Nos. 21-376, 21-377, 21-378, 21-380

IN THE

Supreme Court of the United States

DEB HAALAND, Secretary of the Interior, *et al.*,
Petitioner,
v.

CHAD EVERET BRACKEEN, *et al.*,
Respondents.

(Caption Continued on Inside Cover)

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER IN NO. 21-378

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

CHAD EVERET BRACKEEN, *et al.*,
Respondents.

STATE OF TEXAS,
Petitioner,
v.

DEB HAALAND, Secretary of the Interior, *et al.*,
Respondents.

CHAD EVERET BRACKEEN, *et al.*,
Petitioners,
v.

DEB HAALAND, Secretary of the Interior, *et al.*,
Respondents.

QUESTION PRESENTED

Amicus curiae addresses the following question only:

Whether the Indian Child Welfare Act, 25 U.S.C. §§ 1901-63, and its implementing regulations violate the nondelegation doctrine by allowing individual tribes to alter the child-placement preferences enacted by Congress.

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

NCLA strongly supports judicial enforcement of separation-of-powers principles, including the constitutional mandate that "[a]ll legislative powers" "shall be vested in … Congress." U.S. Const., Art. I, § 1 (the "Vesting Clause"). By requiring that no one other than Congress may exercise legislative powers, the Constitution "ensure[d] that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

The Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-63, does not adhere to that mandate. Section 105(c) of the ICWA, 25 U.S.C. § 1915(c), delegates to Indian tribes authority to re-write legislative rules governing adoptive placement of Indian children. That provision is particularly troubling to NCLA because it entails congressional delegation of authority to entities outside the federal government—"legislative delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

NCLA's brief focuses solely on whether § 1915(c)'s delegation of authority to Indian tribes violates the Vesting Clause's mandate (Question Four in No. 21-378). NCLA does not address the other Questions Presented by these four consolidated petitions.

STATEMENT OF THE CASE

The ICWA is a federal law that regulates state foster-care and adoption proceedings involving Indian children. The statute dictates where state courts and administrators may place Indian children, establishing a hierarchy of placement preferences. In adoptions governed by state law, an Indian child must be placed, absent "good cause," with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). Section 1915(b) establishes similar placement preferences for foster care and pre-adoptive placements and includes the following additional requirement: "Any child accepted for foster care or pre[-]adoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met."[2]

Although the ICWA establishes a hierarchy of placement preferences (explicitly designed to prevent the adoption of Indian children by non-Indians), it also delegates to Indian tribes a unilateral right to establish "a different order of preference" for adoptive placements, pre-adoptive placements, and foster care. 25 U.S.C. § 1915(c). State proceedings are required

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[2] The ICWA applies to state "child custody proceeding[s]" for placement of Indian children living outside a reservation. 25 U.S.C. § 1903(1). It does not apply to tribal courts, which have jurisdiction over placements of: (1) Indian children living on a reservation; and (2) some additional categories of Indian children. 25 U.S.C. § 1911(a) & (b).

to comply with any reordered preferences established by the tribe of the Indian child being placed. *Ibid.* The ICWA places only one limitation on tribes' delegated power to reorder preferences: any foster care or pre-adoptive placement must still comply with § 1915(b)'s requirement that "the placement is the least restrictive setting appropriate to the particular needs of the child." *Ibid.*

The States of Texas, Louisiana, and Indiana filed suit in district court, seeking a declaration that § 1915(c) and its implementing regulations violate the Vesting Clause by delegating Congress's legislative powers to others.[3] J.A. 155-56.[4] The district court agreed and granted their motions for summary judgment. Pet.App.504a-508a.[5] It stated, "The power to change specifically enacted Congressional priorities and impose them on third parties can only be described as legislative." *Id.* at 506a-507a. The court

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[3] NCLA uses the terminology employed by the parties and the courts below: "delegation" of legislative powers and the "nondelegation doctrine." But as NCLA has explained in previous Court filings, violations of the Vesting Clause are more accurately characterized as "divestments" of legislative power. The term "delegation" generally presupposes the right of the delegator to easily reclaim the delegated power. But when Congress adopts legislation assigning its legislator powers to others, it can often be extremely difficult for Congress to adopt new legislation repealing the assignment.

[4] "J.A." refers to the Joint Appendix in No. 21-376.

