PROPER PARENTS, PROPER RELIEF

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INTRODUCTION

Indian children belong with Indian parents—or so says the Indian Child Welfare Act (ICWA).[1] ICWA requires certain procedures for carrying out the adoption of an Indian child. Among those procedures is an explicit preference for Indian families over non-Indian families. The hierarchy is so strict that a court must prioritize placing a child with an Indian family even if she is already thriving in the home of a non-Indian family, and even if her biological parents chose a non-Indian family to adopt her. This regime presents a clear constitutional issue. Can the government deny a family the adoption of a child solely on account of their race?

The Fifth Circuit took up this question in 2021 and found that ICWA's placement preferences violated the Equal Protection Clause.[2] In *Haaland v. Brackeen*,[3] the Supreme Court vacated in part the Fifth Circuit's judgment, but not because it disagreed on the merits. Rather, the Court lacked jurisdiction because it could not redress the plaintiffs' equal protection claim. The plaintiffs had named the wrong defendants: the Washington bureaucrats overseeing ICWA,[4] not the state

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1 25 U.S.C. §§ 1901–1963 (2018).

2 *See* Brackeen v. Haaland, 994 F.3d 249, 268 (5th Cir. 2021) (en banc) (per curiam) ("The en banc court is equally divided . . . as to whether Plaintiffs prevail on their equal protection challenge to ICWA's adoptive placement preference for 'other Indian families' and its foster care placement preference for a licensed 'Indian foster home.' The district court's ruling that [these] provisions . . . violate equal protection is affirmed without a precedential opinion." (footnote omitted) (citations omitted)), *aff'd in part, rev'd in part, vacated in part*, 143 S. Ct. 1609 (2023).

3 143 S. Ct. 1609 (2023).

4 *See id.* at 1626.

officials handling their adoptions on the ground.[5] Indeed, Justice Kavanaugh wrote separately in *Brackeen* to emphasize that he looked forward to a future case "arising out of a state-court foster care or adoption proceeding" when the issue would be "properly raised by a plaintiff with standing."[6]

This Note explores how a plaintiff could bring such a case. To do so, it considers the novel legal question of whether a court can enjoin state (or even tribal) officials from enforcing an unconstitutional federal law.

Part I considers how the ideal resolution of the equal protection issue will not be achieved by challenging a final adoption decision, but by seeking pre-enforcement relief. Part II notices that pre-enforcement relief in this scenario will require applying *Ex parte Young*[7] in a novel legal context. Part III finds that even if an *Ex parte Young* action is available, it will be difficult for the plaintiff to fashion a claim that is both ripe for review and fully redressable. The situation therefore presents a harsh reality of our constitutional system: the best remedy is not always found through the federal courts.

I. THE IDEAL SUIT IS FOR PRE-ENFORCEMENT RELIEF

Pre-enforcement relief has not been the traditional method for protecting constitutional rights. Historically, a litigant would challenge the constitutionality of a state statute defensively, after the state enforced the law against him.[8] But ICWA presents precisely the kind of case where the harm from a post-enforcement challenge demands "a stronger remedy."[9]

To be sure, challenging an adoption decision governed by ICWA would be straightforward enough. Generally speaking, a couple could petition their state court for the adoption of an Indian child, and then challenge the denial of their petition on equal protection grounds. But constitutional challenges can take years to reach a final judgment, leaving family and child in limbo. The emotional cost—to both parents and child—may deter an adoptive couple from seeking relief or even from providing a home for an Indian child in the first place.

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5 *See id.* at 1639.

6 *Id.* at 1661–62 (Kavanaugh, J., concurring).

7 209 U.S. 123 (1908).

8 *See* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 153 (2023); *cf.* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 548 (2021) (Sotomayor, J., concurring in judgment in part and dissenting in part) ("Under normal circumstances, providers might be able to assert their rights defensively in state court.").

