October 8, 2021

ATTORNEY GENERAL RAOUL DEFENDS INDIAN CHILD WELFARE ACT PROTECTIONS BEFORE THE U.S. SUPREME COURT

Chicago — Attorney General Kwame Raoul, as part of a bipartisan coalition of 26 attorneys general, today joined an amicus brief in support of the United States and four federally-recognized tribes in their efforts to uphold critical protections guaranteed under the Indian Child Welfare Act (ICWA). Filed before the U.S. Supreme Court in Haaland v. Brackeen and Cherokee Nation v. Brackeen, the amicus brief highlights the states' compelling interest in standing up for the well-being of all children, including Native American children, in state child-custody proceedings.

"Native American children have a right to be placed with extended family members or tribal homes where they can remain connected to their heritage," Raoul said. "The Indian Child Welfare Act ensures that Native American children have strong support from their extended families and their tribal communities, and I encourage the Supreme Court to uphold this law."

Congress enacted the ICWA in 1978 in response to a serious and pervasive problem: State and private parties were initiating state child-custody proceedings that removed Native American children from the custody of their parents – often without good cause – and placed them in the custody of non-tribal adoptive and foster homes. That practice harmed children and posed an existential threat to the continuity and vitality of tribal communities. To address this, Congress established minimum federal standards governing the removal of Native American children from their families. The ICWA's provisions safeguard the rights of Native American children, parents and tribes in state child-custody proceedings, and seek to promote the placement of Native American children with members of their extended families or with other tribal homes. In the four decades since Congress enacted the ICWA, the statute has become the foundation of state-tribal relations in the realm of child custody and family services. Collectively, the coalition states are home to approximately 86% of federally-recognized tribes in the United States.

In the amicus brief, Raoul and the coalition assert that:

- The ICWA is a critical tool for protecting Native American families and tribes, and fostering state-tribal collaboration.
- The court of appeals incorrectly concluded that several of the ICWA's provisions violate the anti-commandeering doctrine.
- The ICWA's preferences for the placement of Native American children with other Native American families and foster homes do not violate equal protection.

Joining Raoul in filing the amicus brief are the attorneys general of Alaska, Arizona, California, Colorado, Connecticut, the District of Columbia, Idaho, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Vermont, Washington and Wisconsin.

Nos. 21-376 & 21-377

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

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

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(*Additional caption listed on inside cover and additional counsel listed on signature pages*)

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

Petitioners,

v.

CHAD EVERET BRACKEEN, *et al.*,

Respondents.

QUESTIONS PRESENTED

1. Whether various provisions of the Indian Child Welfare Act—namely, the minimum standards of 25 U.S.C. § 1912(a), (d), (e), and (f); the placement-preference provisions of Section 1915(a) and (b); and the recordkeeping provisions of Sections 1915(e) and 1951(a)—violate the anticommandeering doctrine of the Tenth Amendment.

2. Whether the individual plaintiffs have Article III standing to challenge ICWA's placement preferences for "other Indian families," 25 U.S.C. § 1915(a)(3), and for "Indian foster home[s]," *id.* § 1915(b)(iii).

3. Whether 25 U.S.C. § 1915(a)(3) and (b)(iii) are rationally related to legitimate governmental interests and therefore consistent with equal protection.

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INTERESTS OF AMICI

Amici are the States of California, Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Vermont, Washington, and Wisconsin, and the District of Columbia. We submit this brief as amici curiae in support of the petitions for writs of certiorari filed by the United States (No. 21-376) and by four federally recognized Indian Tribes (No. 21-377), each seeking review of the court of appeals' holding that certain aspects of the Indian Child Welfare Act violate the federal Constitution.[1]

Collectively, amici States are home to 86 percent of federally recognized Indian Tribes. As described in greater detail below, we 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 and benefit from placement in stable, supportive custodial settings. As state sovereigns, we also have a powerful interest in mutually beneficial relationships with Indian Tribes in our States—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 constitutional—framework for managing state-tribal relations and for protecting the rights and stability of Indian children, families, and Tribes.

[1] Counsel of record for all parties received timely notice of amici States' intent to file this brief. *See* S. Ct. R. 37.2(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted ICWA in 1978 in response to a serious and pervasive problem: States and private parties were initiating state 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. These removals were often made without good cause, and sometimes reflected bias against the Indian families' tribal heritage and customs. They harmed children and their families, and posed an existential threat to the continuity and vitality of tribal communities.

