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.*,
Petitioners,

v.

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

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE STATES OF CALIFORNIA, ARIZONA, COLORADO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, UTAH, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF THE FEDERAL AND TRIBAL PARTIES

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August 19, 2022

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

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.*,

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INTERESTS OF AMICI

Amici curiae are the States of California, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, and Wisconsin, and the District of Columbia. We submit this brief in support of the federal and tribal parties defending the constitutionality of the Indian Child Welfare Act (ICWA) and its implementing regulations.

Amici States have a compelling interest in the wellbeing of Indian children in our jurisdictions. That interest is especially acute with respect to minors in child-custody proceedings, who are typically in a vulnerable position. We also have a powerful interest in maintaining mutually beneficial relationships with Indian Tribes—who share our interest in the wellbeing of Indian children.

Amici comprise small States and large ones, from every corner of our Nation, with a wide range of political beliefs and policy preferences. We disagree on many things. But we all agree that ICWA is a critical—and constitutionally valid—framework for managing state-tribal relations, protecting the rights of Indian children, and preventing the unwarranted displacement of Indian children from their families and communities.

SUMMARY OF ARGUMENT

1. Congress enacted ICWA in 1978 in response to a serious and pervasive problem: States and private parties were initiating child-custody proceedings that removed significant numbers of Indian children from their Indian families and placed those children in the

custody of non-Indian adoptive families and foster homes. Those removals were often made without good cause and sometimes reflected bias against the Indian families' tribal heritage and customs. This not only harms the children, their families, and their tribal communities; it also poses an existential threat to the continuity and vitality of Tribes, as it is almost impossible for children removed in this manner to remain or become active members of their Tribes.

Congress addressed this problem in ICWA by establishing minimum federal standards governing the breakup of Indian families. ICWA protects the rights of Indian children, parents, and Tribes in state child-custody proceedings, and seeks to promote the placement of Indian children with members of their extended families or with other tribal homes.

In the experience of amici States, ICWA has largely worked as Congress intended. Disparities in the rates of removal of Indian children from their families, as compared to non-Indian children, have fallen—though disparities do persist, underscoring the ongoing need for ICWA. When removal is necessary, ICWA makes it more likely that Indian children will be placed with their extended family or other tribal members. As Congress contemplated, those outcomes have served the interests of Indian children, families, and Tribes. In addition, many States and Tribes have incorporated ICWA's framework into their own statutes and policies governing child-and-family services.

2. These consolidated cases present several questions regarding the constitutionality of ICWA and its implementing regulations. In light of the historical backdrop that prompted Congress to enact ICWA, and the important federalism principles implicated by these constitutional challenges, amici States have a

unique perspective on this case. In our view, plaintiffs' challenges to ICWA are not supported by this Court's precedent or by the text or history of the relevant constitutional provisions.

a. ICWA is a valid exercise of Congress's powers. This Court has long recognized that the Constitution's war, treaty, and commerce powers authorize the Federal Government to manage relations with Indian Tribes. That recognition aligns with both the original understanding of the Constitution and longstanding historical practice. Because ICWA concerns a matter of the utmost importance to tribal relations—the ability of Tribes to sustain their existence by raising children who are connected to their tribal communities—Congress did not exceed its enumerated powers in enacting the statute. Contrary to plaintiffs' assertions, ICWA may be upheld on that basis without suggesting that Congress has unbounded authority to legislate on every subject affecting Indians.

b. The challenged provisions of ICWA do not violate the anticommandeering doctrine. That doctrine is a matter of special concern to amici States. It prohibits Congress from issuing any direct command to state governments or requiring States to enact (or refrain from enacting) any law. Where appropriate, amici States have challenged federal laws under the anticommandeering doctrine. But ICWA does not do any of the things that the doctrine prohibits. Instead, ICWA imposes restrictions that apply to private actors as well as States and confers rights on individuals involved in child-custody proceedings—making it a valid federal statute with preemptive effect.

c. Nor does ICWA violate equal protection. As this Court has held, legal distinctions based on a person's connections to an Indian Tribe are political rather

than racial in nature, and thus do not trigger strict scrutiny. Plaintiffs' argument to the contrary is untenable as a matter of constitutional interpretation, and would call into question the validity of many federal and state statutes. Instead, plaintiffs' equal protection claim is subject to rational basis review, and ICWA readily satisfies that deferential test.

ARGUMENT

I. ICWA IS A CRITICAL TOOL FOR PROTECTING INDIAN CHILDREN AND FOSTERING STATE-TRIBAL COLLABORATION

In the four decades since Congress enacted ICWA, the statute has become the foundation of state-tribal relations in the realm of child custody and family services. In urging this Court to declare many of ICWA's central provisions unconstitutional, Texas and the private plaintiffs seek to undermine a framework that States have relied on to protect the rights of Indian children, parents, and Tribes.

Congress enacted ICWA as a response to a "child welfare crisis . . . of massive proportions" in which Indian children faced "vastly greater risks" of involuntary, unwarranted removal from their families and communities than non-Indian children. H.R. Rep. No. 95-1386, at 9 (1978); *see* 25 U.S.C. § 1901 (congressional findings); *infra* pp. 15-16. To combat that problem, ICWA "establish[es] 'a federal policy that, where possible, an Indian child should remain in the Indian community.'" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989).

In the experience of amici States, that federal policy has improved outcomes for Indian children, their families, and Tribes. ICWA's "minimum Federal standards for the removal of Indian children from

their families," 25 U.S.C. § 1902, reduce unwarranted removals of Indian children. Those standards directly benefit Indian children and their families because removals of children from their families and cultural communities often result in significant harm.[1] Further, ICWA's preference for placing children with relatives enhances those children's placement stability and decreases the likelihood that they will return to foster care.[2] And the vast majority of Indian children who must be removed are placed in accordance with ICWA's placement preferences—most often with a member of their extended family. One study found that 83 percent of the Indian children whose child custody records were analyzed "were placed within the preferences outlined by ICWA," and 55 percent were placed with extended family members.[3]

The evidence also indicates that most state courts are abiding by ICWA's requirement that involuntary termination of parental rights may occur only when there is "a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of

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[1] *See, e.g.*, Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 527-542 (2019) (discussing the various harms and traumas that result from removals, including those specific to minority children).