[5] "Pet.App." refers to the Petition Appendix filed by Texas in No. 21-378.

also stated that "[a]n Indian tribe, like a private entity, is not part of the federal Government at all" and therefore that "Article I does not permit Congress to delegate its inherent authority to the tribes." *Id.* at 508a (citations omitted).

A Fifth Circuit panel affirmed the district court's finding that the plaintiffs had standing[6] but reversed on the merits, rejecting all of the plaintiffs' constitutional challenges to the ICWA—including their nondelegation challenge. Pet.App.400a-467a. The panel's discussion of the nondelegation doctrine, *id.* at 442a-446a, did not address the States' contention that § 1915(c) fails to provide an intelligible principle to guide Indian tribes in the exercise of their delegated authority. The panel stated that Indian tribes "possess attributes of sovereignty," *id.* at 444a (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)), that grant them "inherent power to determine tribal membership and to regulate domestic relations among members," *ibid.* (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)), and that § 1915(c) "is an incorporation of inherent tribal authority by Congress." *Id.* at 446a.

After vacating the panel opinion, a divided *en banc* Fifth Circuit held that § 1915(c) does not violate the nondelegation doctrine, reversing the district

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[6] The panel held that the three States demonstrated standing to raise the nondelegation claim by introducing evidence that the Alabama-Coushatta Tribe of Texas had exercised its § 1915(c) right to alter the ICWA's hierarchy of placement preferences. Pet.App.421a.

court's ruling to the contrary. Pet.App.6a, 166a-179a. The majority held that "§ 1915(c) validly integrates tribal sovereigns' decision-making into federal law, regardless of whether it is characterized as a prospective incorporation of tribal law or an express delegation by Congress under its Indian affairs authority." *Id.* at 179a.

Judge Duncan, joined by six other judges, dissented from the nondelegation-doctrine holding. Pet.App.317a-327a. He concluded that § 1915(c) improperly conveys Congress's lawmaking function to another entity by "empower[ing] tribes to change the substantive preferences Congress enacted in § 1915(a) and (b) and [*sic*] to bind courts, agencies, and private persons to follow them." *Id.* at 319a. He also concluded that "even assuming § 1915(c) delegates only regulatory—as opposed to legislative—authority, it is still unconstitutional because it delegates that authority outside the federal government." *Id.* at 322a-323(b). While acknowledging that Indian tribes possess some attributes of sovereignty, Judge Duncan stated that this sovereignty has "a unique and limited character," *id.* at 322a-323a (quoting *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008)), that cannot justify the authority granted them by § 1915(c) because "Indians have no sovereignty over non-Indians and no sovereignty over state proceedings," *ibid.*

SUMMARY OF ARGUMENT

Neither the United States nor the intervening Indian tribes contend that, in the absence of federal

legislation, Indian tribes possess sovereign authority to require state courts and administrators to adhere to the tribe's placement preferences for Indian children not residing on a reservation. Thus, their claim to such authority derives only from the ICWA's grant of authority. And that grant can pass constitutional muster under the Vesting Clause only if Congress "lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Gundy*, 139 S. Ct. at 2123 (plurality) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

Section 1915(c) does not satisfy the "intelligible-principle" test and thus violates the Vesting Clause's prohibition against the delegation of Congress's legislative powers. Congress established placement priorities for adoptions, pre-adoptive placements, and foster care in §§ 1915(a) and (b), and then (in § 1915(c)) delegated to Indian tribes the unilateral right to establish "a different order of preference"—but failed to set out any "intelligible principle" to guide Indian tribes in reordering preferences. So, an Indian tribe is afforded *unfettered* discretion to ignore the preferences set out in §§ 1915(a) and (b) and to require that state placement proceedings employ the tribe's own hierarchy of preferences. In the absence of any intelligible principle to guide a tribe in exercising its § 1915(c) authority, the statute violates the Vesting Clause's prohibition against the delegation of legislative power.

Section 1915(c)'s delegation of authority is particularly improper because the recipients of that delegation are not part of the federal government. This Court is sometimes reluctant to enforce the nondelegation doctrine too strictly against federal agencies, reasoning that it can be difficult to differentiate between exercising legislative authority (forbidden) and the agencies' customary exercise of discretion in executing the law (constitutionally unproblematic). But there is no excuse for exhibiting similar reluctance when the party to whom Congress has delegated authority is not part of the federal government. Article II does not vest such parties with power to execute the law, and they thus lack the authority to exercise the same discretion in executing the law to which federal agencies are entitled. *See Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 61-62 (2015) (Alito, J., concurring).

