No. 21-378

In the Supreme Court of the United States

STATE OF TEXAS, PETITIONER

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.*, "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. 1902. ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." *Ibid.* Those standards apply in state child-custody proceedings, except to the extent that state law "provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child." 25 U.S.C. 1921. In certain circumstances, ICWA also permits an agency or court effecting the placement of an Indian child in a foster or adoptive home to follow a different order of preference established by the Indian child's tribe. 25 U.S.C. 1915(c). The questions presented are:

1. Whether ICWA and its implementing regulations exceed Congress's plenary power over Indian affairs to the extent that they govern state child-custody proceedings.

2. Whether the Indian classifications in ICWA and its implementing regulations impermissibly discriminate on the basis of race.

3. Whether ICWA and its implementing regulations impermissibly commandeer state agencies and judges.

4. Whether ICWA and its implementing regulations violate the nondelegation doctrine by allowing an Indian child's tribe to establish a different order of placement preferences.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-396a) is reported at 994 F.3d 249. The opinion of a panel of the court of appeals (Pet. App. 400a-467a) is reported at 937 F.3d 406. The order of the district court granting in part and denying in part the plaintiffs' motions for summary judgment (Pet. App. 468a-527a) is reported at 338 F. Supp. 3d 514. The order of the district court denying the defendants' motions to dismiss (Pet. App. 530a-579a) is not published in the Federal Supplement but is available at 2018 WL 10561971.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2021. The petition for a writ of certiorari was filed on September 3, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.*, "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 642 (2013) (citation omitted); see *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32-35 (1989) (discussing congressional hearings). To "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. 1902. Those standards preempt contrary state-law standards, except to the extent that state law "provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child." 25 U.S.C. 1921.

One set of standards, found in 25 U.S.C. 1912, governs the removal of Indian children from their families. In particular, Section 1912 governs two types of "involuntary" proceedings in state court, 25 U.S.C. 1912(a): "action[s]" to remove Indian children from their families for placement in foster homes, 25 U.S.C. 1903(1)(i); and "action[s] resulting in the termination of the parent-child relationship," 25 U.S.C. 1903(1)(ii). Section 1912(a) requires "the party seeking the foster care placement of, or termination of parental rights to, an Indian child" to "notify" the child's parent or Indian custodian and the child's tribe of the pending proceedings. 25 U.S.C.

1912(a). Section 1912(d) further requires "[a]ny party seeking to effect a foster care placement" or "termination of parental rights" to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. 1912(d). And Section 1912(e) and (f) provide that no foster-care placement or termination of parental rights "may be ordered * * * in the absence of a determination," supported by "testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. 1912(e) (requiring "clear and convincing evidence" for a foster-care placement); see 25 U.S.C. 1912(f) (requiring "evidence beyond a reasonable doubt" for the termination of parental rights).

Once a court has made the decision to remove an Indian child from his or her family, another set of standards, found in 25 U.S.C. 1915, governs the placement of the Indian child in an adoptive or foster home. Section 1915(a) requires that "[i]n any adoptive placement," "preference" be given, "in the absence of good cause to the contrary," to placement 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) similarly requires that, "[i]n any foster care or preadoptive placement," "preference" be given, "in the absence of good cause to the contrary," to 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; or (iv) an institution

for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." 25 U.S.C. 1915(b). Section 1915(c) provides that "the agency or court effecting [a] placement" under Section 1915(a) or (b) "shall follow" a "different order of preference" established via "resolution" by "the Indian child's tribe," "so long as the placement is the least restrictive setting appropriate to the particular needs of the child." 25 U.S.C. 1915(c).

Under ICWA, "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. 1903(4). "'Indian tribe,'" in turn, "means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43." 25 U.S.C. 1903(8).

ICWA authorizes the Secretary of the Interior to "promulgate such rules and regulations as may be necessary to carry out the provisions of [ICWA]." 25 U.S.C. 1952. Pursuant to that authority, the Secretary promulgated non-binding guidance in 1979. 44 Fed. Reg. 67,584 (Nov. 26, 1979). After state courts "interpreted the Act in different, and sometimes conflicting, ways," the Secretary promulgated a rule in 2016. 81 Fed. Reg. 38,778, 38,782 (June 14, 2016) (2016 Rule). The 2016 Rule provides, among other things, that "[t]he party seeking departure from the placement preferences [in Section 1915(a) and (b)] should bear the burden of proving by clear and convincing evidence that there is 'good cause'

to depart from the placement preferences." 25 C.F.R. 23.132(b).*

2. In March 2018, the State of Texas, two other States, and seven individuals filed in federal district court the operative complaint in this case against the United States, the Department of the Interior, the Department of Health and Human Services, the Bureau of Indian Affairs (BIA), and various federal officials (federal defendants). See D. Ct. Doc. 35, at 7-10 (Mar. 22, 2018) (Second Am. Compl. ¶¶ 19-34).

In their complaint, the plaintiffs challenged various provisions of ICWA as unconstitutional on their face, alleging violations of Article I, the anticommandeering doctrine of the Tenth Amendment, the equal protection component of the Fifth Amendment, substantive due process, and the nondelegation doctrine. Second Am. Compl. ¶¶ 18, 266-338, 350-376. The plaintiffs also challenged the 2016 Rule as unconstitutional, contrary to the statute, and arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Second Am. Compl. ¶¶ 247-265, 339-349. The plaintiffs sought declaratory and injunctive relief. *Id.* at 83-84.

