Case No. 18-11479

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; DANIEL CLIFFORD,

Plaintiffs-Appellees

vs.

DAVID BERNHARD, Acting 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 STATED 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

and

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
Case No. 4:17-CV-00868-O, Hon. Reed O'Connor, presiding

BRIEF AMICUS CURIAE GOLDWATER INSTITUTE, CATO INSTITUTE, TEXAS PUBLIC POLICY FOUNDATION, AND AMERICAN ACADEMY OF ADOPTION ATTORNEYS IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

Timothy Sandefur
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

Robert Henneke
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Ave.
Austin, Texas 78701
(512) 472-2700
rhenneke@texaspolicy.com

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Per Fed. R. Civ. P. 29(a)(4)(A) and 26.1, the Goldwater Institute certifies that it is a 501(c)(3) nonprofit corporation. No parent corporation or any publicly held corporation owns 10% or more of its stock.

The Cato Institute certifies that it has no parent companies, subsidiaries, or affiliates, and that it does not issue shares to the public.

The Texas Public Policy Foundation certifies that it has no parent companies, subsidiaries, or affiliates, and that it does not issue shares to the public.

The American Academy of Adoption Attorneys certifies that it has no parent companies, subsidiaries, or affiliates, and that it does not issue shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

IDENTITY AND INTEREST *AMICI CURIAE*[1]

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

SUMMARY OF ARGUMENT

ICWA was motivated by good intentions—but today, it imposes race-based mandates and prohibitions that make it harder for states to protect Native American children against abuse, and extraordinarily difficult for them to find the loving, permanent, adoptive homes they often need. This harms children who are part of America's most at-risk demographic—and in a manner that violates due process and the limits of our federalist system.

ICWA is complicated, and discussions of it in legal briefs, law reviews, and popular media are replete with inaccuracy and falsehood. That's unsurprising, because the historical injustices ICWA aimed to remedy generate intense emotions that can obscure careful reasoning. This brief therefore dispassionately addresses, in question-and-answer format, some common misconceptions, confusions, and falsehoods surrounding ICWA.

[1] No counsel for any party authored this brief in whole or part, and no person other than *amici*, their members or counsel—and no party or party's counsel—contributed money intended to fund its preparation or submission.

ARGUMENT

I. DOES ICWA CLASSIFY BY RACE?

A. As used in ICWA, "Indian child" is a racial category because it hinges solely on genetics.

ICWA applies to "Indian child[ren],"[2] which it defines as children who are (a) members of tribes or (b) both (1) eligible for membership, and (2) biological children of tribal members. All tribes determine their own eligibility criteria, but all do so based exclusively on biological factors—not cultural, social, or political considerations.[3]

For example, to be a member of the Navajo, a child must have 25 percent Navajo blood—but need not have any cultural, political, or social affiliation with the tribe. Navajo Nation Code, tit. 1, § 701(B)[4]. To be a member of the Gila River Indian Community, a child must have 25 percent *Indian* blood, *regardless* of tribe, and also be a *biological* child of a tribal member—but no social, political, or cultural affiliation is necessary. Gila River Indian Comm. Const. art. III § 1(b)[5].

---

[2] The distinction between tribal membership and "Indian child" status under ICWA must always be borne in mind. *See In re Abbigail A.*, 375 P.3d 879, 885–86 (Cal. 2016) (observing this distinction). While tribes are free to set their eligibility criteria however they want, including by reference to biological considerations, "Indian child" status "is a conclusion of *federal and state law*," *id*. at 885 (emphasis added), and therefore may not be based on racial or ethnic factors. The *amicus* briefs of Indian Law Scholars and of California, et al., ignore this distinction.

[3] Indeed, defining membership by "descen[t]" is required for federal recognition. 25 C.F.R. § 83.11(e).