The court below stated that Indian tribes are exempt from the nondelegation doctrine—that tribes possess sovereign authority and that the Vesting Clause does not bar Congress from adopting as federal law the future laws of another sovereign. Pet.App.168a. The court's premise and its conclusion are both flawed. The court's premise is that Indian tribes possess broad sovereign authority akin to that of the States. In fact, tribal sovereignty is far more limited in nature; it "centers on the land held by the tribe and on tribal members within the reservation." *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). It thus is inapplicable to the issues here, which involve

neither reservation land nor Indian children living on a reservation.

Nor does anything in the Constitution create an exception to the nondelegation doctrine when the entity to which Congress delegates its lawmaking is another sovereign. This Court has never so held. *United States v. Sharpnack*, 355 U.S. 286 (1958), the decision which the Fifth Circuit majority cited to support its exception-to-nondelegation argument, is easily distinguishable.

The Fifth Circuit majority also asserts more broadly that Congress may freely delegate to Indian tribes its legislative authority on *any* subject matter that Congress is authorized to regulate pursuant to the Indian Commerce Clause. Pet.App.172a. The flawed logic underlying that breathtakingly broad assertion would wholly eviscerate the nondelegation doctrine. If Congress were entitled to delegate all the powers it possesses under the Indian Commerce Clause, it follows that Congress would likewise be permitted to delegate all its powers under other Article I provisions—*e.g.*, the taxing power, the spending power, and the power to regulate interstate commerce.

Nor does the Fifth Circuit's assertion find any support in this Court's case law. *United States v. Mazurie*, 419 U.S. 544 (1975), upheld a federal statute that granted Indian tribes authority to regulate liquor sales on their reservations. But given tribes' broad authority over commercial activities taking place on Indian reservations, it is likely that they already

possessed authority to regulate on-reservation liquor sales. Nothing in *Mazurie* suggests that Congress is exempt from the nondelegation doctrine when legislating pursuant to its Indian Commerce Clause powers, nor that the decision permits Congress to grant Indian tribes authority over matters with no connection to a reservation.

ARGUMENT

I. SECTION 1915(c) LACKS AN "INTELLIGIBLE PRINCIPLE" TO WHICH INDIAN TRIBES MUST CONFORM WHEN EXERCISING THEIR DELEGATED AUTHORITY

A. The Vesting Clause Prohibits Any Congressional Delegation of Legislative Power

The nondelegation doctrine "is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta*, 488 U.S. at 371. The Constitution mandates that only the people's elected representatives may adopt new federal laws restricting individual liberty. U.S. Const., Art. I, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress of the United States[.]") (emphasis added). The grant of "[a]ll legislative Powers" to Congress means that Congress may not transfer to others "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825).

The Court repeatedly has stressed the importance of the Article I Vesting Clause in maintaining the proper separation of powers among the three branches of government. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (the nondelegation doctrine "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) ("[I]n carrying out that constitutional division into three branches it is a breach of the fundamental law if Congress gives up its legislative power and transfers it to the President."); *Gundy*, 139 S. Ct. at 2123 (plurality).

Fearing the power of the new federal government to enact laws restricting the people's liberty,[7] the Framers intentionally made lawmaking quite difficult. Before legislation can become law, the Constitution requires that "any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms of office—and either secure the President's approval or obtain enough support to override his veto." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). The nondelegation doctrine ensures that Congress cannot evade these bicameralism and presentment requirements by delegating its powers to someone else unencumbered by them.

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[7] *See, e.g.*, The Federalist No. 48, at 309-312 (C. Rossiter ed., 1961) (J. Madison).

These requirements were also designed to promote careful deliberation of proposed legislation and clear lines of accountability for enacted laws: "The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow." *Ibid.*

The Court has recognized that the "legislative powers" subject to the nondelegation doctrine are difficult to define with precision. Courts are regularly called upon to make fine distinctions between "the delegation of power to make law … and conferring authority or discretion as to its execution," and "to the latter no constitutional objection can be made." *Marshall Field*, 143 U.S. at 693-94 (quoting *Railroad Co. v. Commissioners*, 1 Ohio St. 77, 88-89 (1852)). But the Constitution brooks no exception to the nondelegation doctrine once a court determines that the authority conveyed by Congress constitutes "legislative powers"; the Vesting Clause's "text permits *no* delegation of those powers." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (emphasis added).

