

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; and Danielle Clifford,
Plaintiffs-Appellees,

v.

David BERNHARDT, in His Official Capacity as Acting Secretary of the United States Department of 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; and United States Department of Health and Human Services,
Defendants-Appellants,

Cherokee Nation; Oneida Nation; Quinault Indian Nation; and 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 (Hon. Reed O'Connor)

**BRIEF OF THE PROJECT ON FAIR REPRESENTATION AS AMICUS
CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE**

William S. Consovoy
J. Michael Connolly
Cameron T. Norris
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com

Counsel for Amicus Curiae Project on Fair Representation

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Per Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, the Project on Fair Representation provides this supplemental statement of interested persons 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 so that the judges of this court can evaluate possible disqualification or recusal.

CONSOVOY MCCARTHY PLLC
William S. Consovoy
J. Michael Connolly
Cameron T. Norris
Counsel for Amicus Curiae Project on Fair Representation

The Project certifies that it is a 501(c)(3) nonprofit organization. It has no corporate parent and is not owned in whole or in part by any publicly held corporation.

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IDENTITY & INTEREST OF AMICUS CURIAE¹

The Project on Fair Representation is a public-interest organization dedicated to equal opportunity and racial harmony. The Project works to advance race-neutral principles in education, government action, and voting. Through its resident and visiting academics and fellows, the Project conducts seminars and releases publications about the Voting Rights Act and the Equal Protection Clause. The Project has been involved in several cases before the Supreme Court involving these important issues. *E.g.*, *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009). The Project also has submitted amicus briefs in cases before the Supreme Court on these issues. *E.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. The Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015); *Perry v. Perez*, 565 U.S. 388 (2012); *Riley v. Kennedy*, 553 U.S. 406 (2008); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). And the Project has filed and participated in related cases in this Circuit. *E.g.*, *Gegenheimer v. Stevenson*, 1:16-cv-1270-RP, 2017 WL 2880867 (W.D. Tex. July 5, 2017); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

¹ No party's counsel authored this brief in whole or in part, and no party, party's counsel, or person—other than amicus or its counsel—contributed money to fund the brief's preparation or submission. Counsel for all parties consent to the filing of this brief.

The Project has a direct interest in this important case. The Project opposes government-imposed racial preferences, including racial preferences in state-administered adoption proceedings. Racial preferences, like those mandated by the Indian Child Welfare Act, contradict the Project's principles and the American ideal of individual equality. For these reasons, the Project respectfully submits this brief and urges the Court to affirm the district court's decision.

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV §1. This safeguard applies equally to the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). The “central mandate” of equal protection “is racial neutrality in governmental decisionmaking.” *Miller v. Johnson*, 515 U.S. 900, 904 (1995); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment). “Classifications of citizens solely on the basis of race ‘are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’” *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *see also Loving v. Virginia*, 388 U.S. 1, 11 (1967). As a consequence, the Constitution requires the law to treat each person as an individual and not simply as a member of a racial group. *See Miller*, 515 U.S. at 911.

The right to equal protection of the laws, “by its terms, [is] guaranteed to the individual,” *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), and obtains irrespective of “the race of those burdened or benefited by a particular classification,” *Crosby*, 488 U.S. at 472. In other words, regardless of the basis for the discrimination or the race of the person disadvantaged, disparate treatment “threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.” *Shaw*, 509 U.S. at 643; *see also Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 230 (1995) (“[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.”). These protections apply to children as well as adults. *See In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”); *e.g., Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 711 (2007).

The race-based adoptive preferences of the Indian Child Welfare Act (“ICWA”) violate the Equal Protection Clause. Section 1915(a) of ICWA requires States to give “preference” to “Indian families” when determining the adoptive placement of “an Indian child.” 25 U.S.C. §1915(a). The statute classifies individuals not based on their political or tribal affiliations, but based on their race. These classifications often result in court orders forcibly depriving Indian children of the homes where they secured attachments and were nurtured, cared for, and loved for the majority of their young lives, solely because they are Indian and the foster families seeking to adopt them are not. This not only causes grievous harm to Indian children and their adoptive families,

but also flagrantly violates the foundational constitutional principle of equal treatment. Because §1915(a) is not narrowly tailored to serve a compelling interest, it is unconstitutional on its face.

ARGUMENT

Section 1915(a) of ICWA requires that, when States determine the “adoptive placement of an Indian child under State law, a preference shall be given ... to a placement with ... members of the Indian child’s tribe[,] or [] other Indian families.” 25 U.S.C. §1915(a). This statutory mandate serves as the single controlling factor in placing Indian children with Indian strangers, often over the objection of their birth parents and their foster parents who have nurtured them from an early age. But for the race of the child and the race of the adoptive family, such disruptive and traumatizing forced separations would not happen.