To address that problem, Congress established minimum federal standards governing the breakup of Indian families. ICWA's provisions safeguard the rights of Indian children, parents, and Tribes in state child-custody proceedings, and seek to promote the placement of Indian children with members of their extended families or with other tribal homes.

In the experience of amici States, while some problems still exist, ICWA has largely worked as Congress intended. Disparities in the rates of removal of Indian children from their families have fallen. When removal is necessary, Indian children are more likely to 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.

Against that backdrop, the en banc court of appeals entertained plaintiffs' novel constitutional and admin-

istrative law challenges to ICWA and its implementing regulations. The court correctly rejected the most far-reaching of plaintiffs' theories, holding (among other things) that Congress had the authority to enact the statute and that ICWA's protections for Indian children do not trigger strict scrutiny under the Equal Protection Clause. While plaintiffs have filed their own petitions asking this Court to review those holdings (in Nos. 21-378 and 21-380), there is no need for further review of those aspects of the court of appeals' judgment: they are correct, do not create any conflict of authority, and do not invalidate any provision of this important federal statute.

At the same time, however, a majority of the en banc court held that certain provisions of the statute violate the anticommandeering doctrine; and the court also affirmed (by an equally divided vote) the district court's conclusion that other provisions violate the anticommandeering doctrine or the Equal Protection Clause. The United States and several Tribes have filed petitions (in Nos. 21-376 and 21-377) seeking review of those questions. Amici States agree with the federal and tribal petitioners that this Court should follow its standard practice of granting review "when a lower court has invalidated a federal statute." *E.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019). Plenary review is especially appropriate here because the rationales offered in the various opinions below for invalidating certain ICWA provisions are deeply flawed.

The challenged provisions of ICWA do not violate the anticommandeering doctrine. To be sure, that doctrine is a matter of great 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. Some of the amici

States have successfully litigated challenges to federal laws under the anticommandeering doctrine. But ICWA does not do any of the things that the doctrine prohibits. Instead, ICWA imposes restrictions and confers rights on private parties in state child-custody proceedings—making it a valid federal preemption statute. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1479-180 (2018).

As to equal protection, ICWA easily satisfies rational basis review in the context of plaintiffs' facial challenge. Among other rationales, Congress reasonably determined that it is generally best for Indian children to be raised by their families or in other Indian homes—even (if need be) by a member of a different Tribe.

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. By holding multiple provisions of this important statute to be unconstitutional, the judgment below threatens to undermine a framework that protects the rights of Indian children, parents, and Tribes.

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 children from their Native American families and communities. Those standards directly benefit Indian children and their families because frequent removals from existing custodial settings are generally associated with significant harm to children.[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, while some variation exists among States, 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 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

[2] *See, e.g.*, Sankaran & Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. Penn. J. of L. and Soc. Change 207, 211-213 (2016) (discussing studies regarding the effects of placement with multiple successive non-familial caregivers).

[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.

[4] *See* Limb, *supra* note 3, at 1285 (finding that 89 percent of the

family preservation aligns with the best practices recommended by present-day child welfare experts.[5]

The experience of amici States also demonstrates 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, studies show that those disparities are significantly lower than they were in the years before Congress enacted ICWA.[6] In amicus State 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 only 4 times more likely to be in foster care.[7] The current disparities in many other States are even lower.[8] And when foster-care placement is necessary, Indian children are now more likely to be placed with extended family members. For example, a 2019 study found that 90 percent of Indian children in foster care are placed in family settings,

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cases it analyzed involving involuntary termination of parental rights satisfied this requirement).

[5] *See, e.g.*, Zug, *ICWA's Irony*, 45 Am. Indian L. Rev. 1, 2, 5-19 (2021).

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

[7] Adams, *American Indian Children Too Often in Foster Care*, Salt Lake Tribune (Mar. 24, 2012), https://tinyurl.com/kccedfxa.

