Case No. 18-11479

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAD EVERET BRACKEEN, et al.,

Plaintiffs-Appellees

vs.

DAVID BERNHARD, Acting Secretary, U.S. Department of the Interior, et al.,

Defendants-Appellants

and

CHEROKEE NATION, et al.,

Intervenor Defendants-Appellants

Appeal from the United States District Court for the Northern District of Texas
Case No. 4:17-CV-00868-O, Hon. Reed O'Connor, presiding

BRIEF *AMICI CURIAE* OF THE GOLDWATER INSTITUTE, TEXAS PUBLIC POLICY FOUNDATION, AND CATO INSTITUTE IN SUPPORT OF PETITIONER AND IN SUPPORT OF REHEARING EN BANC

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CERTIFICATE OF INTERESTED PARTIES

Brackeen, et al. v. Zinke, et al., No. 18-11479.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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.

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IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of *amici curiae* are set forth in the accompanying motion for leave to file.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The panel's conclusion that the Indian Child Welfare Act (ICWA) establishes a political classification subject to rational basis review, instead of a racial classification subject to strict scrutiny, conflicts with Supreme Court precedent and creates a loophole whereby the rules against racial classifications in the law can easily be evaded. Moreover, the panel overlooked the fact that *ancestral eligibility for a future political affiliation* is not itself a political classification; it is instead synonymous with *national origin*, which is just as much a suspect class as race. Applying rational basis scrutiny to what is, at a minimum, a national origin classification has deleterious effects for the law—and for vulnerable Indian children who are rendered more vulnerable by ICWA's reduced standards for child protection.

The panel's decision is not only legally senseless, but dangerous, given that ICWA deprives "Indian children" of the legal protections afforded them by state law. For this class of children—defined solely by their biological ancestry—ICWA imposes different evidentiary standards and different procedures—ones that prevent states from protecting these children from abuse or neglect, and that make

it harder to find them foster homes or adoptive homes when needed. *See* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1 (2017). In case after case, children subject to ICWA are denied the legal protections accorded their black, white, Asian, or Hispanic peers, and suffer, sometimes terribly, as a consequence. *See id*. at 38-40, 51–53; Mark Flatten, *Death on a Reservation,* Goldwater Institute (2015).[1]

Indian children are not foreign nationals; they are American citizens entitled to the equal protection of the law. 8 U.S.C. § 1401(b). They are also America's most vulnerable demographic. They suffer higher rates of poverty, abuse, neglect, molestation, drug and alcohol abuse, and suicide, than any other cohort in the nation. *See generally* Naomi Schaefer Riley, *The New Trail of Tears: How Washington is Destroying American Indians* ch. 5 (2016). Many are in need of foster care or adoptive homes. There are adults of all races throughout the country ready and willing to offer them the safe, loving homes they need.

But ICWA says no, because *their skin is the wrong color*.

The panel's novel legal theory dooms at-risk children to substandard legal protections that undermine their constitutional rights. The decision should be reviewed *en banc*.

[1] https://www.flipsnack.com/9EB886CF8D6/final-epic-pamplet.html.

REASONS FOR GRANTING THE PETITION

I. The decision below creates a dangerous new rule that obliterates the distinction between racial and political distinctions.

Courts have long struggled to distinguish between laws that classify Americans based on tribal affiliation (subject to rational basis scrutiny under *Morton v. Mancari*, 417 U.S. 535 (1974)) and laws that classify them based on race. *Rice v. Cayetano*, 528 U.S. 495 (2000), explained the difference: a law which "singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics,'" and has as its "very object" the "preserv[ation]" of their "distinct[ness]" as racial groupings, falls on the racial, rather than political, side of that line. *Id*. at 515 (citation omitted).