[4] http://www.navajonationcouncil.org/Navajo%20Nation%20Codes/V0010.pdf

[5] http://thorpe.ou.edu/IRA/gilacons.html

The Cherokee require no minimum blood quantum, but require proof of direct *biological* descent from a signer of the Dawes Rolls. Cherokee Const. art. IV § 1.[6] Again, cultural or political factors are not considered.

However else they differ, *no* tribe imposes any cultural, political, religious, or sociological criterion for membership. That means children who are fully affiliated with tribes *culturally*—who practice Native religions, speak Native languages, live on tribal lands, and follow tribal customs—but do not fit the *biological* profile, will *not* qualify as "Indian" under ICWA. A child adopted by a tribal family and raised with tribal culture and customs, does *not* qualify, because she is not the "biological child" of a tribal member. *In re Francisco D.*, 230 Cal. App. 4th 73, 83–84 (2014). Sam Houston, who was adopted by a Cherokee chief, spoke Cherokee, and served as Cherokee ambassador, would not qualify if he were alive today, because he was not the *biological* child of a tribal member. Marquis James, *The Raven: A Biography of Sam Houston* 20, 127 (Austin: University of Texas Press, 2004) (1929). William Holland Thomas, a white man who served for three decades as chief of the Oconaluftee Cherokees, *see* E. Stanly Godbold & Mattie Russell, *Confederate Colonel and Cherokee Chief: The Life of William Holland Thomas* (1990), would not qualify for the same reason—his biology.

[6] http://cherokee.org/Our-Government/Boards-Commissions/Constitution-Convention/Final-Draft-of-Constitution-Convention-Endorsed

On the other hand, a child with *no* cultural, religious, political, or social relationship with a tribe, who's never lived on tribal lands, and has no idea she has Native ancestry, *would* qualify as "Indian" if, and solely because, she has the requisite DNA. The Indian Law Scholars' brief (at 19) says ICWA "applies only to children with a political connection to a federally-recognized tribe," but this is false. ICWA applied, for example, to Lexi, a 6-year-old girl of Choctaw descent, based exclusively on her genes, despite having no cultural, social, or political affiliation with the tribe. *In re Alexandria P.*, 1 Cal. App. 5th 331 (2016). It applied to D.S., a newborn with no political or cultural affiliation with a tribe, based solely on biology. *In re D.S.*, 577 N.E.2d 572, 574-75 (Ind. 1991). It's currently being applied to C.J. Jr., a 6-year-old Ohio child who has no political or social affiliation with a tribe. *In re C.J. Jr.*, No. 18AP-862 (Ct. App. Ohio) (pending).

"Culture isn't carried in the blood," writes Ojibwe author David Treuer, "and when you measure blood, in a sense you measure racial origins." *The Heartbeat of Wounded Knee* 382 (2019). ICWA classifies children as "Indian" based exclusively on blood.

Therefore Indian child status under ICWA is a racial, not a political category.

It's often said that ICWA is not race-based because not all Native children qualify as "Indian children" under ICWA. The *amicus* brief of California, et al., makes this argument (at 18). 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 v. Cayetano*, 528 U.S. 495, 516-17 (2000). A law that, for example, applied only to left-handed black people would still create an unconstitutional racial classification even though it did not apply to right-handed black people. While ICWA does not apply to all children who have Native American biological ancestry, it does apply *only* to children who have that biological ancestry, and it applies *solely because of* that biological ancestry. It is therefore a racial, not a political, classification.

The racial nature of ICWA's categorization is made even more clear by the foster placement mandates in Section 1915(b) and the adoption placement mandates in Section 1915(a). These provisions require that Indian children be placed first with relatives (nothing wrong with that), and if that's not possible, with members of the same tribe, and if that's not possible, with "other Indian families" or in "Indian" institutions, *regardless of tribe*—instead of with adults of other races. In other words, ICWA is predicated not on *tribal affiliation*, but on *generic "Indianness."* But generic Indianness is a racial construct, not a political

classification.[7] ICWA requires, not that Navajo children be placed with Navajo adults, or Cherokee children with Cherokee adults, but that "Indian children" be placed with "Indian adults." ICWA's *express* purpose is to keep biologically "Indian" children separate from biologically non-"Indian" adults.[8]