[8] *See id.*

the highest percentage of any major racial or ethnic group.[9]

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 and families. 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). Some of the amici States—including Alaska, Arizona, Minnesota, New Mexico, Utah, and Washington—have used this provision to enact compacts or other collaborative agreements that effectuate ICWA's policy objectives in state child welfare proceedings.[10] Court systems in Arizona and California, among other States, have units devoted to enhancing coordination with Tribes in custody proceedings that implicate ICWA.[11] And several

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

[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; Minn. Courts, Tribal/State Agreement (Feb. 22, 2017), https://tinyurl.com/9w4sfs3k; N.M. Children, Youth & Families Dep't, State-Tribal Collaboration Act, 2020 Agency Report, https://tinyurl.com/sprw3w6n; Utah Div. of Child and Family Servs., CFSP Final Report for Federal Fiscal Years 2010-2014 and CAPTA Update (June 30, 2014), https://tinyurl.com/bs2zvbmy; Wash. Dep't of Children, Youth, and Families, Tribal/State Memorandums of Understanding, https://tinyurl.com/3vjcvs.

[11] *See* Ariz. Courts, ICWA Committee, https://tinyurl.com/y4sb43sy; Judicial Council of Cal., S.T.E.P.S. to Justice—Tribal

States, including Arizona, Montana, and New Mexico, have created specialized courts to adjudicate such cases.[12]

Many States also use ICWA as a foundation for their own child-custody laws. Some have directly incorporated ICWA's provisions into state law. *See, e.g.*, Ariz. Rev. Stat. § 8-815(B); Colo. Rev. Stat. Ann. § 19-1-126; Vt. Stat. Ann., tit. 33, § 5120. Others use ICWA as a starting point but add their own state law protections. Nebraska and Washington, for instance, build on ICWA's terminology by spelling out what "active efforts" entails, *see* Neb. Rev. Stat. § 43-1503; Wash. Rev. Code § 13.38.040(1), and add more detailed placement preferences to supplement those set forth in the federal statute, *see* Neb. Rev. Stat. § 43-1508; Wash. Rev. Code § 13.38.180. California has adopted many of ICWA's statutory definitions, *see* Cal. Fam. Code § 170(a)-(c), but has imposed its own supplemental notice requirements, *id.* § 180, and extended similar protections to Tribes not recognized under federal law, *id.* § 185. And Oklahoma and Wisconsin extend ICWA's protections to custodial situations that may not be covered by federal law. *See* Okla. Stat. Ann. § 40.3(B); Wis. Stat. Ann. § 48.028(3)(a); *compare Adoptive Couple v. Baby Girl*, 570 U.S. 637, 647-651 (2013).

Customary Adoption in California (Feb. 2019), https://tinyurl.com/pckbjhj2.

[12] *See* Ariz. Superior Court, Pima County, Indian Child Welfare Act Court, https://tinyurl.com/5ys62d8; Mont. Leg. Servs. Division, *Tribal Nations in Montana: A Handbook for Legislators* (Nov. 2020), at 57, https://tinyurl.com/8mm6yw8; Armas, *New Court Designed to Keep Native American Kids Close to Tribes, Pueblos*, KOAT News (Feb. 17, 2020), https://tinyurl.com/d5957ad4.

The court of appeals' decision casts constitutional doubt on the substantive federal standards that underlie much of the tribal-state collaboration in the realm of child custody. Although the decision does not itself bind the state courts in which child custody proceedings occur, *see* U.S. Pet. 25; U.S. Pet. App. 371a-372a (Costa, J., concurring in part and dissenting in part), if it remains in place it will create uncertainty, invite additional litigation at the state level, and call into question state laws that incorporate or cross-reference ICWA. In particular, the court of appeals' misguided equal protection ruling (*see infra* pp. 19-22) could undermine a range of state policies that protect Indian children, parents, and Tribes. And history suggests that, absent continued federal involvement, some States might not take action to protect Indian families. *See* 25 U.S.C. § 1901(5); *Holyfield*, 490 U.S. at 32-35. This Court should grant the petitions filed by the United States and the Tribes to correct the court of appeals' erroneous constitutional holdings and to preserve this critical federal framework.

II. THE DECISION BELOW IS INCORRECT

Given this Court's longstanding practice of granting plenary review when a lower court has invalidated a federal statute, *see, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019), and the profound importance of ICWA, certiorari would be warranted regardless of the relative strength of petitioners' merits arguments. But review is especially appropriate here because the rationales offered by the courts below for declaring certain provisions invalid on anticommandeering and equal protection grounds are deeply flawed.