9 Baude & Bray, *supra* note 8, at 159.

Consider the ordeals suffered by the plaintiffs in *Brackeen*. One family, the Cliffords, fostered a five-year-old girl whose maternal grandmother belonged to the White Earth Band of the Minnesota Chippewa Tribe.[10] At the time the child entered foster care, the tribe had written a letter to the court saying that she was not eligible for tribal membership.[11] But after the Cliffords petitioned for adoption, the tribe changed course and enrolled her as a member.[12] The court then removed the child to the home of her maternal grandmother instead of finalizing adoption with the Cliffords, for the simple reason that her grandmother was a member of the tribe and the Cliffords were not.[13] Her grandmother outranked the Cliffords even though she had lost her foster-care license and had a criminal conviction.[14]

Another plaintiff couple, the Brackeens, petitioned for the adoption of a baby boy they fostered, but they lost their petition after his tribe intervened with a nonrelative placement in New Mexico.[15] When the state court ordered the baby to be removed, the Brackeens obtained an emergency stay, and the Indian family withdrew from consideration for the adoption.[16] Because there was no longer an alternative Indian placement, the Brackeens were able to finalize their adoption of the baby. But given the hardship of the proceedings, they are now reluctant to provide a foster home for Indian children in the future.[17]

The final plaintiff couple, the Librettis, endured a similar trial in their adoption proceedings. The Librettis had petitioned for adoption of an Indian baby girl after the baby's mother selected them as adoptive parents. But the baby's tribe intervened against the mother's wishes and identified several potential placements on the tribe's reservation.[18] The tribe withdrew its challenge after the Librettis filed suit in *Brackeen*, and the Librettis were able to finalize their adoption.[19] But like the Brackeens, the Librettis are now reluctant to foster or adopt another Indian baby.[20]

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10 *See* 143 S. Ct. at 1626.

11 *Id.*

12 *Id.*

13 *See id.*

14 *Id.*

15 *Id.* at 1625.

16 *Id.*

17 *See id.*

18 *See id.*

19 *Id.* at 1625–26.

20 Brackeen v. Bernhardt, 937 F.3d 406, 419 (5th Cir. 2019), *aff'd in part, rev'd in part en banc sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (per curiam), *aff'd in part, rev'd in part, vacated in part*, 143 S. Ct. 1609 (2023).

The plaintiffs' experiences show that a couple that wants to challenge ICWA on equal protection grounds must be ready to suffer prolonged uncertainty in their adoption. The child could be moved out of their home as litigation drags on. And years of holding on to the hope of being his or her parents could end in disappointment and grief.

Of course, it doesn't have to end this way. State judges also swear an oath to uphold the Constitution.[21] And they cannot enforce a law they understand to be unconstitutional. So a state court judge may very well find ICWA unconstitutional in the midst of adoption proceedings and place the Indian child with the petitioning non-Indian family. But the success of this path depends on having an adoption case heard before a state judge in family court who is ready and willing to decide that the applicable federal law violates the Equal Protection Clause. The petitioners in *Brackeen* make for a small sample size. But after forty-six years of ICWA, it seems that few judges are inclined to make that call.

Thus, challenging ICWA on equal protection grounds would be easiest for a couple that intends to adopt an Indian child in the future but that has not grown attached to any particular child. Such pre-enforcement review, however, is not a guarantee. Plaintiffs must have a proper cause of action and meet Article III standing requirements. And they must overcome the doctrine of state sovereign immunity, which generally bars suits brought by citizens against their own states.

II. *EX PARTE YOUNG* PROVIDES THE PROPER CAUSE OF ACTION

State sovereign immunity grew out of the common law and law of nations. Under these bodies of law, all nation-states enjoy the presumption of immunity from suit.[22] As the arbiter of law, the sovereign can be subjected to the coercive force of law only when he acts beyond his authority or else submits to the punishments of law. From this general principle derives the rule that a citizen may not sue his state unless Congress lawfully abrogates the state's immunity[23] or the state waives its immunity.[24] This principle also applies to suits against state officials for actions taken in their official capacity.[25] Thus, the Constitution

21 *See* 4 U.S.C. § 101 (2018).

22 *See* ANTHONY J. BELLIA JR., FEDERALISM 476 (2d ed. 2017).

23 Congress may not abrogate state sovereign immunity pursuant to its Article I powers but may abrogate state sovereign immunity through Section 5 of the Fourteenth Amendment. *See* Seminole Tribe v. Florida, 517 U.S. 44, 59, 65, 72 (1996).