Final proof of ICWA's race-based nature comes from the largely failed attempt by some state courts to adopt a legal test that *was* predicated on political, cultural, or social affiliation. This test is called the "existing Indian family doctrine" (EIFD), and it requires proof that a purported Indian child have some connection with a tribe *other than* biological before ICWA could apply. *See, e.g.*, *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982). The EIFD is a saving construction, intended to prevent ICWA from transgressing constitutional prohibitions on race-based laws. Yet it came under withering criticism from tribal governments and has been repudiated by most courts, on the theory that it unduly intrudes on tribal power. *See. e.g., In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009) (abandoning EIFD

[7] The concept of the "generic Indian"—lumping all Natives together without regard to tribal distinctions—is "an arbitrary collectivization" imposed by Europeans. *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). *See also United States v. Bryant*, 136 S. Ct. 1954, 1968-69 (2016) (Thomas, J., concurring) ("Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions.").

[8] In *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989), for example, the Court quoted from a Congressional report stating that ICWA "establish[es] 'a Federal policy that, where possible, an Indian child should remain in the Indian community.'" In other words, Congress did not seek to ensure that Navajo children were raised by Navajos, or Eastern Band Cherokees remain in Eastern Band Cherokee homes, but that *Indian* children, regardless of tribe, be kept within the "Indian community"—conceived of as an undifferentiated mass.

because it required a "factual determination" about whether a child had a political relationship with a tribe).

As a result, the question of whether a child is an "Indian child" under ICWA does *not*, and in those states rejecting the EIFD, *absolutely may not*, include consideration of political, cultural, social, linguistic, religious, etc., factors. Rather, it *must* be based exclusively on biological, i.e., racial, factors.

B. The *Mancari* rational-basis rule does not apply because ICWA is "directed towards a 'racial' group consisting of 'Indians.'"

Morton v. Mancari, 417 U.S. 535 (1974), upheld an employment preference for Native Americans at the Bureau of Indian Affairs (BIA) against the argument that it was an unconstitutional racial preference. But the Court made a point of noting that the preference was "not directed towards a 'racial' group consisting of 'Indians.'" *Id.* at 553 n.24. Thus *Mancari* did *not* hold that *all* laws that treat Indians differently are subject to rational basis. A law directed toward a racial group consisting of Indians still falls outside the scope of that precedent.

United States v. Antelope, 430 U.S. 641 (1977), said the same thing: the rational basis rule applied to laws that treated adults differently based on their decision to become or remain members of Indian tribes—a matter that is qualitatively political, not racial—yet *Antelope* again expressly reserved the

question of whether laws that treat Indians as a separate class *without* reference to political or social affiliation would be constitutional. *Id*. at 646 n.7.[9]

The Court clarified the limits on *Mancari* in *Rice*, when it defined a race-based law as a law that "singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics.'" 528 U.S. at 515 (citation omitted). That is true of ICWA, which is not only triggered by a child's *biological* eligibility for tribal membership, but is designed that way for the express racial purpose of keeping "Indian children" in homes that ICWA defines (generically) as "Indian."

The *Mancari* rule was designed to address the limited question of a statute that treated people differently based on their choice to become or remain members of a political society. But ICWA categorizes based on genetics alone—not tribal culture, political affiliation, or treaty rights. It creates not a political, but a racial classification.

Tribes are free to use genetic criteria as qualifications for membership. But federal and state governments may not give legal effect to such criteria. Solangel

[9] *Antelope* noted that if, hypothetically, a law established different evidentiary standards for cases involving Indians than other biological groups, that would likely violate the Constitution. *Id.* at 649 n.11. But ICWA does that. It imposes a "beyond a reasonable doubt" standard, for example, in termination of parental rights (TPR) cases, 25 U.S.C. § 1912(f), which supersedes the "clear and convincing" standard that applies to TPR cases involving all other children. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (mandating "clear and convincing" in TPR cases because "a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.").

Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 Colum. J. Gender & L. 1, 40 (2008) ("[T]ribes may consider private racial biases and even discriminate against their citizens. However, federal and state courts are constrained by the United States Constitution and thus cannot."). If a private organization used race as a membership criterion, the government could not then use membership in *that* organization as a consideration in granting benefits or imposing burdens. *Cf. Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (government may not "become significantly involved in private discriminations.") As the Supreme Court said in a decision that forbade states from blocking interracial adoptions, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

C. ICWA cannot be analogized to international adoption law because Indian children are American citizens.

It is often argued that tribal membership can be analogized to the *jus sanguinis* rule of citizenship—i.e., that ICWA only incorporates tribal citizenship determinations in the way international law incorporates the citizenship determinations of foreign nations. *See, e.g.*, Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 Stan. L. Rev. 1025, 1071 (2018). The problem with that argument is that all Indian children are U.S. citizens, 8 U.S.C. § 1401(b), which makes the international-law

analogy untenable. Federal and state governments may not treat citizens differently based on the fact that their biological ancestry would qualify them for citizenship in a foreign nation. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944)).

II. WOULD INVALIDATING ICWA HARM TRIBAL SOVEREIGNTY AND ALL OTHER FEDERAL INDIAN LAW?

A. The challenged provisions of ICWA do not constitutionally promote tribal sovereignty.

The theory that ICWA is essential to preserving tribal sovereignty is predicated on three assumptions: *first*, that ICWA protects tribal court authority to adjudicate child welfare matters, thereby giving tribal governments the respect they deserve; *second*, that ICWA supports tribes' capacity to determine their own citizenship criteria; *third*, that it prevents diminishment of tribal populations. But none of these factors establish the conclusion that ICWA promotes tribal sovereignty in a constitutionally acceptable *way*.

1. True, ICWA authorizes tribal courts to decide child welfare cases on reservation; that's unobjectionable and not challenged here.[10] A problem arises, though, when tribal courts try to adjudicate *off*-reservation ICWA cases in which they lack personal jurisdiction. This happens because Section 1911(b) purports to

[10] Nor did ICWA give it to tribes; on-reservation jurisdiction over members is inherent sovereignty.

give tribal courts authority based on a child's "Indian child" status—meaning that tribal courts often assert personal jurisdiction based exclusively on a child's biological ancestry, even where the child has never been domiciled on reservation, as in *Renteria v. Shingle Springs Band of Miwok Indians*, No. 2:16-CV-1685-MCE-AC, 2016 WL 4000984 at *3 (E.D. Cal. July 26, 2016), or has never visited tribal lands, as in *In re C.J. Jr.*, 108 N.E.3d 677, 695–97 ¶¶ 90–104 (Ohio Ct. App. 2018).

For any court to assert personal jurisdiction on the basis of race is unconstitutional, and tribal courts cannot complain if they are barred from doing so. *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) ("We demand that foreign nations afford United States citizens due process ... [and] must ask no less of Native American tribes."). Therefore, affirming the decision below will not injure tribal authority *where that authority is constitutional*. It would bar tribal courts from asserting jurisdiction where such jurisdiction is based on *racial* factors—which is as it should be.

2. ICWA does not support a tribe's ability to determine citizenship criteria, nor does the decision below undermine that authority. Rather, the decision below is concerned with "Indian child" status under ICWA, which is a matter of federal, not tribal, law. *In re Abbigail A.*, 375 P.3d at 885–86. Affirmance would leave untouched the ability of tribes to determine their membership criteria. It

would instead affect the way *state agencies* deal with cases involving children whom a federal statute classifies as "Indian."