Four Indian tribes—the Cherokee Nation, the Oneida Nation, the Quinault Indian Nation, and the Morongo Band of Mission Indians (Tribes)—intervened as defendants. D. Ct. Doc. 45 (Mar. 28, 2018). The federal defendants and the Tribes moved to dismiss the complaint for lack of standing, see Pet. App. 530a, and

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* Contrary to Texas's assertion, (Pet. 7 n.1), Congress has not "linked federal funding to compliance with ICWA." The statute that Texas cites (*ibid.*) requires only that States *describe* their compliance with ICWA as a condition of funding. 42 U.S.C. 622(b)(9). It does not condition funding on the fact of compliance itself.

the plaintiffs moved for summary judgment, see *id.* at 469a.

The district court denied the motions to dismiss, upholding the plaintiffs' standing to bring each of their claims. Pet. App. 530a-579a. In addition, the court granted summary judgment to the plaintiffs on all of their claims except their substantive due process claims, which the court rejected on the merits. *Id.* at 468a-527a. The court then entered final judgment, declaring various provisions of ICWA and the 2016 Rule unconstitutional. *Id.* at 528a-529a.

3. The federal defendants and the Tribes appealed, and the court of appeals granted a stay pending appeal. C.A. Order (Dec. 3, 2018). The court of appeals also permitted the Navajo Nation to intervene in support of the appellants. C.A. Order 2 (Jan. 25, 2019).

A divided panel of the court of appeals affirmed the district court's judgment that the plaintiffs have standing, but reversed the district court's grant of summary judgment and rendered judgment in the defendants' favor on all claims. Pet. App. 400a-467a. Judge Owen concurred in part and dissented in part. *Id.* at 457a-467a. Although she agreed with the majority's rejection of most of the plaintiffs' claims, she expressed the view that several provisions of ICWA violate the anticommandeering doctrine "because they direct state officers or agents to administer federal law." *Id.* at 457a; see *id.* at 466a.

4. The court of appeals granted rehearing en banc and issued a fractured decision affirming in part and reversing in part. Pet. App. 1a-396a.

a. The en banc court of appeals affirmed the district court's judgment that at least one plaintiff had standing to bring each of the plaintiffs' claims. See Pet. App. 3a

(per curiam); *id.* at 59a-66a (opinion of Dennis, J.); *id.* at 214a-223a (opinion of Duncan, J.); *id.* at 344a-348a (Owen, C.J., concurring in part, dissenting in part); *id.* at 363a (Haynes, J., concurring). As relevant here, the en banc court concluded that the state plaintiffs had standing to bring their Article I, anticommandeering, and nondelegation claims. See *id.* at 65a-66a (opinion of Dennis, J.); *id.* at 215a-216a (opinion of Duncan, J.); *id.* at 344a-348a (Owen, C.J., concurring in part, dissenting in part); *id.* at 363a (Haynes, J., concurring). The en banc court also affirmed the individual plaintiffs' standing to bring their equal protection claims. *Id.* at 3a (per curiam).

No member of the en banc court concluded that the state plaintiffs had standing to bring an equal protection challenge. Eight judges concluded that the state plaintiffs lacked standing as *parens patriae* to bring an equal protection claim against the federal government, see Pet. App. 55a n.13 (opinion of Dennis, J.); *id.* at 373a n.2 (Costa, J., concurring in part and dissenting in part), while eight judges declined to reach the issue, see *id.* at 218a n.13 (opinion of Duncan, J.).

b. On the merits of the plaintiffs' Article I claim, the en banc court of appeals held that ICWA is a valid exercise of Congress's plenary power over Indian affairs. Pet. App. 71a-105a. The court explained that the Constitution's "Treaty, Property, Supremacy, Indian Commerce, and Necessary and Proper Clauses, among other provisions, operate to bestow upon the federal government supreme power to deal with the Indian tribes." *Id.* at 72a. And the court emphasized that "[a]s a consequence of the Indians' partial surrender of sovereign power, the federal Government naturally took on an attendant duty to protect and provide for the well-

being of the 'domestic dependent Indian nations.'" *Id.* at 76a (brackets and citation omitted). The court held that ICWA "falls within Congress's 'plenary powers to legislate on the problems of Indians' in order to fulfill its enduring trust obligations to the tribes." *Id.* at 82a (citation omitted).

Judge Duncan, joined by six other judges, dissented on the issue. Pet. App. 223a-261a. They acknowledged that "[a]mple founding-era evidence shows that Congress's Indian affairs power was intended to be both broad in subject matter and exclusive of state authority." *Id.* at 245a. In their view, however, Congress's power over Indian affairs does not include the authority to "regulate state child-custody proceedings involving Indian children." *Id.* at 223a.

c. On the merits of the plaintiffs' equal protection claims, a majority of the en banc court of appeals held that ICWA's Indian classifications are political, not racial, in nature and are thus subject to rational-basis review under the standard set forth in *Morton* v. *Mancari*, 417 U.S. 535 (1974). See Pet. App. 140a-155a; *id.* at 352a (Owen, C.J., concurring in part, dissenting in part). No judge disagreed with that holding. See *id.* at 263a (opinion of Duncan, J.) (declining to "decide whether ICWA classifies by race").

