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, in his official capacity as Secretary of the United States 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; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,
Intervenor Defendants – Appellants

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

EN BANC BRIEF OF AMICUS CURIAE CHRISTIAN ALLIANCE FOR INDIAN CHILD WELFARE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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Dated: January 7, 2020

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, Christian Alliance for Indian Child Welfare provides this supplemental statement of interested persons in order to fully disclose all those with an interest in this brief. The undersigned counsel of record certifies that the following supplemental list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. *Amicus Curiae*: Christian Alliance for Indian Child Welfare. The Alliance certifies that it is a nonprofit organization. It has no corporate parent and is not owned in whole or in part by any publicly held corporation.
2. Counsel for *Amicus Curiae*: Wiley Rein LLP (Krystal B. Swendsboe)

Dated: January 7, 2020

s/ Krystal B. Swendsboe
Krystal B. Swendsboe

Counsel for Amicus Curiae Christian Alliance for Indian Child Welfare

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INTERESTS OF *AMICUS CURIAE*[1]

Christian Alliance for Indian Child Welfare ("Alliance") is a North Dakota nonprofit corporation with members in thirty-five states, including Texas and Indiana. Alliance was formed, in part, to (1) promote human rights for all United States citizens and residents; (2) educate the public about Indian rights, laws, and issues; and (3) encourage accountability of governments, particularly the federal government, to families with Indian ancestry.

Alliance promotes the civil and constitutional rights of all Americans, especially those of Native American ancestry, through education, outreach, and legal advocacy. One area of constitutional concern for Alliance is the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 ("ICWA"). Congress enacted the ICWA pursuant to, and specifically invoked power delegated by, the "Indian Commerce Clause" in Article I of the Constitution, *see* 25 U.S.C. § 1901(1), which grants Congress the power to "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8. The constitutional scope of this power, however, is disputed, and neither this Court, nor the Supreme Court, have fully analyzed the meaning or

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel contributed money that was intended to fund the preparation or submission of this brief.

breadth of the Indian Commerce Clause. Alliance believes that the ICWA is an unconstitutional expansion of congressional power pursuant to this clause. The term "commerce" is limited and is typically understood to be synonymous with "trade" or "economic exchange." Despite its enaction pursuant to the Indian Commerce Clause, the ICWA is a broad and far-reaching law that has little or nothing to do with commerce. And, it affects individuals that have no connection to, or have actively chosen to avoid entanglement with, tribal government.

Alliance is particularly concerned for families with members of Indian ancestry who have been denied the full range of rights and protections of federal and state constitutions when subjected to tribal jurisdiction under the ICWA. This case raises particularly significant issues for Alliance because its members are birth parents, birth relatives, foster parents, and adoptive parents of children with varying amounts of Indian ancestry, as well as tribal members, individuals with tribal heritage, or former ICWA children, all of whom have seen or experienced the tragic consequences of applying the racial distinctions imbedded in the ICWA.

SUMMARY OF ARGUMENT

The District Court correctly held that the ICWA is unconstitutional. The most fundamental constitutional flaw, however, and one that has not been fully analyzed by this Court, is the ICWA's unconstitutional expansion of Congress's power under the Indian Commerce Clause. The Indian Commerce Clause is a narrow grant of power to Congress to regulate "commerce"—not all "Indian affairs"—with Indian Tribes. The ICWA goes far beyond that constitutional grant.

Contrary to the original meaning of the Indian Commerce Clause, the ICWA imposes sweeping regulations that are at best only marginally related to commerce. The ICWA also intrudes on a quintessential area of state law: family and domestic matters. This intrusion obliterates the bedrock constitutional distinction between federal and local power, effectively allowing the federal government free reign to regulate however, and whatever, it wishes simply by invoking the Indian Commerce Clause. That is not what the Framers intended for the Indian Commerce Clause, and the ICWA, therefore, is unconstitutional for this additional reason.