Under these criteria, "Indian child" status under ICWA is racial, not tribal.[2] It is triggered by *biological eligibility* for membership, plus the status of the *biological* parent. 25 U.S.C. § 1903(4). Under this rule, a child who is fully acculturated with a tribe (practices a tribal religion, speaks a tribal language, lives on tribal lands, etc.) would not qualify as "Indian" if she fails to satisfy the biological profile. By contrast, a child who *does* meet the biological standards

[2] It is important to bear in mind the difference between tribal membership—which is entirely a function of tribal law—and "Indian child" status under ICWA, which is a determination of federal and state law. *In re Abbigail A.*, 375 P.3d 879, 885–86 (Cal. 2016). While tribal law need not comply with constitutional standards, federal and state law must.

would qualify, even if she has no cultural, political, social, religious, or linguistic connection to a tribe.

Under ICWA, a person like William Holland Thomas (a white man who served as chief of the Eastern Band of the Cherokee in the nineteenth century) would not qualify as "Indian" if he were alive today, because he lacked the *sole* relevant criterion: biological ancestry. *See, e.g.*, *In re Francisco D.*, 178 Cal. Rptr. 3d 388, 395–96 (Cal. App. 2014) (children adopted by tribal members are not "Indian children"). On the other hand, a child like "Lexi," who had no cultural or political affiliation with a tribe, qualified as "Indian" based exclusively on the blood in her veins. *See In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (Cal. App. 2016) (child with no cultural affiliation deemed "Indian" under ICWA).

Nevertheless, the panel held that although ICWA defines "Indian child" by reference to biological factors alone, these factors are "a proxy" for the child's "not-yet-formalized tribal affiliation," and therefore create a *Mancari*-style political classification. *Brackeen v. Bernhardt*, No. 18-11479, 2019 WL 3857613 at *10 (5th Cir. Aug. 9, 2019). No court has ever suggested that the government can classify Americans based *entirely* on their biological ancestry, and nevertheless call that a "political" classification, on the theory that the biological factors render those people eligible for a *potential* political relationship *in the future*.

This novel theory is irrational. Biological eligibility for membership in a political classification is, at a minimum, a form of *national-origin* classification, which is subject to the same strict scrutiny standard that applies to racial classifications.

Classifying Americans based on their ancestral eligibility for membership in a nation simply is "national origin" classification. As the Supreme Court held in *Espinoza v. Farah Mfg. Co*., 414 U.S. 86 (1973), a "national origin" classification is not just a classification predicated on the person's foreign citizenship, *id.* at 89, but also "refers to [classification based on] the country where a person was born, or, more broadly, *the country from which his or her ancestors came*." *Id.* at 88 (emphasis added). ICWA's definition of "Indian child" does precisely that.

In *Oyama v. California*, 332 U.S. 633, 645 (1948), the Court found that California's Alien Land Act constituted a form of national origin discrimination because it was triggered by a child's parents' citizenship or ancestry: "as between the citizen children of a Chinese or English father and the citizen children of a Japanese father, there is discrimination," the Court said—which constituted national origin discrimination even if it did not constitute racial discrimination.

The same principle applies here: the kind of categorization the panel referred to as "not-yet-formalized tribal affiliation," where that potential affiliation is based on biological descent, is simply another way of describing national origin

classification—which is subject to strict scrutiny. *Cf. Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998) (discrimination based on tribal affiliation was national-origin discrimination).

Membership in a political association is fundamentally *chosen* and *voluntary*. That is why tribal membership is political, *see United States v. Crook*, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) (No. 14,891) ("the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it."), and why classification based on it is subject to rational basis scrutiny. By contrast, "race and national origin" are based on "immutable characteristic[s] determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), which is why classifications made along those lines are subject to strict scrutiny. Genetic eligibility for a "not-yet-formalized" political association is therefore not a political classification—it is, if not racial, at least a *national origin* classification. "Indian child" status under ICWA's two-prong test (eligibility plus the status of the biological parent) is entirely a function of immutable factors determined by accident of birth. It cannot be characterized as political—or, as the panel put it, as future-political-based-on-ancestry—and subjected to rational basis review.