“To whatever racial groups ... citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.” *Croson*, 488 U.S. at 493. Section 1915(a) makes an Indian child’s race the sole criterion in determining that child’s adoptive placement, elevating race as a trump card over compelling factors such as the child’s best interests and the birth parents’ wishes. “[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications” such as these “be subjected to the most rigid scrutiny.” *Fisher I*, 133 S. Ct. at 2418-19 (cleaned up). ICWA cannot survive that review.

I. Section 1915(a)'s classifications are racial, not political.

The Supreme Court has permitted different treatment of Indians when it is rooted in the federal government's "unique" treaty obligations, which "confer enforceable special benefits on signatory Indian tribes." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 (1979). But those cases are strictly limited to matters concerning "the internal affair[s] of a quasi sovereign." *Rice v. Cayetano*, 528 U.S. 495, 520-21 (2000). When an Indian tribe's self-governance or property is at issue, classifications drawn along tribal lines are "political rather than racial in nature" because they are tied to the balance of power between the federal government and a quasi-sovereign. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

Section 1915(a)'s classifications cannot be characterized as "political in nature" because the statute is unrelated to tribal self-governance. It does not implicate internal matters of a quasi-sovereign, such as the prosecution and investigation of crimes committed on reservations by Indians domiciled there, *United States v. Antelope*, 430 U.S. 641, 645-47 (1977); the administration of an agency charged with governing the lives and activities of Indians, *Mancari*, 417 U.S. at 554; or even the adoption of Indian children registered with a reservation and residing on tribal land, *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 391 (1976). Adoption proceedings concerning children that neither reside on, nor are domiciled on, tribal land "are the affair[s] of the State of [Texas]." *Rice*, 528 U.S. at 520; *see also In re Santos Y.*, 92 Cal. App. 4th 1274, 1321 (2d Dist. 2001) (holding that because "child custody or dependency

proceedings [do not] involve uniquely Native American concerns,” ICWA’s classifications are racial, not political).

The classifications in §1915(a) are explicitly stated in terms of race, void of any ties to a child’s tribal identity or the sovereignty of any tribe. The statute applies to *any* Indian child—regardless whether the child is domiciled or residing on a reservation, and regardless whether the child is even a member of an Indian tribe.² And it gives preference to *any* Indian family—regardless whether they share a tribal identity or allegiance with the child. *Cf.* 25 U.S.C. §1911(a) (limiting a grant of exclusive jurisdiction to proceedings “involving an Indian child *who resides or is domiciled within the reservation*” (emphasis added)); *id.* §1922 (discussing emergency removal of “an Indian child *who is a resident of or is domiciled on a reservation*” (emphasis added)). In fact, state and federal statutes that forbid racial discrimination in adoption proceedings expressly exempt cases administered under ICWA, proving the statute draws racial lines. *See* Tex. Fam. Code Ann. §162.015; 42 U.S.C. §1996(b)(3). Section 1915(a) simply “do[es] not regulate Indian tribes as tribes.” *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 665 (2013) (Thomas, J., concurring).

Any other conclusion would contradict the Supreme Court’s decision in *Adoptive Couple*. There, a state court denied a couple’s attempt to adopt a baby girl, who was

² The placement preferences of §1915(a) apply not only to Indian children who are “member[s] of an Indian tribe,” but also to those who are “eligible for membership in an Indian tribe and [are] the biological child[ren] of . . . member[s] of an Indian tribe.” 25 U.S.C. §1903(4).

“3/256 Cherokee,” and instead awarded custody to her Cherokee father, “whom she had never met.” *Id.* at 645-46 (majority op.). The Court read ICWA not to cover this situation. *Id.* at 646-56. In rejecting the applicability of §1915(a), the Court invoked the doctrine of constitutional avoidance. Reading ICWA to disadvantage children “solely because an ancestor—even a remote one—was an Indian,” the Court explained, “would raise equal protection concerns.” *Id.* at 655-56. The dissent thought the majority’s invocation of equal protection contradicted precedents, including *Mancari*, that hold “classifications based on Indian tribal membership are not impermissible racial classifications.” *Id.* at 690 (Sotomayor, J., dissenting). But the majority did not ignore *Mancari*; it understood that the principle in that case is narrow and cannot be extended to statutes, like ICWA, that classify individuals based on their ancestry. The Court invoked equal protection in *Adoptive Couple* because it saw §1915(a) for what it is: a racial, not a political, classification.

II. Section 1915(a) cannot withstand strict scrutiny.

Because ICWA’s classifications are based on race, they “are constitutional only if they are narrowly tailored measures that further compelling government interests.” *Adarand*, 515 U.S. at 227. They are not.