Applying *Mancari*'s deferential standard of review, the majority upheld the constitutionality of ICWA's definition of "Indian child" and Section 1915's preferences for placements with an Indian child's extended family or tribe, finding them to be rationally connected to "Congress's goal of fulfilling its broad and enduring trust obligations to the Indian tribes." Pet. App. 156a-157a; see *id.* at 155a-166a & n.58; *id.* at 352a (Owen, C.J., concurring in part, dissenting in part); *id.* at 363a

(Haynes, J., concurring) (concluding that "the first two prongs of ICWA § 1915(a)—concerning the members of the child's extended family and tribe—withstand even strict scrutiny"). An equally divided en banc court of appeals, however, affirmed the district court's judgment that Section 1915(a)(3)'s third-ranked preference for adoptive placement with "other Indian families," and Section 1915(b)(iii)'s third-ranked preference for foster-care placement with licensed "Indian foster home[s]," violate equal protection. *Id.* at 4a (citations omitted).

d. On the merits of the plaintiffs' Tenth Amendment claims, the en banc court of appeals held that many of ICWA's provisions validly preempt contrary state law and present no anticommandeering problem. See Pet. App. 5a, 305a-307a, 309a-314a, 316a-317a. The court observed that, in various places, "ICWA enacts substantive child-custody standards applicable in state child-custody proceedings." *Id.* at 312a. "For instance," the court explained, "ICWA requires courts to place Indian children with certain persons (§ 1915), and also requires courts to make specific findings under a heightened standard of proof before an Indian child may be placed in a foster home or his parents' rights terminated (§ 1912(e) and (f))." *Ibid.* The court held that, "[t]o the extent those substantive standards compel state *courts* (as opposed to state *agencies*)," "they are valid preemption provisions." *Ibid.*

A majority of the en banc court of appeals, however, held that, to the extent Section 1912(e) and (f) "require state agencies and officials to bear the cost and burden of adducing expert testimony to justify placement of Indian children in foster care, or to terminate parental rights," they impermissibly "commandeer states." Pet.

App. 290a. A majority also held that, to the extent Section 1912(d) requires state agencies to engage in "'active efforts'" to provide remedial services to Indian families "as a condition to" placing Indian children in foster care or terminating parental rights, *id.* at 287a (citation omitted), it likewise "commandeers states" in violation of the Tenth Amendment, *id.* at 288a. The majority further held that that by "requir[ing] 'the State' to 'maintain[] . . . [a] record' of any Indian child placements under state law," *id.* at 293a (citation omitted; second and third sets of brackets in original), Section 1915(e) impermissibly "co-opt[s]" a State's agencies or courts "into administering a federal program," *id.* at 295a n.108.

In addition, an equally divided en banc court of appeals affirmed the district court's judgment that Section 1912(a) violates the anticommandeering doctrine to the extent it requires state agencies to provide notice of pending child-custody proceedings to Indian parents and tribes, Pet. App. 5a; see *id.* at 295a-297a (opinion of Duncan, J.); that the placement provisions in Section 1915(a) and (b) violate the anticommandeering doctrine "to the extent they direct action by state agencies and officials," *id.* at 5a (per curiam); and that Section 1951(a) violates the anticommandeering doctrine by "requir[ing] state courts to provide the Secretary with a copy of an Indian child's final adoption decree, 'together with . . . other information,'" *id.* at 314a (opinion of Duncan, J.).

e. On the merits of the state plaintiffs' nondelegation claim, a majority of the en banc court of appeals held that Section 1915(c) does not violate the nondelegation doctrine. Pet. App. 6a, 166a-179a. The majority explained that Section 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, expressing the view that Section 1915(c) "violates the nondelegation doctrine, either because it delegates Congress's lawmaking function or because it delegates authority to entities outside the federal government altogether." *Id.* at 323a-324a.

f. With respect to the 2016 Rule, a majority deemed invalid portions of the rule that implement certain statutory provisions that the court held "unconstitutional." Pet. App. 6a. In addition, a majority held that the Secretary's decision to promulgate a "binding" rule did not violate the APA, while a different majority held that the rule's provision regarding the burden of proof for demonstrating "good cause" for departing from the placement preferences under Section 1915 is contrary to ICWA. *Id.* at 6a-7a & nn.12, 14.

ARGUMENT

"Recognizing the special relationship between the United States and the Indian tribes and their members," 25 U.S.C. 1901, Congress enacted ICWA forty years ago "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," 25 U.S.C. 1902. ICWA's provisions have been routinely applied in state courts across the country since that time, affording vital protection to Indian children, their families, and their tribes.

Texas nevertheless now contends (Pet. 12-31) that ICWA and its implementing regulations exceed Congress's power over Indian affairs, impermissibly discriminate on the basis of race, impermissibly commander state agencies and judges, and violate the

nondelegation doctrine. Those contentions lack merit, and the en banc court of appeals' rejection of Texas's arguments on those issues does not conflict with any decision of this Court, another court of appeals, or any state court of last resort. In any event, this petition would be a poor vehicle for this Court's review, because Texas lacks standing as *parens patriae* to assert an equal protection claim against the federal government, and because Texas lacks Article III standing to bring its nondelegation challenge.

The federal government and the Tribes have sought this Court's review of the portions of the en banc court of appeals' decision invalidating various provisions of ICWA. While that request urges the Court to follow its usual course of granting certiorari when a lower court has held an Act of Congress unconstitutional, Texas's request here satisfies none of this Court's traditional criteria for review. Accordingly, Texas's petition for a writ of certiorari should be denied.