3. ICWA characterizes children as tribal "resource[s]," 25 U.S.C. § 1901, and seeks to reinforce tribes as collective entities. *See* N. Bruce Duthu, *American Indians and the Law* 150-51 (2008). But whatever obligation Congress has to preserve tribal "resource[s]," it may not do so in ways that deprive U.S. citizens—including minors—of equal protection or due process. Congress certainly could not, say, outlaw marriage between tribal members and non-members, or forbid tribal members from leaving the tribe—even though these prohibitions would support "[a] tribe's communal interests in preserving its sovereign and cultural integrity." *Id.* at 151. For the same reason, Congress cannot deprive Indian children or their parents of their right to equal treatment, even if the goal is legitimate.

B. ICWA violates Indian parents' rights.

Another way ICWA strengthens tribal governments is by giving them authority over children "on a parity with the interest of the parents." *Holyfield*, 490 U.S. at 52 (citation omitted). For instance, ICWA lets tribal governments veto adoption decisions made by Indian parents, as in *Holyfield* or the Brackeens' case, or block Indian parents from terminating the rights of neglectful or abusive ex-spouses, as in *In re T.A.W.*, 383 P.3d 492 (Wash. 2016), or *S.S. v. Stephanie H.*,

388 P.3d 569 (Ariz. App. 2017), *cert. denied sub nom. S.S. v. Colo. River Indian Tribes,* 138 S.Ct. 380 (2017).

But it's unconstitutional to give *any* third party authority over a child which is on a parity with, or superior to, that of the parents. *Troxel v. Granville,* 530 U.S. 57, 69 (2000). Just as Washington could not force parents to allow grandparents visitation—disregarding the "special weight" that a state owes "to [a parent's] determination of her [child's] best interests," *id*. at 69—so Congress may not override an Indian parent's decision to put her child up for adoption, select adoptive parents, or seek TPR of her ex.

C. Even analogizing ICWA to the international adoption context, ICWA exceeds constitutional limits.

It's sometimes claimed that ICWA should be analogized to international adoption, so that just as, say, Canada could block Americans from adopting Canadian children, tribal governments can forbid adoption of Indian children. This analogy fails, however. First, ICWA is not a treaty, but a statute. Second, Indian children are American citizens, not foreigners. Third, foreign governments block adoptions in *their own* courts, not American courts, whereas ICWA uses *federal* power to override *state* courts on behalf of *tribal* governments. Fourth, Congress lacks authority, even under its treaty-making powers, to force American citizens into a legal system that lacks constitutionally guaranteed due process protections. *Reid v. Covert,* 354 U.S. 1 (1957).

Reid involved crimes committed by wives of servicemen stationed overseas; the women were tried by military tribunals. The Court found this unconstitutional because as American citizen civilians, they were entitled to trial in ordinary courts, with their "express safeguards." *Id.* at 22. The government claimed authority under the treaty power to subject them to military proceedings, thanks to agreements with Britain and Japan, *id.* at 14-16, but the Court said "[i]t would be manifestly contrary" to "our entire constitutional history and tradition" to allow Congress to adopt a treaty whereby American citizens were subjected to a legal process that deprived them of the protections of the Bill of Rights. *Id.* at 17.

ICWA does just that. It subjects American citizens—Indian children and the adults who love them—to the jurisdiction of tribal courts that lack the due process protections available in state or federal courts (and often with no pretense of personal jurisdiction beyond genetics). Section 1911's jurisdiction-transfer mandate means that these children and adults are forced into tribal courts where the Bill of Rights does not apply, *see Nevada v. Hicks*, 533 U.S. 353, 383 (2001), and where appeal rights are so severely restricted as to be, in most cases, illusory. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (violations of Indian Civil Rights Act can almost never be taken to federal court). Therefore, like the treaty provisions in *Reid*, the provisions of ICWA that force "Indian" children and

adults—all U.S. citizens—into tribal courts are "illegitimate and unconstitutional." *Reid*, 354 U.S. at 39–40.

