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

In the Supreme Court of the United States

DEB HAALAND, ET AL.

Petitioners,

v.

CHAD EVERET BRACKEEN, ET AL.

Respondents.

CHEROKEE NATION, 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

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BRIEF OF *AMICI CURIAE* STATES OF OHIO AND OKLAHOMA SUPPORTING PETITIONERS IN CASE NOS. 21-378 & 380

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TEXAS

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STATEMENT OF *AMICI* INTEREST

The States have "virtually exclusive" authority over child-custody proceedings. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Ordinarily, States decide custody disputes based on "the 'best interests' of the child." *In re Cunningham*, 391 N.E.2d 1034, 1038 (Ohio 1979). But in disputes involving an "Indian child," 25 U.S.C. §1903(4), federal law displaces that best-interests inquiry. In those cases, the Indian Child Welfare Act, or "ICWA," makes custody determinations turn on a child's ancestry. The results can be heart-wrenching. Children are torn from stable families and sent off to live in tribes to which they have no personal connection. In one Ohio case, courts applying ICWA came within a hair's breadth of removing a five-year-old boy from the only home he could remember. *See In re C.J.*, 108 N.E.3d 677 (Ohio Ct. App. 2018). Other children in other States have fared worse. *See, e.g.*, Charlotte Alter, *Inside the Agonizing Custody Fight Over Six-Year-Old Lexi*, Time (Mar. 28, 2016), https://perma.cc/8GEX-Q7F7; George F. Will, *The blood-stained Indian Child Welfare Act*, Wash. Post (Sept. 2, 2015), https://perma.cc/F3UQ-T3EL.

If Congress had the power to enact ICWA, these outcomes would be morally unconscionable but legally untroubling—the States would turn to the political branches, not the courts, for redress. But Congress lacked any authority to pass ICWA. The *en banc* Fifth Circuit wrongly held otherwise, by a slim majority. The judges of that court struggled with this Court's repeated and usually unexplained statements that Congress has "plenary power" over "Indian affairs." *E.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). This case offers a

chance for clarity. The Court has never addressed whether Congress's power over Indian affairs is so broad as to include a power over domestic-relations proceedings in state courts. Thus, even if the Court is unwilling to "revisit" its earlier plenary-power cases, it need not "extend those precedents" to this new context. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020). Ohio and Oklahoma urge the Court to reject any further extension. It should hold that Congress exceeded its constitutional authority when it enacted ICWA. While Congress possesses broad powers with respect to Indian tribes, those powers are not "plenary" in any normal sense of that word.

SUMMARY OF ARGUMENT

None of Congress's enumerated powers authorize it to regulate state-court, child-custody proceedings involving Indian children.

I. This Court has repeatedly stated that Congress has "plenary power" over "Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The notion began as an unexplained assumption. *See Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899). It grew over time, seemingly by accident, into a well-settled principle. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979).

But the Court's plenary-power statements have never described a power that is truly "plenary." They are instead shorthand for a broad power—but a power still "subject … to" constitutional limits. *Stephens*, 174 U.S. at 478; *accord United States v. Creek Nation*, 295 U.S. 103, 110 (1935). Key here, Congress's plenary power over Indian affairs does not empower Congress to displace the States' sovereign authority

whenever it pleases. *See, e.g.*, *Dick v. United States*, 208 U.S. 340, 353 (1908); *Seminole Tribe v. Florida*, 517 U.S. 44, 64, 72 (1996); *United States v. Lara*, 541 U.S. 193, 204–05 (2004).

II. The Court has never addressed whether Congress's power over Indian affairs includes the power to set federal standards for child-custody proceedings in state courts. The Court should respect the limits of its past judgments in deciding that unresolved question. *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022). Because plenary-power cases supply no direct or clear answer, the Court should decide this case based on "[t]he Constitution's text and the Nation's history." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2323 (2020). Even if the Court is unwilling to "revisit" its past plenary-power statements, it should not extend those statements in a way that "clashes" with the Constitution's text and history. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020).

III. The Constitution grants Congress no power broad enough to allow for ICWA's enactment.

Consider first the Indian Commerce Clause. It empowers Congress "To regulate Commerce … with the Indian Tribes." U.S. Const. art. I, §8, cl. 3. That empowers Congress to regulate *only* with respect to "Indian Tribes," as opposed to all people of Indian ancestry. And it empowers Congress to regulate *only* "Commerce," which founding-era speakers understood as mercantile trade and related activities. *United States v. Lopez*, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring). A clause that permits Congress to regulate trade with Indian tribes stops well short of conferring a power to regulate state child-custody proceedings.

The Treaty Clause also bestows no plenary power on Congress. It grants the President the power "to make Treaties" with the Senate's advice and consent. U.S. Const. art. II, §2, cl.2. The Treaty Clause, therefore, "does not literally authorize Congress to act legislatively." *Lara*, 541 U.S. at 201. At most, it permits Congress to legislate "pursuant to … treaties." *Id.* ICWA is *not* an exercise of such power. It does not rely on any specific treaty or treaties, *see* 25 U.S.C. §1901, and it applies to Indian children regardless of any given tribe's treaty status, *see* §1903. Further, the States are unaware of any treaty statement—much less a clear statement, *see Bond v. United States*, 572 U.S. 844, 858 (2014)—signaling that the United States agreed, through treaties with Indian tribes, to regulate child-custody proceedings within the jurisdiction of state courts.

Remaining justifications for a plenary power also fail. For example, there is no merit to the Court's passing suggestions that Congress's "legislative authority" over Indian affairs might rest on "preconstitutional powers." *Lara*, 541 U.S. at 201. In our system of enumerated and reserved powers, federal power—including Congress's power over Indian affairs—must arise from the Constitution. *See Medellin v. Texas*, 552 U.S. 491, 524 (2008).