1. Texas contends (Pet. I) that Congress lacks "the power under the Indian Commerce Clause or otherwise to enact" ICWA. That contention is incorrect and does not warrant this Court's review.

a. The Constitution vests Congress with "plenary and exclusive power over Indian affairs." *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). In "an unbroken current of judicial decisions," this Court has repeatedly reaffirmed that power. *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913); see, *e.g.*, *United States* v. *Cooley*, 141 S. Ct. 1638, 1643 (2021); *Puerto Rico* v. *Sanchez Valle*, 579 U.S. 59, 70 (2016); *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *United States* v. *Lara*, 541 U.S. 193, 200 (2004); *Alaska* v. *Native Vill. of Venetie*

Tribal Gov't, 522 U.S. 520, 531 n.6 (1998); *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 84 (1977); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *United States* v. *Hellard*, 322 U.S. 363, 367 (1944); *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 718 (1943); *Winton* v. *Amos*, 255 U.S. 373, 391 (1921); *Choate* v. *Trapp*, 224 U.S. 665, 671 (1912); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 306 (1902).

As the Court has recognized, the "plenary power of Congress" over Indian affairs derives "explicitly" from the text of the Constitution itself. *Mancari*, 417 U.S. at 551; see Pet. App. 72a (opinion of Dennis, J.). "That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (Marshall, C.J.); see U.S. Const. Art. I, § 8; U.S. Const. Art. II, § 2, Cl. 2. "These powers comprehend all that is required for the regulation of [the United States'] intercourse with the Indians." *Worcester*, 31 U.S. (6 Pet.) at 559; see also U.S. Const. Art. I, § 8, Cl. 18 (authorizing Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers). Indeed, the Indian Commerce Clause alone "provide[s] Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989).

Congress's plenary power over Indian affairs is also "implicit[]" in the Constitution's structure. *Mancari*, 417 U.S. at 551-552. "In the exercise of the war and

treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them * * * [a] dependent people, needing protection"—including from the States. *Id.* at 552 (quoting *Seber*, 318 U.S. at 715); see *United States* v. *Kagama*, 118 U.S. 375, 384 (1886) (observing that "[b]ecause of the local ill feeling, the people of the States where [Indian tribes] are found are often their deadliest enemies"). "Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic." *Mancari*, 417 U.S. at 552 (quoting *Seber*, 318 U.S. at 715).

Under the Constitution, the federal government thus enjoys "the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders." *Sandoval*, 231 U.S. at 46. That power and duty are "'necessary concomitants of nationality,'" part of the "Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government." *Lara*, 541 U.S. at 201 (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-322 (1936)). And they reflect the nature of the federal government's relationship with Indian tribes—a relationship that "has been characterized as akin to a guardian-ward relationship, or, in more contemporary parlance, a trust relationship." Pet. App. 76a n.23 (opinion of Dennis, J.); see *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, C.J.) (describing the Indian tribes' "relation to the United States" as "that of a ward to his guardian"); *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) (explaining

that "[t]hroughout the history of the Indian trust relationship," this Court has "recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress").

Congress's plenary power over Indian affairs finds further confirmation in "long continued legislative and executive usage." *Sandoval*, 231 U.S. at 46; see *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020) (explaining that "'a regular course of practice' can 'liquidate & settle the meaning of' disputed or indeterminate 'terms & phrases'" in the Constitution) (citation omitted). "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 234 (1985). "In 1790, at the urging of President Washington and Secretary of War Knox, Congress passed the first Indian Trade and Intercourse Act." *Id.* at 231; see Act of July 22, 1790, ch. 33, 1 Stat. 137. That "legislation provided exclusively for federal management of essential aspects of Indian affairs," including the "federalization of crimes committed by non-Indians against Indians" in Indian territory. Pet. App. 74a (opinion of Dennis, J.). And it was merely the first of a "series of Acts * * * designed to regulate trade and other forms of intercourse between the North American Indian tribes and non-Indians." *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979); see Pet. App. 74a-75a (opinion of Dennis, J.) (citing statutes). The federal government's plenary power over Indian affairs has thus "always been recognized by the Executive and by Congress, and by this [C]ourt, whenever the question has arisen." *Kagama*, 118 U.S. at 384. That shared understanding, reflected in "[l]ong settled and established practice" dating to the Founding, removes any doubt

about the existence of the power. *Chiafalo*, 140 S. Ct. at 2326 (citation omitted).

In light of the text, structure, and history of the Constitution, the en banc court of appeals correctly upheld ICWA as a valid exercise of Congress's plenary power over Indian affairs. See Pet. App. 71a-105a (opinion of Dennis, J.). In enacting ICWA, Congress specifically relied upon its "plenary power over Indian affairs," which it traced to the Indian Commerce Clause and "other constitutional authority." 25 U.S.C. 1901(1). In addition, Congress invoked its "responsibility for the protection and preservation of Indian tribes and their resources"—a responsibility Congress found evident in "statutes, treaties, and the [United States'] general course of dealing with Indian tribes." 25 U.S.C. 1901(2). And Congress expressly articulated how ICWA was connected to that responsibility, explaining that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," 25 U.S.C. 1901(3); that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," 25 U.S.C. 1901(4); and that by establishing "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes," ICWA "protect[s] the best interests of Indian children" and "promote[s] the stability and security of Indian tribes and families," 25 U.S.C. 1902.