ARGUMENT

The ICWA was enacted pursuant to Article I, Section 8, of the United States Constitution: specifically, the "Indian Commerce Clause." *See* 25 U.S.C. § 1901(1). Article I, Section 8, of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and

with the Indian Tribes." U.S. Const. art. I, § 8. Although the ICWA broadly refers to "other constitutional authority," Congress does not rely on the Treaty Clause, U.S. Const. art. II, § 2—the other primary source of constitutional power related to Indian Tribes—and it did not invoke any federal treaty that otherwise authorized Congress to act. The only constitutional source that Congress explicitly relied on for the ICWA's enaction is the Indian Commerce Clause. *See id* (quoting only the Indian Commerce Clause)*; see also Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658 (2013) (Thomas, J., concurring) ("I am aware of no other enumerated power that could even arguably support Congress' intrusion into this area of traditional state authority." (listing articles in support)).

Even though the term "commerce" is used only once to apply in three distinct scenarios—foreign and interstate commerce and commerce with Indian Tribes—"commerce," is a limited term that means economic trade or exchange. At the time of the Constitution's ratification, the term "commerce" was used to describe specific economic activities. It was not understood to concern ***any or all*** affairs or intercourse between two parties.

By its plain terms, the Indian Commerce Clause does not grant Congress broad and unlimited power to regulate all Indian affairs. The ICWA transgresses this limited grant of power by regulating entirely noncommercial matters. Moreover, the ICWA imposes regulations on matters that are particularly within the

states' purview, effectively bypassing the important constitutional distinction between federal and state authority.

I. THE INDIAN COMMERCE CLAUSE GRANTS CONGRESS THE LIMITED POWER TO REGULATE "COMMERCE."

Rather than providing blanket authorization for all laws, the Constitution gave to Congress specific enumerated powers. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); *see United States v. Lopez*, 514 U.S. 549, 552 (1995) ("The Constitution creates a Federal Government of enumerated powers."). Thus, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). When "Congress has exceeded its constitutional bounds," the Court must "invalidate [that] congressional enactment." *Id.*

To understand the limited scope of power granted to Congress, the Court should consider what the words in the Constitution—in this case, the Indian Commerce Clause—meant to its authors and to the general public at the time of the ratification. Specifically, the Court should begin by analyzing the term "commerce" in light of the meaning ascribed to that term when the Constitution was ratified.[2]

[2] When interpreting constitutional text, the Court gives words the meaning they had when the text was adopted. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067,

This includes reviewing the use of the term "commerce" within the pertinent text, contemporaneous dictionaries, and common discussion, as well as legal and non-legal publications related to the ratification of the Constitution. *See Heller*, 554 U.S. 581-95; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 107-08 (2001) [hereinafter Barnett, *Original Meaning*]. These materials reveal that the expansive power claimed by Congress in the name of the Indian Commerce Clause marks a significant departure from the common understanding afforded to the term "commerce" as it was used and understood by the Constitution's Framers.

A. The Term "Commerce," As Used in the Constitution, Means Trade or Comparable Economic Exchange.

The term "commerce," as it was used in eighteenth century dictionaries, contemporaneous lay and legal discourse, and by the Framers during debate,

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2070 (2018) ("As usual, our job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" (quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979))). This is a familiar and foundational canon of interpretation, and it has been actively applied in interpreting provisions of the U.S. Constitution. *See District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

drafting, and ratification of the Constitution, almost exclusively referred to trade or comparable economic exchange.[3]

Prominent legal dictionaries dating to the mid-to-late eighteenth century define commerce narrowly as "Commerce, (Commercium) Traffick, Trade or Merchandise in Buying and Selling of Goods. *See Merchant*," Giles Jacob, *A New Law-Dictionary* (8th ed. 1762), or "[i]ntercourse; exchange of one thing for another; interchange of any thing; trade; traffick," Samuel Johnson, 1 *A Dictionary of the English Language* (J.F. Rivington, *et al.* 6th ed. 1785). These definitions, and the specific reference to the term "merchant," demonstrate the close relationship between "commerce" and the *Lex Mercatoria* (merchant law) and reflect the inherently commercial or economic character of the term "commerce." *See* Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789, 817-18 (2006) [hereinafter Natelson, *Legal Meaning of "Commerce"*] (analyzing the dictionary definitions of commerce and noting the distinct connection between commerce and the *Lex Mercatoria*); *Lopez*, 514 U.S. at