B. The "Intelligible-Principle" Test Requires, at a Minimum, that a Law Provide *Some* Discernible Standards to Guide Those to Whom It Extends Authority

For much of the past century, the Court has applied what has become known as the "intelligible-principle" test to determine whether a federal statute unconstitutionally delegates Congress's legislative

powers to others. Chief Justice Taft described the test as follows: "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton*, 276 U.S. at 409.

While subsequent Court decisions have applied the test with varying degrees of rigor, all have focused their inquiries on whether the challenged statute establishes *some* policy to which the administering body is expected to "conform." *See, e.g.*, *Gundy*, 139 S. Ct. at 2123-24 (plurality) (construing 34 U.S.C. § 20913(d), a provision of the Sex Offender Registration and Notification Act, as imposing strict limits on the Attorney General's authority with respect to registration of convicted sex offenders). Statutes that establish no such policy and instead provide administrators with unfettered discretion to regulate as they deem appropriate have been held to violate the nondelegation doctrine. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

All three decisions below failed to apply the "intelligible-principle" test to 25 U.S.C. § 1915(c), the statute at issue here. Instead, the courts cited alternative grounds for rejecting Texas's nondelegation challenge. Pet.App.504a-508a, 442a-446a, 166a-179. Yet they cited no case law from this Court—and there is none—for the proposition that a federal statute can survive constitutional scrutiny under the Vesting Clause if it fails to articulate an

intelligible principle that guides the conduct of those whom the statute authorizes to act.

C. Section 1915(c) Provides No Guidance to Tribes Regarding When and How They May Exercise Their Authority to Reorder Congress's Placement Priorities

Sections 1915(a) and (b) provide a hierarchy of placement priorities to be followed by state officials when engaged in adoptive, pre-adoptive, or foster-care placement for Indian children. But § 1915(c) directs state officials to ignore those congressionally mandated placement priorities and instead follow placement priorities adopted by the Indian child's tribe when the tribe has "establish[ed] a different order of preference by resolution." The statute provides no intelligible principle to guide Indian tribes when deciding whether to replace Congress's placement priorities with their own set of priorities. Because the statute fails to provide any such guidance, it is an unconstitutional delegation of federal legislative power from Congress to Indian tribes.

The *en banc* Fifth Circuit suggested that Congress provided some guidance to Indian tribes "by setting a default standard rather than leaving the implementation of a statute entirely to the deleg[at]ee's discretion." Pet.App.175a. That suggestion makes little sense. By establishing its hierarchy of placement preferences in §§ 1915(a) and (b), Congress set forth its views on how placements

should be prioritized. So, to the extent that Congress has provided guidance, it has indicated to Indian tribes that they should adopt—not alter—the placement preferences set out in §§ 1915(a) and (b). Those statutes provide no guidance whatsoever to Indian tribes that wish to use their delegated authority under § 1915(c) to ignore Congress's preferences and "establish a different order of preference."

And despite §§ 1915(a) and (b)'s mandated placement priorities, § 1915(c) requires state courts and administrators to adhere to directives from the Indian child's tribe when the tribe has established an alternative mandate. Section 1915(c) creates only one exception to that requirement: state officials "shall" follow the tribe's alternative mandate "so long as the placement [mandated by the tribe's reordered placement hierarchy] is the least restrictive setting appropriate to the particular needs of the child, as provided in [25 U.S.C. § 1915(b)]." But that provision is inapplicable to § 1915(a) and thus has no application to adoptive placements.

Moreover, the "least restrictive setting" requirement cannot reasonably be viewed as guidance to Indian tribes when they are reordering placement priorities for pre-adoptive placement and foster care under § 1915(b). That statute establishes three sets of placement priorities for Indian children accepted for foster care or pre-adoptive placement:

(1) The child "shall be placed in the least restrictive setting which most approximates a

> family and in which his special needs, if any, may be met";
>
> (2) "The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child"; and
>
> (3) "A preference shall be given, in the absence of good cause to the contrary, to a placement with—(i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority."

25 U.S.C. § 1915(b). If an Indian tribe wishes to override Congress and establish its own placement priorities, § 1915(c) requires it to adhere to the first of the three requirements set out in § 1915(b)—the least-restrictive-setting requirement. But § 1915(c) provides no "intelligible principle" to guide Indian tribes in deciding whether to reject § 1915(b)'s second and third requirements and "establish a different order of preference."[8]

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[8] Section 1915(c) also states, "Where appropriate, the preference of the Indian child or parent shall be considered" by state authorities. That statement provides *no* guidance to Indian tribes in deciding whether to override Congress's priorities. Nor does it provide meaningful guidance to state authorities, because it is silent regarding when such considerations are "appropriate."