The judges who dissented on this issue did not dispute that "Congress has ample power to legislate respecting Indians," including on matters "that go beyond trade." Pet. App. 224a (opinion of Duncan, J.). Indeed, they acknowledged that "[a]mple founding-era evidence

shows that Congress's Indian affairs power was intended to be both broad in subject matter and exclusive of state authority." *Id.* at 245a. The dissent nevertheless concluded that ICWA exceeds Congress's "Indian affairs power" on the theory that it "trespass[es] on state child-custody proceedings." *Id.* at 260a. But Congress's Indian affairs power includes a duty to protect Indians from other sovereigns, including "the people of the States." *Kagama*, 118 U.S. at 384; see Pet. App. 78a (opinion of Dennis, J.) ("Chief among the external threats to the Indian tribes were the states and their inhabitants."). And there is nothing remarkable about the fact that ICWA does so by establishing minimum federal standards that apply in state-court proceedings. See Pet. App. 98a (opinion of Dennis, J.) (citing "ample Supreme Court precedent supporting Congress's authority to enact laws applicable in state proceedings"); cf., *e.g.*, 42 U.S.C. 14932(b) (establishing similar minimum federal standards, applicable in state-court proceedings, for international adoptions). After all, the Constitution expressly provides that "the Judges in every State shall be bound" by federal law. U.S. Const. Art. VI, Cl. 2.

Notably, Texas does not embrace the dissent's reasoning on this issue. Instead, Texas principally contends that the Indian Commerce Clause should be construed to "mean substantially the same thing" as the Interstate Commerce Clause. Pet. 13 (citation omitted). No member of the en banc court of appeals adopted that view, and for good reason. See, *e.g.*, Pet. App. 85a (opinion of Dennis, J.) (finding Texas's "construction of the Indian Commerce Clause unduly cramped, at odds with both the original understanding of the clause and the Supreme Court's more recent instructions"); *id.* at 247a

(opinion of Duncan, J.) (accepting, in light of founding-era evidence, that "Congress's [Indian affairs] power goes beyond regulating tribal trade").

As this Court has recognized, "the Interstate Commerce and Indian Commerce Clauses have very different applications." *Cotton Petroleum*, 490 U.S. at 192; cf. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 446-447 (1979) (rejecting the premise "that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved"). "In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum*, 490 U.S. at 192 (citations omitted). "The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Ibid.*; see *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."). Texas's contention (Pet. I) that Congress does not have "the power under the Indian Commerce Clause or otherwise to enact" ICWA therefore lacks merit.

b. Nor does that contention satisfy any of this Court's established criteria for review. The court of appeals *upheld* ICWA as a valid exercise of Congress's plenary power over Indian affairs. Cf. *Iancu* v. *Brunetti*,

139 S. Ct. 2294, 2298 (2019) (explaining that this Court "usual[ly]" grants review "when a lower court has *invalidated* a federal statute") (emphasis added). And the court of appeals' decision upholding the statute on that ground does not conflict with any decision of this Court, another court of appeals, or any state court of last resort.

Indeed, Texas does not assert any conflict warranting this Court's review. Instead, Texas argues merely (Pet. 13) that "this Court should grant review to clarify its past statements" on the scope of Congress's Indian affairs power. This case, however, does not implicate any "confusion" over this Court's past statements. *Ibid.* Every member of the en banc court of appeals understood this Court's precedents to mean that "Congress has ample power to legislate respecting Indians," including on matters "that go beyond trade." Pet. App. 224a (opinion of Duncan, J.); see *id.* at 71a-105a (opinion of Dennis, J.). And the judges who dissented on the scope of Congress's Indian affairs power did so on a novel theory that no court has adopted and that Texas itself has not embraced. See pp. 16-17, *supra*.

Nor has Texas asked this Court to overrule any of its longstanding precedents recognizing Congress's plenary power over Indian affairs. See pp. 12-13, *supra* (citing precedents). Rather, Texas has asked (Pet. 13) this Court merely to grant review to "clarify its past statements." That is not a basis for granting review of the en banc court of appeals' decision sustaining an Act of Congress that was enacted more than forty years ago and that has served to protect Indian children, their families, and their tribes since that time.

Moreover, the question whether ICWA is a valid exercise of Congress's Indian affairs power presents an

issue distinct from the anticommandeering issue on which the federal government and the Tribes have sought certiorari. See 21-376 Pet. I, 15-21; 21-377 Pet. i, 19-29. The anticommandeering issue raised by the federal government and the Tribes turns on whether ICWA "issue[s] direct orders to the governments of the States." *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). That question is separate from whether ICWA falls within Congress's Indian affairs power. Indeed, the court of appeals understood the issues to be distinct. See Pet. App. 100a (opinion of Dennis, J.) ("first address[ing] Congress's Article I authority to legislate over ICWA's subject matter and then separately consider[ing] whether ICWA is consistent with the anticommandeering doctrine"); *id.* at 223a-261a, 280a-317a (opinion of Duncan, J.) (similar). And Texas likewise distinguishes between the two issues in its petition for a writ of certiorari. See Pet. I (first and third questions presented). Given that the issues are distinct and the question of Congress's power to enact ICWA does not satisfy this Court's standards for review, there is no sound reason for the Court to grant review of that question.