[3] Interpretation of a term typically begins with an analysis of the pertinent term as it is used in the text. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004); *Texas Educ. Agency v. U.S. Dep't of Educ.*, 908 F.3d 127, 132 (5th Cir. 2018). However, as at least one scholar has already noted, the term "commerce," as it is used in the Constitution, "does not tell us in which sense, narrow or broad, the word 'commerce' is being used in the Commerce Clause, and we must look elsewhere for guidance." Barnett, *Original Meaning* at 113.

586-87 (Thomas, J., concurring) (relying on lay and legal dictionaries, convention records, founding era communications, and the Federalist Papers to narrowly define the term "commerce"). Thus, based solely on contemporaneous legal dictionaries, and the ready inferences presented in those texts, the definition of the term "commerce" "was an exceedingly narrow one." Natelson, *Legal Meaning of "Commerce"* at 819.

Lay and legal texts in the eighteenth century similarly support the narrow dictionary definition of "commerce" as economic exchange, trade, or traffic.[4] When used in the economic context, the term commerce "referred to mercantile activities: buying, selling, and certain closely-related conduct, such as navigation and commercial finance." *Id.* at 805-06. "Commerce" was rarely used in a non-economic sense. "The social, religious, and sexual meanings of 'commerce,' while sometimes employed, were figurative or metaphorical, derived from the mercantile meaning." Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause:*

[4] Eighteenth century legal commentaries similarly use the term "commerce" to mean trade. Professor Robert G. Natelson, has engaged in meticulous review of the use of the term "commerce" in Blackstone's Commentaries, explaining that "by far Blackstone's most common use of "commerce" was to mean mercantile exchange and its incidents. . . . As far as I can find, Blackstone never unambiguously employed 'commerce' to mean 'general economic activity.'" Natelson, *Legal Meaning of "Commerce"* at 821-22.

A Response to Jack Balkin, 109 Mich. L. Rev. First Impressions 55, 56 (2010) [hereinafter Natelson & Kopel, *Response*].

Indeed, the definition of "commerce" was remarkably consistent at the time of the founding. Professor Robert G. Natelson consulted all reported English court cases from the sixteenth through eighteenth centuries; all available American cases before 1790; all of the leading English legal abridgments and digests; prominent legal treatises; popular legal dictionaries; and pamphlets written by prominent American and British attorneys, to come to the simple conclusion: "the word 'commerce' nearly always has an economic meaning." Natelson, *Legal Meaning of "Commerce"* at 845; *see* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201, 214-15 (2007) [hereinafter Natelson, *Indian Commerce Clause*] (discussing the results of several studies that examined how the word "commerce" was employed in lay and legal contexts). Similarly, Professor Randy E. Barnett reviewed each use of the term "commerce" in the Pennsylvania Gazette from 1728-1800 and determined it "impossible here to convey the overwhelming consistency of the usage of 'commerce' to refer to trading activity (especially shipping and foreign trade) without listing one example after another." Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 858 (2003); *see generally* Natelson & Kopel, *Response* at 56.

Finally, when the term "commerce" was used during the Constitutional Convention and related state conventions it was almost entirely limited to trade or similar economic matters. After reviewing a nearly exhaustive record of the constitutional and state conventions (a collection that is still considered to be one of the most complete on the topic), Professor Barnett concluded that "if anyone in the Constitutional Convention or the state ratification conventions used the term 'commerce' to refer to something more comprehensive than 'trade' or 'exchange,' they either failed to make explicit that meaning or their comments were not recorded for posterity." Barnett, *Original Meaning* at 124; *see also* Natelson, *Legal Meaning of "Commerce"* at 839-41.

