.

With the task of judging a statute's constitutionality so weighty, courts must take care to ensure that Article III authorizes them to do so. The "law of Art. III standing is built on a single basic idea—the idea of separation of powers." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quotation marks omitted). The decisions below flouted that bedrock principle when they invalidated provisions of ICWA at the behest of litigants with no "personal stake." *Id.* In nonetheless finding standing, the *en banc* majority adopted a theory that rewrites Article III and conflicts with decisions of other federal circuits. Certiorari is warranted to redress this grave violation of the separation of powers.

1. The decisions below invalidated only two ICWA provisions on equal-protection grounds: the placement preferences in §1915(a)(3) and §1915(b)(iii), via the *en banc* court's equally divided affirmance. An *en banc* majority found standing to challenge the §1915 placement preferences on the theory that state-court judges adjudicating adoptions or foster placements might follow what the Fifth Circuit said.

As to §1915(a), Judge Dennis found that its adoptive preference imposed on the Brackeens "the ongoing

injury of increased regulatory burdens." Pet. App. 63a. By the time the *en banc* court ruled, the Brackeens had successfully adopted A.L.M., whose adoption gave rise to their federal-court suit—mooting any injury from ICWA's preferences in that proceeding. Pet. App. 52a; *see Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) ("A corollary to th[e] case-or-controversy requirement is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."). But after their complaint was filed, the Brackeens also sought to adopt A.L.M.'s sister, Y.R.J., in Texas court. Pet. App. 63a-64a. Judge Dennis concluded that the "increased regulatory burdens in the[se] proceedings" constituted injury-in-fact. Pet. App. 63a. And he averred that a favorable decision would redress this injury because "the Texas trial court" considering Y.R.J.'s adoption "has indicated that it will refrain from ruling on the Brackeens' federal constitutional claims pending a ruling from [the Fifth Circuit]." Pet. App. 64a.

Judge Dennis concluded that the Cliffords were injured by §1915(b) because the child they fostered "was removed from their custody and placed with her maternal grandmother." Pet. App. 66a. And he held that this injury would be redressed by a favorable ruling because it was "substantially likely" that a state court would abide by the Fifth Circuit's decision, "even though [it] would not be directly bound." Pet. App. 67a (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)).

Judge Duncan agreed. He reasoned that the individual plaintiffs were "'objects' of the contested provisions," and that under the "ordinary rule," they had

standing to challenge those provisions. Pet. App. 232a. The placements they sought, he continued, "have been burdened … by ICWA's unequal treatment of non-Indians," which he found to be "injuries-in-fact." Pet. App. 232a, 234a. Judge Duncan held that those injuries were redressable because a favorable decision "would make overcoming ICWA's preferences easier" in the state courts that actually adjudicate child-welfare proceedings. Pet. App. 236a.

2. These theories, if accepted, would transform standing law. Judge Dennis and Judge Duncan both found redressability on the theory that state-court judges might choose to follow a Fifth Circuit decision invalidating ICWA's preferences. Pet. App. 67a, 236a-237a, 237a n.19. But as Judge Costa explained—quoting Justice Scalia—"[i]f courts may simply assume that everyone … will honor the legal rationales that underlie their decrees, then redressability will always exist"; instead, redressability "requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." Pet. App. 401a (quoting *Franklin*, 505 U.S. at 825 (Scalia, J., concurring in part and concurring in the judgment)). The majority's contrary conclusion not only contradicts core Article III standing principles but also conflicts with decisions of other circuits that have properly held that plaintiffs cannot ground redressability on a decision's potential to persuade third parties.[9] It is

[9] *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1254 (11th Cir. 2020); *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1305 (11th Cir. 2019); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005); *cf. Wis.*

scarcely overstatement to say that, if the Fifth Circuit's theory becomes law, redressability will exist in every case.

3. As revolutionary as this standing theory is, however, it does not even *apply* to the only placement preferences the decisions below invalidated. The Fifth Circuit affirmed, by an equally divided court, the district court's judgment that the adoptive placement preferences for "other Indian families" and the foster-care preference for "Indian foster homes" violated equal protection. Pet. App. 5a, 297a-298a. So, the plaintiffs had to establish standing to challenge *those provisions*. That is because standing "is not dispensed in gross." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quotation marks omitted)). Instead, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* (quoting *Davis*, 554 U.S. at 734).

