No. 18-11479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,
Plaintiffs – Appellees

v.

DAVID BERNHARDT, Secretary, U.S. Department of the Interior; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, in his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants – Appellants

CHEROKEE NATION; ONEIDA NATION; QUINALT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,
Intervenor Defendants – Appellants

Appeal from the United States District Court
for the Northern District of Texas, No. 4:17-CV-00868-O

EN BANC BRIEF FOR AMICUS CURIAE PROFESSOR GREGORY ABLAVSKY IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

The number of this case is 18-11479. The case is styled as *Brackeen, et al. v. Bernhardt, et al*. Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities have an interest in this amicus brief. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Date: December 12, 2019

/s/*Michelle T. Miano*
Michelle T. Miano

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Gregory Ablavsky is Associate Professor of Law at Stanford Law School. He received his J.D./Ph.D. in American Legal History from the University of Pennsylvania. His work focuses on the history of federal Indian law in the Founding era. His publications on this topic include *Empire States: The Coming of Dual Federalism*, 128 Yale L.J. 1792 (2019); "*With the Indian Tribes*": *Race, Citizenship, and Original Constitutional Meanings*, 70 Stan. L. Rev. 1025 (2018); *Beyond the Indian Commerce Clause,* 124 Yale L.J. 1012 (2015); and *The Savage Constitution*, 63 Duke L.J. 999 (2014), which received the Cromwell Prize for the best article in American legal history from the American Society for Legal History. As legal scholar and historian, Professor Ablavsky has a scholarly interest in, and expertise on, the original constitutional understandings of the federal power over Indian affairs at issue in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

History plays a central role in constitutional interpretation. The understanding of constitutional text at the time of its adoption is critical, and often dispositive, in resolving disputes over its meaning. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). Moreover, the Court has repeatedly stressed the

1 All parties have consented to this filing. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than the amicus curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

principle—"neither new nor controversial"—that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 524-525 (2014).

In holding key provisions of the Indian Child Welfare Act (ICWA) unconstitutional, the district court not only disregarded two centuries of precedent, but also omitted any discussion of the history of the federal power over Indian affairs. This absence is telling. Indians were important enough to be written into the constitutional text three times. U.S. Const. art. I, § 2, cl. 3; art. I, § 8, cl. 3; amend. XIV, § 2. The original understanding of these provisions, as well as subsequent practice, strongly support Congress's constitutional authority to enact ICWA. They also demonstrate that classifications as "Indian" based on membership or eligibility for membership, as ICWA employs, 25 U.S.C. § 1903(4), were consistent with Founding-era understandings of citizenship.

At the time of the Constitution's drafting, the power over Indian affairs was understood similarly to the foreign affairs power—as an "indivisible" bundle of related authorities to govern relationships with other sovereigns through treaties, war and peace, trade regulation, land sales, and borders. The routine exercise of this authority reflected the original understanding of an expansive federal Indian affairs power: the Constitution's drafters deliberately sought to remedy the failure

of the Articles of Confederation, which had ambiguously divided authority over Indian affairs between states and the federal government, by centralizing authority in the new federal government.

In *Adoptive Couple v. Baby Girl*, Justice Thomas offered a revisionist interpretation of the original understanding of the Indian affairs power, arguing that federal authority was limited solely to trade. 570 U.S. 637, 656 (2013) (Thomas, J., concurring). Yet Justice Thomas's initial and tentative exploration of this history, offered without any briefing, relied almost exclusively on a single law review article that ignored, and at times outright misquoted, the relevant evidence.

In fact, from ratification onward, the federal government routinely exercised authority over Indian children as part of its expansive power over Indian affairs. This centrality reflects both the widespread frontier commerce in captive Indian children and the significance of education to the federal project to "civilize" Indians.

The conclusion that ICWA is a race-based statute is similarly at odds with constitutional history. The Supreme Court's ruling that "Indian" is a political, rather than a racial, classification, *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974), is not limited solely to the Bureau of Indian Affairs; on the contrary, it is consistent with the original understanding of "Indian" in the Constitution, which read the term as the opposite of another political category, "U.S. citizens." Nor

does ICWA's use of biological parentage or eligibility for membership to define Indian children magically transform a political classification into a racial one. On the contrary, both classifications reflect Founding-era understandings of citizenship. Finally, despite substantial changes in citizenship law since the Founding, policymakers repeatedly preserved the Founding-era concept that Indians were legally defined by their membership within another sovereign. This legal framework endures to the present.

ARGUMENT

I. The Original Understanding of the Constitution Was That the Federal Government Enjoyed Expansive Power Over Indian Affairs, Including Indian Children.