Indeed, James Madison tellingly observed later in life (specifically discussing the Foreign Commerce Clause) that "(i)f, in citing the Constitution, the word trade was put in the place of commerce, the word foreign made it synonymous with commerce. Trade and commerce are, in fact, used indiscriminately, both in books and in conversation." James Madison, Letter to Professor Davis--not sent (1832), in Galliard Hunt, ed., 4 *Letters and Other Writings of James Madison* 232, 233 (J.B. Lippincott ed. 1865); *see Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring) ("[W]hen Federalists and Anti-Federalists discussed the Commerce Clause during

the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably." (internal citations omitted)).[5]

"The most persuasive evidence of original meaning—statements made during the drafting and ratification of the Constitution as well as dictionary definitions and The Federalist Papers—strongly supports [a] narrow interpretation of Congress's power" under the Commerce Clause; "'Commerce' means the trade or exchange of goods (including the means of transporting them)." Barnett, *Original Meaning* at 146. This accepted general meaning of the term "commerce" is foundational for proper interpretation of the Indian Commerce Clause.

B. At the Very Least, the Term "Commerce" Should Be Interpreted Consistently in the Commerce Clause.

This Court should interpret the term "commerce" consistently within the Constitution. "In the absence of some indication to the contrary, we interpret words or phrases that appear repeatedly in a statute to have the same meaning." *Vielma v. Eureka Co.*, 218 F.3d 458, 464–65 (5th Cir. 2000) (citation omitted); *see Clark v.*

[5] In addition to the plain meaning and commonly understood definition of "commerce," the remaining language of the Indian Commerce Clause also points to a narrow reading. *See Adoptive Couple*, 570 U.S. at 660 (Thomas, J. concurring) (emphasizing that "Congress is given the power to regulate Commerce 'with Indian *tribes*.' . . . A straightforward reading of the text, thus, confirms that Congress may only regulate commercial interactions—'commerce'—taking place with established Indian communities—'tribes.'"); Barnett, *Original Meaning* at 132 ("[T]he reach of even a broad conception of 'commerce' is confined by the meaning of the rest of the clause—that is, by the phrases 'among the several States' and 'To regulate.'").

Martinez, 543 U.S. 371, 378 (2005) ("To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one."). This canon is equally applicable to constitutional interpretation. *See Weems v. United States*, 217 U.S. 349, 395 (1910). Moreover, it is undoubtedly true that a single word within the Constitution must be interpreted to have a single meaning in context. It cannot be that the meaning of the word "commerce," as used in the Commerce Clause, changes just by the artful addition of ellipses.

The term "commerce," therefore, should be interpreted to mean the same thing with respect to Congress's power to regulate commerce with "foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8. That is, the term "commerce" should be no more expansive in the Indian Commerce Clause than it is with respect to interstate or foreign commerce.[6]

The term "commerce" as it used in the Interstate Commerce Clause is understood generally to mean economic activity. *See Taylor v. United States*, 136 S. Ct. 2074, 2079-80 (2016) ("'[T]hus far in our Nation's history our cases have

[6] Alliance focuses on interstate commerce here as the Supreme Court has not had the opportunity to thoroughly explore the scope of Congress's power to regulate foreign commerce. And, on the few occasions where the Supreme Court has addressed foreign commerce, those opinions have addressed laws regulating a significant connection with the United States or the "so-called dormant Foreign Commerce Clause." *Baston v. United States*, 137 S. Ct. 850, 851 (2017) (Thomas, J., dissenting from denial of cert.) (listing examples). However, in no circumstance has the Supreme Court held that the Foreign Commerce Clause would apply to noncommercial conduct.

upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.'" (quoting *Morrison*, 529 U.S. at 613)); *Lopez*, 514 U.S. at 560. Even in one of the Supreme Court's broadest recent opinions regarding the scope of the Interstate Commerce Clause, *Gonzales v. Raich*, 545 U.S. 1 (2005), which allowed Congress to regulate purely local growth of marijuana for medical use, the Court explained that the regulations were acceptable because they governed an "economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17.