A. ICWA Does Not Violate the Anticommandeering Doctrine

The court of appeals concluded that several of ICWA's provisions violate the anticommandeering doctrine; and the court also affirmed (by an equally divided vote and without published opinion) the district court's invalidation of other provisions under the same doctrine. U.S. Pet. App. 4a-5a. The amici States have a unique perspective on the anticommandeering doctrine, which is essential to the Constitution's structural protection of state sovereignty and autonomy. In appropriate circumstances we have invoked that doctrine to challenge federal overreach. But respect for the Constitution requires not just recognition of the checks the anticommandeering doctrine imposes on federal power, but also acknowledgment of the doctrine's limits. Properly understood, the challenged provisions of ICWA do not impermissibly seek to commandeer state governments. The lower courts' contrary conclusion rests on a misreading of this Court's anticommandeering precedents.

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 anticommandering 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.

As to the first requirement of a valid preemption provision, Congress plainly had the authority to enact ICWA: the Constitution vests Congress with "plenary power over Indian affairs" and the federal government has a "continuing trust relationship with the tribes." U.S. Pet. App. 78a, 80a; *see Antoine v. Washington*, 420 U.S. 194, 203 (1975). As 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. They "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 ICWA provisions also "confer[] rights," *Murphy*, 138 S. Ct. at 1479-1480, 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 substantive federal standards are satisfied. *See, e.g.*, 25 U.S.C. §§ 1912(d)-(f).

To its credit, the court of appeals properly applied these principles in holding that several of ICWA's key requirements are valid preemption provisions. For example, it determined that certain provisions conferring particular rights on Indian parents and Tribes—such as the right to intervene in child-custody proceedings, 25 U.S.C. § 1911(c); to court-appointed counsel,

id. § 1912(b); and to a full and comprehensible explanation of the proceedings, *id.* § 1913(a)—validly preempt contrary state law because they "regulate private actors." U.S. Pet. App. 305a. Similarly, it held that the "placement preferences, placement standards, and termination standards are valid preemption provisions" that state courts must enforce because they are "substantive child-custody standards applicable in state child-custody proceedings." *Id.* at 309a, 311a; *see* 25 U.S.C. §§ 1912(e)-(f), 1915.

But a majority of the court of appeals held that several other provisions of ICWA impermissibly seek to commandeer state governments and cannot be viewed as valid preemption provisions, U.S. Pet. App. 4a; and the court affirmed, by an equally divided vote, the district court's similar conclusion with respect to other ICWA provisions, *id.* at 4a-5a. Those conclusions were not correct. As explained below, every one of the provisions that the lower courts viewed as unconstitutional are properly understood as valid regulatory measures: Each provision either evenhandedly imposes restrictions on parties (whether public or private) seeking relief in state child-custody proceedings; confers rights on Indian children, parents, or Tribes in such proceedings; or does both. None of the provisions *requires* state agencies to enact any regulation or to initiate or participate in child-custody proceedings.

"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. It sets forth evenhanded conditions and limitations on the ability of "[a]ny party," whether a private or state actor, to remove an Indian child from the custody of their parents or other Indian custodians. Both private actors and state entities sometimes seek to effect foster care placement or terminate parental rights. *See* U.S. Pet. App. 122a-125a; 25 U.S.C. § 1901(4). ICWA 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. *See* U.S. Pet. 17-18; Tribes Pet. 22.[13]

Apart from imposing restrictions on private actors, the active-efforts requirement confers rights on Indian parents and children. It affords parents the right not to have their parental rights terminated, and affords children the right not to be placed in foster care, unless remedial efforts have been attempted and have failed. It also ensures that "Indian parents" will be "provided with access to 'remedial services and rehabilitative programs'" in an attempt to "avoid[] foster-

[13] In Judge Duncan's view, "the 'evenhanded regulation' principle . . . has no application here," because "unlike the laws in *Baker* and *Condon*," which "regulated states as participants in the bond market and the 'market for motor vehicle information,'" ICWA supposedly "regulates states 'in their sovereign capacity.'" U.S. Pet. App. 298a-299a. But when state agencies seek to terminate parental rights or effect a foster-care placement, that *is* "an activity in which both States" and non-sovereign "private actors engage." *Murphy*, 138 S. Ct. at 1478 (discussing *Baker* and *Condon*). In that context, ICWA's substantive federal standards apply evenhandedly to private parties and state agencies in their capacity as litigants seeking relief in state child-custody proceedings.

care placement . . . or termination of parental rights." *Adoptive Couple*, 570 U.S. at 652; *see generally* 25 U.S.C. § 1921 (referring to "the rights provided under this subchapter"); 25 U.S.C. § 1914 (granting Indian children, parents, and Tribes the right to petition for enforcement of the provisions of Section 1912).