A. Section 1915(a) serves no compelling government interest.

The “government may treat people differently because of their race only for the most compelling reasons.” *Adarand*, 515 U.S. at 227. ICWA was enacted in response to “rising concern[s] 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 641 (majority op.) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). To the extent §1915(a)’s racial preferences are part of a “seem[ingly] benign” effort to remedy an injury arising from direct discrimination, *Fisher*, 133 S. Ct. at 2417, the government must justify their use by producing the detailed findings “necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects.” *Croson*, 488 U.S. at 510.³ “Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.” *Id.*

Although Congress made some findings regarding the high adoption rates for Indian children removed from Indian homes, nothing in the record suggests that these statistics are the product of racial discrimination. *See Miss. Band of Choctaw Indians*, 490 U.S. at 32-36 (summarizing congressional findings); 25 U.S.C. §1901. And more importantly, there is zero “evidence for [the] conclusion that remedial action [continues to be] necessary” nearly forty years later. *Croson*, 488 U.S. at 510. All “race-conscious” remedial schemes of government must have “a termination point” that serves to assure

³ To the extent the government’s interest is remedying “societal discrimination,” the use of racial classifications is unjustified and cannot survive strict scrutiny. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

“all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter.” *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (quoting *Croson*, 488 U.S. at 510). In the end, ICWA is without a “strong basis in evidence for [the] conclusion that remedial action was [or is] necessary.” *Croson*, 488 U.S. at 500. It is unconstitutional for this reason alone.

B. Section 1915(a) is not narrowly tailored.

Even if the justifications for ICWA were compelling, §1915(a)’s racial preferences are not narrowly tailored to serve that interest. To be “narrowly tailored,” the “means chosen to accomplish the State’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.” *Shaw*, 517 U.S. at 908 (cleaned up). The government must demonstrate, among other things, that “neutral alternatives that are both available and workable do not suffice.” *Fisher II*, 136 S. Ct. at 2208 (cleaned up).

Section 1915(a) is not narrowly tailored because it is overly broad and fails to tie the classifications to tribal affiliation and domicile, which would bring them closer to being political instead of racial. The statute’s mandate applies to all Indian children, regardless whether they are domiciled or residing on a reservation, and regardless whether they are even a member of an Indian tribe. 25 U.S.C. §1915(a); *see also id.* §1903(4). Further, the statute gives preference to *any* Indian family, even members of a wholly separate tribe who lack an affiliation or connection to the child. *See id.* §1915(a). Other provisions of ICWA demonstrate that Congress is perfectly capable of tailoring statutory language to tribal interests in a narrower fashion than §1915(a)’s sweeping

racial preferences. *See, e.g., id.* §1911(a) (providing for exclusive jurisdiction over “any child custody proceeding involving an Indian child *who resides or is domiciled within the reservation of such tribe*” (emphasis added)); *id.* §1922 (discussing emergency removal of “an Indian child *who is a resident of or is domiciled on a reservation*” (emphasis added)).

This case is a perfect example of the ill fit between §1915(a)’s scope and Congress’s interest in avoiding invidious removal of Indian children from their tribes. As the district court explained, “This case arises because three children, in need of foster and adoptive placement, fortunately found loving adoptive parents who seek to provide for them. Because of [ICWA], however, these three children have been threatened with removal from, in some cases, the only family they know, to be placed in another state with strangers. Indeed, their removals are opposed by the children’s guardians or biological parent(s), and in one instance a child was removed and placed in the custody of a relative who had previously been declared unfit to serve as a foster parent.” ROA.4008. The disruption of these children’s family lives from §1915(a)’s racial preferences is without justification, and it certainly bears no relation to any compelling government interest.

* * *

Section 1915(a) forces state governments to enforce odious racial classifications that deprive individuals of the most basic forms of dignity and equality. As this case demonstrates, such classifications cause a significant degree of disruption and trauma in the life of a child, simply because that child is Indian. Section 1915(a)’s overly broad

use of racial preferences fails to serve a compelling state interest in a narrowly tailored way. Accordingly, the statute is unconstitutional on its face and cannot be given any effect in these proceedings.

CONCLUSION

For all these reasons, the Court should affirm the district court's decision.

Respectfully submitted,

January 13, 2020

s/ William S. Consovoy
William S. Consovoy
J. Michael Connolly
Cameron T. Norris
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
cam@consovoymccarthy.com

*Counsel for Amicus Curiae Project on Fair
Representation*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits of Rule 29(a)(5) because it contains 2,690 words, excluding the parts that can be excluded. This brief also complies with the typeface and type-style requirements of Rule 29(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

January 13, 2020

s/ William S. Consovoy

CERTIFICATE OF SERVICE

I filed a copy of this brief with this Court via ECF, which will electronically serve all parties.

January 13, 2020

s/ William S. Consovoy