ARGUMENT

Domestic relations is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Typically, States resolve child-custody disputes based on the child's best interests. *See Determining the Best Interests of the Child* at 1, U.S. Dep't of Health & Human Servs. (June 2020), https://

perma.cc/AP2Z-U63J. Applying these best-interest standards, state courts consider a variety of factors relevant to a child's custody—including a child's heritage. But the ultimate goal entails determining "who is best suited to take care of a child." *Id.* at 2.

The goal changes with ICWA, a federal law that applies to state-custody proceedings involving any "Indian child." 25 U.S.C. §1903(4). ICWA defines "Indian child" to include any child who is "eligible for membership in an Indian tribe" and has a biological parent who is a tribe member. *Id.* If a custody proceeding involves an Indian child, ICWA employs "tools of jurisdictional allocation, procedural requirements, and substantive criteria for child placement." Cohen's Handbook of Federal Indian Law §11.01 (Lexis 2019). The "overriding purpose" of that combination is to ensure that state courts elevate "protect[ing] … Indian families" over other state-law considerations. *Id.* ICWA, in short, "substantially transform[s]" how state courts approach custody proceedings, inserting "federal and tribal law into family matters long within the domain of the states." *Id.*

From the outset, ICWA's approach raised serious constitutional questions. *See* H.R. Rep. No. 95-1386, at 38–41 (1978) (statement of Assistant Attorney General Patricia M. Wald). The most fundamental is whether the Constitution even grants Congress the power to regulate state-court proceedings concerning child custody.

The Constitution grants Congress no such power. The States explain why, in three steps. *First*, they examine the Court's precedents. That examination reveals that Congress's power over Indian affairs—though often labeled a "plenary" power—has always

been subject to, and thus limited by, other aspects of the Constitution. The Court's plenary-power cases, therefore, do not resolve the question whether Congress had authority to enact ICWA. *Second*, the States urge the Court to resolve that unanswered question by looking to the Constitution's text and history. *Third*, the States explore that text and history, and they conclude that none of Congress's enumerated powers are broad enough to justify ICWA.

I. Congress's power over Indian affairs is subject to constitutional limits.

Congress purported to rely on its "plenary power over Indian affairs" when it enacted ICWA. 25 U.S.C. §1901(1). ICWA thus parrots the Court's repeated statements that Congress has "plenary" power to legislate "over Indian affairs." *E.g.*, *United States v. Hellard*, 322 U.S. 363, 367 (1944). These statements describe the relationship between the federal government and Indian tribes. They also "describe federal power over Indian affairs to the exclusion of states." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1014 (2015). But this notion of plenary power has always been confusing. While the Constitution grants Congress "sizable" powers, they are "enumerated powers." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). And Congress's enumerated powers, on their face, are "almost silent" with respect to Indian affairs. *See United States v. Kagama*, 118 U.S. 375, 378 (1886). For these reasons, it is worth exploring how the Court's plenary-power statements came about, and what those statements really mean.

The plenary-power doctrine is what one might call "accidental law"—a doctrine that "arose more

from historical accident" than anything else. *Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 538 (6th Cir. 2021). This Court has hinted that *Worcester v. Georgia*, 31 U.S. 515 (1832), supports the existence of Congress's plenary power over Indian affairs. *See United States v. Lara*, 541 U.S. 193, 202 (2004). Others say that *Kagama* "inaugurated" the "plenary power era." David E. Wilkins, *The U.S. Supreme Court's Explication of "Federal Plenary Power:" An Analysis of Case Law Affecting Tribal Sovereignty, 1886-1914*, 18 Am. Ind. Q. 349, 352 (1994). But this "trail of case citations," *Ass'n of Am. Physicians*, 13 F.4th at 538, turns out to be unsatisfying. Neither *Worcester* nor *Kagama* tells a convincing origin story.

In *Worcester*, the Court confronted Georgia's attempt to regulate conduct outside its own territory and within the Cherokee Nation's territory. *See* 31 U.S. at 537, 541–42, 555–56. Faced with those facts, the Court concluded that "Indian territory" was not state territory and that "intercourse" with people living on Indian territory was to be "carried on exclusively by the government of the union." *Id.* at 557. That analysis hardly suggests a plenary federal power—it simply suggests a limit on the States' power to regulate Indian affairs.

As for *Kagama*, the case involved a crime committed on an Indian reservation. While the reservation was located within California, both the suspects and the victim were members of an Indian tribe. *Kagama*, 118 U.S. at 375. In that scenario, *Kagama* concluded that the tribe was dependent on the federal government for protection and guidance. *Id.* at 383–84. Noticeably absent from *Kagama* is any reference to Congress's having "plenary" power over all Indian-

related affairs regardless of how such affairs intersect with a State's own territory, citizens, or legal proceedings. Indeed, *Kagama* stressed that the case involved a "confined" federal power that would not "interfere with the process of the state courts" or "with the operation of State laws." *Id.* at 383.

The "first appearance of the term plenary regarding tribal sovereignty was in *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899)." Wilkins, *The U.S. Supreme Court's Explication of "Federal Plenary Power,"* 18 Am. Ind. Q. at 357. And *Stephens* merely assumed, without explanation, the existence of plenary power. The dispute in *Stephens* involved the constitutionality of federal legislation that established a commission to determine citizenship in Indian tribes. 174 U.S. at 483. In upholding that legislation, the Court "assum[ed] that [C]ongress possesses plenary power of legislation in regard to" Indian tribes. *Id.* at 478. Still, the Court cautioned that this assumed plenary power was "subject" to constitutional limits and that Congress therefore lacked authority to violate any "prohibition" contained in the Constitution. *Id.*

After *Stephens*, and with little further elaboration, the Court latched onto the idea that Congress has "plenary" power over Indian tribes. *See, e.g.*, *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306 (1902); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *In re Heff*, 197 U.S. 488, 498–99 (1905); *Wallace v. Adams*, 204 U.S. 415, 422 (1907); *Choate v. Trapp*, 224 U.S. 665, 670–71 (1912). Through sheer force of repetition, what started as an unexplained assumption morphed into a "well established" principle. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979).