24 *See* Bd. of Liquidation v. McComb, 92 U.S. 531, 541 (1876) ("A State, without its consent, cannot be sued by an individual . . . .").

25 This is not to be confused with the availability of *Bivens* claims. *Bivens* provides an implied cause of action for damages against federal officials for constitutional violations in

does not itself create a remedy for damages after a state official violates a citizen's rights. But the same is not true for injunctive relief. Because the Constitution is a higher source of law that compels even the actions of state officials, citizens may enjoin state officials from violating their constitutional rights in the first place.

This kind of pre-enforcement relief is available under *Ex parte Young*.[26] *Young* arose after Minnesota passed laws requiring that railroads charge certain rates for passengers and freight.[27] The penalties for noncompliance were harsh, including fines in the thousands and even jail time.[28] Parties who wanted to challenge a state statute would normally do so defensively in the course of enforcement proceedings, but the consequences of violating these particular laws were "so drastic that no owner . . . could invoke the jurisdiction of any court to test [their] validity."[29] So the railroad opted for another way. It filed for an injunction against the State Attorney General, claiming that enforcement of the rates would violate the railroad's rights under the Fourteenth Amendment.[30]

The Court granted the railroad's request, finding that injunctive relief against the Attorney General did not violate Minnesota's sovereign immunity. The reasoning is somewhat convoluted, but logical. Minnesota law cannot violate the Constitution. Therefore, its officials have no authority to enforce an unconstitutional state law. And if its officials have no authority to enforce the law, the court does not abrogate Minnesota's sovereign immunity by enjoining their enforcement action.[31]

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the course of their official acts. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). However, *Bivens* applies only to federal officers and is available only in a few narrow contexts. *See* Egbert v. Boule, 142 S. Ct. 1793, 1799–1800 (2022).

26 209 U.S. 123 (1908).

27 *Id.* at 127–28.

28 *Id.* at 127–29.

29 *Id.* at 131.

30 *See id.* at 131.

31 *See id.* at 159–60. This piece of the *Ex parte Young* doctrine has been called a fallacy. If an official does not act with state authority, he acts only as a private citizen. And the Fourteenth Amendment defends only against state action, not against constitutional violations by other citizens. So the defendant is a state actor for the purposes of accountability under the Fourteenth Amendment, but not for purposes of state sovereign immunity. *See* John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 1011–12, 1011 n.94 (2008). If this is a fallacy, it is at least a useful and workable one. Without it, courts may have to sit idly by as state officials violate their citizens' constitutional rights. Plus, other scholarly accounts have presented strong arguments disputing the extent to which *Young* creates a paradox. *See id.* at 1012–13 ("[T]he Constitution goes beyond nullification and in addition forbids some conduct by officials that is not, in a sense, official conduct, because it rests on an invalid rule." *Id.* at 1013.).

The Court has since developed the *Young* doctrine into the general understanding "that the Constitution of its own force gives rise to causes of action to enjoin state officials engaged in constitutional violations."[32] Thus, even though today Congress has green-lighted such pre-enforcement actions by statute at 42 U.S.C. § 1983, courts often uphold causes of action for injunctive relief "directly under the Constitution . . . without adverting" to the cause of action under federal law.[33]

This raises an important question: if a plaintiff could bring his claim directly under the Constitution via the *Ex parte Young* framework, or by statute via § 1983, which should he choose? A belt-and-suspenders approach is a reliable litigation strategy. But a § 1983 claim would likely be unsuccessful in this context. As Part III will show, the plaintiff must not only enjoin state officials to meet redressability requirements; he must also enjoin tribal officials. Tribal officials act under color of federal law, not state law, when they exercise their right to intervene in state adoption proceedings.[34] But § 1983 applies only to persons acting under the color of state law.[35] Therefore, though incorporating a § 1983 claim is often a successful approach to pre-enforcement constitutional challenges, it would fail to grant the plaintiff relief in this scenario. This Note accordingly focuses on relief under the *Ex parte Young* framework.

Unfortunately, relief under *Young* in the context of ICWA is not so straightforward. The hang-up is that *Ex parte Young*, and seemingly every case decided under its framework, has addressed a state actor enforcing an unconstitutional *state* law. But ICWA is a *federal* law.[36] A plaintiff challenging ICWA would thus have to argue that *Ex parte Young* just as easily applies to state officials enforcing unconstitutional

32 RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 927 (7th ed. 2015).

33 *Id.* at 933.