2. Texas also contends (Pet. I) that "the Indian classifications used in ICWA and its implementing regulations violate the Fifth Amendment's equal-protection guarantee." That contention likewise lacks merit and does not warrant this Court's review.

a. The en banc court of appeals correctly held that the Indian classifications in ICWA and the 2016 Rule are political, not racial, classifications and are thus subject to rational-basis review. Pet. App. 139a-166a; *id.* at 352a (Owen, C.J., concurring in part, dissenting in part). "Indian tribes are domestic dependent nations that

exercise inherent sovereign authority." *Bay Mills*, 572 U.S. at 788 (citations and internal quotation marks omitted). Members of Indian tribes are thus members of "distinct political communities." *Worcester*, 31 U.S. (6 Pet.) at 557. When Congress enacts legislation addressing Indian affairs, the distinct treatment of Indians generally reflects a "political rather than racial" classification. *Mancari*, 417 U.S. at 553 n.24. Indeed, "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution." *United States* v. *Antelope*, 430 U.S. 641, 645 (1977); see U.S. Const. Art. I, § 8, Cl. 3. And this Court has consistently upheld such laws on the ground that they are "not based upon impermissible racial classifications." *Antelope*, 430 U.S. at 645; see, *e.g.*, *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479-480 (1976); *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976) (per curiam); *Mancari*, 417 U.S. at 554-555; see also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (treaty).

In *Mancari*, for example, the Court upheld the constitutionality of a law extending a preference for employment in the BIA to individuals who were "one-fourth or more degree Indian blood and * * * member[s] of a Federally-recognized tribe." 417 U.S. at 553 n.24 (citation omitted); see *id.* at 551-555. "Although the classification had a racial component, the Court found it important that the preference was 'not directed towards a "racial" group consisting of "Indians,"' but rather 'only to members of "federally recognized" tribes.'" *Rice* v. *Cayetano*, 528 U.S. 495, 519-520 (2000) (quoting *Mancari*, 417 U.S. at 553 n.24). "In this sense," the Court held, "the preference [wa]s political rather than racial in

nature." *Mancari*, 417 U.S. at 553 n.24; see *id.* at 554 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."). The Court concluded that because the preference could "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," it did not violate the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at 555; see *id.* at 551.

The Indian classifications in ICWA and the 2016 Rule are "political" in the same sense as in *Mancari*. 417 U.S. at 553 n.24. ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. 1903(4). "Indian tribe," in turn, means a federally recognized tribe, 25 U.S.C. 1903(8)—*i.e.*, a tribe that "has entered into 'a government-to-government relationship with the United States.'" *Yellen* v. *Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434, 2440 (2021) (brackets and citation omitted). Thus, whether a child qualifies as an "Indian child" under ICWA turns entirely on the child's connection to a distinct political community. The classification is therefore "political," not "racial." *Mancari*, 417 U.S. at 553 n.24. It follows that the applicable standard of review is the one set forth in *Mancari*. As long as ICWA's definition of "Indian child" and other Indian classifications "can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians," they are consistent with equal protection. *Id.* at 555.

Texas does not contend that *Mancari* should be overruled. Nor does Texas dispute that ICWA's protections "can be rationally linked to the trust relationship between the tribes and the federal government, as well as to furthering tribal sovereignty and self-government." Pet. App. 165a. Instead, Texas contends (Pet. 22) that *Mancari*'s deferential standard of review is inapplicable in this case because "ICWA governs state child-custody proceedings, not tribal child-custody proceedings." The fact that ICWA governs state child-custody proceedings, however, has no bearing on whether the statute's Indian classifications are race-based and trigger strict scrutiny.

Contrary to Texas's contention (Pet. 21-22), this Court's decision in *Rice* does not suggest otherwise. *Rice* did not disturb *Mancari*'s holding or its underlying reasoning concerning the political nature of Indian classifications and the applicability of rational-basis review. See *Rice*, 528 U.S. at 518-520. Rather, *Rice* concluded that the interests in "Indian self-government" that the Court had recognized in upholding the particular Indian classification in *Mancari*, 417 U.S. at 555, would not permit "a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens," *Rice*, 528 U.S. at 520. That conclusion regarding whether particular interests would be sufficient to justify such a law in that unique context has no application to the question here whether Congress has discriminated on the basis of race in the first place.

b. Texas's contention that the Indian classifications in ICWA and the 2016 Rule impermissibly discriminate on the basis of race does not warrant this Court's review. The en banc court of appeals *upheld* the con-

stitutionality of ICWA's definition of "Indian child," and no member of the court accepted Texas's view that the statute discriminates on the basis of race. See Pet. App. 139a-166a; *id.* at 352a (Owen, C.J., concurring in part, dissenting in part); *id.* at 270a (opinion of Duncan, J.) (declining to decide "whether ICWA classifies by race").

Contrary to Texas's assertion (Pet. 22-23), moreover, the court of appeals' decision does not implicate any conflict warranting this Court's review. Neither of the two Ninth Circuit decisions that Texas cites (*ibid.*) involved ICWA, invalidated an Indian classification in any other federal statute, or resolved any constitutional issue. See *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1119 (9th Cir. 1998) (holding, as a matter of statutory interpretation, that the provision of Title VII prohibiting employers from discriminating on the basis of "national origin" prohibited an employer from giving a preference to members of a particular tribe in hiring), cert. denied, 528 U.S. 1098 (2000); *Williams* v. *Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997) (holding, as a matter of statutory interpretation, that a federal statute did "not preclud[e] non-natives in Alaska from owning and importing reindeer," while declining "to unnecessarily resolve" the "constitutional questions" raised by a contrary interpretation), cert. denied, 523 U.S. 1117 (1998).