Even aside from this, ICWA would exceed Congress's treaty powers (if it were a treaty). Congress cannot make treaties that exceed its constitutional authority, *id.* at 18; *Bond v. United States*, 572 U.S. 844, 867 (2014) (Scalia, J., concurring), and the Fifth Amendment's Due Process Clause forbids Congress from discriminating on the basis of race. Congress therefore could not make a treaty with, say, Japan, which subjected lawsuits involving Americans of Japanese ancestry to different evidentiary standards than apply to cases involving Americans of non-Japanese descent. Congress could not force Americans of Jewish descent to adjudicate disputes before a *beth din* instead of a legal court—even if it tried to do so by treaty. So, too, American citizens not domiciled on reservations are legally entitled to be treated the same as all other American citizens, even if they are biologically eligible for tribal membership—and even if their loved ones are. ICWA's separate evidentiary standards (which displace the evidentiary standards of state law) and procedural requirements (mandating jurisdiction transfer and giving tribes authority to dictate treatment of state-law child welfare cases) are therefore unconstitutional *even if* the treaty analogy holds.

D. No other federal Indian law uses ICWA's race-based "eligibility" criterion.

The fear expressed in the Indian Law Scholars' brief (at 24) that the decision below "call[s] into question" the foundations of federal Indian law are radically overblown. ICWA is unique among federal Indian statutes in being triggered solely by biological eligibility for tribal membership. The Indian Gaming Regulatory Act does not do this—it applies to actual members, 25 U.S.C. § 479, and to tribal land. 25 U.S.C. § 2703(4), (5). The Indian Self-Determination and Education Assistance Act applies to actual members. 25 U.S.C. § 5304. The Native American Graves Protection and Repatriation Act applies to things that have a cultural affiliation with an existing tribe. 25 U.S.C. § 3002. *Only* ICWA applies *not* to tribal members, but to "*potential* Indian children, including those who will never be members of their ancestral tribe." *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018). *See also* Duthu, *supra*, at 154-55 (ICWA "maintain[s] [a child's] actual *or even potential* cultural and social links with … [a] tribe." (emphasis added).

The only other law that comes close to ICWA's biological trigger is the Indian Major Crimes Act, 18 U.S.C. § 1153, which does not actually include such a provision, but has been interpreted as *possibly* applicable to persons who are only *potential* members of tribes. *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015). That interpretation that has been criticized for "transform[ing]" the Act

"into a creature previously unheard of in federal law: a criminal statute whose application turns on whether a defendant is of a particular race." *Id.* at 1116 (Kozinski, J., concurring in judgment). But even under that rule, eligibility for tribal membership is not dispositive, as it is in ICWA; it's one factor to be considered in determining whether the Act applies. *United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005).

Only ICWA makes biology the sole triggering factor. A child must be *biologically* eligible for tribal membership and the *biological* child of a tribal member. Nothing else counts. Efforts by some states to require consideration of other factors—under the EIFD—have been condemned and largely repudiated. Because ICWA's biology-only trigger is unique in Indian law, affirming the decision below would have no effect on other Indian law statutes.

III. HOW CAN STATES CLAIM INTERFERENCE WHEN CONGRESS HAS AN OBLIGATION TO INDIAN TRIBES?

A. ICWA goes beyond preemption and exercises a federal police power.

Where the federal government has exclusive authority, states cannot complain of being preempted. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018) (discussing the line between permissible preemption and impermissible commandeering.) But Congress may not override state police powers where there is no genuine connection to a federal authority. Thus in *United States v. Morrison*, 529 U.S. 598, 618 (2000), Congress could not impose a federal

law against sexual assault, something that "has always been the province of the States."

ICWA—at least with regard to the children at issue here—is precisely like the statute struck down in *Morrison*. It is not confined to federal lands, or to tribal citizens who might claim to be subject exclusively to federal regulation under the Indian Commerce Clause. Instead, it applies to children who are ordinary citizens of states like everyone else, except that federal law classifies them as "Indian" based solely on their biological eligibility for tribal membership. These "Indian children" don't live on reservations, but in suburbs and cities like their peers of other races. There are already state laws in place to deal with it if they are abused or neglected. Therefore, unless Congress has the authority here that it lacked in *Morrison*, it may not supersede the states' police powers. The question therefore, as in *Morrison*, is whether ICWA pursues Congress's legitimate goals in a constitutional manner.