34 *See* 25 U.S.C. § 1911 (2018).

35 "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983 (2018).

36 This issue surely will not come up often. Congress usually cannot direct state officials to enforce federal law. *See* Printz v. United States, 521 U.S. 898, 935 (1997). ICWA dodged the anticommandeering challenge, however, because its provisions apply "even-handedly" to any actor carrying out an adoption in state court, which can include private organizations. *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1633, 1631–38 (2023) (quoting Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018)).

federal laws as it does to state officials enforcing unconstitutional state laws.

Depictions of the *Young* action in recent caselaw make this, at first, a tricky argument. The Court has termed *Young* a "narrow exception."[37] It has described *Young* in ultraspecific terms, such as in *Whole Woman's Health v. Jackson*,[38] where the Court explained that *Young* "allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law."[39] And the modern Court is generally hesitant to uphold implied causes of action, having come "'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'"[40]

Despite this rhetoric, the legal principles underlying *Young* clearly support the injunction of state officials enforcing unconstitutional federal law. The crux of *Ex parte Young* is that because the Constitution is the supreme law of the land, a state cannot authorize her officials to violate the constitutional rights of her citizens. Courts can enjoin state officials from taking unconstitutional actions without implicating state sovereignty because the injunction does not invade the state's legitimate exercise of authority.

This framework proceeds logically no matter whether the state official is enforcing state or federal law. Either way, the state official derives from the state his authority to act against a citizen. And the state has no authority to violate the Constitution, even if Congress instructs it to do so.

The force of this argument is clear in the adoption context. States generally grant their officials the authority to investigate and recommend adoption placements and to execute adoption orders. Consider a hypothetical state law that forbade officials from recommending the placement of a white child with a black family. A state official who refused to consider a black family's petition to adopt a white child would surely violate the Equal Protection Clause. A court could lawfully enjoin the official from following state law under *Ex parte Young*. When we change the hypothetical to a federal law, the analysis stays the same. The official still derives his authority to investigate from the state. And his refusal to consider the black family's petition on account of their race still violates their constitutional rights. *Ex parte Young* remains an appropriate action to prevent the family's constitutional injury at the hands of the state actor.

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37 Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996).

38 142 S. Ct. 522 (2021).

39 *Id.* at 532.

40 Egbert v. Boule, 142 S. Ct. 1793, 1802 (2022) (quoting Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020)).

This perspective on *Ex parte Young* also aligns with the doctrine as a whole. The Court does not always phrase the *Young* claim in *Whole Woman's Health*'s hyperspecific terms. In past cases, the Court has been more focused on the big picture. As the Court phrased it in *Idaho v. Coeur d'Alene Tribe*, "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction."[41] Accordingly, where the Court has limited the availability of injunctions to prevent violation of constitutional rights, it has not carved away the core of the *Young* action: pre-enforcement relief against constitutional violations by state officials.

There have been only a few instances in which the Court has limited the availability of injunctions under *Young*. None of these suggested that federal law could not provide the basis for the claim. Rather, these limiting cases either (1) highlighted the need for a proper defendant, (2) deferred to Congress's remedial scheme, or (3) preserved *Young* as an essentially equitable action.

First, *Whole Woman's Health v. Jackson* declined to expand *Young* to enjoin state officials who did not actually enforce the state law. That case challenged the constitutionality of S.B. 8, a Texas heartbeat law that enabled private parties, not state officials, to sue abortion providers.[42] Because no state officials were responsible for enforcement, the plaintiffs sued state court judges and clerks to prevent courts from hearing suits under S.B. 8 in the first place.[43] Even though S.B. 8 unquestionably abridged abortion rights at the time, the Court did not allow the novel theory of naming state court judges and clerks to prevail because "state-court judges and clerks . . . do not enforce state laws," but rather "work to resolve disputes between parties."[44] Shutting down courts would have been a dramatic expansion of *Ex parte Young*. And it would have upended the fundamental principle that federal courts do not intervene in the function of state courts unless the proceeding itself is unconstitutional.[45]

The same defendant issue would not arise in an ICWA challenge. State adoption officials perform traditional executive functions: investigating homes for potential adoption placements, recommending placements to the courts, and carrying out adoption orders. And because their acts are executive, a state adoption official would be the proper plaintiff in a *Young* action.