The broad federal power over Indian children is consistent with the original understanding of the Constitution, which, as the Supreme Court has acknowledged for nearly two centuries, granted the federal government, and not the states, the power to manage Indian affairs. In *Adoptive Couple*, Justice Thomas offered a revisionist suggestion to the contrary, maintaining that the Constitution granted the federal government *less* power, and reserved more power to the states, than under the Articles of Confederation. *Adoptive Couple*, 570 U.S. at 656. Yet more thorough examination of Founding-era evidence contradicts Justice Thomas's initial and tentative historical exploration.

A. History and Text Demonstrate that the Constitution Conferred the Federal Government Broad Power over Indian Affairs.

1. Early Americans Understood Indian Affairs as an "Indivisible" Bundle of Interrelated Powers Akin to the Power over Foreign Affairs.

The newly independent United States did not craft what became Indian law from whole cloth. Before the Revolution, the British had long regarded Indian tribes as quasi-foreign nations outside the empire's legislative control. Relationships with tribes, like relationships with other sovereigns, were governed through negotiation and treaties. Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* 12-97 (2013).

The United States decided to pursue a similar policy, crafting a structure for governing what was referred to as "Indian affairs," a term analogous to "foreign affairs." The clearest statement of Founding-era understandings of this Indian affairs power appeared in a report written by the Continental Congress's Committee on Southern Indians in August 1787, while the Constitutional Convention was sitting. 33 *Journals of the Continental Congress, 1774-1789*, 457 (Roscoe R. Hill ed., 1936). The Committee stressed that the legal framework for "managing Affairs with the Indians" was "long understood and pretty well ascertained" as a bundle of interrelated powers analogous to the power to regulate foreign affairs: "making war and peace, purchasing certain tracts of [Indians'] lands, fixing the boundaries between them and our people, and preventing the latter

settling on lands left in possession of the former." *Id.* at 458. These objects were closely interconnected: indeed, the Committee wrote, "The powers necessary to these objects appear to the committee to be indivisible." *Id.*

The Committee wrote, however, because the Articles of Confederation *had* attempted to divide this authority—and failed miserably. The Articles granted Congress the power "of regulating the trade and managing all affairs with the Indians"—but only so long as the Indians were "not members of any of the States" and "provided that the legislative right of any State within its own limits be not infringed or violated." *Articles of Confederation of 1781*, art. IX, para. 4. These limitations, James Madison later observed, were "obscure and contradictory." *The Federalist No. 42* at 217 (James Madison). Seizing on these ambiguities, states challenged federal authority, even purporting to nullify federal treaties. Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999, 1018-38 (2014).

By the time of the Constitution's drafting, states' defiance of federal Indian affairs authority had led the nation to the brink of war. "[U]nless the United States do in reality possess the power 'to manage all affairs with the independent tribes of Indians,'" the Secretary at War informed Congress in July 1787, "a general Indian war may be expected." H. Knox, Report of the Secretary of War on the Southern Indians (July 18, 1787), *in* 18 *Early American Indian Documents: Treaties and Laws, 1607-1789: Revolution and Confederation* 449, 450 (Alden T. Vaughan gen.

ed., Colin G. Calloway ed., 1994). Advocates began to argue for a new constitution that would, among other aims, remedy state interference in Indian affairs. *See, e.g.*, James Madison, Vices of the Political System of the United States, *in* 9 *The Papers of James Madison* 345, 348 (Robert A. Rutland & William M.E. Rachal eds., 1975) (enumerating "Encroachments by the States on the federal authority"—the very first of which was "the wars and Treaties of Georgia with the Indians.").

2. The Constitutional Text Granted the Federal Government Expansive Power over Indian Affairs.

The Constitutional Convention sought to undo the damage from the Articles' failure by granting the federal government every stick in the "indivisible" bundle of powers related to Indian affairs. The Constitution it drafted gave Congress the power to declare war, U.S. Const. art. I, § 8, cl. 11, and it specifically denied this power to the states, *id*. art. I, § 10, cl. 3. It gave the President and Senate the power to make treaties, *id.* art. II, § 2, cl. 2, which would be the "Supreme Law of the Land," binding on state as well as federal courts, *id.* art. VI, cl. 2. It specifically prohibited states from making treaties. *Id.* art. I, § 10, cl. 1. The Property Clause affirmed the federal government's power to make "all needful rules and regulations" concerning federal property as well as for federal territories, where most Indians lived. *Id.* art. IV, § 3, cl. 2. And the Constitution granted Congress

all authority "necessary and proper" to implement these enumerated powers. *Id.* art. I, § 8, cl. 18.