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. Congress conferred that right in view of the troubling history of "unwarranted" removal of Indian children from their families. *See id.* § 1901(4); *Adoptive Couple*, 570 U.S. at 642.

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 a 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). The court of appeals held that these placement preferences are generally valid and must be applied in state child-custody proceedings, state law notwithstanding; but it affirmed (by an equally divided vote) the district court's conclusion that the placement preferences violate the anticommandeering doctrine as applied to state agencies. U.S. Pet. App. 4a-5a, 289a-292a.

The district court was mistaken. When state agencies seek relief in state child-custody proceedings, the placement preferences apply for the same reason that state courts must enforce them: They are valid federal enactments that confer rights and impose restrictions on private parties. The 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 placement preferences 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 the preferences preclude any party—whether a state or private actor—from obtaining a court order placing an Indian child with a non-preferred custodian except as prescribed by the statute. Like the other challenged provisions, they do not compel state agencies to enact any regulation, to initiate or participate in child-custody proceedings, or to seek any form of relief in those proceedings.

Recordkeeping provisions. Finally, ICWA requires States, if they make any adoptive or foster-care "placement, under State law, of an Indian child," to maintain a "record of each such placement . . . evidencing the efforts to comply with" the statutory order of placement preference. 25 U.S.C. § 1915(e). The record must be "made available at any time upon the request of the Secretary or the Indian child's tribe." *Id.* This provision confers on Tribes a right to the information necessary to confirm that state child-custody proceedings have complied with ICWA's protections. Similarly, ICWA provides that "any State court entering a final decree or order in any Indian child adoptive placement" must provide the Secretary with a copy of the order and information regarding the identity of the child, their tribal affiliation, and the identity of their biological and adoptive parents. 25 U.S.C. § 1951(a). As the statutory text confirms, this provision confers on Indian children and Tribes a right to access the information "necessary for the enrollment of an Indian child in the tribe," should the child choose to enroll. 25 U.S.C. § 1951(b). Like the other challenged provisions, these recordkeeping requirements confer a federal 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. Judge Duncan concluded that the challenged ICWA provisions violate the anticommandeering doctrine because they "regulate, not private persons, but the conduct of state agencies and officials." U.S. Pet. App. 307a-308a. But *Murphy* cautioned against precisely this kind of analytical error. The Court emphasized that 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 "'related 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)). In other words, regardless of the precise statutory language, a federal law that in substance confers rights on private parties, or that evenhandedly imposes restrictions on private parties and state actors engaged in similar conduct, does not violate the anticommandeering doctrine. *Murphy*, 138

S. Ct. at 1480-1481. That is true for each of the ICWA provisions challenged here.[14]

B. ICWA's Preferences for Placement with Other Indian Families and Indian Foster Homes Do Not Violate Equal Protection

The court of appeals also affirmed, by an equally divided vote, the district court's judgment declaring that ICWA's third-ranked adoptive-placement preferences for "other Indian families," 25 U.S.C. § 1915(a)(3), and its third-ranked foster-care-placement preference for licensed "Indian foster home[s]," *id.* § 1915(b)(iii), violate equal protection. *See* U.S. Pet. App. 3a-4a. That conclusion is also incorrect and warrants further review.

The court of appeals properly recognized that rational basis review governs plaintiffs' equal protection challenge. U.S. Pet. App. 139a-154a; *see also id.* at 262a (Duncan, J.). This Court's decisions "leave no doubt that federal legislation with respect to Indian

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[14] In its separate petition, Texas contends that it would undermine the anticommandeering doctrine if the challenged provisions of ICWA were upheld as valid preemption provisions. No. 21-378 Pet. 24-28. That view is mistaken because, as this Court emphasized in *Murphy*, a federal law that satisfies the two criteria of a valid preemption statute—*i.e.*, a law that is within Congress' enumerated powers and that is properly understood as regulating private actors—does not violate the anticommandeering doctrine. 138 S. Ct. at 1481. The laws at issue in cases such as *Murphy*, *Printz*, and *New York* could not survive that analysis because "there is no way in which" they could be "understood as a regulation of private actors." *Id.* Of particular relevance here, unlike ICWA, none of those laws could be understood as conferring a right on private parties to be free from certain state action.