Judge Dennis and Judge Duncan did not try to show that the individual plaintiffs were injured by the specific placement preferences invalidated below. Judge Dennis and Judge Duncan concluded that §1915(a) injured the Brackeens based on their efforts to adopt Y.R.J. Pet. App. 63a, 232a-233a. But in opposing the Brackeens' efforts to adopt Y.R.J., Navajo Nation did not invoke §1915(a)(3)'s preference for "other Indian famil[ies]"; it sought her adoption by her maternal great-aunt. *In re*

Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1187 (7th Cir. 1998) ("Potential injury from decisions by state courts in private litigation is not redressable by any order that could be issued in this case.").

Y.J., No. 02-19-00235-CV, 2019 WL 6904728, at *1 (Tex. App. Dec. 19, 2019). A great-aunt is "a member of the child's extended family" receiving the highest-priority preference under §1915(a)(1). Hence, §1915(a)(3)'s "other Indian family" preference is irrelevant.

Similarly, no plaintiff suffers harm from §1915(b)(iii)'s preference for "Indian foster homes." Judge Dennis concluded that the Cliffords had standing to challenge this preference. Pet. App. 67a; *see* Pet. App. 233a (Judge Duncan's statement that "the Cliffords' attempt to foster Child P. has been thwarted by the pre-adoptive preferences"). But no one invoked §1915(b)(iii)'s preference against the Cliffords. Child P. "was removed from their custody and placed with her maternal grandmother, a member of the White Earth Band." Pet. App. 66a. So again, the relevant preference was §1915(b)(i)'s preference for "extended family"—not §1915(b)(iii)'s preference for "Indian foster homes."[10]

The decisions below should not have invalidated provisions of a vital federal statute when no plaintiff had any personal stake in those provisions.

---

[10] Nor can the other individual plaintiffs, the Librettis, establish standing to challenge either preference. They sought to adopt Baby O., whose adoption became final on December 19, 2018. Pet. App. 53a. Because they seek only prospective relief, they must show a *future* injury that is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation marks omitted); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). The Librettis presented no evidence that they intend to foster or adopt another child—or, indeed, of any other possible future injury caused by the placement preferences.

B. The Decisions Below Should Have Upheld The Two Placement Preferences They Invalidated.

On the merits, an *en banc* majority correctly analyzed ICWA as a political classification subject to *Mancari*. Pet. App. 164a. Under *Mancari*, statutes classifying based on Indian status are valid so long as "the special treatment can be tied rationally to the fulfillment of Congress's unique obligation towards the Indians." *Mancari*, 417 U.S. at 555. But as just explained, the *en banc* court equally divided as to whether ICWA's adoptive preference for "other Indian families," §1915(a)(3), and foster-care and preadoptive preference for "Indian foster home[s]," §1915(b)(iii), pass muster under *Mancari*. Pet. App. 5a, 211a, 298a. The district court's judgment invalidating those provisions was thus affirmed. The Fifth Circuit should have upheld these provisions too (if, counterfactually, any plaintiff had standing). They readily satisfy *Mancari*.

Judge Duncan rested his contrary conclusion on a two-step argument. Per Judge Duncan, ICWA's aim is "ensuring that Indian children are linked to their tribe." Pet. App. 298a. And because, in Judge Duncan's view, the above preferences favor "Indian families [that] are, by definition, not members of the child's tribe," he concluded that these preferences have "no rational link" to ICWA's purposes.[11] *Id.* This argument, however,

---

[11] This is a dubious characterization of §1915(b)(iii)'s foster-care preference for "Indian foster home[s]." This preference does not exclude members of the child's Tribe. It just prefers Indian foster homes "licensed or approved by an authorized non-Indian licensing

both defines ICWA's purposes too narrowly and ignores how these preferences rationally further the purpose Judge Duncan identified.