The Indian Commerce Clause, *id.* art. I, § 8, cl. 3, was only one stick in this larger bundle of interrelated powers. Yet even viewed in isolation, its text suggests broad federal authority. The Clause was, in Madison's words, "very properly unfettered" from the ambiguous limits of the Articles that had preserved state power. *The Federalist No. 42* at 217 (James Madison). Nor was the contemporary meaning of commerce with Indians limited to trade: the phrase encompassed the exchange of religious ideas or even sexual intercourse. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1029 (2015) [hereinafter Ablavsky, *Beyond*]. As Justice Thomas notes, the historical definition of "commerce" encompassed "intercourse," *Adoptive Couple*, 570 U.S. at 659, a ubiquitous term of art for all Indian affairs at the time, Ablavsky, *Beyond*, *supra*, at 1028-31.

Ratification confirms that the new Constitution was understood to confer expansive federal power over Indian affairs. The strongest opposition to the Constitution's Indian affairs provisions came from Anti-Federalist Abraham Yates, Jr., who cited the Supremacy Clause, federal tariffs, the Indian Commerce Clause, and the federal government's expanded "legislative, executive and judicial powers" as sources of federal power. Abraham Yates, Jr. (Sydney), To the

Citizens of the State of New York (June 13-14, 1788), *reprinted in* 20 *The Documentary History of the Ratification of the Constitution* 1153, 1156-67 (John P. Kaminski et al. eds., 2004). Because of these provisions, Yates concluded, "[i]t is therefore evident that this state, by adopting the new government, will enervate their legislative rights, and totally surrender into the hands of Congress the management and regulation of the Indian affairs." *Id*.

3. Immediate Post-Ratification History Demonstrates Broad Federal Power over Indian Affairs.

Americans heard Yates's argument that ratification would "totally surrender" all power over Indian affairs to Congress—and ratified the Constitution anyway. In fact, Yates's interpretation of expansive federal power quickly became the dominant understanding of the newly ratified Constitution.

The Washington Administration reiterated that federal power over Indian affairs was akin to its authority over foreign affairs: "The independent nations and tribes of Indians ought to be considered as foreign nations, not as the subjects of any particular state," Secretary of War Henry Knox wrote President Washington. Letter from Henry Knox to George Washington (July 7, 1789), *in* 3 *Papers of George Washington: Presidential Series* 134, 138 (Dorothy Twohig ed., 1989). Knox accordingly argued for federal supremacy over the states: "[T]he United States have, under the constitution, the sole regulation of Indian affairs, in all matters whatsoever." Letter from Henry Knox to Israel Chapin (Apr. 28, 1792), *in*

1 *American State Papers: Indian Affairs* 231-32 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

In 1792, when some Georgians planned to violate an Indian treaty, Knox wrote to Georgia's governor to urge him, "as a public officer, bound by oath to support the constitution of the United States," to suppress the invasion. Letter from Secretary of War to the Governor of Georgia (Aug. 31, 1792), *in* 1 *American State Papers*, *supra*, at 258-59.[2] "[Y]our Excellency will easily discover what is the duty of the federal and your own Government," Knox stated. *Id.* "The constitution has been freely adopted; the regulation of our Indian connexion is submitted to Congress; and the treaties are parts of the supreme law of the land." *Id.* Knox concluded, "[T]he situation of the United States strongly demands that this co-operation be immediate, zealous, and firm." *Id*.

Many state officials acknowledged the federal government's expansive authority over Indian affairs under the new constitution. Soon after ratification, South Carolina Governor Charles Pinckney spoke of "the general Government, to whom with great propriety the sole management of India[n] affairs is now committed." Letter from Charles Pinckney to George Washington (Dec. 14, 1789), *in* 4 *Papers of George Washington: Presidential Series* 401, 404 (Dorothy Twohig

[2] The Constitution's Oath Clause, U.S. Const. art. VI, cl. 3, played an important role in Founding-era understandings of state officials' obligations to obey federal law. *See* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 Yale L. J. 1104, 1133-39 (2013).

ed., 1993); *see also* Ablavsky, *Beyond*, *supra*, at 1043 (citing similar examples from Georgia and Virginia).

Congress, too, evidently shared this view of federal supremacy. During its first session, Congress enacted the Trade and Intercourse Act. Act of July 22, 1790, 1 Cong. ch. 33, 1 Stat. 137. The statute extensively regulated Indian trade through a licensure system, *id.* §§ 1-3, but it also made killing or theft from Indians by U.S. citizens in Indian country, even within state borders, a federal crime, *id.* § 5. Subsequent versions enacted over the 1790s criminalized merely crossing into Indian country without permission, Act of May 19, 1796, 4 Cong. ch. 30, § 3, 1 Stat. 469, 470, and authorizing the use of federal military force to arrest violators of the Act found within Indian country anywhere in the United States, *id.* §§ 5, 16.