As Judge Duncan explained, "If Congress wants to enact a new order of preferences, it must follow the constitutional demands of presentment and bicameralism." Pet.App.320(a) (Duncan, J., dissenting). What the Vesting Clause prohibits Congress from doing is precisely what it has done here: authorize Indian tribes to enact a new order of preferences without providing the tribes with an intelligible principle to guide them in doing so.

II. SECTION 1915(c) VIOLATES THE VESTING CLAUSE OF ARTICLE I BY DELEGATING LEGISLATIVE POWER TO ENTITIES OUTSIDE THE FEDERAL GOVERNMENT

As demonstrated above, § 1915(c)'s failure to articulate the requisite intelligible principle renders the statute unconstitutional without regard to the identity of the entity to which legislative power is delegated. Moreover, it cannot withstand constitutional scrutiny for the additional reason that it delegates that authority outside the federal government. Although Indian tribes possess certain attributes of sovereignty, that status does not authorize Congress's delegation of authority to entities not vested with such authority by the Constitution.

A. The Rationale for Judicial Caution in Some Nondelegation Cases Is Inapplicable Here

This Court is sometimes reluctant to enforce the nondelegation doctrine too strictly against federal

agencies, reasoning that it can be difficult to differentiate between exercising legislative authority (forbidden) and the agencies' customary exercise of discretion in executing the law (constitutionally unproblematic). As the Court has observed, "A certain degree of discretion, and thus lawmaking, inheres in most executive or judicial action." *Whitman*, 531 U.S. at 475 (quoting *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting)). Justice Scalia explained his personal discomfort with overly strict enforcement of the nondelegation doctrine as follows:

> [W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgment, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. … [I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.

Mistretta, 488 U.S. at 415-16.

But while Justice Scalia was reluctant to apply the intelligible-principle test too strictly to instances in which Congress has delegated some degree of discretionary authority to federal administrators, he balked at congressional delegation of such authority to officials located outside the federal government:

> Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation. The major one, it seems to me, is that the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.

Id. at 416-17.

While NCLA takes issue with Justice Scalia's reluctance to apply the intelligible-principle test rigorously, his rationale for drawing the line at delegation of lawmaking authority to officials not constitutionally authorized to exercise federal power is spot on. Article II does not vest such individuals with power to execute the law, and they thus lack the authority to exercise the discretion in executing the law to which federal agencies are entitled.[9]

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[9] Nor does Article III grant federal judicial authority to individuals located outside the federal judiciary.

Numerous court decisions have recognized the need to strictly guard against efforts to delegate federal legislative power to entities located outside the federal government. *See, e.g.*, *Carter*, 298 U.S. at 311 (describing delegation of legislative power to a private commission as "legislative delegation in its most obnoxious form"); *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 721 F.3d 666, 670-74 (D.C. Cir. 2013), *vacated and remanded on other grounds*, 575 U.S. 43 (2015); *Nat'l Ass'n of Regul. Utility Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984).

See also Texas v. Comm'r, 142 S. Ct. 1308, 309 (2022) (Alito, J., joined by Thomas and Gorsuch, JJ., statement respecting denial of cert.) (noting disapprovingly that "[w]hat was essentially a legislative determination … was made not by Congress or even by the Executive Branch but by a private group"); *Ass'n of Am. R.Rs.*, 575 U.S. at 61-62 (Alito, J., concurring) (stating that "the formal reason why the Court does not enforce the nondelegation doctrine with more vigilance is that the other branches of Government have vested powers of their own that resemble lawmaking. … When it comes to private entities, however, there is not even a fig leaf of constitutional justification."); *Id.* at 87-88 (Thomas, J., concurring in the judgment) (stating that "our so-called 'private nondelegation doctrine' flows logically from the three Vesting Clauses" of Articles I, II, and III).

The power delegated to Indian tribes by 25 U.S.C. § 1915(c) is legislative in nature. It grants Indian tribes the unfettered authority to change the

law as written by Congress regarding placement priorities for Indian children. Indian tribes are not part of the federal government. Accordingly, § 1915(c) violates the Vesting Clause by delegating legislative authority to an entity outside the federal government.

