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 Acting 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,

and

NAVAJO NATION,
Intervenor.

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

BRIEF OF AMICUS CURIAE CHRISTIAN ALLIANCE FOR INDIAN CHILD WELFARE IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

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Dated: October 8, 2019

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

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: October 8, 2019

s/ Krystal B. Swendsboe
Krystal B. Swendsboe
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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 promotes the civil and constitutional rights of all Americans, especially those of Native American ancestry, through education, outreach, and legal advocacy.

Alliance is particularly concerned by the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 ("ICWA") and considers it an unconstitutional expansion of congressional power to "regulate commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8. The ICWA is a far-reaching law that does not concern commerce, and it affects individuals who have no connection to, or have actively chosen to avoid entanglement with, tribal government. This case raises particularly significant issues for Alliance because its members are parents, relatives, and 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.

[1] All parties have consented to the timely 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.

ARGUMENT

Article I 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. The Fifth Circuit Panel improperly held, without analysis, that the ICWA is a constitutional exercise of Congress's "plenary" power under the Indian Commerce Clause. A33-34. However, contrary to the Panel's conclusory holding, the Indian Commerce Clause is a narrow grant of power to the United States to regulate "commerce" with Indian Tribes. The term "commerce," as it was understood at the time of the Constitution's ratification, means economic trade, exchange, or intercourse, *i.e.* specific economic activities. By its plain terms, the Indian Commerce Clause does not give Congress plenary jurisdiction over all Indian *affairs*, much less the authority to impose sweeping regulations like the ICWA that are unrelated to commerce. The ICWA, therefore, is an unconstitutional exercise of Congress's authority under the Indian Commerce Clause. The panel's misunderstanding of the power granted to Congress by the Indian Commerce Clause is an issue of exceptional importance that the Court should review en banc.

I. THE INDIAN COMMERCE CLAUSE DOES NOT GIVE CONGRESS PLENARY AUTHORITY TO REGULATE ALL INDIAN AFFAIRS.

The Constitution grants and defines Congress's power. To understand the scope of power granted to Congress in the Indian Commerce Clause, the Court must

analyze the term "commerce" in light of the meaning ascribed to that term when the Constitution was ratified.[2] A review of the pertinent sources—the constitutional text, contemporaneous dictionaries, common discussion, as well as legal and non-legal publications related to the ratification of the Constitution, *see Heller*, 554 U.S. at 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*")—reveals that the expansive power claimed by Congress under the Indian Commerce Clause is drastically different from the common understanding of the term "commerce" in the eighteenth century.

A. The Term "Commerce," As Used In the Indian Commerce Clause, Means Trade or Similar Economic Exchange.

The term "commerce," as it was used in eighteenth century, almost exclusively refers to trade or similar economic exchange. For example, prominent eighteenth century legal dictionaries define commerce as "[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); *see* Giles Jacob, *A New Law-Dictionary* (8th ed. 1762) ("Commerce, (Commercium)

[2] Words in a constitutional provision must be given the meaning they had when the text was adopted. This is a familiar canon of interpretation, and has been regularly applied in interpreting constitutional provisions. *See District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008).

traffick, trade or merchandise in buying and selling of goods. See *Merchant*"). Similarly, lay and legal discourse in the eighteenth century demonstrate that "commerce" is economic exchange, traffic, or intercourse. *See* Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789, 805-06 (2006) (hereinafter "Natelson, *Legal Meaning of Commerce*"). "[T]he word 'commerce' nearly always has an economic meaning." *Id.* at 845 (reviewing use of the word "commerce" in sixteenth through eighteenth century legal cases, digests, treatises, dictionaries, and pamphlets); *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 several studies examining the use of the word "commerce" in lay and legal contexts). The understanding of commerce as trade is well documented, and was "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.

Moreover, use of the term "commerce" during the Constitutional Convention and state conventions was almost entirely limited to trade or related economic matters. "[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." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring) (internal quotation marks and citations omitted).

Moreover, convention records are virtually silent as to whether the term "commerce" referred to something more comprehensive than "trade" or "exchange." *See* Barnett, *Original Meaning* at 124; *see also* Natelson, *Legal Meaning of Commerce* at 839-41.