[2] *See* Zug, *ICWA's Irony*, 45 Am. Indian L. Rev. 1, 58 (2021) (citing Vesneski et al., *An Analysis of State Law and Policy Regarding Subsidized Guardianship for Children: Innovations in Permanency*, 21 U.C. Davis J. Juv. L. & Pol'y 27, 37 (2017)).

[3] *See* Limb et al., *An Empirical Examination of the Indian Child Welfare Act and Its Impact on Cultural and Familial Preservation for American Indian Children*, 28 Child Abuse & Neglect 1279, 1285 (2004), https://tinyurl.com/2bnpnepb.

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(f).[4] And ICWA's emphasis on family preservation aligns with the current best practices recommended by child welfare experts.[5]

The experiences of amici States also demonstrate the value of ICWA's requirement that parties seeking to terminate parental rights or effect foster-care placement must make "active efforts" to "provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). While disparities between removal rates for Indian and non-Indian children have not been eliminated—underscoring the ongoing need for ICWA—studies show that those disparities are significantly narrower than they were in the years before Congress enacted ICWA.[6] In Utah, for example, an Indian child in 1976 was 1,500 times more likely to be in foster care than a non-Indian child; by 2012, Indian children were 4 times more likely to be in foster care.[7] And when foster-care placement is necessary, Indian children are now more likely to be placed with extended family

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[4] *See* Limb, *supra* note 3, at 1285 (finding that 89 percent of the cases it analyzed involving involuntary termination of parental rights satisfied this requirement).

[5] *See, e.g.*, Zug, *supra* note 2, at 2, 5-19.

[6] *See* Padilla & Summers, *Disproportionality Rates for Children of Color in Foster Care*, Nat'l Council of Juv. & Fam. Ct. Judges (May 2011), https://tinyurl.com/5dhcu8cy.

[7] Adams, *American Indian Children Too Often in Foster Care*, Salt Lake Trib. (Mar. 24, 2012), https://tinyurl.com/kccedfxa. While this statistic reflects considerable progress, the continuing disparity (even at a lower rate) demonstrates the ongoing need for ICWA's protections.

members. For example, a 2019 study found that 90 percent of Indian children in foster care were placed with family members, compared with 86 percent for children overall in foster care.[8]

Apart from ICWA's minimum federal standards for child-custody proceedings, other provisions of the Act have facilitated robust state-tribal collaboration that benefits Indian children, families, and the States in which they live. ICWA authorizes States and Tribes to "enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings." 25 U.S.C. § 1919(a). As of 2017, 10 States had used this authority to enter into agreements with 37 different Tribes.[9] Several States—including Alaska, Arizona, Michigan, New Mexico, Utah, and Washington—have entered into these types of agreements, effectuating ICWA's policy objectives in state child welfare proceedings.[10] In

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[8] Annie E. Casey Found., *Keeping Kids in Families: Trends in U.S. Foster Care Placement* (Apr. 2019), at 2, https://tinyurl.com/4fsxxs2s.

[9] Ass'n on Am. Indian Affairs, *A Survey and Analysis of Tribal-State Indian Child Welfare Act Agreements* (June 2017), at 2, https://tinyurl.com/utx86mb6.

[10] *See* Alaska Tribal Child Welfare Compact (Dec. 15, 2017), https://tinyurl.com/reyxv7sf; Indian Child Welfare Act Memorandum of Agreement Between the State of Arizona and the Navajo Nation (May 3, 2019), https://tinyurl.com/p9w3475n; Indian Child Welfare Act Agreement Between the Saginaw Chippewa Indian Tribe of Michigan and the Michigan Department of Human Services (2014), https://tinyurl.com/3utz3pkb; N.M. Children, Youth & Families Dep't, *State-Tribal Collaboration Act, 2020 Agency Report*, https://tinyurl.com/sprw3w6n; Utah Div. of Child & Family Servs., *CFSP Final Report for Federal Fiscal Years 2010-2014 and CAPTA Update* (June 30, 2014), https://

Utah, for example, the state Department of Human Services and the Navajo Nation have agreed to "work cooperatively in all child custody proceedings to protect the best interest[s] of Navajo children and the legal rights of their parents and Indian custodians."[11] In Nevada, the State has established a Child Welfare Steering Committee composed of tribal, federal, state, county, and community representatives.[12]

The tribal-state cooperation facilitated by ICWA extends to the judicial branch as well. For example, court systems in Arizona, California, and Michigan have established units or adopted guidance focused on enhancing coordination with Tribes in custody proceedings.[13] And several States—including Arizona, Minnesota, Montana, and New Mexico—have created specialized courts to adjudicate such cases.[14]

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tinyurl.com/bs2zvbmy; Wash. Tribal/State Memorandums of Agreement, https://tinyurl.com/3vjcvs.

[11] *See* Indian Child Welfare Intergovernmental Agreement Between the Utah Department of Human Services, Division of Child and Family Services and the Navajo Nation 3 (2019), https://tinyurl.com/yrce33nr.

[12] Nev. Dep't of Health & Hum. Servs. Div. of Child & Fam. Servs., *Indian Child Welfare Act (ICWA)*, https://tinyurl.com/y65hkmpv.

[13] *See* Ariz. Courts, *ICWA Committee*, https://tinyurl.com/y4sb43sy; Judicial Council of Cal., *S.T.E.P.S. to Justice—Tribal Customary Adoption in California* (Feb. 2019), https://tinyurl.com/pckbjhj2; Mich. Court Improvement Program et al., *Michigan Indian Family Preservation Act of 2013 and Indian Child Welfare Act of 1978: A Court Resource Guide (2017)*, https://tinyurl.com/5ds4856b.