Virtually no one at the time argued that these federal interpretations or actions exceeded the federal government's enumerated powers. *See* Ablavsky, *Beyond*, *supra*, at 1045-49. That argument was a later, antebellum development, as Georgia and other states, frustrated by the slow pace at which the federal government had purchased Indian title, concocted arguments that federal power was narrowly confined to trade alone. *Id.* at 1048-50. Even then, Georgia's novel claim lost in the Supreme Court, where Chief Justice John Marshall affirmed the original understanding of the Indian affairs power as an indivisible bundle of related powers vested in the federal government alone. The Constitution "confers

on congress the powers of war and peace; of making treaties, and of regulating commerce . . . *with the Indian tribes*," Marshall reasoned in *Worcester v. Georgia*, where he ruled Georgia's efforts to assert jurisdiction over the Cherokee Nation unconstitutional. 31 U.S. (6 Pet.) 515, 558 (1832). "These powers comprehend all that is required for the regulation of our intercourse with the Indians." *Id.* at 558-59.

Marshall's emphasis on federal supremacy over the states in Indian affairs remains good law. To be sure, the federal government no longer governs Indian affairs through treaties, opting to use statutes instead. Yet the late nineteenth-century Supreme Court case that blessed that shift emphasized the continued need for federal supremacy to curb state power, stressing that the states were often tribes' "deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

In ICWA, Congress unambiguously exercised its authority over Indian affairs in an effort to redress the effect of state actions on the nation's relations with tribes. The Constitution not only authorizes this exercise of authority: it was designed partly to remedy such concerns by ensuring that the federal government, not the states, would have the ultimate say in how the nation's relationship with Indian tribes would be governed.

4. Justice Thomas's Contrary Argument Relies on Flawed Scholarship.

Justice Thomas's *Adoptive Couple* concurrence argued that the Constitution *narrowed* rather than expanded federal power over Indian affairs. *Adoptive Couple*, 570 U.S. at 656. Thomas's interpretation—raised *sua sponte* without the benefit of briefing, *id.* at 690 n.16 (Sotomayor, J., dissenting)— relied principally on a law review article written by former academic Robert Natelson that argued for a limited federal power over Indian affairs. *See id.* at 656 (Thomas, J., concurring) (citing ten times Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201 (2007)). Yet Natelson's article is deeply flawed, marred by inaccurate versions of sources and unsupported assertions directly at odds with explicit Founding-era evidence.

Perhaps most glaringly, Natelson relies on an inaccurate transcription of Anti-Federalist Abraham Yates, Jr.'s objection to federal power over Indian affairs.[3] The source that Natelson cites entirely omitted the language, quoted above, that ratification would "totally surrender into the hands of Congress the management and regulation of the Indian affairs." Natelson then proceeds to draw a negative inference from the mangled quotation, arguing, "if there had been any reasonable interpretation of that provision that included plenary authority over

[3] Natelson also inaccurately attributes the statement to Abraham Yates's nephew, Robert Yates. *See* Ablavsky, *Beyond*, *supra*, at 1023 n.48.

Indian affairs, he [Yates] certainly would have pointed it out.*"* Natelson, *supra*, at 248-49. As the corrected quotation demonstrates, there was, and he did. *See also Adoptive Couple*, 570 U.S. at 656 (Thomas, J., concurring) (citing Natelson and his inaccurate evidence for the proposition that "[t]here is little evidence that the ratifiers of the Constitution understood the Indian Commerce Clause to confer anything resembling plenary power over Indian affairs").

Elsewhere, Natelson's unsupported assertions conflict with explicit contrary evidence. Natelson argues, for instance, that the Trade and Intercourse Act was enacted solely pursuant to Congress's Treaty Power, citing apparent similarities with contemporaneous Indian treaties. Natelson, *supra*, at 250-56. Yet when some in Congress proposed removing the statute's criminal provisions as duplicative of treaty provisions, the proposal failed: "[T]he power of Congress to legislate, independent of treaties, it was also said, must be admitted; for it is impossible that every case should be provided for by those treaties." 3 *Annals of Cong.* 751 (1792). Similarly, Natelson asserts—based on his "knowledge of Latin"—that the word "nation" was not associated with political sovereignty in the Founding era. Natelson, *supra*, at 259 n.411. But this claim, too, is contradicted by historical evidence. *See, e.g.*, James Duane's Views on Indian Negotiations (1784), *in* 18 *Early American Indian Documents*, *supra*, at 299-300 (insisting, in negotiating with the Iroquois, that he "wou[l]d never suffer the word nations, or Six Nations

. . . or any other Form which wou[l]d revive or seem to confirm their former Ideas of Independence.").