B. The Attributes of Sovereignty Possessed by Indian Tribes Do Not Exempt Them from the Nondelegation Doctrine

The *en banc* Fifth Circuit did not contest that 25 U.S.C. § 1915(c) authorizes the exercise of legislative power by Indian tribes. Instead, it pointed to "the inherent sovereign authority" of tribes and asserted that the statute "may arguably be justified by the fact that the Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine." Pet.App.168a (citing *Sharpnack*, 355 U.S. at 293-94). The appeals court's assertion is based on an exaggerated sense of tribal sovereignty, and its reliance on *Sharpnack* is misplaced.

First, tribal sovereignty has "a unique and limited character." *Plains Com.*, 554 U.S. at 327 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). It "centers on the land held by the tribe and on tribal members within the reservation." *Ibid.* That limited sovereignty does not come into play in connection with § 1915(c). The statute delegates legislative power to Indian tribes over matters

unrelated to "the land held by the tribe" and "tribal members within the reservation"; § 1915(c) applies only to Indian children who do *not* reside on a reservation.

Nor does *Sharpnack* provide support for the decision below. *Sharpnack* rejected a constitutional challenge to the Assimilative Crimes Act of 1948 (ACA), 18 U.S.C. § 13, which makes the criminal law of a State applicable to conduct occurring in a federal enclave located within that State. The ACA incorporates both pre-existing state law and state law adopted following enactment of the ACA in 1948.

Sharpnack is a narrow decision limited to its unique facts. Between 1825 and 1948, Congress had adopted a series of similar statutes incorporating *existing* state criminal law into federal enclaves. But inevitable changes in state criminal law meant that each such statute eventually got out of whack with the law of the State in which any given federal enclave was located. The ACA attempted to solve that problem by incorporating state criminal law prospectively. Rejecting a claim that the ACA improperly delegated legislative power to the States, the Court explained:

> Having the power to assimilate [existing] state laws, Congress obviously has like power to renew such assimilation annually or daily in order to keep the laws in the enclaves current with those in the States. That being so, we conclude that Congress is within its

> constitutional powers and legislative discretion when, after 123 years of experience with the policy of conformity, it enacts that policy in its most complete and accurate form.

355 U.S. at 293-94. The Court concluded that "[t]his procedure is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make federal regulation of local conduct conform to that already established by the State." *Id.* at 294. Section 1915(c) bears little relationship to the "continuing adoption" of state law at issue in *Sharpnack*.

C. The Constitution Does Not Authorize Congress to Delegate to Indian Tribes the Legislative Power Congress Possesses Under the Indian Commerce Clause

The *en banc* Fifth Circuit also held that the Indian Commerce Clause empowers Congress to delegate legislative powers to Indian tribes in light of the tribes' "'independent authority over matters' relating to their 'internal and social relations.'" Pet.App.170a-172a (quoting *Mazurie*, 419 U.S. at 557). It reasoned that "because the authority to alter [Indian child] placement preferences is within Congress's power, Congress can validly delegate this authority to Indian tribes." *Id.* at 172a.

The Fifth Circuit's assertion that the Indian Commerce Clause provides Congress with a free pass from Vesting Clause limitations is breathtaking in its scope and implications. In essence, the appeals court held that Congress may freely delegate to Indian tribes its legislative authority on *any* subject matter that Congress is authorized to regulate pursuant to the Indian Commerce Clause. *Id.* The flawed logic of that assertion, which finds no support in this Court's decisions, would entirely eviscerate the nondelegation doctrine. If Congress were entitled to delegate all the powers it possesses under the Indian Commerce Clause, it follows that Congress would likewise be permitted to delegate its powers under other Article I provisions—*e.g.,* the taxing power, the spending power, and the power to regulate interstate commerce. If Congress could delegate away these core legislative powers, there would be hardly any legislative power left that could not be delegated, and the nondelegation doctrine would be a dead letter.

The Fifth Circuit's reliance on *Mazurie* is misplaced. Contrary to the appeals court's assertion, the legislation at issue in that case did not delegate to Indian tribes the power to ban liquor sales on their reservations. Rather, a federal statute in existence at the time *already* imposed a ban on liquor sales in "Indian country," a term that encompassed most lands within Indian reservations. 419 U.S. at 547. The ban included an exception that permitted liquor sales in "Indian country" if, but only if, the local Indian tribe authorized the sales. *Id.* at 548 n.4. Martin and Margaret Mazurie were convicted of selling liquor in

"Indian country" after the local Indian tribe denied their application for a permit to do so.