And eventually, these plenary-power statements expanded not just to interactions with Indian *tribes* but to "Indian *affairs*" more generally. *See Hellard*, 322 U.S. at 367 (emphasis added); *accord Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989).

The "plenary" label has always been a misnomer. Taken literally, a "plenary" power would be a power that is "[f]ull; entire; complete; absolute; perfect; unqualified." Webster's New International Dictionary of the English Language 1889 (2d. ed., unabridged, 1948). But Congress's power over Indian affairs is "not absolute." *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *accord Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977). Nor is it a power exclusive of other considerations. Rather, from the beginning, Congress's plenary power has been "subject … to," *Stephens*, 174 U.S. at 478, other "pertinent constitutional restrictions," *Creek Nation*, 295 U.S. at 110. That is why Congress cannot use its plenary power to unlawfully take property. *See, e.g.*, *id.*; *Choate*, 224 U.S. at 670–71. That is also why Congress, when exercising its supposed plenary power, must comply with procedural due process. *Garfield v. United States*, 211 U.S. 249, 262 (1908). And that is why Congress, even when it acts to benefit Indian tribes, must abide by equal-protection principles. *See Morton v. Mancari*, 417 U.S. 535, 551, 553–55 (1974).

Most relevant here, Congress's supposed plenary power over Indian affairs does not include an unqualified power to displace state authority. Several cases prove the point. Begin with *Dick v. United States*, 208 U.S. 340 (1908), a case decided less than a decade after *Stephens*. It addressed whether the United States could regulate the use of liquor near an Indian

reservation in Idaho. *See id.* at 351–52. The Court upheld the liquor regulation. But it carefully cabined "the extent of the power of Congress" over Indian affairs with reference to "certain principles … fundamental in our governmental system." *Id.* at 353. When Congress exercises its "power to regulate commerce," the Court explained, that power is "paramount to the authority of any [S]tate within whose limits are Indian tribes." *Id.* But Congress, in exercising its commerce power, "must have regard to the general authority which the [S]tate has over all persons and things within its jurisdiction." *Id.* Congress cannot interpret its power to "regulat[e] commerce with Indian tribes" so broadly "as to nullify or substantially impair" the States' traditional sovereignty. *Id.*

Consider also *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The Court held there that the Indian Commerce Clause gave Congress no power to abrogate States' sovereign immunity. *Id.* at 47. It recognized that "the Indian Commerce Clause accomplishes a great[] transfer of power from the States to the Federal Government." *Id.* at 62. That includes a transfer of the States' ability to regulate "Indian commerce and Indian tribes." *Id.* But that transfer does not "eviscerate[]" principles of "federalism," such as "the background principle of state sovereign immunity embodied in the Eleventh Amendment." *Id.* at 64, 72. The dissenters in *Seminole Tribe* thought otherwise—they argued that "concerns of federalism" were "subordinate to the plenary power of Congress." *Id.* at 95 (Stevens, J., dissenting); *accord id.* at 167 (Souter, J., dissenting). But that view did not carry the day. Thus, *Seminole Tribe*, at minimum, shows that Congress's plenary power over In-

dian affairs does not "*ipso facto* override state sovereignty as a general matter." Pet.App.238a n.39, No. 21-378 (op. of Duncan, J.).

The Court's analysis in *Lara,* 541 U.S. 193, further suggests that Congress's plenary power over Indian affairs is limited by the powers reserved to the States in the Tenth Amendment. *Lara* held that Congress had authority "to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority." *Id.* at 196. The Court based its holding in part on Congress's "broad general powers to legislate in respect to Indian tribes." *Id.* at 200. But the Court stressed the limited nature of its decision. *Id.* at 204–05. In particular, it highlighted that the case "involve[d] no interference with the power or authority of any State." *Id.* at 205. *Lara*'s concern over Congress interfering "with the power or authority of any State," *id.*, would be inexplicable if Congress's plenary power over Indian affairs eclipsed all exercises of state authority.

In sum, this Court's statements that Congress has a "plenary" power over Indian affairs are best read as imprecise shorthand. They describe a broad power, but one "subject … to" other constitutional principles and limits. *Stephens*, 174 U.S. at 478.

From that, it follows that unreasoned incantations of "plenary power" cannot resolve this case. The Constitution reserves to the States the power to regulate "domestic relations." *Sosna*, 419 U.S. at 404; *accord United States v. Windsor*, 570 U.S. 744, 766 (2013). ICWA, by dictating the procedures and standards that govern child-custody proceedings involving Indian children, intrudes upon that tradi-

tional state authority. Arguably, the Court's cases affirmatively support the argument that ICWA shows too little "regard" for authority traditionally reserved to the States. *See Dick*, 208 U.S. at 353. At the very least, however, the logic of existing precedent stops well short of blessing ICWA's "interference with" state sovereignty. *See Lara,* 541 U.S. at 204–05. So, in resolving the question presented, the Court must decide whether to *extend* its precedent. The States turns to that question now.

II. The Court should not extend the notion of plenary power any further beyond the Constitution's original meaning.

The Court's precedents addressing Congress's power over Indian affairs should play little role, if any, in resolving the question whether Congress had constitutional authority to enact ICWA.

Stare decisis requires "deep respect" for precedent. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). "Fidelity to precedent" is therefore "the preferred course" when the Court has already answered the question a case presents. *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (quotations omitted). But *stare decisis* is neither "an inexorable command" nor "a mechanical formula." *Id.* (quotations omitted). And it does not require "methodically ignoring what everyone knows to be true." *Ramos*, 140 S. Ct. at 1405. Thus, even in cases where precedent supplies a direct answer, this Court will sometimes change course. That is especially true in the constitutional context, "because a mistaken judicial interpretation of that supreme law is often 'practically impossible' to correct through other means." *Id.* (quotations omitted).