Natelson also argues, in a point taken up by Justice Thomas, that commerce with the Indian tribes was limited solely to trade. Natelson, *supra*, at 214-18. Of course, as argued above, focusing on the Indian Commerce Clause in isolation is inconsistent with the original understanding of federal powers. Even so, Natelson's method for equating commerce and trade is flawed. He states that he searched databases of early American printed materials for exact phrases. *Id.* But the phrases he used rarely occur in material published in America before 1787: "commerce with the Indians" appeared six times; "commerce with Indian tribes" did not occur at all.[4] Contrast these results with the frequency of "intercourse" and "commerce" (77 hits and 32 hits, respectively), *in a single volume* of collected federal Indian affairs documents from 1789-1814. Ablavsky, *Beyond*, *supra*, at 1028-29 n.81. These and other more comprehensive searches demonstrate that Natelson's tidy equivalence between "commerce" and "trade" breaks down. *Id.* at 1028-31.

The views of Supreme Court Justices are entitled to great deference. But as Justice Thomas himself has acknowledged, the Justices' initial, tentative

[4] In the less relevant material published in Britain, "commerce with the Indians" appeared in forty-four distinct works between 1700 and 1787; "commerce with Indian tribes" did not appear at all.

interpretations sometimes warrant reconsideration upon further evidence. *See Apprendi v. United States*, 530 U.S. 466, 502-21 (2000) (Thomas, J., concurring) (conducting extensive research into early caselaw to reject an earlier contrary holding as "an error to which I succumbed"). A single dubiously sourced law review article explicitly contradicted by historical evidence provides an especially poor foundation from which to overturn two centuries of Supreme Court precedent.

B. The Power over Indian Affairs in the Founding Era Encompassed Authority over Indian Children.

It would be anachronistic—and bizarre—to expect the U.S. Constitution to contain an "adoption of Indian children" clause. Rather, historical practice demonstrates that, in exercising its power over Indian affairs, the federal government from its very beginning routinely governed relations with Indian tribes by regulating the status of Indian children.

In his *Adoptive Couple* concurrence, Justice Thomas emphasized that "domestic relations" law has been "regarded as a virtually exclusive province of the States." 570 U.S. at 656-57 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). Yet historians recognize that this generalization is flatly untrue for Indian affairs. Rather, the federal government consistently sought to "transform Native peoples' intimate, familial ties" as part of its project of assimilation. Cathleen D. Cahill, *Federal Fathers and Mothers: The United States Indian Service, 1869-1933*, 6 (2011). One of the most consistent through lines of federal Indian policy has been

its singular preoccupation with regulating the lives of Indian children. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885 (2016).

The federal focus on the "transfer of American Indian children into foreign homes and institutions" began "during the post-Revolutionary period." Dawn Peterson, *Indians in the Family: Adoption and the Politics of Antebellum Expansion* 6 (2017). The concern with Indian children derived from both contemporary understandings of the legal nature of the United States' relationship with tribes and issues of practical governance. As a legal matter, the regulation of children fell squarely within the scope of the United States' regulation of diplomatic relations with both foreign nations and tribes. Washington Administration officials relied on the era's law of nations to guide their relationships with Indian tribes as well as European nations. *See* Ablavsky, *Beyond*, *supra*, at 1059-67. And the law of nations was replete with discussions of the status of children. Emer de Vattel's treatise *The Law of Nations*,[5] for instance, established that children frequently were central to the relationship between sovereigns: their status implicated questions of naturalization, birth, and belonging,

[5] "Translated immediately into English, it [*the Law of Nations*] was unrivaled among such treatises in its influence on the American founders." Peter S. Onuf & Nicholas Greenwood Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776-1814*, 11 (1993).

Emer de Vattel, *The Law of Nations*, bk I, ch. XIX, §§ 215-20, at 219-22; bk. III, ch. V, § 72, at 510; bk. III, ch. VIII, § 145, at 549; bk. III, ch. XVII, § 271, at 635 (1758) (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund ed. 2008).

Children also were central to the often-violent interactions between Anglo-Americans and Indians on the early American frontier. At the time, formal adoption statutes did not yet exist.[6] Rather, what we now call the law of domestic relations was part of what contemporaries understood as the "law of persons," which encompassed all members of a household—not only husbands, wives, and children, but also wards, servants, employees, and even slaves. *See* 2 *Blackstone's Commentaries: With Notes of Reference* 422-67; app. H 31-86 (St. George Tucker ed., 1803). As a result, children's precise status as dependents within the household—as apprentices, wards, or servants—was often ill-defined.