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41 521 U.S. 261, 281 (1997).

42 142 S. Ct. at 530.

43 *See id.* at 531–32.

44 *Id.* at 532.

45 *Id.* ("As *Ex parte Young* put it, 'an injunction against a state court' or its 'machinery' 'would be a violation of the whole scheme of our Government.'" (quoting *Ex parte* Young, 209 U.S. 123, 163 (1908))).

Second, the Court in *Seminole Tribe v. Florida* declined to grant pre-enforcement relief under *Young* when Congress had already created a detailed remedial scheme.[46] The plaintiff tribe sued to enjoin its state's Governor after he failed to follow federal procedures for negotiating a gaming contract.[47] But the Court noted that the statutory requirements did not "stand alone."[48] Rather, they were passed "in conjunction with [a] carefully crafted and intricate remedial scheme."[49] Consistent with the Court's general approach to implied causes of action,[50] the majority declined to provide additional remedies where the design of the Government's program suggested "that Congress . . . provided what it consider[ed] adequate remedial mechanisms."[51]

This limitation is inapplicable to challenging ICWA on equal protection grounds. In the statute at issue in *Seminole Tribe*, Congress foresaw the possibility that state governments would not comply with negotiation requirements and created a detailed scheme for remedying those claims. Here, Congress has created no scheme for addressing equal protection concerns. Nor would it make any sense for the statute to provide a remedial scheme for that issue, as the very purpose of ICWA is to prefer one type of adoptive family to another on the basis of race. This creates an ideal situation for federal courts to provide a remedy through *Young*.

Finally, the Court has declined to find an implied right to injunctive relief under *Young* when relief would "implicate[] special sovereignty interests."[52] The only case where the Court has denied a *Young* action for this reason has been *Idaho v. Coeur d'Alene Tribe*, where an Indian tribe brought an equitable action seeking ownership of "a vast reach of lands and waters long deemed by the State to be an integral part of its territory."[53] The Court realized the suit was essentially a quiet title action but that the consequences of relief through *Young* would go "well beyond [quiet title's] typical stakes."[54] The Court declined to grant such extraordinarily "far-reaching and invasive relief."[55]

The decision in *Coeur d'Alene Tribe* may speak to the Court's recent emphasis on *Young* as an essentially equitable action where plaintiffs must seek appropriate "judge-made remed[ies]."[56] Courts must use

46 *See* Seminole Tribe v. Florida, 517 U.S. 44, 53 (1996).
47 *See id.* at 51–53.
48 *Id.* at 73.
49 *Id.* at 73–74.
50 *See* Alexander v. Sandoval, 532 U.S. 275, 289–91 (2001).
51 *Id.* at 74 (quoting Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)).
52 Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997).
53 *Id.* at 282.
54 *Id.*
55 *Id.* at 282, 287–88.
56 Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015).

caution when granting equitable relief. Contrary to actions for damages, where "there is an inherent symmetry between the amount of a plaintiff's injury and the amount of damages the defendant is required to pay[,] . . . no such symmetry is inherent in . . . injunctions."[57] Thus, an imprudent court in equity could grant a remedy "that imposed massive costs on the defendant" for only "a trifle of grievance."[58]

But these words for the wise should not stay the hand of a court considering a pre-enforcement challenge to ICWA. Contrary to *Coeur d'Alene Tribe*, an injunction in this context would not dismantle previous understandings of state sovereignty. In fact, an injunction would reflect the very purpose of equity, as the court would make an individualized decision that pauses the proceeding before irreparable harm is done to parent and child.[59]

Despite the novel legal context, *Young* is a legitimate and appropriate cause of action for challenging ICWA. However, as *Brackeen* makes all too clear, a plaintiff challenging ICWA must still meet rigorous justiciability requirements.