It is important to keep in mind that "respect for past judgments also means respecting their limits." *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022). The reality is that parties often seek to "stretch" the Court's past statements "beyond their context." *Id.* In such instances, *stare decisis* does not block the Court from giving the best answer to unresolved questions. Rather, "if a faithful reading of precedent shows it is not directly controlling, the rule of law may dictate confining the precedent, rather than extending it further." *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229*, 974 F.3d 1106, 1117 (9th Cir. 2020) (Bumatay, J., dissenting from the denial of rehearing *en banc*). In other words, respect for precedent does not require the Court to extend precedent "to the limits of its logic." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 615 (2007) (plurality op.). And though *stare decisis* might protect "discrete holdings," it does not demand that the Court forever apply old "methodology" to every "future dispute." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in the judgment).

Understanding these limits to *stare decisis* is particularly important for unresolved constitutional questions. In that context, "fidelity to original meaning counsels against further extension of" precedents when doing so would put the case law at odds (or further at odds) with the Constitution's text. *Hester v. United States*, 139 S. Ct. 509, 509 (2019) (Alito, J., concurring in the denial of *certiorari*). Thus, when deciding unresolved constitutional questions, the Court should look to "[t]he Constitution's text and the Nation's history." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2323 (2020); *accord Free Enter. Fund v.*

Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010).

Several of the Court's recent cases exemplify the proper methodology. One example is *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). There, the Court was "asked to extend" the logic of prior decisions that placed limits on the President's power to remove executive officers. *Id.* at 2192. The Court did not "revisit [those] prior decisions," but it declined to expand them in a manner that "clash[ed] with constitutional structure" and "lack[ed] a foundation in historical practice." *Id.* Or consider *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). In that case, the Court recognized that its method-of-execution cases had stepped beyond the Eighth Amendment's original meaning. *Id.* at 1125–26. While *Bucklew* did not "revisit[] that debate," it refused to adopt a rule that would afford even greater protection. *Id.* at 1126.

This Court's cases regarding interstate commerce are also illustrative. The Commerce Clause gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, §8, cl.3. As explored below, founding-era speakers used the term "Commerce" to describe mercantile trade and related activities. *United States v. Lopez*, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring). This Court's cases regarding interstate commerce, however, have taken a more expansive view of Congress's commerce power—they say that Congress may regulate "anything that has a 'substantial effect' on" interstate commerce. *Id.* at 584. But more recent cases have refused to extend Congress's power over interstate commerce further beyond the Constitution's

original meaning. Of particular note, the Court has said that the power to regulate "Commerce" does not include the power to regulate "family law and other areas of traditional state regulation." *United States v. Morrison*, 529 U.S. 598, 615–16 (2000); *accord Lopez*, 514 U.S. at 567–68 (majority op.).

This case calls for a similar approach. As all seem to agree, the Court has never squarely answered whether Congress's power over Indian affairs includes the power to set federal standards for domestic-relations cases in state courts. *See* Pet.App. 98a–105a (op. of Dennis, J.); Pet.App.238a–44a (op. of Duncan, J.). True, the Court has said that Congress may grant tribal courts—as opposed to state courts—exclusive jurisdiction over adoption proceedings "arising on the Indian reservation" and "in which all parties are members of" an Indian tribe. *Fisher v. District Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 383, 389 (1976) (*per curiam*). But a faithful reading of the Court's cases, including its plenary-power cases, does not supply an answer to whether Congress may dictate the standards for state-custody proceedings arising off of Indian reservations and involving children who are not members of Indian tribes. Thus, the Court should decide the scope of Congress's power, as it relates to ICWA, by examining the Constitution's text and history rather than trying to conjure an answer from existing cases.

III. No part of the Constitution grants Congress a power over Indian affairs broad enough to reach child-custody proceedings within state jurisdiction.

With all that in mind, return to first principles. The Constitution grants Congress "only certain enu-

merated powers." *Murphy*, 138 S. Ct. at 1476. And the Tenth Amendment says that all "powers not delegated to" Congress, or some other branch of the federal government, "are reserved to the States." U.S. Const. amend. X. Pairing enumerated federal power with reserved state power naturally limits Congress's authority. *NFIB v. Sebelius*, 567 U.S. 519, 534 (2012) (op. of Roberts, C.J.). As one example, since the Constitution grants Congress no power over "family law" or "child custody," it follows that the States retain, and Congress lacks, authority to regulate domestic relations. *See Sosna*, 419 U.S. at 404; *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890).

What enumeration within the Constitution gives Congress a plenary power over Indian affairs? None. The Constitution's text "is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders." *Kagama*, 118 U.S. at 378. Given the lack of any apparent textual hook for a plenary power over Indian affairs, this Court and others have listed a variety of constitutional and "preconstitutional" powers that somehow coalesce to form a plenary power. *See, e.g.*, *Lara*, 541 U.S. at 200–02; Pet. App.72a–73a (op. of Dennis, J.). But upon scrutiny, none of these potential sources—whether alone or added up—yields a power broad enough to save ICWA.

A. The Indian Commerce Clause did not empower Congress to enact ICWA.

The Indian Commerce Clause, U.S. Const. art. I, §8, cl.3, is the logical starting point for analyzing Congress's power in this area. It is the only constitutional provision that "grants Congress … explicit

constitutional authority to deal with Indian tribes." Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Neb. L. Rev. 121, 137 (2006). This Court has frequently cited the clause when making plenary-power statements. *E.g.*, *Cotton Petroleum Corp.*, 490 U.S. at 192; *Morton*, 417 U.S. at 551–52. And Congress expressly invoked the Clause when it enacted ICWA. §1901(1).

Neither the text nor history of the Indian Commerce Clause supports a claim of plenary power over all Indian affairs.

Text. The Commerce Clause says that "Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, §8, cl.3. Those words do not give Congress a "plenary" power sufficient to encompass ICWA. Rather, the text contains two key limits.