This was especially true on the frontier, where captivity and wardship blurred together. Indians, for instance, routinely captured white children and then adopted them into their own clan structures. *See* James Axtell, *The White Indians*, *in The Invasion Within: The Contest of Cultures in Colonial North America* 302 (1985). For their part, Anglo-Americans traded extensively in Indian slaves, many

[6] The nation's first adoption statute, in Massachusetts, was enacted in 1851. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443, 465 (1971).

of them children. Alan Gallay, *The Indian Slave Trade: The Rise of the English Empire in the American South, 1670-1717*, 311-14 (2002). By the late eighteenth and early nineteenth centuries, elite Anglo-Americans increasingly had begun to take in and raise orphaned Native children, in a practice indistinguishable from the informal adoption practices of white children of the time. Lawrence Friedman, *A History of American Law* 148-49 (Simon & Schuster, 3rd ed. 2005); Peterson, *supra*, at 3. Many of these guardians of Indian children were federal Indian agents and architects of federal Indian policy, including Andrew Jackson, who took in a Creek child he found after the battle of Horseshoe Bend. Peterson, *supra*, at 81-233.

The status of Indian children implicated early federal Indian policy in two ways. First, federal officials found themselves dragged, often reluctantly, into the widespread trade in captured children, both Indian and white. As early as 1791, the superintendent of southern Indian affairs sent a federal official to recover an "Indian boy" held as a slave by a U.S. citizen. The United States of America in Account with William Blount (Dec. 31, 1791), *William Blount Papers, 1783-1823* (on file with Manuscript Division, Library of Congress at Folder 3: 1791). Soon, federal officials were routinely paying federal monies as ransom for children. Christina Snyder, *Slavery in Indian Country: The Changing Face of Captivity in Early America* 173-74 (2010). As the United States expanded westward, the

federal government sought, often ineffectually, to suppress the ubiquitous commerce in captive Indian children. Andrés Reséndez, *The Other Slavery: The Uncovered Story of Indian Enslavement in America* 295-316 (2017).

Second, the federal government superintended the care of Indian children as part of the new nation's "civilization" policy, which sought to transform Indians into "civilized" U.S. citizens. An integral part of this policy involved placing Indians within Anglo-American communities. In the 1780s, the Continental Congress arranged for the education of George White Eyes, an Indian boy from the Delaware Nation, at Princeton, paying for his room and board from the national treasury. 28 *Journals of the Continental Congress 1774-1781*, 411 (Roscoe R. Hill ed., 1936). Beginning in 1791, Philadelphia Quakers took in a dozen Native children to be raised and educated in their homes, often at the request of tribes, who sought European educations for prospective tribal leaders. Peterson, *supra*, at 43-46. Before undertaking this project, the Quakers ensured that they received the approval of Henry Knox, the Secretary of War; they also received federal funds to aid in supporting the children. *Id.*

These early precedents established a long-standing pattern of federal policy that regulated the treatment and status of Indian children. By the late nineteenth century, these practices had transformed into the federally-run boarding school system, which took Indian children, often without their parents' consent, as part of

its efforts to civilize them. 25 U.S.C. §§ 271-304b; Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920*, 189-210 (1984).

In sum, the federal government's power over Indian affairs has always been understood to include the power to regulate the legal status of Indian children. To be sure, the government often exercised that power in paternalist and coercive ways. ICWA itself acknowledged and sought to remedy this history by using the federal government's power over Indian affairs to restore, rather than remove, Indian children. 25 U.S.C. § 1301. It is deeply ironic that, as Congress has worked to correct the disastrous effects of its own past policies, its authority over the status of Indian children—power it routinely exercised since even before the Constitution's ratification—has faced constitutional challenge for the first time.

II. The Definition of "Indian Child" in ICWA is Consistent with the Original Understanding of the Term "Indian" in the Constitution.

A. Historical Evidence Suggests that the Original Meaning of "Indian" in the Constitution was Political, not Racial.

The category "Indian" appears three times in the U.S. Constitution. U.S. Const. art. I, § 2, cl. 3; art. I, § 8, cl. 3; amend. XIV, § 2. As the Supreme Court noted in *Morton v. Mancari*, the Constitution itself "singles Indians out as a proper subject for separate legislation." 417 U.S. 535, 552 (1974). Although the *Mancari* Court did not engage in an analysis of the original meaning of the constitutional

term "Indian" at the time of ratification, historical evidence suggests that such an analysis supports the Court's holding.