Texas's reliance (Pet. 23) on various intermediate state-court decisions is likewise misplaced. Those decisions involved the so-called "existing Indian family" exception to ICWA—a judicially created exception "under which some State courts first determine[d] the 'Indianness' of the child and family before applying the Act." 81 Fed. Reg. at 38,782; see *In re Santos Y.*, 112 Cal.

Rptr. 2d 692, 715-716 (Cal. Ct. App. 2001); *S.A.* v. *E.J.P.*, 571 So. 2d 1187, 1189-1190 (Ala. Civ. App. 1990); *In re Interest of S.A.M.*, 703 S.W.2d 603, 608-609 (Mo. Ct. App. 1986). As Texas acknowledges (Pet. 23), the 2016 Rule has since clarified that the "existing Indian family" exception "has no basis in ICWA's text or purpose." 81 Fed. Reg. at 38,782. And contrary to Texas's contention (Pet. 23), the 2016 Rule's rejection of that exception reinforces, rather than undermines, the fact that ICWA's definition of "Indian child" is a political classification because of its link to tribal membership; indeed, the rule makes clear that a court "may not consider factors" outside that statutory definition. 25 C.F.R. 23.103(c). In any event, any tension between the decision below and the decisions of intermediate state courts would not warrant this Court's review. See Sup. Ct. R. 10(a) (stating that, in deciding whether to grant a writ of certiorari, the Court considers whether a court of appeals "has decided an important federal question in a way that conflicts with a decision by a state court of last resort").

The federal government and the Tribes have asked this Court to grant review on whether the en banc court of appeals erred in affirming the judgment declaring two of ICWA's placement preferences—for "other Indian families," 25 U.S.C. 1915(a)(3), and for "Indian foster home[s]," 25 U.S.C. 1915(b)(iii)—unconstitutional. See 21-376 Pet. I, 26-30; 21-377 Pet. i, 35-38. In particular, the federal government and the Tribes ask this Court to decide whether the en banc court erred in reaching the merits of the constitutionality of these provisions at all and, if not, whether Section 1915(a)(3) and (b)(iii) satisfy *Mancari*'s deferential standard of review. See 21-376 Pet. I, 21-30; 21-377 Pet. i-ii, 30-38. Review of those issues would not require the Court to revisit the

en banc court's determination—which no member of the en banc court disputed—that *Mancari*'s deferential standard of review applies here. See p. 24, *supra*. Accordingly, there is no sound reason to grant review of the racial-discrimination issue that Texas raises here.

c. In any event, even if the issue otherwise warranted this Court's review, Texas's certiorari petition would be a poor vehicle for the Court to address whether the Indian classifications in ICWA and the 2016 Rule impermissibly discriminate on the basis of race. "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966). "Nor does a State have standing as the parent of its citizens to invoke [the Fifth Amendment] against the Federal Government, the ultimate *parens patriae* of every American citizen." *Id.* at 324; see, *e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007) (explaining that the Court's decision in *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), prohibits "allowing a State 'to protect her citizens from the operation of federal statutes'") (citation omitted); *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as *parens patriae* to bring an action against the Federal Government."). Thus, as all eight members of the en banc court who addressed the issue concluded, Texas lacks standing as *parens patriae* to challenge the Indian classifications in ICWA and the 2016 Rule on equal protection grounds. See Pet. App. 55a n.13 (opinion of Dennis, J.) (concluding that Texas lacks standing to bring an equal protection challenge); *id.* at 373a n.2 (Costa, J., concurring in part and dissenting in part) (same); *id.* at 218a

n.13 (opinion of Duncan, J.) (declining to reach the issue).

Texas argued below that, at a minimum, it has "standing to bring an equal-protection challenge to the [2016] Rule under the APA." States C.A. Br. 19 n.3. But "the APA evinces no congressional intent to authorize a State as *parens patriae* to sue the federal government." *Government of Manitoba* v. *Bernhardt*, 923 F.3d 173, 181 (D.C. Cir. 2019). Thus, the rule that a State lacks standing as *parens patriae* to sue the federal government also bars Texas's challenge to the 2016 Rule under the APA. See *ibid.*

3. Texas further contends (Pet. I) that "ICWA and its implementing regulations violate the anticommandeering doctrine by requiring States to implement Congress's child-custody regime."

a. Texas observes (Pet. 26-27) that the en banc court of appeals' decision "was mixed, holding that some provisions of ICWA violated the anticommandeering doctrine, some merely preempted state law, and some violated the anticommandeering doctrine when applied to state agencies but were permissible preemption when applied to state courts." Texas contends (Pet. 27) that the court erred in holding that the provisions in the "last category" were "permissible preemption [provisions] when applied to state courts."

That contention lacks merit. "ICWA requires courts to place Indian children with certain persons (§ 1915), and also requires courts to make specific findings under a heightened standard of proof before an Indian child may be placed in a foster home or his parents' rights terminated (§ 1912(e) and (f))." Pet. App. 312a. Those provisions establish "substantive child-custody standards applicable in state child-custody proceedings." *Ibid.*

The Supremacy Clause requires state judges to apply such "federal standards" "even in realms of traditional state authority such as family and community property law." *Ibid.* Thus, as every member of the en banc court correctly recognized, "ICWA's substantive standards requiring state courts to observe placement preferences (§ 1915) and make placement or termination findings (§ 1912(e) and (f)) are valid preemption provisions." *Id.* at 313a; see *id.* at 111a-114a (opinion of Dennis, J.) (concluding that "§ 1912(e) and (f)'s evidentiary standards and § 1915(a) and (b)'s placement's preferences simply supply substantive rules enforceable in state court and do not violate the Tenth Amendment").