Further, there is very little clear "evidence from the Founding Era that users of English varied the meaning of 'commerce' among the Indian, interstate, and foreign contexts." Natelson, *Indian Commerce Clause* at 216. As set out above, the definition of commerce as trade was oft-repeated, and "must have been burned into the minds of every founding-era lawyer who had even a passing interest in the subject." Natelson, *Legal Meaning of "Commerce"* at 806. So too here, the term "commerce" must be limited to trade and similar economic exchange.

To do otherwise would violate a well-established canon of statutory interpretation. Indeed, failure to interpret the term "commerce" consistently, necessarily requires the word "commerce"—used only once in Article One, Section

8—to mean one thing in relation to interstate commerce and entirely another in the Indian Commerce Clause.[7]

C. The Indian Commerce Clause Does Not Grant Congress Plenary Jurisdiction Over All Indian Affairs.

The limited power conferred upon Congress in the Indian Commerce Clause does not grant plenary jurisdiction over all Indian affairs. As Justice Thomas has explained, "'neither the text nor the original understanding of the [Indian Commerce] Clause supports Congress' claim to such 'plenary' power.' . . . Instead, . . . the Clause extends only to 'regulat[ing] trade with Indian tribes—that is, Indians who had not been incorporated into the body-politic of any State.'" *Upstate Citizens for Equal., Inc. v. United States*, 199 L. Ed. 2d 372 (2017) (Thomas, J., dissenting from denial of cert.) (citations omitted); *see United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring) ("No enumerated power—not Congress' power to 'regulate Commerce . . . with Indian Tribes,' not the Senate's role in

[7] *Amicus* in support of Appellants, Professor Gregory Ablavsky, however, urges an outcome-driven view of the term "commerce." Professor Ablavsky has claimed that, despite the presumption that a single word in a document does not change its meaning and should be interpreted consistently, he can divine a different meaning of the Indian Commerce Clause using "alternate" interpretative methods that he describes as "heterodox." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1017 (2015) [hereinafter "Ablavsky, *Beyond"*]. Such methods should be rejected by this Court. The Court is bound by the plain text of the Constitution and the accepted methods of interpreting the Constitution, including those canons relied on by the Supreme Court.

approving treaties, nor anything else—gives Congress [plenary authority]."); *Adoptive Couple*, 570 U.S. at 659.

The original understanding of the term "commerce" stands in stark contrast to other, broader terms—such as "Indian affairs"—which have been misapplied to the Indian Commerce Clause. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (describing Congress's power "to legislate in the field of Indian affairs"). But the term "affair" has a more extensive meaning, indicating an important distinction in the meaning and use of the terms "commerce" and "affair." In contrast to Samuel Johnson's definition of "commerce," noted above, the term "affair" meant "[b]usiness; something to be managed or transacted." Samuel Johnson, 1 *A Dictionary of the English Language* (J.F. Rivington, *et al.* 6th ed. 1785). Similarly, the 1783 edition of Nathan Bailey's dictionary defined "affair" as "business, concern, matter, thing." Nathan Bailey, *A Universal Etymological English Dictionary* (Edinburgh 25th ed. 1783 unpaginated); *see* Natelson, *Indian Commerce Clause* at 217 (comparing historical dictionary definitions of "commerce" and "affair").

In short, the term "affair"—as it was defined at the time of the Constitution's ratification—is "a much broader category than trade or commerce." Natelson, *Indian Commerce Clause* at 217. The use of the word "commerce" in the Indian Commerce Clause—rather than use of word "affair"—therefore cannot be read to

grant Congress broad or plenary authority to regulate all "Indian affairs." *See id.* at 241 ("The term 'commerce' did not include authority over the tribes' internal affairs."); *see id.* at 241 n.301 (listing support).