[14] *See* Nat'l Council of Juvenile & Fam. Court Judges, *ICWA Courts*, https://tinyurl.com/53ur8fy2.

Many States also use ICWA as a foundation for their own child-custody laws. Some directly incorporate ICWA's provisions into state law. *See, e.g.*, Ariz. Rev. Stat. § 8-815(B); Colo. Rev. Stat. § 19-1-126; Vt. Stat. Ann., tit. 33, § 5120. Others use ICWA as a starting point but add their own state law protections. Michigan, Nebraska, and Washington, for instance, build on ICWA's terminology by spelling out in more deatil what "active efforts" entails, *see* Mich. Comp. Laws § 712B.3(a); Neb. Rev. Stat. § 43-1503; Wash. Rev. Code § 13.38.040(1), and add more detailed placement preferences to supplement those in the federal statute, *see* Mich. Comp. Laws § 712B.23; Neb. Rev. Stat. § 43-1508; Wash. Rev. Code § 13.38.180. California adopts many of ICWA's definitions, *see* Cal. Fam. Code § 170(a)-(c), but imposes its own supplemental notice requirements, *id.* § 180. And Oklahoma and Wisconsin extend ICWA's protections to custodial situations that may not be covered by federal law. *See* Okla. Stat. § 40.3(B); Wis. Stat. § 48.028(3)(a); *compare Adoptive Couple v. Baby Girl*, 570 U.S. 637, 647-651 (2013). These are just a few examples of the many ways in which States incorporate and adapt ICWA in their own laws.

Outside of direct codification in state statute, States rely on ICWA to craft their administrative policies and practices.[15] Idaho and Minnesota, for example, publish step-by-step guides to help ensure that

[15] *See, e.g.*, State of Alaska, Dep't of Health & Soc. Servs., Off. of Children's Servs., *Child Protective Services Manual: 1.5 The Indian Child Welfare Act (ICWA)* (2003), https://tinyurl.com/4akfjnyy; 89 Ill. Admin. Code, Ch. III, subch. (a), Part 307, https://tinyurl.com/4633dvmc; Ind. Dep't of Child Servs., *Child Welfare Policy: Indian Child Welfare Act* (2019), https://tinyurl.com/ycackh2j; Ky. Dep't for Cmty. Based Servs., *Standards of*

parties comply with applicable federal and state laws regarding placement of Indian children.[16] These documents are typically tailored to the particular needs and circumstances of each State. Alabama's manual, for instance, discusses that State's agreement with the Porch Band of Creek Indians and describes particular procedures for children affiliated with that Tribe.[17]

Practice Online Manual: 4.2 Indian Child Welfare Act (ICWA) (2019), https://tinyurl.com/2p8sdmub; Md. Dep't of Hum. Res., *Policy Directive SSA-CW #16-5* (2015), https://tinyurl.com/2p8325b8; Mich. Dep't of Health & Hum. Servs., *Native American Affairs Policy Manual* (2021), https://tinyurl.com/yd7dd6s9; Miss. Dep't of Child Protection Servs., *Policies and Procedures: Indian Child Welfare Act (ICWA)* (2017), https://tinyurl.com/bdzaukx8; Mont. Dep't of Pub. Health & Hum. Servs., *Child and Family Services Policy Manual: Legal Procedure, Indian Child Welfare Act* (2017), https://tinyurl.com/3anywnje; N.J. Dep't of Child & Fams., *Policy Manual: Indian Child Welfare Act and Native American Placements* (2019), https://tinyurl.com/y35axky6; N.D. Dep't of Hum. Servs., *Indian Child Welfare Act (ICWA) 624-05-15-52, PI 17-32* (2017), https://tinyurl.com/3yced8ea; Okla. Hum. Servs. Dep't, *Child Welfare: Working with Indian Children OAC 340-075-19*, https://tinyurl.com/4pndw7rx; Va. Dep't of Soc. Servs., *Child and Family Services Manual, C. Child Protective Services, 1.11 Appendix A: Indian Child Welfare Act (ICWA)* (2020), https://tinyurl.com/d4j72stv; Wyo. Dep't of Fam. Servs., *Protective and Juvenile Services Manual, 2.6 Indian Child Welfare Act (ICWA)* (2017), https://tinyurl.com/bdzanry4.

[16] *See* Idaho Dep't of Health & Welfare, *Standard for Implementing the Indian Child Welfare Act* (2019), https://tinyurl.com/catbszyn; Minn. Dep't of Hum. Servs., *Indian Children Welfare Manual*, https://tinyurl.com/yc4tukkf. Minnesota also created an Ombudsperson for American Indian Families to monitor compliance and assist state courts. Minn. Stat. § 3.9215.

[17] *See* Ala. Dep't of Hum. Res., *Indian Child Welfare Policies and Procedures* (2013), https://tinyurl.com/4p88uevv.

To be sure, in the absence of ICWA, States might act on their own to address the policy concerns underlying ICWA. But ICWA provides a valuable foundation for those efforts, establishing a nationwide baseline policy upon which States can build their own laws. Invalidating the statute in whole or in part could force States and Tribes to start from scratch. That would unnecessarily disrupt well-settled practices, while also threatening to undermine the positive results States and Tribes have achieved under ICWA. Those practical concerns underscore the gravity of this case for both States and Tribes.

II. ICWA AND ITS IMPLEMENTING REGULATIONS ARE CONSTITUTIONAL

Texas and the private plaintiffs raise far-reaching constitutional challenges to ICWA. The Court should reject these claims, which lack a persuasive basis in precedent or in the original understanding of the relevant constitutional provisions.