First, the Indian Commerce Clause limits Congress's power to interactions "with the Indian *Tribes*." U.S. Const. art. I, §8, cl.3 (emphasis added). It "does not give Congress the power to regulate commerce with all Indian *persons,*" no matter how remote their connection to a tribe. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 660 (2013) (Thomas, J., concurring). Congress's power is therefore limited to dealings with "distinctly Indian communities." *United States v. Sandoval*, 231 U.S. 28, 46 (1913). As a corollary, Congress cannot "bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe." *Id.*

ICWA runs afoul of this first textual limit, at least in many applications. Recall that ICWA applies to any custody proceeding involving an "Indian

child." 25 U.S.C. §1903(4). And the Act broadly defines "Indian child" to include any child who (1) is eligible to become a tribal member and (2) has a biological parent who is a tribe member. *Id.* Under that definition, ICWA captures children who are not yet tribal members, who may never become tribal members, who do not live on Indian reservations, and who may have little real-world connection to any Indian tribe. Consider, for example, one case involving a six-year-old girl named Lexi. *See In re Alexandria P.*, 1 Cal. App. 5th 331 (Cal. Ct. App. 2016). Lexi was only "1/64th Choctaw," *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1330 (Cal. Ct. App. 2014), and her biological father—a member of the Choctaw tribe—had abandoned attempts to reunite with Lexi, *In re Alexandria P.*, 1 Cal. App. 5th at 336, 340. Nonetheless, because Lexi qualified as an "Indian child," she was subject to ICWA's strong placement preferences and removed from a loving foster family. *See id.* at 351, 362.

Second, the Indian Commerce Clause limits Congress's power to regulating "Commerce." The power to regulate "Commerce" is not a "plenary power" to regulate issues (like adoption proceedings) with an at-most-tangential connection to commercial activity. "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, 514 U.S. at 585–86 (Thomas, J., concurring) (collecting authority); *accord United States v. Rife*, 33 F.4th 838, 2022 WL 1421193 at *2 (6th Cir. 2022) (Kethledge, J., for the court); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 124–25 (2001). "Thus, 'commerce' did not include manufacturing, agriculture, hunting,

fishing, other land use, property ownership, religion, education, or domestic family life." Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201, 214–15 (2007). That explains why, during debates over ratification, the Constitution's advocates stressed that such topics—including domestic affairs—would be left to the States. Robert G. Natelson, *The Enumerated Powers of States*, 3 Nev. L.J. 469, 476–88 (2003). To be sure, founding-era speakers "sometimes" used commerce in a "figurative or metaphorical" sense, to describe "other social relationships" beyond "mercantile trade." Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A response to Jack Balkin*, 109 Mich. L. Rev. First Impressions 55, 56 (2010). But "the ordinary and common meaning of 'commerce,' both in common discourse and in legal language, was mercantile trade and traditionally associated activities." *Id.*

The original meaning of commerce "was no broader in the Indian context than in the context of foreign and interstate relations." Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. at 215. That is apparent from the Commerce Clause's grammar. The Clause refers to "Commerce" just once and modifies that noun with three prepositional phrases: "with foreign Nations," "among the several States," and "with the Indian Tribes." U.S. Const. art. I, §8, cl.3. It follows that "Commerce" must mean the same thing without regard to the prepositional phrase with which it is used; a single word used only once cannot "be interpreted" to mean different things "at the same time." *Clark v. Suarez Martinez*, 543 U.S. 371, 378 (2005); *see also* Natelson, *The Original Understanding of the*

Indian Commerce Clause, 85 Denver U. L. Rev. at 215 & n.96. Further, founding-era usage shows that the meaning of "Commerce" did not change when used in connection with Indian tribes. A broad review of "eighteenth-century documents" reveals that expressions like "'commerce with Indian tribes' … almost invariably meant 'trade with the Indians' and nothing more." Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. at 215 & n.97 (collecting examples).

Despite the Commerce Clause's grammar, some argue that "Commerce" is susceptible of a broader reading when referring to "Commerce … with the Indian tribes." Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. at 1025–32. The idea is that commerce-adjacent terms like "trade" had "a different character" with respect to Indians, since "'trade' was a form of diplomacy." *Id.* at 1029–30. But "trade" in that setting "still referred to buying, selling, trading, exchanging, and gifting items." *Id.* at 1030. Thus, even accepting that "trade" with the Indians referred to interactions that "were not primarily commercial," it does not follow that "trade" with Indian tribes meant "all relations with Indians." *Id.* at 1032. As a consequence, "the Indian Commerce Clause alone cannot justify exclusive federal power over Indian affairs," even for those who believe the original meaning of "commerce with the Indian tribes" was more expansive. *See id.* at 1032, 1050.

History. A deeper dive into the history surrounding the Indian Commerce Clause's ratification reinforces the textual limits just discussed. Begin with the fact that, for much of the colonial era, Great Britain took a hands-off approach to Indian affairs, leaving the "day-to-day management of Indian rela-

tions … to the colonies." Cohen's Handbook §1.02. The individual colonies thus became used to interacting directly with Indian tribes, both through trade and treaties. *See* Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999, 1011 & n.37 (2014). That changed in the decades leading up to the Revolution, when the British government began exercising greater control over the colonies with respect to Indian affairs. Most notably, after the French and Indian War, the Royal Proclamation of 1763 forbade colonists from purchasing Indian land independent of the Crown. Cohen's Handbook §1.02. The proclamation proved controversial: the colonies "bitterly resented" interference with their previously allowed management of Indian relations. *Id.*

After declaring their independence, the States transferred some of their authority over Indian affairs to the Continental Congress. The Articles of Confederation gave Congress "the sole and exclusive right and power of … regulating the *trade* and managing *all affairs* with the Indians, not members of any of the states." Articles of Confederation of 1781, art. IX (emphases added). As that language suggests, "Indian affairs and trade," though related, "were … treated separately and distinctly within the law" in the lead-up to the Constitution. Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. 413, 430 (2021). "When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian 'affairs.'" Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. at 217; *see also* Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. at 422, 430–31.