The Court upheld the conviction, rejecting the defendants' contention that the statute was an unconstitutional delegation of legislative power. *Id.* at 556-58. The Court explained that it was "an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territories." *Id.* at 557. In other words, the "attributes of sovereignty" cited by *Mazurie* are of limited relevance to § 1915(c), a statute that seeks to grant Indian tribes legislative authority over nonmembers of the tribes and over matters far distant from Indian reservations.[10]

More importantly, the criminal conviction arose from a federal prosecution for violation of a law that explicitly prohibited the defendants' conduct, not as a result of legislative activity of third parties to whom Congress had delegated authority. Thus, regardless of whether Congress acted constitutionally

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[10] The Court stated that limitations on Congress's authority to delegate its legislative powers to others are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Ibid.* But the Court never suggested that the nondelegation doctrine is altogether inapplicable in such situations. Moreover, the Court's reference to "independent authority" is an acknowledgment that the Indian tribe in question would have been entitled to initiate its own criminal prosecution of the Mazuries, who were operating their business on land within the Indian reservation.

in enacting a statutory exception that delegated to Indian tribes the right to legislatively override the ban on liquor sales, that statutory exception played no role in the Mazuries' conviction—the tribe on whose reservation the liquor sales occurred chose not to exercise its delegated authority.[11] *Mazurie* thus is far afield from the facts of this case.

Other decisions relied on by the Fifth Circuit, Pet.App.178a, are even less relevant. The appeals court cited *Wilkerson v. Rahrer*, 140 U.S. 545, 562 (1891), in support of its claim that this Court "has long approved of federal statutes that permit another sovereign to supply key elements of the law." Pet.App.177a. *Wilkerson* did no such thing. That decision upheld a state-court criminal conviction for selling liquor in Kansas in violation of state law. In prior years, some courts had held that while Kansas could impose a ban on the sale of domestic liquor, the Commerce Clause prevented the application of the ban to imported liquor that remained in its original packaging. Thereafter, in the exercise of its Commerce Clause powers, Congress adopted the "Wilson Bill," which stated that imported liquor should be subject to state law to the same extent that the State regulated domestic liquor sales. 140 U.S. at 559-60. Contrary to the Fifth Circuit's claim, *Wilkerson* did not approve "federal statutes that

[11] Moreover, there is considerable doubt that the statute actually delegated any meaningful authority to Indian tribes. *Mazurie* noted that the statute conditioned enactment of any tribal ordinance permitting liquor sales on approval by the Secretary of the Interior. *Id.* at 558 n.12.

permit another sovereign to supply key aspects of the [federal] law." Pet.App.177a. The Court simply upheld a law barring discrimination among different types of commerce; indeed, the Court stated explicitly that in adopting the Wilson Bill, "Congress has not attempted to delegate the power to regulate commerce." 140 U.S. at 561.

The Fifth Circuit's citation to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), is similarly spurious. Pet.App.178a. *Gibbons* had absolutely nothing to do with constitutional limits on Congress's authority to delegate its legislative power. Rather, it addressed the authority of States to continue to regulate interstate commerce following adoption of the Constitution. Supporters of States' continued power to regulate cited a 1789 federal statute that incorporated into federal law all state laws regulating pilots. They argued that adoption of the statute was an acknowledgment of "a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate" interstate commerce. 22 U.S. at 80.

The Court held that no such inference could be drawn from adoption of the 1789 statute, stating that Congress incorporated state law into federal law as a matter of convenience until such time as it could adopt a regulatory system of its own. *Ibid.* The Court added, "Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject." *Ibid.*

The Fifth Circuit's reliance on the quoted language is misplaced. Nothing in that language, which was written for the sole purpose of construing States' power to regulate interstate commerce, provides any support for the appeals court's holding that Congress may delegate to "another sovereign" authority to supply "key elements" of federal law.

In sum, neither the Indian Commerce Clause nor the attributes of sovereignty possessed by Indian tribes authorize Congress to ignore the Vesting Clause's prohibition in Article I, § 1 of the U.S. Constitution against the delegation of legislative powers.

CONCLUSION

The Court should reverse the judgment below with respect to the fourth Question Presented in No. 21-378.

Respectfully submitted,

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