First, ICWA indeed seeks to "promote the stability and security of Indian tribes" by maintaining links between children and Tribes. §1902. The preferences for "other Indian families" and "Indian foster homes" further this purpose. "[M]any contemporary tribes descended from larger historical bands and continue to share close relationships and linguistic, cultural, and religious traditions," such that placing a child with another Indian family will help children stay connected with their own Tribes. Pet. App. 175a. The Cherokee Nation and the Eastern Band of Cherokee Indians, for example, are two separate Tribes—but both are Cherokee, and they share culture, language, religion, and history. Children raised in one (even if members of the other) are more likely to remain connected with their Tribe. *Id.*; *see* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235-41 (Jan. 30, 2018).

Many Indian children are also eligible for membership in more than one Tribe. That includes the Brackeens' adopted child, A.L.M., whose biological mother is a Navajo Nation member and whose biological father is an enrolled Cherokee Nation citizen. Pet. App. 51a. Although only one Tribe can be A.L.M.'s "tribe" for ICWA purposes, a placement with either would help maintain family and tribal links.

---

authority" (in contrast to §1915(b)(ii), which prefers foster homes "licensed, approved, or specified by the Indian child's tribe").

Second, Judge Duncan ignored ICWA's coequal purpose of "protect[ing] the best interests of Indian children." §1902. Congress had before it ample evidence showing that ICWA's nondispositive placement preferences would help Indian children *do better*. 1977 Hearings at 1 (statement of Sen. Abourezk); *Holyfield*, 490 U.S. at 33 & n.1. And experience has borne out those predictions—showing that ICWA's preference to (all else equal) keep children and communities together helps children and communities alike.[12]

Judge Duncan's approach bears scant resemblance to the rational-basis review that *Mancari* calls for. And his concerns are especially misplaced in a *facial* challenge to a *nondispositive* preference. Behind his concerns are a hypothetical: Suppose an Indian child has a chance at a superior non-Indian placement—but due to ICWA, the child winds up with an "other Indian family" lacking any relationship with the Indian child or her Tribe. But to begin, it is hard to imagine how this hypothetical could occur given that courts may and do depart from ICWA's preferences for "good cause." §1915(a)-(b). And regardless, that hypothetical is no basis for invalidating the preferences on their face. Plaintiffs seeking facial invalidation "must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481

[12] *E.g.*, Casey Family Programs 5th Cir. Br. 12 ("[P]lacement within the child's community or network serves the interest of stability."); *accord* Child Welfare Information Gateway, *Community-Based Resources: Keystone to the System of Care* 2-3 (Oct. 2009); Nat'l Indian Child Welfare Ass'n, *Attachment and Bonding in Indian Child Welfare: Summary of Research* (2016), https://tinyurl.com/NICWA-Final-Brief.

U.S. at 745. Here, the preferences certainly further ICWA's purposes in some—indeed, many—cases. And if someday plaintiffs contend that applying ICWA's preferences would be irrational in a particular child-custody proceeding where (unlike here) those placement preferences *actually affect* them, they may raise an as-applied challenge.[13] The decisions below should not have invalidated a federal statute on its face based on strained hypotheticals about cases not before the court.

CONCLUSION

The petition should be granted.

[13] Judge Duncan also averred that the placement preferences are invalid because they affect "critical state affairs," citing *Rice v. Cayetano*, 528 U.S. 495 (2000). Pet. App. 285a. *Rice*, however, was a Fifteenth Amendment challenge to a *racial* classification (based on Native Hawaiian ancestry) that excluded many Hawaiians from state elections. *Rice* is irrelevant under *Mancari*'s rational-basis standard.

Respectfully submitted,

IAN HEATH GERSHENGORN
Counsel of Record
KEITH M. HARPER
ZACHARY C. SCHAUF
ILLYANA A. GREEN
VICTORIA HALL-PALERM
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

ADAM H. CHARNES
KILPATRICK TOWNSEND
2001 Ross Ave., Suite 4400
Dallas, TX 75201

ROB ROY SMITH
KILPATRICK TOWNSEND
1420 Fifth Ave., Suite 3700
Seattle, WA 98101

KATHRYN E. FORT
MICHIGAN STATE UNIV.
COLLEGE OF LAW,
INDIAN LAW CLINIC
648 N. Shaw Lane
East Lansing, MI 48823

September 3, 2021