But the Articles of Confederation—though purporting to grant Congress exclusive power over all Indian affairs—contained "obscure and contradictory" language that blurred the scope of federal authority. *See* The Federalist No. 42, at 284 (Madison, J.) (Cooke ed., 1961). The Articles promised the States that Congress's power over Indian affairs would not infringe "the legislative right of any state within its own limits." Articles of Confederation of 1781, art. IX. Several States read that promise expansively, as a broad "concession[] to state sovereignty" over Indian affairs. Ablavsky, *The Savage Constitution*, 63 Duke L.J. at 1036. Moreover, the Articles did nothing to bar States from pursuing their own treaties and policies with Indian tribes. *Id.* at 1037. And the Articles also "provided no means to resolve jurisdictional disputes." *Id.* at 1036. To complicate things further, the British Crown ended the Revolutionary War by relinquishing its claim of sovereignty not to the Continental Congress, but directly to the thirteen "independent States." Definitive Treaty of Peace, U.S.-Gr. Brit., art. I, Sept. 3, 1783, 8 Stat. 80, 81.

Given all this, the division of power over Indian relations remained a contentious, unsettled topic when the Constitution was drafted. Nevertheless, an early working draft of the Constitution omitted any language addressing Indian trade and affairs. Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. at 444–54. That omission may have occurred by mistake. *See id.* James Madison, however, caught the omission and proposed giving Congress the power "To regulate affairs with the Indians as well within as without the limits of the U. States." James Madison, Notes on the Debates in the Federal Convention (Aug. 18, 1787), https://perma.cc/V38E-EVVQ. The

drafters rejected that proposal. They "instead grafted 'Indians' into the Commerce Clause." Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. at 465. Accordingly, what started as a likely mistake became a conscious decision: the Constitution's drafters gave Congress "power over Indian trade but not [Indian] affairs." *Id.* From the drafter's perspective, that choice had strategic advantages: at a time when "forward progress" was most needed, a congressional power over commerce with Indian tribes was a less controversial step than including a power over all Indian affairs. *Id.* at 471–72. Consistent with the drafter's choice, ratification debates focused not on "Indian affairs" generally, but on more specific topics such as "the question of treaties" with Indian tribes. *See* Ablavsky, *The Savage Constitution*, 63 Duke L.J. at 1054; *cf.* Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. at 473–75.

Comparing the language of the Articles of Confederation and the Constitution, Congress's power under the Constitution grew in some ways, but "shrank" in others. Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. at 443. On the one hand, the Constitution gave Congress a power over "Commerce … with the Indian Tribes," U.S. Const. art. I, §8, cl.3, a power unqualified by "the legislative right of any state," Articles of Confederation of 1781, art. IX. The Indian Commerce Clause, therefore, left Congress's power "unfettered" by state authority with respect to "[t]he regulation of commerce with the Indians tribes." The Federalist No. 42, at 284. On the other hand, and unlike the Articles of Confederation, the Indian Commerce Clause did not grant Congress a more general power to regulate "all affairs with the Indians." Articles of Confederation

of 1781, art. IX. Given the omission of an Indian-affairs power, any claim of "plenary power" under the Indian Commerce Clause is "wanting." Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. at 476.

Post-ratification history does not support a plenary power over domestic relations under the Indian Commerce Clause. It is true that the Washington Administration and the First Congress were quick to assert broad federal power after the founding. *See* Pet.App.23a–24a (op. of Dennis, J.). But those assertions are best understood in historical context. There is no doubt that various aspects of the Constitution—including the Treaty Clause, discussed more momentarily—increased federal power over Indian affairs in ways that were quite significant during the country's early years. But even with the increase, there are no "founding-era examples" of Congress using its commerce "power to intrude on state governmental functions as ICWA does." Pet.App.260a (op. of Duncan, J.). And regardless, the federal government's self-serving assertions of power after ratification cannot overshadow the Indian Commerce Clause's text, which forecloses the existence of a plenary power over Indian affairs.

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At bottom, the regulation of "Commerce … with the Indian Tribes," U.S. Const. art. I, §8, cl.3, means the regulation of mercantile trading and activities with Indian tribes. The Indian Commerce Clause did not grant Congress the ability to regulate everything having to do with people of Indian ancestry. Because ICWA goes well beyond regulation of trade with In-

dian tribes, Congress lacked authority to enact it under the Indian Commerce Clause.

If this Court holds as much, it will clean up some "stray comments" within its Commerce Clause cases. *Davenport*, 142 S. Ct. at 1528. The Court has at times suggested that Congress's power under the Indian Commerce Clause is broader than its power under the Interstate Commerce Clause. *See Seminole Tribe*, 517 U.S. at 62. But again, the Commerce Clause uses a single noun, "Commerce," to modify both the phrase "among the several States" and the phrase "with the Indian Tribes." U.S. Const. art. I, §8, cl.3. Thus, if the power to regulate "Commerce … among the several States" is not a plenary power to regulate all affairs among the several States, *Morrison*, 529 U.S. at 615–16; *Lopez*, 514 U.S. at 567; *NFIB*, 567 U.S. at 551 (op. of Roberts, C.J.), the power to regulate "Commerce … with the Indian Tribes" cannot be a plenary power to regulate all Indian affairs.

B. The Treaty Clause does not save ICWA.

The Treaty Clause is the other constitutional text that this Court has "traditionally identified" as the source of Congress's plenary power. *Lara*, 541 U.S. at 201. It says the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. art. II, §2, cl.2. Such treaties become "the supreme Law of the Land." U.S. Const. art. VI, cl.2. And States have no power to make their own treaties. U.S. Const. art. I, §10, cl.1.