Texas's contention that the en banc court of appeals erred does not warrant this Court's review. The en banc court unanimously *upheld* the constitutionality of those provisions as applied to state courts, and that decision does not conflict with any decision of this Court, another court of appeals, or any state court of last resort.

b. To the extent Texas seeks review (Pet. 25-26) of the anticommandeering challenges on which it *prevailed* below, Texas seeks review of the same anticommandeering question presented in the federal government's and the Tribes' petitions for writs of certiorari. See 21-376 Pet. I, 15-21; 21-377 Pet. i, 19-29. But Texas has not explained why it should be "exempt[ed]" from this Court's "usual rule against considering prevailing parties' petitions." *Camreta* v. *Greene*, 563 U.S. 692, 709 (2011). The federal government's and the Tribes' petitions are therefore the only suitable vehicles for addressing the anticommandeering challenges on which Texas prevailed.

4. Finally, Texas contends (Pet. I) that "ICWA and its implementing regulations violate the nondelegation

doctrine by allowing individual tribes to alter the placement preferences enacted by Congress." That contention also is incorrect and does not warrant this Court's review.

a. Section 1915(a) and (b) establish default preferences for the placement of Indian children in adoptive or foster homes. 25 U.S.C. 1915(a) and (b). Section 1915(c) provides:

> In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section.

25 U.S.C. 1915(c); see 25 C.F.R. 23.130(b), 23.131(c).

The en banc court of appeals correctly determined that Section 1915(c) and its implementing regulations do not violate the nondelegation doctrine. Pet. App. 166a-179a. Indian tribes are "'distinct, independent political communities' exercising sovereign authority." *Cooley*, 141 S. Ct. at 1642 (citation omitted). As such, they "possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life." *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). That authority includes the power to legislate on matters related to tribal members and their children. See *Wheeler*, 435 U.S. at 322 n.18.

In *Mazurie*, this Court held that such "independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils [a] portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'" 419 U.S. at 557. A tribe's independent authority

to legislate on matters related to its members and their children is likewise sufficient here. Pet. App. 170a-172a. Moreover, this Court "has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine." *Id.* at 168a; see *United States* v. *Sharpnack*, 355 U.S. 286, 293-294 (1958); see also, *e.g.*, 28 U.S.C. 1346(b)(1) (basing the tort liability of the United States on "the [state] law of the place where the act or omission occurred"). Thus, as the en banc court of appeals held, Section 1915(c) "validly integrates tribal sovereigns' decision-making into federal law." Pet. App. 179a.

Texas contends (Pet. 29) that ICWA "gives [tribes] power to change the law enacted by Congress." But Section 1915(c) itself is a "law enacted by Congress." It is simply a choice-of-law provision calling for agencies and courts to follow a different order of preference established by a tribe under certain circumstances. When agencies and courts do so, they are following the law enacted by Congress, not changing it.

b. Texas's contention that Section 1915(c) and its implementing regulations violate the nondelegation doctrine does not satisfy any of this Court's criteria for review. Texas does not challenge the invalidation of an Act of Congress. And the en banc court of appeals' rejection of Texas's nondelegation claim does not conflict with any decision of this Court, another court of appeals, or any state court of last resort.

c. In any event, this case would be a poor vehicle for this Court's review of the nondelegation issue because Texas lacks Article III standing to challenge Section 1915(c) and its implementing regulations. "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent.'" *Clapper* v. *Amnesty*

Int'l USA, 568 U.S. 398, 409 (2013) (citation omitted). In concluding that Texas had made that showing with respect to its nondelegation challenge, the en banc court of appeals observed that one tribe in Texas, the Alabama-Coushatta Tribe, "has already filed their reordered placement preferences with Texas's Department of Family and Protective Services." Pet. App. 66a (opinion of Dennis, J.); see *id.* at 216a n.11 (opinion of Duncan, J.). But Texas has not explained how any difference between that tribe's order and the default order set forth in Section 1915(a) and (b) could injure the State. After all, the default order is one established by Congress, not Texas, so the tribe's order of preference would not displace any order established by the State.

Moreover, even if Texas could show potential injury from application of the Alabama-Coushatta Tribe's order of preference, it would still have to show that any such injury was "certainly impending." *Clapper*, 568 U.S. at 409 (citation and emphasis omitted). Texas, however, can only speculate that it will be a party to a child-custody proceeding involving the Alabama-Coushatta Tribe in the imminent future. And it can only speculate that the reordered preferences will actually play a role in such a future proceeding—which they would do only if a court finds that they result in a placement that is "the least restrictive setting appropriate to the particular needs of the child." 25 U.S.C. 1915(c). Thus, even if it were possible for Texas to identify a cognizable injury based on the Alabama-Coushatta Tribe's different order of preference, any such injury is "too speculative for Article III purposes." *Clapper*, 568 U.S. at 409 (citation omitted). In any event, a declaratory judgment against the federal defendants in this case would not be binding

on a Texas state court in which any such placement issue might arise in the future. See 21-376 Pet. 25-26.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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