III. JUSTICIABILITY REMAINS AN OBSTACLE

Even if plaintiffs successfully argue that they should be able to seek an injunction under *Ex parte Young*, it will be difficult to frame the issue in a way that is ripe for relief and redressable. The ripeness challenge will probably mean that plaintiffs must seek relief further into adoption proceedings, though still not after the child has been placed with a different family. The redressability issue, though, depends on whether tribal officials can be enjoined under *Ex parte Young*. The Supreme Court has indicated that this is possible but has never squarely decided the question.

A. Ripeness

Ripeness derives from the Article III case-or-controversy limitation. It requires a plaintiff to bring a fully formed case before the court, one that is not "dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"[60] In a pre-enforcement action, a case is only ripe once the plaintiff can show a "*direct* threat" to his civil rights.[61] A "*general* threat of possible

57 Baude & Bray, *supra* note 8, at 160.

58 *Id.*

59 *See id.* at 170.

60 Trump v. New York, 141 S. Ct. 530, 535 (2020) (per curiam) (quoting Texas v. United Sates, 523 U.S. 296, 300 (1998)).

61 *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 88 (1947) (emphasis added).

interference with [civil] rights . . . does not make a justiciable case or controversy."[62]

A plaintiff couple challenging ICWA would not be able to show that their case is ripe for review before filing an adoption petition. This is because ICWA makes it highly probable, but not certain, that tribal status will control the outcome of the adoption proceedings. True, ICWA does impose a mandatory hierarchy preferring placement with Indian families. But courts are permitted to finalize adoptions with non-Indian families in the absence of an alternative.[63] And an alternative placement is not a given. State officials are not responsible for finding an alternative placement.[64] And tribes have the right, but not the obligation, to intervene with an alternative.[65] Whether a court decides a plaintiff's adoption petition on the basis of race depends on the discretionary decision of tribal officials to intervene with an alternative placement.

Thus, pure pre-enforcement review will almost certainly be unavailable. A plaintiff couple may have a claim ripe for review, though, once they reach a specific middle stage of adoption proceedings: after learning of the tribe's intent to intervene, but before officials present an alternative family.

The plaintiff's claim would be ripe for review after learning of intent to intervene because looking for alternative placements poses a "direct threat," or a "definite prejudicial interference[]" with the plaintiff's rights.[66] Intent to intervene thus opens the door to a constitutional challenge, but not for long. Once a tribe presents an alternative, ICWA compels the court to prefer the Indian family. And an alternative placement closes the door, for at that point, the only actor that could discriminate on the basis of the plaintiff's race would be the state court as it evaluates the placement options. And federal courts cannot enjoin state courts. Such a suit would almost certainly fail under *Whole Woman's Health v. Jackson*, where the Supreme Court emphasized that "'an injunction against a state court' or its 'machinery'" is "a violation of the whole scheme of our Government."[67]

Even if a plaintiff could file in this window, filing for an injunction in the middle of proceedings may still run too high a risk for some adoptive parents. For a couple that is currently fostering the child they wish to adopt, the emotional strain of knowing the child could be taken after litigation could be too much to bear. And couples that are not

62 *Id.* at 89 (emphasis added).
63 *See* 25 U.S.C. § 1915(a) (2018).
64 *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1625, 1634–35 (2023).
65 *See* 25 U.S.C. § 1911(c) (2018).
66 *United Pub. Workers*, 330 U.S. at 88, 90.
67 142 S. Ct. 522, 532 (2021) (quoting *Ex parte* Young, 209 U.S. 123, 163 (1908)).

currently fostering the child they wish to adopt may be unwilling to wait until after litigation to begin parenting the child.

Whether to move forward with a pre-enforcement challenge after petitioning for adoption would be a decision highly specific to the needs of the plaintiff couple. But a couple that does want to move forward with a pre-enforcement challenge would still need to meet one last requirement: redressability.