A. ICWA Is a Valid Exercise of Congress's Powers over Indian Affairs

In arguing that Congress lacked the constitutional authority to enact ICWA, plaintiffs assert that any contrary result would mean that Congress has the authority to regulate "all affairs that happen to involve an individual Indian." Brackeen Br. 47; *see* Texas Br. 37 (arguing that upholding ICWA would allow Congress to "create different rules for any state-court proceeding involving an Indian"). That is not correct. Congress enacted ICWA in response to a specific problem—the unwarranted removal of Indian children from Indian homes—that was imperiling relations with Tribes and threatening the Tribes' very existence. Under these particular circumstances, and in light of the original understanding of the Constitution

and established historical practice, this Court may uphold ICWA as a permissible exercise of Congress's authority to manage relations with Tribes and to protect tribal interests. Such a holding would not imply that Congress has unbounded authority to legislate on every subject affecting Indians.

1. The Constitution empowers the Federal Government to manage relations with Indian Tribes. As Chief Justice Marshall explained, "the powers of war and peace; of making treaties; and of regulating commerce . . . *with the Indian tribes*" collectively "comprehend all that is required for the regulation of our intercourse with the Indians." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).[18] The Constitution "discarded" the "shackles imposed on this power" by the Articles of Confederation. *Id.*; *accord Oneida County v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law.").

Chief Justice Marshall's view aligns with the dominant understanding of congressional power at the time of the founding. "'[D]uring the first century of America's national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law.'" *United States v. Lara*, 541 U.S. 193, 201 (2004) (quoting Cohen, Handbook of Federal Indian Law 208 (1982 ed.) (Cohen 1982)). "[D]iplomacy and politics" were "the defining feature of Native-colonial relations"; terms such as "commerce," "intercourse," and "trade," which were

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[18] Abrogated on other grounds as recognized in, *e.g.*, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022).

widely used to describe interactions with Indians during this period, were "understood almost solely through this political and diplomatic lens." Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1030 (2015).

In keeping with that understanding, "most of those who drafted and interpreted the Constitution wrote of authority over Indian affairs as an interrelated, coherent bundle of powers"—specifically, as "the interplay of the national government's diplomatic, military, and commercial authority." Ablavsky, *supra*, 124 Yale L.J. at 1040, 1042. From the very earliest days under the new Constitution, both federal and state officials recognized that "'the sole management of Indian affairs is now committed'" to the Federal Government. *Id.* at 1043 (quoting Letter from Charles Pinckney to George Washington (Dec. 14, 1789), in 4 The Papers of George Washington: Presidential Series 401, 404 (Twohig ed., 1993)).

Congress has exercised that power ever since the First Congress, which enacted the Indian Trade and Intercourse Act. *See* Act of July 22, 1790, 1 Cong. ch. 33, 1 Stat. 137. That law provided for "exclusive[] . . . federal management of essential aspects of Indian affairs," including commercial relations, land purchases, and crimes committed against Indians by non-Indians. 21-376 Pet. App. 74a (citing Cohen, Handbook of Federal Indian Law § 1.03[2] (2012 ed.)). Congress enacted a series of similar laws throughout the late eighteenth and early nineteenth centuries. *See id.* (collecting statutes); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664-665 (1979) (citing statutes from 1802, 1822, and 1834). As plaintiffs acknowledge (*see* Texas Br. 30), these laws went well beyond mere trade sregulation, instead addressing a broad array of issues

affecting relations with Tribes. For instance, "[b]ecause of recurring trespass upon and illegal occupation of Indian territory, a major purpose of these Acts" was to "prohibit[]" non-Indians "from settling on tribal properties." *Wilson*, 442 U.S. at 664.

Of course, these issues were also frequently the subject of treaties between the United States and Indian Tribes, until "Congress ended the practice of entering into treaties with the Indian tribes" in 1871. *Lara*, 541 U.S. at 201 (citing 25 U.S.C. § 71). But that statutory change "'in no way affected'" the scope of Congress's Indian affairs power. *Id.* (quoting *Antoine v. Washington*, 420 U.S. 194, 203 (1975)). In the years since then, in lieu of new treaties, Congress has undertaken an obligation to maintain a "general trust relationship between the United States and the Indian people." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011). The management of that trust relationship "is a sovereign function subject to the plenary authority of Congress," and entails "moral obligations of the highest responsibility." *Id.* at 175, 176. Congress undertook that responsibility because, "[i]n the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force," creating a "necessity" for the United States to "furnish[] . . . protection" to the Tribes. *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *accord Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).[19]

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[19] Although the war and treaty powers are vested partly in Congress and partly in the President, the Necessary and Proper Clause empowers Congress "to make all Laws which shall be necessary and proper for carrying into Execution" all "Powers vested

2. Viewed in light of that history, ICWA is a permissible exercise of Congress's power to manage relations with Tribes and to protect tribal interests. Congress sought to end a practice—the unwarranted removal of Indian children from Indian homes—that was impairing governmental relations with Tribes and imperiling tribal communities, and which the federal government has the authority to remedy given its trust relationship with the Tribes.

In enacting ICWA, Congress set forth its rationale in plain terms. It found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). It also recognized 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," with "an alarmingly high percentage of such children . . . placed in non-Indian foster and adoptive homes and institutions." *Id.* § 1901(4). And it found that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the es-

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by this Constitution in the Government of the United States," including the Executive Branch. U.S. Const. art. I, § 8, cl. 18; *see, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 16 (2015). The Necessary and Proper Clause thus provides an additional source of authority for Congress to enact legislation to protect tribal interests and manage relations with Tribes. *See* Cohen 1982, *supra*, at 211; *United States v. Kagama*, 118 U.S. 375, 384 (1886).

sential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* § 1901(5).