Viewed in historical context, the Treaty Clause—along with the prohibition of state treaties—

bolstered federal power over Indian affairs. Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. at 1038. During the founding era, "Indian affairs were more an aspect of military and foreign policy" than they are today. *See Lara*, 541 U.S. at 201 (quotations omitted). And, under the Articles of Confederation, "treaties with Native nations had caused the primary struggles between states and the national government." Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. at 1038. Thus, by establishing the supremacy of federal treaties, and by removing the States' ability to make treaties, the Constitution solidified the federal government's authority to negotiate with Indian tribes.

Nonetheless, the Treaty Clause remains a weak candidate for Congress's "plenary" power over Indian affairs. The Clause gives treaty power to the President, with the Senate playing only a secondary role. The Clause therefore does not "authorize Congress to act legislatively." *Lara*, 541 U.S. at 201. Despite that inherent limit, this Court has suggested that treaties with Indian tribes might "authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" *Id.* (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)). More on that dubious premise below. But accepting its validity for the moment, the Treaty Clause still does not amount to a plenary power: any congressional action "made pursuant to" a treaty must, of course, flow from the terms of a treaty. *See id.*

From that last statement, it follows that the Treaty Clause did not empower Congress to enact ICWA. When Congress enacted ICWA, it made only a generic reference to its "assumed … responsibility" under "treaties … with Indian tribes." §1901(2). It

did not identify any specific treaty or treaties. And the findings Congress codified in support of ICWA, do not explain how the terms of any treaty—or set of treaties—gave Congress the power to craft standards for state-custody proceedings. *See* §1901. In operation, ICWA does nothing to limit its effect to Indian tribes with which the United States has entered treaties. Remember that ICWA applies to custody proceedings involving any "Indian child," regardless of any given tribe's treaty status. *See* §1903(4). Thus, ICWA is an example of Congress "act[ing] legislatively," independent of any "treaties made" under the Treaty Clause. *See Lara*, 541 U.S. at 201. That is hardly surprising—the federal government ceased making treaties with Indian tribes over a century before ICWA's enactment. *See id.*

The Indian tribes participating in this case see things differently. They contend that Congress's power to enact ICWA stems from the federal government's treaty power, at least as applied to children who are potential members of Indian tribes that entered into treaties with the United States. Many treaties, the argument goes, memorialized a "trust relationship" between the United States and Indian tribes. Pet.App.16a (op. of Dennis, J.). For further support, the tribes point to treaty language through which the United States made promises relating to the Indian children of certain tribes. *See, e.g.*, Navajo Nation BIO.31–32 & n.7, Nos. 21-378 & 21-380; Cherokee Nation BIO.27 & n.17, No. 21-380. For example, in an 1849 treaty, the United States promised to "legislate and act as to secure the permanent prosperity and happiness of" the Navajo Nation. Treaty with the Navajo, art. XI, Sept. 9, 1849, 9 Stat. 974. Then, in an 1868 treaty, the United States

promised to build a "schoolhouse" and furnish "teacher[s]" so that children living on Navajo reservations would receive "an English education." Treaty with the Navajo, art. III & VI, June 1, 1868, 15 Stat. 667. According to the Navajo Nation, such language must be understood as a "promise[] … to maintain cultural and familial connections between the Nation and its children." Navajo Nation BIO.32. And Congress, the argument concludes, could fulfill the United States' treaty promises through ICWA, even if Congress's enumerated powers would not otherwise have allowed for ICWA. *See id.* at 31–33.

The tribes' treaty-power argument suffers from two fatal flaws. *First*, when the federal government acts—such as by making treaties or enacting statutes—it does so against the backdrop of "well-established principle[s]," including "the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (quotations omitted). If the federal government seeks to "'radically readjust the balance of state and national authority," this Court demands a "clear statement" of such intent. *Id.* (quotations omitted, alterations accepted). Here, ICWA radically readjusts child-custody proceedings, an area traditionally within the States' "virtually exclusive" authority. *Sosna*, 419 U.S. at 404. But none of the treaty provisions the tribes identify contains any statement, much less a clear statement, increasing Congress's power vis-à-vis the States. (Particularly so with respect to children who are not tribal members and who do not live on Indian reservations.) Thus, none of these treaties lay a foundation for ICWA.

Second, and more fundamentally, the tribes' argument rests on the mistaken idea that the federal

government can—through treaties with foreign nations or Indian tribes—give Congress powers that the Constitution reserves to the States. To be fair, the mistake comes from this Court's decision in *Holland*, 252 U.S. 416. In that case, Congress enacted a statute authorizing federal regulations governing migratory birds. It did so to give domestic effect to a treaty the President had entered with Great Britain. Missouri sued, arguing that the statute invaded its reserved powers under the Tenth Amendment. The Court disagreed. Without citation, it declared: "If the treaty is valid there can be no dispute about the validity of the statute … as a necessary and proper means to execute the powers of the Government." *Id.* at 432. In other words, *Holland* held without explanation that Congress may—through its power under the Necessary and Proper Clause, U.S. Const. art. I, §8, cl.18—enact legislation to execute treaties. And Congress may do so, under *Holland*'s logic, even for subjects otherwise outside its enumerated powers.

As just discussed, none of the treaty provisions the tribes identify obligates Congress to enact anything like ICWA. If the Court agrees, there is no need to revisit *Holland*. But the Court should correct *Holland* when it next has the chance. The notion that the President, through the Treaty Clause, may extend Congress's power "to every conceivable domestic subject matter," *Bond*, 572 U.S. at 883 (Thomas, J., concurring in the judgment), contradicts "[t]he Constitution's text and structure," *id.* at 874 (Scalia, J., concurring in the judgment).