Moreover, an assertion of plenary power conflicts with prior Supreme Court precedent. On the one occasion that the Court analyzed the reach of the Indian Commerce Clause, it rejected a broad interpretation. The Court stated that such a ruling would result in a "very strained construction" of the clause to find that "without any reference to their relation to any kind of commerce," a criminal code was somehow "authorized by the grant of power to regulate commerce with the Indian tribe." *United States v. Kagama*, 118 U.S. 375, 379 (1886) (rejecting the argument that the Indian Commerce Clause granted Congress the power to create a federal criminal code for Indian land); *see* Nathan Speed, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. Rev. 467, 470-71 (2007) ("[W]hen Congress eventually began asserting plenary power over Indian tribes, the Supreme Court expressly rejected the assertion that the Indian Commerce Clause provided a basis for such a power. This evidence supports a narrow interpretation of the power to 'regulate Commerce,' and in turn, a narrow

interpretation of both the Indian Commerce Clause and the Interstate Commerce Clause.").[8]

Even *amicus* in support of Appellants, Professor Gregory Ablavsky, has previously agreed that the Indian Commerce Clause does not support Congress's claim to plenary power over all Indian affairs. "[T]he history of the Indian Commerce Clause's drafting, ratification, and early interpretation does not support either 'exclusive' or 'plenary' federal power over Indians. In short, Justice Thomas['s concurrence in *Adoptive Couple*, 570 U.S. 637] is right: Indian law's current doctrinal foundation in the [Indian Commerce] Clause is ***historically untenable***." Ablavsky, *Beyond,* at 1017 (emphasis added); *see also* En Banc Brief for Amicus Curiae Professor Gregory Ablavsky in Support of Defendants-Appellants and Reversal, at 8 (Dec. 12, 2019) (acknowledging that the Indian Commerce "was only one stick" in a larger bundle of power related to Indian Tribes).

[8] The oft-cited opinion of *United States v. Lara*, 541 U.S. 193 (2004), is not to the contrary. Except for a concurrence by Justice Thomas, the *Lara* opinion did not analyze the proper scope of the Indian Commerce Clause. *See id.* at 224 (Thomas, J., concurring) ("I cannot agree that the Indian Commerce Clause provides Congress with plenary power to legislate in the field of Indian affairs. At one time, the implausibility of this assertion at least troubled the Court, and I would be willing to revisit the question." (internal citations, quotation marks, and alterations omitted)). The *Lara* opinion instead involved a double-jeopardy analysis, focusing primarily on the Tribe's inherent power to prosecute and punish a nonmember defendant and the sovereign authority of Tribes. *See id.* at 199-200.

Thus, Congress lacks plenary authority and may not regulate "Indian affairs," in the name of the Indian Commerce Clause, that fall outside the limited scope of its authority to regulate "commerce" granted by the Indian Commerce Clause.

II. THE ICWA FAR EXCEEDS THE AUTHORITY GRANTED BY THE INDIAN COMMERCE CLAUSE.

Having established that the term "commerce" means trade or, at the very least, economic activity—and that the Indian Commerce Clause does not grant Congress plenary authority—it is clear that the ICWA exceeds the narrow power granted to Congress by the Indian Commerce Clause. The constitutional grant of power to regulate "commerce" does "not include economic activity such as 'manufacturing and agriculture,' let alone noneconomic activity such as adoption of children." *Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring) (citations omitted). Further, the ICWA intrudes on matters that are typically reserved to the states, bypassing the firm constitutional distinction between federal and local authority. The ICWA, therefore, is an unconstitutional exercise of Congress's authority to "regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8.