Federal documents of the 1780s and '90s, for instance, routinely defined Indians as a political category in opposition to the "citizens or inhabitants of the United States." Gregory Ablavsky, "*With the Indian Tribes*"*: Race, Citizenship, and Original Constitutional Meanings*, 70 Stan. L. Rev. 1025, 1055-56 (2018) [hereinafter Ablavsky, *Race*]. Indian treaties adopted both before and after the Constitution explicitly stated that they were on behalf of, and binding upon, "the citizens and members" of both United States and signatory Native nations. *Id.* at 1056-57. The 18 Indian treaties that the United States ratified between 1778 and 1800 used the term "citizen" as a synonym for non-Indian 96 times. *Id*. Similar classifications appeared in statutory law. Federal Indian law's foundational statute, the Trade and Intercourse Act, forbade crimes committed by "any citizen or inhabitant of the United States" against "any Indian." Act of July 22, 1790, 1 Cong. ch. 33, § 5, 1 Stat. 137, 138.

The nature of the Constitution also supports this understanding of the meaning of "Indian." The Constitution was a document of governance, and so the most relevant definition of "Indian" is the one used in diplomacy and statutes—where "Indian" meant a member of another sovereign polity. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 549 (2003)

(observing that originalists consider themselves bound by "founding-era understandings of specialized legal constructions or terms of art"). The text of the Constitution itself argues for such a reading. The exclusion of "Indians not taxed" from congressional representation, U.S. Const. art. I, § 2, cl. 3, for instance, strongly points toward a jurisdictional rather than racialized understanding of Indian classifications as defined by quasi-foreign status.[7]

B. The Definition of "Indian Child" in ICWA is Consistent with Founding-Era Understandings of Citizenship.

Recognizing that Indian status was linked to Founding-era understandings of citizenship helps clarify the "Indian child" classification in ICWA. The statute defines an Indian child as an unmarried person under eighteen who is either (1) a member of an Indian tribe or (2) eligible for tribal membership *and* the biological child of a member of an Indian tribe. 25 U.S.C. § 1903. Both definitions are consistent with Founding-era citizenship classifications.

The eighteenth-century law of nations embraced *jus sanguinus* principles to define citizenship: citizenship followed a child's biological father. *See* Vattel,

[7] To be sure, the term "Indian" in the late eighteenth century was freighted with racial as well as political meanings. Anglo-Americans of the time routinely defined "Indians" as different from "white people" based on skin color. Ablavsky, *Race*, *supra*, at 1050-54. After the Revolution, Anglo-Americans specifically spoke of Indians as a distinct "race." *Id.* As discussed above, there are good reasons to question whether this definition was the one adopted in the Constitution. Yet insisting that the term "Indian" in the Constitution possessed racial meaning at the time of Founding would nonetheless not render "Indian" a constitutionally impermissible classification. On the contrary, because the term "Indian" appears in the Constitution, challengers to Indian classifications would be arguing, in effect, that the Constitution itself is unconstitutional.

supra, bk. I, ch. XIX, § 212 ("[C]hildren naturally follow the condition of their fathers, and succeed to all their rights."). Although the early United States embraced the common-law tradition of birthright citizenship, the nation's first citizenship law also employed *jus sanguinus* principles to define citizenship, as does U.S. citizenship today. *See* Act of Mar. 26, 1790, 1 Cong. ch. 3, § 1, 1 Stat. 103, 103-04 (stating that the children of U.S. citizens born outside the country "shall be considered as natural born citizens" unless their fathers had never resided in the United States). In predicating "Indian child" status based partly on the membership status of a child's biological parents, ICWA follows eighteenth-century citizenship practice.

The statute's use of eligibility for membership also is consistent with Founding-era understandings of citizenship. Legal thought of the time recognized that both acquiring and renouncing citizenship, including U.S. citizenship, often required complying with complex procedures. *Id.* (discussing the requirements for acquiring citizenship); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 161-66 (Iredell, J.) (suggesting that an individual remained a U.S. citizen because he had failed to follow the process for expatriation). As a result, classifications based on eligibility were rife. Throughout the nineteenth century, for instance, states permitted non-citizens to vote prior to naturalization as long as they had declared their *intention* to become U.S. citizens. *See, e.g.*, Wisc. Const. of 1848 art. III, § 1.