Start with the text. The Treaty Clause gives the President the "Power … to make Treaties," with the Senate's advice and consent. U.S. Const. art. II, §2, cl.2. The Necessary and Proper Clause empowers

Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, §8, cl.18. "Read together, the two Clauses empower Congress to pass laws 'necessary and proper for carrying into Execution ... [the] Power ... to make Treaties.'" *Bond*, 572 U.S. at 874–75 (Scalia, J., concurring in the judgment). Said another way, Congress may, under the Necessary and Proper Clause, help "carry[]" the power to make treaties "into Execution" by taking actions to facilitate "treaty-related deliberations." *Id.* at 876. "But a power to help the President *make* treaties is not a power to *implement* treaties already made." *Id.* Congress instead needs to rely on its own independent powers to give treaties "domestic legal effect." *Id.* at 875–76. Founding-era speakers would have understood this: at the time of the Revolution, "making a treaty," was a task for the King, whereas giving a treaty "domestic legal effect … required an act of Parliament." Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1884 & n.75 (2005) (citing 1 William Blackstone, Commentaries *243–44, *249).

The Constitution's structure leads to the same conclusion. *Holland* is at odds with our system of dual sovereignty; it "places Congress only one treaty away from acquiring a general police power." *Bond*, 572 U.S. at 879 (Scalia, J., concurring in the judgment). The decision tempts the federal government to use a treaty—with any willing partner—as a weapon to "flatten[] the principle of state sovereignty." *Id.* Further, to interpret the President's treaty power as touching on any subject, "would destroy the

basic constitutional distinction between domestic and foreign powers." *Id.* at 883 (Thomas, J., concurring in the judgment). Further still, *Holland*'s view of the Treaty Power is plainly "implausible," as a matter of history. *Rife*, 2022 WL 1421193 at *6. It would be strange indeed to think that a founding generation—highly sensitive to Parliament's broad claims of authority—would include a "hidden power" within the Constitution by which Congress could "overleap the bounds" of all other limits. *Id.*

One more point about *Holland*. Though recognizing a broad treaty-making power over interests that "can be protected only by national action," *Holland* signaled that there were "qualifications to the treaty-making power." 252 U.S. at 433, 435. At minimum, therefore, *Holland*'s analysis begs for clarification as to what "qualifications" keep "the treaty-making power" in check. *Id.* Within his concurrence in *Bond*, Justice Alito identified one potential limiting principle: a treaty "exceeds the scope of the treaty power" if it obligates Congress "to enact domestic legislation" concerning conduct "typically … regulated by the States." 572 U.S. at 897 (Alito, J., concurring in the judgment). That limit would doom ICWA. Under any fair reading, ICWA amounts to "domestic legislation" in an area "typically … regulated by the States."

C. Congress's other enumerated powers do not allow for ICWA, nor do any "preconstitutional" powers.

As all this shows, neither the Indian Commerce Clause nor the Treaty Clause offers a satisfying justification for Congress's plenary power over Indian affairs. That is likely why many look elsewhere. For

instance, the lead opinion for the *en banc* Fifth Circuit said that Congress's plenary power derives "from the holistic interplay" of various constitutional provisions, including the Supremacy Clause and the Property Clause. Pet.App.85a (op. of Dennis, J.). This Court has further suggested that (to some unspecified degree) Congress's "legislative authority" over Indian affairs might derive in part from "preconstitutional powers necessarily inherent in any Federal Government." *Lara*, 541 U.S. at 201 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–22 (1936)).

None of these alternative explanations for plenary power fares any better. The powers the Constitution delegates "to the Federal Government, are few and defined," while the powers that "remain in the State Governments are numerous and indefinite." The Federalist No. 45, at 313 (Madison, J.) (Cooke ed., 1961). This country operates under "a *written constitution*" that "marks out limitations to federal power." *Rife*, 2022 WL 1421193 at *4. Under this approach, Congress's authority must derive from a particular clause, not from penumbras emanating from a holistic reading of unrelated clauses.

In any event, the Constitution's various clauses, even when read "holistically," do not add up to a "plenary power" over Indian affairs. *See* Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. at 207–10. The Supremacy Clause, for example, has no effect unless Congress is exercising "its enumerated powers." *Collins v. Virginia*, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring). The Property Clause, for its part, gives Congress rulemaking power over federal property. U.S. Const. art. IV, §3, cl. 2. Congress, there-

fore, has broad authority over Indians living on federal land. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976). During the founding era, when the country was expanding westward, the Property Clause was arguably of greater importance to the management of Indian affairs. *See* Cohen Handbook §5.01[1]. But the Property Clause supplies no basis for Congress to regulate state courts or the affairs of people living on state land, which is what ICWA purports to do.

Any claim of a plenary "preconstitutional" power over Indian affairs is likewise unconvincing. The basic theory is that the federal government, as part of the founding, inherited powers over Indian affairs, which were primarily of a "military and foreign policy" nature. *Lara*, 541 U.S. at 201 (quotations omitted). Some add that the founding generation had an "implicit" understanding that "the United States, as the more powerful sovereign, owed a duty of protection to tribes." Pet.App.386a (op. of Costa, J.).

Contrary to these suggestions, Congress possesses no inherent authority over all Indian affairs. As discussed above, for most of the colonial era, the individual colonies directly managed Indian affairs. *See* Cohen's Handbook §1.02. And Great Britain relinquished its claim of sovereignty directly to the States. Definitive Treaty of Peace, art. I, 8 Stat. at 81. It follows that whatever power the federal government has over Indian affairs "must stem … from the Constitution itself." *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quotations omitted).

Further indulging a "preconstitutional" power over Indian affairs also risks perpetuating the offensive reasoning underlying this Court's early Indian-

law cases. For example, in *Kagama*, this Court based its understanding of federal power on the view that Indian tribes are "wards of the nation … remnants of a race once powerful," but "now weak" and dependent on the federal government for protection. *See Kagama*, 118 U.S. at 383–84. The Court should avoid expanding cases built on bigoted logic. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2097 n.3 (2019) (Thomas, J., concurring in the judgment); *cf. Ramos*, 140 S. Ct. at 1394.

CONCLUSION

The Court should hold that Congress lacked the power to enact ICWA.

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