The testimony and evidence Congress considered amply supported these findings. Multiple studies indicated that "25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions." H.R. Rep. No. 95-1386, at 9. Those removals created "shocking" disparities, with Indian children anywhere from five to twenty times more likely to be placed in foster or adoptive care. *Id.* And the removals were largely unwarranted, resulting from "ignoran[ce] of Indian cultural values and social norms," *id.* at 10, as well as flat-out "'contempt[],'" *Holyfield*, 490 U.S. at 35 (quoting Hearings on S. 1214 Before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978) (1978 Hearings), at 191-192).

Understandably, Tribes viewed this practice as an existential threat. One tribal chief explained that "'the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People." *Holyfield*, 490 U.S. at 34 (quoting 1978 Hearings at 193). The removals also "seriously undercut the tribes' ability to continue as self-governing communities." *Id.* The House Report similarly observed that "there can be no greater threat to essential tribal relations and no greater infringement on the right of the Tribe to govern themselves than to interfere with tribal control over the custody of their children." H.R. Rep. No. 95-1386, at 15 (internal quotation marks omitted). Confronted with this

threat, Congress validly exercised its authority to manage relations with Indian Tribes and fulfill its trust obligations by adopting a legal framework that would protect tribal relations, tribal well-being, and Indian children.

3. Contrary to the arguments advanced by plaintiffs, this Court may uphold ICWA without suggesting that Congress may regulate "all affairs that happen to involve an individual Indian." Brackeen Br. 47. For example, recognizing that ICWA is a permissible exercise of congressional authority to manage relations with Tribes would not imply that Congress's Indian affairs authority encompasses any general "police power." *Id.* at 58; *cf. Adoptive Couple v. Baby Girl*, 570 U.S. 637, 660 (2013) (Thomas, J., concurring) (Congress lacks "general police powers with respect to Indians").

Likewise, a decision affirming ICWA's constitutionality would not suggest that Congress may create "Indian-specific rules for state prosecutions or for the enforcement of contracts." Texas Br. 37. As just discussed (*supra*, pp. 15-17), Congress enacted ICWA in response to a specific, well-documented problem that was imperiling federal and state relations with Tribes and threatening the Tribes' very existence. Amici States are not aware of any similar dynamic that would justify the hypothetical statutes plaintiffs posit. And it is telling that plaintiffs do not point to any *actual* statutes along those lines: Congress has not enacted any such legislation during the more than four decades that ICWA has been on the books. If Congress were to do so in the future, the constitutionality of that legislation could be litigated at that time. A decision upholding ICWA as a permissible exercise of the Federal Government's power to manage relations with

Tribes, in light of the record before Congress when it enacted ICWA, would have little (if any) bearing on whether the kinds of hypothetical laws plaintiffs discuss could be justified on similar grounds.

Plaintiffs also contend that ICWA impermissibly seeks to regulate domestic relations, a subject traditionally reserved to the States. Texas Br. 36-37; Brackeen Br. 54-55. But ICWA fits comfortably alongside other statutes Congress has enacted that establish federal standards to be applied when state domestic-relations proceedings implicate particular federal interests. For example, the Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 839, sets minimum federal standards to be applied in state child-custody proceedings involving international adoptions. *See* 42 U.S.C. § 14932(b). Other federal statutes validly preempt contrary state domestic relations laws in areas such as military retirement benefits, *see McCarty v. McCarty*, 453 U.S. 210, 235-236 (1981), and railroad workers' pensions, *see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584, 590 (1979); *see also id.* at 582 (describing other similar cases).[20] This Court has recognized that while "[t]he whole subject" of "domestic relations . . . belongs to the laws of the States and not to the laws of the United States," Congress may nonetheless preempt state domestic relations law where doing so is "necessary to forestall . . . an injury to federal rights." *Id.* at 581, 582. That is precisely what Congress did in enacting ICWA.

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[20] *McCarty* was superseded by statute on other grounds, as recognized in *Howell v. Howell*, 137 S. Ct. 1400, 1403 (2017).

B. ICWA Does Not Violate the Anticommandeering Doctrine

Plaintiffs also assert that several provisions of ICWA violate the anticommandeering doctrine. Texas Br. 60-69; Brackeen Br. 59-70. Amici States have a unique perspective on that doctrine, which is essential to the Constitution's structural protection of state sovereignty and autonomy. In appropriate circumstances we have invoked the doctrine to challenge federal overreach. But the anticommandeering doctrine is not without limits. Here, rather than impermissibly seeking to commandeer state governments, the challenged provisions of ICWA properly confer substantive federal rights and restrictions on parties in state child-custody proceedings.

1. The anticommandeering doctrine is "the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018); *accord New York v. United States*, 505 U.S. 144, 166 (1992). "[E]ven where Congress has the authority" to "requir[e] or prohibit[] certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Murphy*, 138 S. Ct. at 1477. For example, Congress may not "command[] state legislatures to enact or refrain from enacting state law," *id.* at 1478, or "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 935 (1997).

There are "several reasons" why "the anticommandeering principle is important." *Murphy*, 138 S. Ct. at 1477. First, it seeks to ensure a "healthy balance of

power between the States and the Federal Government," reducing "the risk of tyranny and abuse from either front." *Id.* Second, it "promotes political accountability" because "if a State imposes regulations only because it has been commanded to by Congress, responsibility is blurred." *Id.* And third, it "prevents Congress from shifting the costs of [a] regulation to the States." *Id.*

In *Murphy*, the Court explained the difference between an impermissible attempt to commandeer state government and a "valid preemption provision" that takes precedence over state law "in case of a conflict" between the two. 138 S. Ct. at 1479. A valid preemption provision "must satisfy two requirements." *Id.* "First, it must represent the exercise of a power conferred on Congress by the Constitution"; merely "pointing to the Supremacy Clause will not do" because "that Clause is not an independent grant of legislative power to Congress." *Id.* Second, because "the Constitution "'confers upon Congress the power to regulate individuals, not States,'" the provision "must be best read as one that regulates private actors"—that is, one that "imposes restrictions or confers rights on private actors." *Id.* at 1479-1480 (quoting *New York*, 505 U.S. at 166). If Congress imposes a restriction that applies to private actors as well as States, "the anticommandeering doctrine does not apply" so long as "Congress evenhandedly regulates an activity in which both States and private actors engage." *Id.* at 1478 (discussing *South Carolina v. Baker*, 485 U.S. 505 (1988) and *Reno v. Condon*, 528 U.S. 141 (2000)).