II. The panel's analysis commits several logical fallacies.

The panel also committed significant fallacies. First, it held that ICWA establishes a political classification because a child is deemed an "Indian" child "because his or her biological parent became a member of a tribe, despite not being racially Indian." *Brackeen*, 2019 WL 3857613 at *10. This is not true. A child whose parent became a tribal member would qualify as "Indian" under ICWA *only* if he or she were *also* "eligible" for tribal membership—which depends exclusively on biological ancestry.[3] A child who fails to satisfy those biological criteria would not qualify based solely on a parent's action. And, of course, a child whose *adopted* parent became a tribal member would also not qualify.

The second fallacy came in holding that because "many racially Indian children … do not fall within ICWA's definition of 'Indian child,'" it cannot create a racial classification. *Id.* But "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Rice*, 528 U.S. at 516–17. For example, a law that applied exclusively to left-handed Asian people would still be a racial classification even though it doesn't apply to right-handed Asian people. ICWA's combination of non-

[3] It has to. Federal regulations require as a condition of federal recognition that Indian tribes use ancestry as a criterion. 25 C.F.R. § 83.11(e).

biological with biological criteria does not magically transform a racial classification into a political one.

The fact that ICWA's classification is not a political one is made clearer by other provisions of the statute. The foster care placement requirements in 25 U.S.C. § 1915(b) and the adoption-placement requirements in Section 1915(a) both mandate placement of children with "Indian" adults regardless of tribal affiliation. A child of Seminole ancestry would have to be placed with, say, Inuit adults rather than adults of white, Asian, black, or Hispanic ancestry. These provisions of ICWA depend not on tribal affiliation, *or even potential* affiliation, but on the racial category of the "generic Indian." But the concept of "generic Indian" is racial, not political—and arbitrarily racial at that. *See* Robert Utley, *The Indian Frontier 1846-1890* at 4-6 (Allen Billington et al. eds., Univ. of N.M. Press rev. ed. 2003) (1984) (concept of generic "Indian" was "an arbitrary collectivization" imposed by Europeans who disregarded tribal differences); *cf. United States v. Bryant*, 136 S. Ct. 1954, 1968-69 (2016) (Thomas, J., concurring) (courts should not "treat[] all Indian tribes as an undifferentiated mass.").

III. ICWA harms America's most at-risk minority.

It cannot be too often reiterated that ICWA deprives America's most vulnerable children of legal protections necessary to protect them from harm. Flatten, *supra.* American Indian children are at greater risk of abuse, neglect,

molestation, alcoholism, drug abuse, and suicide than any other demographic in the nation. Riley, *supra*.

Yet instead of providing these children with stronger legal protections, ICWA's heavier evidentiary burdens in abuse cases requires that Indian children be *more* abused for *longer* before state officials can rescue them. *See* Sandefur, *supra*, at 37–42. Its heavier procedural requirements force state officials to return abused or neglected children to parents who have wronged them—sometimes resulting in worse abuse. *See, e.g.*, Ariz. Dep't of Child Safety, *Statement on the Death of One-year-old Josiah Gishie*, Oct. 12, 2018.[4] Its beyond-a-reasonable-doubt standard for termination of parental rights "deprives them of equal opportunities to be adopted that are available to non-Indian children." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 529 (1996). And it deters would-be foster parents from providing care to Indian children in need. *See* Elizabeth Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, Phoenix New Times, Sept. 7, 2016.[5] This case is critically important for countless Indian children nationwide whose right to equal protection is denied them by ICWA.

[4] https://goo.gl/8Ayjw2.
[5] https://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832.

CONCLUSION

This case should be heard by the *en banc* Court.

RESPECTFULLY SUBMITTED this 8th day of October, 2019 by:

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Pursuant to Fed. R. App. P. 32(g)(1) and Fed. R. App. P. 29(a)(5), I certify that this *Amici* Brief:

(a) was prepared using 14-point Times New Roman font;

(b) is proportionately spaced; and

(c) contains 2,014 words.

Submitted this 8th day of October 2019,

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I hereby certify that on this 8th day of October 2019, the foregoing brief was filed and served on all counsel of record via the ECF system.

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