A. Family and Child Custody Matters Do Not Affect Commerce with Indian Tribes.

The ICWA is, at bottom, a federal regulation of child custody proceedings and adoption. *See* ROA.4011 (describing the ICWA). The ICWA was enacted in response to the "rising concern in the mid–1970's over the consequences to Indian

children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Adoptive Couple*, 570 U.S. at 642 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). The ICWA has no relationship to commerce or economic activity, and, indeed, it does not claim to have any relationship or connection to commerce. *See* 25 U.S.C. § 1901.

This case is analogous to *Lopez* and *Morrison*. For example, in *Lopez*, 514 U.S. 549, the Supreme Court invalidated the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q). The Act exceeded the authority of Congress under the Interstate Commerce Clause, because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551. The Court made clear that the Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561; *cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (rejecting applicability of federal arson statute, passed pursuant to the Interstate Commerce Clause, because damage to an owner-occupied private residence was not sufficiently related to commerce and infringed on state police power). Similarly, in *Morrison*, 529 U.S. 598, the Supreme Court struck down 42 U.S.C. § 13981, the civil remedy portion of the Violence

Against Women Act. The Court found that Congress lacked constitutional authority under the Interstate Commerce Clause to pass such a measure, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558-59 (2012) (finding that economic ***inactivity*** was not sufficiently related to commerce to justify regulation under the Interstate Commerce Clause).

Adoption proceedings have no more relationship to commerce than domestic violence or guns near schools. *See Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring) (citations omitted) (noting also that adoption proceedings, like the ones at issue here, do not involve Indian Tribes, an additional requirement of the Indian Commerce Clause). Indeed, by its terms, the ICWA "deals with 'child custody proceedings,' not 'commerce.'" *Id.* at 665 (internal citations omitted). As Justice Thomas has noted, the ICWA "was enacted in response to concerns that 'an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.' The perceived problem was that many Indian children were 'placed in non-Indian foster and adoptive homes and institutions.' This problem, however, ***had nothing to do with commerce***." *Id.* (emphasis added) (internal citations omitted).

B. Federal Regulation of Family and Child Custody Matters Infringes on State Authority.

In addition to exceeding the recognized definition of "commerce," the ICWA also intrudes on a quintessential area of state concern that is entirely distinct from "commerce" that may be regulated by Congress: family law. "The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18 (citation omitted). By regulating on truly local issues of family and personal relationships, the ICWA further exceeds the power granted to Congress by the Constitution and obliterates this important distinction between federal and local powers.

The Supreme Court has repeatedly acknowledged that marriage, divorce, child custody, and adoption are outside of Congress's control. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (explaining that domestic relations have "long been regarded as a virtually exclusive province of the states"). "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). Indeed, these matters are distinct and separate from Congress's authority to regulate, as the "Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *United States v. Windsor*, 570 U.S. 744, 766-67 (2013) (quotation omitted).

The Supreme Court has rejected interpretations of the Commerce Clause that would allow Congress to the "regulate any activity that it found was related to the economic productivity of individual citizens[, including] family law ([] marriage, divorce, and child custody)." *Lopez*, 514 U.S. at 564; *see Morrison*, 529 U.S. at 616 (rejecting reasoning that may "be applied equally as well to family law and other areas of traditional state regulation"). Congress thus may not exercise power over such matters under the guise of regulating commerce, because such power would be effectively limitless. Indeed, the Supreme Court has stated that, in such a situation, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564. The ICWA, therefore, exceeds Congress's power to regulate commerce—not only because it is entirely unrelated to commerce—because it intrudes on noncommercial subject matter belonging entirely to the states and eliminates the well-established federalist barrier erected between the state and federal government powers.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1)(C), I certify the following:

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and Rule 32(a)(7)(B), and Fifth Circuit Rule 32, because this Brief contains 5,182 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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 in 14-point Times New Roman font.

Dated: January 7, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2020, a true and correct copy of the foregoing was electronically filed with the Clerk of this Court using the CM/ECF system and that a copy has been served through the CM/ECF system upon counsel of record.

Dated: January 7, 2020

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