2. The challenged provisions of ICWA validly preempt state law and thus do not violate the anticommandeering doctrine.

For the reasons discussed above, ICWA satisfies the first requirement of a valid preemption provision: it represents the legitimate exercise of a power conferred on Congress by the Constitution. *See supra* pp. 11-18. With respect to the second requirement, the challenged provisions of ICWA are properly understood as ones that "regulate[] private actors" within the meaning of the *Murphy* framework. 138 S. Ct. at 1479. As detailed below, several of the provisions "impose[] restrictions," *id.* at 1480, on any "party seeking the foster care placement of, or termination of parental rights to, an Indian child," 25 U.S.C. § 1912(a); *accord id.* § 1912(d). Those restrictions apply evenhandedly to private parties and to state agencies seeking to effectuate such a placement or termination. The challenged provisions also "confer[] rights," *Murphy*, 138 S. Ct. at 1479-1480, on Indian children, parents, and Tribes to participate in litigation and to be free from certain state action—*i.e.*, termination of parental rights or adoptive or foster-care placement—unless ICWA's standards are satisfied. *E.g.*, 25 U.S.C. §§ 1912-1914; *see id.* § 1921 (referring to "the rights provided under this subchapter"). None of the challenged provisions requires state agencies to enact any regulation or to initiate or participate in child-custody proceedings; but to the extent state agencies do so, they must comply with ICWA's substantive requirements, just as private parties must.

Procedural rights in litigation. Several of the challenged provisions create procedural rights designed to protect the ability of Indian parents and Tribes to participate meaningfully in state child-custody proceedings. For instance, ICWA confers on Indian custodians and Tribes the right to intervene in proceedings, 25 U.S.C. § 1911(c), and to examine relevant reports or documents filed in court, *id.* § 1912(c). It

also entitles indigent Indian parents or custodians to court-appointed counsel, *id.* § 1912(b); to receive an explanation of the terms of any consent to a foster care placement or termination of parental rights, *id.* § 1913(a); and to withdraw consent to foster care placement or termination of parental rights before any final decree is issued, *id.* § 1913(b)-(c). As the Fifth Circuit correctly held, these provisions do not violate the anticommandeering doctrine because they "are best read as regulating private actors," not States. 21-376 Pet. App. 305a-306a; *see also* 25 U.S.C. § 1914 (granting Indian children, parents, and Tribes the right to petition for enforcement of the provisions in Section 1912).

"Active efforts" requirement. ICWA directs that "[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall 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). This provision both "imposes restrictions" and "confers rights" on private actors. *Murphy*, 138 S. Ct. at 1480. Both private actors and state entities sometimes seek to effect foster care placement or terminate parental rights. *See*, *e.g.*, 25 U.S.C. § 1901(4). Section 1912(d) limits the ability of "[a]ny party"—whether a private or state actor—to remove an Indian child from the custody of the child's parents or other Indian custodians. It does not force state agencies to perform that role; but if they choose to do so, they must satisfy the same substantive federal standards that similarly situated private parties must meet in order to obtain relief. Section 1912(d) also confers substantive federal rights: the right of parents not to have their parental

rights terminated, and the right of children not to be taken away from their parents or placed in foster care, unless remedial efforts have been attempted and have failed.

Expert-witness requirement. Like the "active efforts" requirement, ICWA's expert-witness provisions establish a substantive evidentiary standard that proponents of child-custody placements—whether private or state actors—must meet before a court orders foster care placement, 25 U.S.C. § 1912(e), or terminates parental rights, *id.* § 1912(f). These provisions also confer rights on private actors: the right of Indian parents and children not to have parental rights terminated, or to have children placed in foster care, unless that standard is met.

Notice requirement. Any "party seeking the foster care placement of, or termination of parental rights to, an Indian child" must "notify the parent or Indian custodian and the Indian child's tribe . . . of the pending proceedings and of their right of intervention." 25 U.S.C. § 1912(a). This notice provision imposes an evenhanded obligation on any plaintiff or petitioner in an applicable child-custody proceeding. And it confers on Indian parents and Tribes a right to receive notice of the proceeding, which Congress determined was necessary to make the right to intervene effective.

Placement preferences. ICWA also provides that, in any adoptive placement of an Indian child, preference "shall be given" to a member of the child's extended family, other members of the child's Tribe, or other Indian families. 25 U.S.C. § 1915(a); *see id.* § 1915(b) (similar for foster care placements). These provisions grant preference rights in child-custody proceedings to extended family and other tribal members when such parties present themselves as potential custodians.

See Adoptive Couple, 570 U.S. at 654. The provisions also confer a right on Indian children to be placed with the preferred categories of custodians when such a placement is feasible and appropriate. *See Holyfield*, 490 U.S. at 37 (Section 1915 "protect[s] the rights of the Indian child" and "the rights of the Indian community and tribe in retaining its children"). And they preclude any party—whether a private or state actor—from obtaining a court order placing an Indian child with a non-preferred caregiver except as prescribed by the statute. Like the other challenged provisions, the preference provisions do not compel state agencies to enact any regulation, to initiate or participate in any child-custody proceeding, or to seek any form of relief in such a proceeding.

Recordkeeping provisions. Finally, ICWA grants Tribes the right to information concerning child-custody placements of Indian children, by requiring state agencies and courts to keep records of such placements that evidence the parties' compliance with ICWA and by specifying procedures that allow Tribes to access those records. 25 U.S.C. §§ 1915(e), 1951(a). Like the provisions discussed above, these recordkeeping requirements confer a right on Indian children, parents, and Tribes to be free from certain state action—*i.e.*, termination of parental rights or adoptive or foster-care placement—unless ICWA's standards are satisfied.