Such procedures created complications for children because of their legal incapacity. Unlike subjecthood, the category of citizenship was understood to require voluntary allegiance and consent. James H. Kettner, *The Development of American Citizenship, 1608-1870*, at 173-209 (1978). But children were presumed unable to consent, and so they were not true citizens until they had reached adulthood. Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* 130-36 (2005). In this sense, every child under the age of 21 was, strictly speaking, merely *eligible* to become a U.S. citizen until reaching majority and making a choice of allegiance, either explicit or tacit.[8] Yet these quasi-citizen children were treated legally as though they were full citizens. Brewer, *supra*, at 130-36. In this sense, classifying minors based on their *eligibility* for membership rather than insisting on formal membership when they are still legally incapable of consent comports with Founding-era law on citizenship; eligibility does not function as a proxy for some impermissible classification.

[8] As the first U.S. treatise on citizenship stated, "At twenty-one years of age, every freeman is at liberty to chuse his country, his religion, and his allegiance. Those who continue after that age in the allegiance under which they have been educated, become, by tacit consent, either subjects or citizens, as the case may be. In this manner, young men are now daily *acquiring* citizenship, without the intervention of an oath." David Ramsay, *A Dissertation on the Manner of Acquiring the Character and Privileges of a Citizen of the United States* 5 (1789) (emphasis added).

C. Neither the Fourteenth Amendment Nor Subsequent Developments Altered the Founding-Era Constitutional Framework.

The American constitutional law of citizenship and equal protection has changed significantly since the Founding. Yet, at each key transition, the new legal order left unimpaired the pre-existing legal structure that classified Indians as members of separate sovereigns.

Through the Civil War, U.S. law continued to define members of Indian tribes as non-U.S. citizens. *See, e.g.*, *Goodell v. Jackson ex rel. Smith*, 20 Johns. 693, 710 (N.Y. 1823); Relation of Indians to Citizenship, 7 Op. Att'y Gen. 746 (1856). In its infamous *Dred Scott* decision, the Court used Indian status to emphasize African-Americans' unique legal disabilities: Indians, the Court opined, had always been "foreigners not living under our Government," and so were "like the subjects of any other foreign Government." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857).

Reconstruction, particularly the Fourteenth Amendment's Citizenship Clause, dramatically reshaped U.S. citizenship, explicitly overruling *Dred Scott*'s holding that African-Americans were ineligible for citizenship. U.S. Const. amend. XIV, § 1. Yet the Amendment's drafters emphasized that the Amendment did not confer birthright citizenship on Indians. *See* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 Calif. L. Rev. 1165,

1173-76 (2010). Besides repeating earlier constitutional language "excluding Indians not taxed" from congressional representation, U.S. Const. amend. XIV, § 2, the Amendment limited birthright citizenship solely to persons "subject to the jurisdiction" of the United States. *Id*. § 1. The Amendment's drafters stressed that, because tribes retained rights of autonomy, Indians who remained tribal members would not become citizens under this provision even when born within the U.S. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull); Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 Am. U. L. Rev. 331, 356-59 (2010). The Supreme Court subsequently affirmed this conclusion in a challenge brought by an Indian who had left his tribe and claimed U.S. citizenship. *Elk v. Wilkins*, 112 U.S. 94 (1884). In short, the drafters of the Fourteenth Amendment explicitly chose to reaffirm Founding-era understandings of Indian status.

Indians' legal status *did* change as Congress naturalized increasing numbers of Indians, culminating in a 1924 statute that conferred citizenship on all Indians within the United States. Indian Citizenship Act of 1924, 68 Cong. ch. 233, 43 Stat. 253. Yet the Supreme Court repeatedly held that Indians' status as U.S. citizens did not obviate classifications based on Indians' continued political membership in another sovereign. *See, e.g., United States v. Nice*, 241 U.S. 591, 598 (1916) ("Citizenship is not incompatible with tribal existence."); *Hallowell v.*

United States, 221 U.S. 317, 324 (1911) ("[T]he mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest."). Just as a person could simultaneously be a citizen of United States and also a citizen of a state or even another nation, an Indian could at once be a U.S. citizen and a tribal member.

This framework persists in the present day. The federal government continues to classify Indians based on their political relationship to a distinct sovereign, just as it did at the Founding, when the Constitution granted the federal government the power to regulate the United States' relationship "with the Indian tribes." The federal government may constitutionally distinguish individuals based on their status as members of a tribe, as it has lawfully done since 1789.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting in part and denying in part the motion for summary judgment.

Date: December 12, 2019

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1. I hereby certify that this brief complies with the length and type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), and Fifth Circuit Rule 32.2, because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this document contains 6,491 words.

2. I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1, and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

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I hereby certify that, on December 12, 2019, I electronically filed the foregoing brief – as an exhibit to the motion for leave to file – with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that, on that date, the CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

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