B. Redressability

Article III constrains the power of the federal courts. They may exercise only the judicial power, and they may exercise that power over certain cases and controversies.[68] An essential part of the judicial power is that a court's judgment binds the proper parties to grant the plaintiffs proper relief.[69] A court cannot merely advise a defendant of his legal obligations. Rather, the court's judgment must bind the defendant to act in a way that "redresses" the plaintiff's injury.[70]

In short, federal courts may not hear claims they cannot redress. So the plaintiff must name the defendant whose actions caused the plaintiff's legal injury, or whose actions are expected to cause the plaintiff's legal injury. This requirement became all too clear in *Brackeen*. The plaintiffs sued the Washington bureaucrats responsible for overseeing ICWA.[71] But ICWA puts individual adoption proceedings in the hands of state officials.[72] The parties who would act against the plaintiffs in their adoption proceedings—the state officials—were left off the other side of the "v." The plaintiffs asked for an injunction, but named no state actors for the court to enjoin. The plaintiffs asked for a declaratory judgment, but did not empower the court to balance their rights against those of "the officials who matter[ed]."[73]

Say the Court had found ICWA unconstitutional. It could have bound the federal officials to stop overseeing ICWA. But it could not have bound the state officials in each plaintiff's adoption proceeding to carry out that proceeding without regard to race. The state courts could still choose Indian families instead of the non-Indian families, and the state agencies could still carry out the placements. The Court's opinion may have persuaded state officials to do otherwise. But its judgment between the parties presented could not legally bind anyone in the plaintiffs' cases to take any specific course of action. The

68 *See* U.S. CONST. art. III, §§ 1–2.
69 *See* Baude & Bray, *supra* note 8, at 156.
70 *See id.* at 155.
71 *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1626 (2023).
72 *See id.* at 1639.
73 *See id.*

judgment could not remedy the harm to the plaintiffs as it would leave key players free to act against them. The plaintiff's legal injury—racial discrimination, resulting in the loss of an expected adoption—could persist.

Redressability is thus a threshold question that marks a true case or controversy. No matter how serious the merits issue, federal courts have no power to declare constitutional rights in the abstract.

In this revised challenge, redressability remains a stumbling block. In order for a court to ensure that plaintiffs are not discriminated against on account of their race, it must enjoin each party who could do so in the course of the adoption proceedings. Otherwise, the same issue that plagued the plaintiffs in *Brackeen* would resurface. One party would be bound by the court's judgment not to discriminate. But the plaintiffs would not have a judgment to bind the other. They would have "nothing more than an opinion," and opinions do not satisfy Article III.[74]

As *Brackeen* suggests, plaintiffs must almost certainly ask the court to enjoin the state officials. Officials' duties at the pre-enforcement stage are determined by state law and may include evaluating potential placements to aid the court in its judgment.[75] An injunction would be necessary to prevent an official from following ICWA's mandate to prefer Indian families to non-Indian families.

But plaintiffs must ask the court to enjoin a second set of parties, and this set may be tougher to sue: officials of the Indian tribe. ICWA grants the child's tribe the right to intervene at any point in the adoption proceeding, and courts are bound to prefer that placement.[76] Even if the state official were enjoined from presenting an alternative placement, the tribe could enter proceedings and present an alternative on its own initiative.

It is unclear whether tribal officials can be enjoined under *Ex parte Young*. On the one hand, tribes and their officials generally enjoy an expansive conception of sovereign immunity. The Court has, in the past, expressed this in no uncertain terms: "As separate sovereigns preexisting the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as

74 *Id.* at 1640.

75 State officials performed this function in the Librettis' adoption proceeding. *Id.* at 1625.

76 *See* 25 U.S.C. § 1911(c) (2018). In some states, suggested placements may have to pass through state officials, but this process is murky and likely varies across jurisdictions. And in at least some proceedings, it seems that tribal officials go directly to the court with their desired alternative placement. *See Brackeen*, 143 S. Ct. at 1625 ("[T]he Navajo Nation designated A. L. M. as a member and informed the state court that it had located a potential alternative placement . . . .").

limitations on federal or state authority."[77] And just like states, tribes possess the "common-law immunity from suit traditionally enjoyed by sovereign powers."[78]

The Court has indicated, though, that as with states, enjoining tribal actors from committing constitutional violations does not abridge the sovereign immunity of the tribes. However, it has not squarely addressed this issue. The closest it has come has been in *Michigan v. Bay Mills Indian Community*, a case resolving whether Michigan could sue a tribe for commercial activities occurring off of its reservation.[79] The Court held that it could not,[80] but suggested an alternative approach. "Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction . . . . As this Court has stated before, analogizing to *Ex parte Young*, tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers . . . ."[81]