3. Plaintiffs' arguments fail to demonstrate that ICWA violates the anticommandeering doctrine.

Plaintiffs contend that the way Congress phrased the challenged provisions suggests an intent to regulate the conduct of state agencies and officials, not private parties. *See* Texas Br. 62-64, 66-67; Brackeen Br. 69-70. But *Murphy* cautioned against precisely that

kind of analytical error: Although federal statutes sometimes contain language that "might appear to operate directly on the States, . . . it is a mistake to be confused by the way in which a preemption provision is phrased." 138 S. Ct. at 1480. In particular, "Congress commonly phrases the granting of private rights in the language of state prohibition." Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 Notre Dame L. Rev. 351, 376 (2020). Courts therefore must "look beyond the phrasing employed" to determine whether the federal statute imposes restrictions or confers rights on private actors. *Murphy*, 138 S. Ct. at 1480.

As *Murphy* explained, for example, the Airline Deregulation Act of 1978 provides that "no State . . . shall enact or enforce" any law "relating to rates, routes, or services" of air carriers. 138 S. Ct. at 1480 (quoting 49 U.S.C. App. § 1305(a)(1) (1988 ed.)). That language appears to operate directly on States, but it is a valid "federal law with preemptive effect" because it "confers on private entities (*i.e.*, covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints." *Id.* Similarly, the federal statute providing a "full set of standards governing alien registration" validly preempts state law because it "confer[s]" on noncitizens "a federal right to be free from any other registration requirements"—even though the text does not use that particular terminology. *Id.* at 1481 (citing *Arizona v. United States*, 567 U.S. 387, 401 (2012)).

Texas also argues that the principle that Congress may "evenhandedly regulate[] an activity in which both States and private actors engage" (*Murphy*, 138 S. Ct. at 1478) does not apply here. Texas Br. 68-69.

Texas acknowledges that both States and private actors initiate child-custody proceedings, but it contends that the evenhanded-regulation principle "applies only when Congress regulates the States as market participants," not "as sovereigns." *Id.* at 68. That argument is not supported by this Court's precedent. The Court's foundational decisions in this area, *Baker* and *Condon*, did not rest on any such distinction—and the Court has elsewhere recognized the perils of adopting legal rules that seek to differentiate between sovereign and non-sovereign state activities. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548 (1985) (noting the "elusiveness of objective criteria for 'fundamental' elements of state sovereignty").

Rather, the critical inquiry is whether "both States and private actors engage" in the activity that the federal government seeks to regulate. *Murphy*, 138 S. Ct. at 1478. In *Baker*, the activity was the issuance of bonds, 485 U.S. at 508-510; in *Condon*, it was the disclosure and resale of personal information collected in databases, 528 U.S. at 143. In both cases, the States might fairly be described as acting "in their sovereign capacities" (Texas Br. 69): issuing bonds and establishing databases for use in regulating automobile licensure are undoubtedly sovereign state functions. But the salient points underlying this Court's decisions upholding the laws were that (i) both private and public actors engaged in the regulated activity, and (ii) the laws at issue did "not require the States in their sovereign capacity to regulate their own citizens." *Condon*, 528 U.S. at 151; *accord Baker*, 485 U.S. at 514

(the federal statute "does not . . . seek to control or influence the manner in which States regulate private parties"); *see also Murphy*, 138 S. Ct. at 1478-1479.[21]

That is equally true here: Both public and private actors initiate and participate in child-custody proceedings. ICWA does not require States to become involved in such proceedings. But to the extent they do, they must satisfy the same substantive standards as similarly situated private parties. *See supra* pp. 21-24.

C. ICWA Does Not Violate Equal Protection

Plaintiffs also argue that ICWA impermissibly classifies individuals on the basis of race, in violation of the Equal Protection Clause. Brackeen Br. 20-45; Texas Br. 37-60. That theory is flawed in several respects. It contravenes this Court's settled precedent, which recognizes that classifications based on a person's membership (or potential membership) in an Indian Tribe are political, not racial. It cannot be squared with the original understanding of the relevant constitutional provisions or with longstanding historical practice. It would cast constitutional doubt on innumerable federal and state statutes. And it would offer little (if any) practical benefit to children or potential custodians, because ICWA itself already authorizes state courts to depart from the federal placement preferences where warranted in particular

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[21] In addition, the law at issue in *Condon*—which prohibited the disclosure of drivers' personal information without their consent, 528 U.S. at 144—could be viewed as one that "confers rights on private actors," *Murphy*, 138 S. Ct. at 1480, namely the right of drivers not to have their personal information disclosed without consent.

cases. Plaintiffs' equal protection claim is appropriately subject to rational basis review, and ICWA easily satisfies that deferential standard.

1. This Court's decisions "leave no doubt that federal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications" and thus does not trigger strict scrutiny. *United States v. Antelope*, 430 U.S. 641, 645 (1977); *see also Mancari*, 417 U.S. at 554-555. "Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Antelope*, 430 U.S. at 646.

Like other federal statutes, ICWA does not define any "'racial' group consisting of 'Indians'"; instead, it defines Indian children as children who are "members of 'federally recognized' tribes," *Mancari*, 417 U.S. at 553 n.24, as well as children who are eligible for tribal membership and whose biological parents are members of Tribes, *see* 25 U.S.C. § 1903(4). This definition turns not on race or ethnicity, but on individuals' membership or potential membership in "political communities." *Antelope*, 430 U.S. at 646. Indeed, ICWA's definition of Indian children "operates to exclude many individuals who are racially to be classified as 'Indians'" but who are not members of Tribes or the children of members. *Mancari*, 417 U.S. at 553 n.24.