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).[15] Under rational basis review, ICWA's protections of Indian children, parents, and Tribes "will not be disturbed" as "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Applying that standard, the court of appeals correctly upheld the statute's first- and second-ranked placement preferences for members of a child's family and Tribe. But it failed to recognize that the third-ranked preferences also satisfy rational basis review. *See* U.S. Pet. App. 3a-4a.

There are a number of rational considerations that might have led Congress to enact those preferences. Most significantly, as the United States and the Tribes explain, Tribes are often closely related to each other by geography, history, or culture. U.S. Pet. 27-28; Tribes Pet. 36. Members of many different Tribes share the common experience of navigating difficult questions of identity and their relationship to the broader society. Congress rationally could have concluded that seeking to place Indian children in Indian

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[15] Texas observes that certain intermediate state appellate courts have developed the so-called "existing Indian family" doctrine, refusing on equal protection grounds to apply ICWA in certain cases involving Indian children who purportedly lack any "significant political or cultural connection to an Indian tribe." No. 21-378 Pet. 23 (citing *In re Santos Y.*, 92 Cal. App. 4th 1274, 1303-1304 (2001), among other cases). Even if that theory had any merit, which is doubtful, *see, e.g.*, *In re A.B.*, 663 N.W.2d 625, 634-636 (N.D. 2003), it would not support plaintiffs' *facial* equal protection challenge seeking to invalidate ICWA's placement preferences in all cases.

homes—even, where necessary as a third resort, with families of a different Tribe—would generally be in the children's interest and would align with "the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5); *see Holyfield*, 490 U.S. at 37. State courts have adopted similar reasoning in rejecting other equal protection challenges to ICWA.[16]

Judge Duncan concluded that the third-ranked preferences violate equal protection based primarily on his view that, although the preferences may be appropriate in many cases, the statute as drafted is over-inclusive. *See* U.S. Pet. App. 279a. But rational basis review under the Equal Protection Clause "does not demand a surveyor's precision." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 814 (1976). And Judge Duncan's concern about over-inclusivity is "especially misplaced in a *facial* challenge to a *nondispositive* preference." Tribes Pet. 37; *see* U.S. Pet. 29-30. To the extent placement in accordance with ICWA's preferences may not be appropriate in particular cases, courts may depart from those preferences for good cause. 25 U.S.C. §§ 1915(a)-(b).

The experience of amici States is that, as a general matter, most state courts are properly applying that good-cause provision, authorizing placement of Indian children with non-Indian custodians where warranted

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[16] *See, e.g.*, U.S. Pet. App. 370a-371a & n.1 (Costa, J., concurring in part and dissenting in part) (collecting cases); *In re Baby Boy L.*, 103 P.3d 1099, 1107 (Okla. 2004) (ICWA is "rationally related to the protection of the integrity of American Indian families and tribes and . . . to the fulfillment of Congress's unique guardianship obligations toward Indians") (citing *In re A.B.*, 663 N.W.2d at 636).

under ICWA and state law. While different jurisdictions have interpreted the provision in somewhat different ways, *see, e.g.*, *In re A.E.*, 572 N.W.2d 579, 583-585 (Iowa 1997) (collecting cases), state courts have not hesitated to place Indian children with non-Indian custodians where good cause requires a departure from ICWA's placement preferences, *see, e.g.*, *id.* at 585-587; *In re P.F.*, 405 P.3d 755, 764 (Utah App. 2017); *In re Alexandria P.*, 1 Cal. App. 5th 331, 359 (2016) (collecting California cases). The protections offered by the good-cause provision underscore the lack of merit in plaintiffs' facial equal protection challenge to ICWA's third-ranked placement preferences.

CONCLUSION

The petitions for writs of certiorari in No. 21-376 and No. 21-377 should be granted.

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