Though this statement sounds like a doctrinal rule, it may be dictum, leaving room to doubt whether this matter of tribal sovereignty is settled law. The issue in *Bay Mills* was whether Michigan could sue the tribe under the Indian Gaming Regulatory Act. To decide the case, the Court looked to the Act's text to discern whether Congress intended to abrogate the tribe's sovereign immunity from suit.[82] Deciding whether the tribe could be enjoined under *Ex parte Young*, therefore, was not necessary to its holding. Likewise, in an earlier case the Court referenced, the *Ex parte Young* question was also ancillary to the holding of the Court.[83]

77 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Congress does have the "power to authorize civil actions against tribal officers." *Id.* at 60. However, out of respect for the sovereignty of tribes, the Court treads especially lightly when considering whether Congress intended to create a cause of action. *Id.* It is for this reason that § 1983 is not a proper cause of action for the plaintiff challenging ICWA. Nothing in § 1983 indicates that relief is available against a tribe, and the express language of the statute suggests otherwise, given that the tribes do not act under color of "state" law.

78 *Id.* at 58.

79 572 U.S. 782, 786–88 (2014).

80 *See id.* at 804.

81 *Id.* at 796 (citation omitted).

82 *See id.* at 785, 790–91.

83 In distinguishing between suits against tribes and those against individual tribal officers, the Court referenced *Santa Clara Pueblo v. Martinez*. *Id.* at 796. In Santa Clara, the Court said that an individual officer of the defendant tribe was "not protected by the tribe's immunity from suit." *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978). That case, however, was also about whether Congress intended to grant a statutory cause of action, not about whether the plaintiff could seek relief under *Ex parte Young*. *See id.*

Both the Second and the Eighth Circuits interpreted the Court's statement in *Bay Mills* as a green light for enjoining tribal officials.[84] The Ninth Circuit, meanwhile, had been enjoining tribal officials under *Young* even before the *Bay Mills* opinion.[85] But being subject to suit under *Ex parte Young* depends on the proposition that the sovereign's officials have no authority to violate federal law. This proposition is always true for the states. But tribes have a complex relationship to federal law—including the Bill of Rights—and have retained the authority to govern their own matters until Congress prescribes otherwise.[86] Therefore, it is unclear whether private plaintiffs can claim the protection of the courts against constitutional violations by tribal officials.

Even if an adoptive couple gets past the novel application of *Young* to federal claims, they would still have to succeed in this second novel application of *Young* to the actions of tribal officials. Combine this with the narrowness of the window for filing a pre-enforcement injunction, and relief may be practically impossible for many plaintiffs.

CONCLUSION

A pre-enforcement challenge to ICWA is no slam dunk. Though a plaintiff should be able to proceed under *Ex parte Young*, both the cause of action and the legal theory for naming required defendants present novel legal contexts. On top of those issues, ripeness concerns mean the plaintiff must bring suit in a risky procedural posture. And because a federal court cannot enjoin the state court from considering alternative placements once they are presented, the window for filing a pre-enforcement injunction may be razor thin.

It certainly feels unjust that a case so formidable to bring on the merits would also be so technically complex as to chill pre-enforcement review. Yet it is a foundational principle of the federal courts that "those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments," and that even the worthiest plaintiff has no "unqualified right to pre-enforcement review of constitutional claims."[87]

Unless they are able to litigate on the merits, parents seeking adoption of Indian children may join a long history of plaintiffs who

84 *See* Gingras v. Think Finance, Inc., 922 F.3d 112, 121 (2d Cir. 2019); Kodiak Oil & Gas (USA) Inc. v. Burr, 932 F.3d 1125, 1131 (8th Cir. 2019).

85 *See* Big Horn Cnty. Elec. Coop., Inc. v. Adams, 219 F.3d 944, 954 (9th Cir. 2000).

86 *See Santa Clara Pueblo*, 436 U.S. at 62–63 (explaining how the Indian Civil Rights Act did not abrogate the tribe's sovereign right to establish a religion and otherwise govern itself contrary to the provisions of the Bill of Rights).

87 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 537–38 (2021).

identify a right without a judicial remedy.[88] These parents may have one truly practical option for litigating their equal protection claims: the court of public opinion and the political process.

88 *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Hans v. Louisiana, 134 U.S. 1 (1890).