Both the original understanding of the relevant constitutional provisions and longstanding historical practice confirm that classifications based on tribal affiliation are political rather than racial in nature. The text of the Constitution expressly distinguishes between Indians and non-Indians. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. In addition, as the Court has recognized, the explicit reference to "Commerce . . .

with the Indian Tribes" in the Indian Commerce Clause similarly provides a textual basis for Indian-specific legislation. *Mancari*, 417 U.S. at 552. Congress has enacted such legislation throughout the Nation's history.[22] That practice reflects the reality that "early treaties and laws conveyed an understanding that legal status as 'Indian' hinged on membership in an Indian polity," not strictly on racial considerations. Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 Stan. L. Rev. 1025, 1057 (2018).

Plaintiffs argue that *Mancari* and its progeny recognized only a "limited exception" to what they perceive as a general rule that classifications based on Indian status are racial rather than political in nature. Brackeen Br. 3 (quoting *Rice v. Cayetano*, 528 U.S. 495, 520 (2000)); *see* Texas Br. 43-47. But this Court made clear in *Rice* that the principles discussed in *Mancari* underlie much of federal Indian law, and it underscored that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Rice*, 528 U.S. at 519-520. If plaintiffs were correct that classifications based on Indian status are generally racial rather than political in nature, countless acts of Congress would apparently be subject to strict scrutiny for the first time: "[E]very piece of legislation dealing with Indian tribes and reservations singles out for special treatment a constituency of tribal Indians." *Id.* at 519 (quoting *Mancari*, 417 U.S. at 552 (alterations omitted)). That includes statutes on subjects as wide-ranging as education, *see* 25

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[22] *E.g.*, Act of July 22, 1790, 1 Cong. ch. 33, 1 Stat. 137; Act of Mar. 30, 1802, 7 Cong. ch. 13, 2 Stat. 139; Act of Mar. 3, 1885, 48 Cong. ch. 341, 23 Stat. 362; *see also supra* pp. 13-14.

U.S.C. §§ 271-304b; ownership of real property, *see id.* §§ 334-426; gaming, *see id.* §§ 2701-2721; and tribal law enforcement, *see id.* §§ 2801-2815.

Plaintiffs' theory that classifications based on Indian status are racial rather than political in nature would also call into question numerous state statutes. Strict scrutiny would apparently apply to state laws modeled after ICWA. *Supra* p. 9; *see also, e.g.*, Iowa Code Ann. §§ 232B.1–232B.14; Mich. Comp. Laws §§ 712B.1–712B.41; Neb. Rev. Stat. §§ 43-1501–43-1517; Wash. Rev. Code §§ 13.38.010–13.38.190. And plaintiffs' theory would seemingly subject a multitude of other types of state enactments to strict scrutiny for the first time as well. *See, e.g.*, Fla. Stat. § 380.055(8) (authorizing "usual and customary" hunting, fishing, and trapping for members of certain Indian Tribes); Ga. Code Ann. § 44-12-262 (requiring museums to return human remains or burial objects to lineal descendants of Indians); Minn. Stat. § 144.4165 (specifying that state tobacco regulation does not prohibit adult members of Indian Tribes from using tobacco as part of a "traditional Indian spiritual or cultural ceremony"); Mo. Rev. Stat. § 407.315(3) (defining "[a]uthentic American Indian art or craft" as an article "made wholly or in part by American Indian labor and workmanship"); Wis. Stat. § 301.073 (directing the state department of corrections to "establish a program to facilitate the reintegration of American Indians who have been incarcerated in a state prison into their American Indian tribal communities"). Prudence counsels against adopting a novel theory of equal protection that would cast doubt on such a wide array of longstanding state laws. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-44 (1973).

2. In support of their equal protection claim, plaintiffs contend that ICWA's placement preferences unfairly disadvantage certain Indian children and non-Indian custodians by preventing potentially beneficial adoptive and foster-care placements. Texas Br. 41-49; Brackeen Br. 37-42. Even if that were correct, it would provide a basis only for an as-applied equal protection claim in certain individual cases; it would not support plaintiffs' theory that ICWA is unconstitutional on its face. But no such as-applied equal protection claim is likely to be necessary in the first place, because ICWA contains a safety-valve provision that prevents the kind of inequitable results that plaintiffs posit. That provision authorizes courts to depart from the statute's placement preferences when there is "good cause" to do so. 25 U.S.C. § 1915(a)-(b).

The experience of amici States is that, as a general matter, state courts are properly applying that good-cause provision, authorizing placement of Indian children with non-Indian custodians where warranted under ICWA and state law. State courts have not hesitated to place Indian children with non-Indian custodians where the courts have found that good cause requires a departure from ICWA's placement preferences. *See, e.g.*, *In re A.E.*, 572 N.W.2d 579, 585-587 (Iowa 1997); *In re P.F.*, 405 P.3d 755, 764 (Utah App. 2017); *In re Alexandria P.*, 1 Cal. App. 5th 331, 359 (2016). ICWA itself thus accommodates plaintiffs' concern that the statutory placement preferences may be inappropriate in certain cases.

3. Viewed under the proper, rational basis standard of review, Congress's use of tribal membership to determine the applicability of ICWA is consistent with equal protection. As discussed above, *see supra* pp. 15-

17, after considering extensive evidence and testimony, Congress found that a disproportionate number of Indian children were being improperly removed from their families and communities. *See* 25 U.S.C. § 1901(3)-(5). Congress sought to respond to that serious problem in a measured and reasonable way—not by prohibiting the removal of Indian children from parental custody or the placement of Indian children with non-Indian custodians, but by establishing minimum federal standards to prevent abuses. Experience over the last four decades has demonstrated both that ICWA is an important tool for reducing unwarranted removals of Indian children, and also that its protections continue to be necessary in light of remaining disparities.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part, and the claims advanced by plaintiffs should be rejected in their entirety.

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