B. The Term "Commerce" Means Economic Exchange Elsewhere In The Constitution.

At the very least, the Court should interpret the term "commerce" consistently across the Interstate, Foreign, and Indian Commerce Clauses. "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. Martinez,* 543 U.S. 371, 378 (2005). This interpretation principle has even greater applicability here, as Founding Era evidence indicates that individuals did not vary "the meaning of 'commerce' among the Indian, interstate, and foreign contexts." Natelson, *Indian Commerce Clause* at 216. Thus, the term "commerce" should have the same meaning in the Indian Commerce Clause as it does in the Interstate Commerce Clause.

As used in the Interstate Commerce Clause, the term "commerce" is understood generally to mean economic activity. "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Taylor v. United States*, 136 S. Ct. 2074, 2079-80 (2016) (citations omitted); *Cf. United States v. Lopez*, 514 U.S. 549, 560 (1995)

(explaining that "the pattern is clear": "economic activity" must "substantially affect[] interstate commerce" in order to be sustained). So too here, the term "commerce" must be interpreted to mean trade and similar economic exchanges.

C. Interpreting "Commerce" in the Indian Commerce Clause to Mean Economic Exchange Is Consistent with Supreme Court Precedent.

The Indian Commerce Clause does not grant Congress 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 Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring).

The Panel's assertion that Congress possesses such plenary power conflicts with prior Supreme Court precedent. The Panel cited several cases that describe Congress's power as "plenary"; however, none of those cases squarely address the meaning or scope of the Indian Commerce Clause. *See United States v. Lara*, 541 U.S. 193, 196 (2004) (constitutional power to relax restrictions that have been created by political branches); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 834 (1982) (preemption of federal law over state tax imposition); *Morton v. Mancari*, 417 U.S. 535, 537 (1974) (employment preference for qualified

Indians). Instead, when presented with an analogous issue, the Supreme Court rejected the argument that the Indian Commerce Clause granted Congress the power to create a federal criminal code for Indian land because it would result in a "very strained construction" of the clause. *United States v. Kagama*, 118 U.S. 375, 378 (1886); *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) (explaining that "the Supreme Court expressly rejected the assertion that the Indian Commerce Clause provided a basis for [plenary] power."); Natelson, *Indian Commerce Clause* at 210 (same). Such an interpretation is consistent with the Framers' understanding of the term "commerce" as trade or economic activity.

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

Having established that the term "commerce" means trade or, at the very least, economic activity, it is clear that the ICWA exceeds the limited power granted to Congress in 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). The ICWA is, at bottom, a federal regulation of child custody proceedings and adoption, and it has no relationship to commerce or economic activity. *See* 25 U.S.C. § 1901.

The Supreme Court has repeatedly held that statutes passed pursuant to Congress's authority under the Commerce Clause must have a sufficient relationship to commerce. Topics that do not involve commerce—or, are not sufficiently related to commerce—fall outside the scope of Congress's Commerce Clause power. For example, in *United States v. Lopez*, the Supreme Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), as an unconstitutional exercise of Congress's Commerce Clause power, because the Act "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; *see also United States v. Morrison* (holding that Congress lacked authority under the Interstate Commerce Clause to establish the civil remedy portion of the Violence Against Women Act, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. 598, 613 (2000); *see 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). Congressional assertions of power under the Commerce Clause must be, at least, related to commerce.

Adoption proceedings have no more relationship to commerce than domestic violence or guns near schools. *Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring). Indeed, by its terms, the ICWA "deals with 'child custody

proceedings,' not 'commerce,'" and the problems that prompted the passage of the ICWA "had nothing to do with commerce." *Id.* at 665 (internal citations omitted). The ICWA, therefore, is an unconstitutional exercise of Congress's power under the Indian Commerce Clause.

CONCLUSION

For the foregoing reasons, Alliance respectfully requests that Plaintiffs-Appellees' Petition be granted and this case be reheard en banc.

Respectfully submitted,

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Dated: October 8, 2019

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 32(g), and Fifth Circuit Rules 29.3 and 32, because this Brief contains 1,940 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: October 8, 2019

s/ Krystal B. Swendsboe
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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2019, 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: October 8, 2019

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