B. Child welfare is not "commerce."

Family law is such a quintessentially state law matter that federal courts will not adjudicate such cases, even where they would have jurisdiction. *Ankenbrandt v. Richards*, 504 U.S. 689, 703-07 (1992). The Constitution's authors considered family law categorically beyond federal authority. They found it so hard to imagine the federal government trying "by some forced constructions" of the

Constitution to "vary the [state] law" relating to inheritance or other domestic matters, that only the "imprudent zeal" of the Constitution's opponents could envision such a thing. *The Federalist* No. 33 at 206 (J. Cooke ed., 1961) (Alexander Hamilton).

There is no basis for believing that the Indian Commerce Clause allows Congress to impose a federal family law that governs off-reservation cases involving children who are "eligible" for tribal membership. *See* Robert Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201, 265 (2007) (Clause "did not grant to Congress a police power over the Indians."). Child welfare is not commerce, *cf. Morrison*, 529 U.S. at 610, and cases that involve no connection to federally-governed tribal land are properly matters of state jurisdiction in which Congress lacks authority to interfere. Just as Congress cannot override non-discriminatory state family law to mandate a discriminatory federal family law, *United States v. Windsor*, 570 U.S. 744, 769-70 (2013), so it cannot do so with regard to children who don't reside on tribal lands and aren't necessarily tribal citizens.

IV. WHAT ABOUT RESIDENTIAL SCHOOLS AND OTHER ABUSES?

A. The injustices of the past are not cured by inflicting injustices today.

Native Americans have suffered awful wrongs throughout American history, including by federal and state governments trying to force their assimilation into

white society against their will. But inflicting injustices against *today's* children does nothing to redress the wrongs of the past—it only perpetuates the cycle of wrong. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). Two racial wrongs do not make a right. Martin Luther King Jr., *Give us the Ballot—We Will Transform the South* (1957) *reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* 200 (James Washington, ed. 1986) ("We must act in such a way as to make possible a coming-together … on the basis of a real harmony of interest and understanding. We must seek an integration based on mutual respect.").

Depriving Native children—who are statistically at greater risk of abuse and neglect,[11] violence,[12] gang activity,[13] drug abuse,[14] alcoholism,[15] and suicide,[16] than any other group of children in the U.S.—of the legal protections necessary to

---

[11] *See, e.g.*, Tara Culp-Ressler, *The Shocking Rates Of Violence And Abuse Facing Native American Kids*, ThinkProgress, Nov. 18, 2014, https://goo.gl/CjM3rn.

[12] *See, e.g., Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence: Ending Violence so Children Can Thrive* (U.S. Dep't of Justice, 2014), https://goo.gl/Lwqfso.

[13] *See, e.g,* Aline Major, *et al., Youth Gangs in Indian Country*, OJIIDP Juv. Justice Bulletin, Mar. 2004, https://goo.gl/fpH19d.

[14] L.R. Stanley, *et al., Rates of Substance Use of American Indian Students in 8th, 10th, and 12th Grades Living on or Near Reservations: Update, 2009-2012*, 129 Pub. Health Rep. 156 (2014), goo.gl/yryzK9.

[15] *See, e.g,* Bettina Friese, *et al., Drinking Among Native American and White Youths: The Role of Perceived Neighborhood and School Environment*, 14 J. Ethnicity in Substance Abuse 287 (2015).

[16] *See, e.g.*, Suicide Among Racial/Ethnic Populations in the U.S.: American Indians/Alaska Natives, Suicide Prevention Resource Center (2013), https://goo.gl/rWH4aS.

secure them a safe and healthy future, fixes nothing. In fact, the injustices toward Native Americans have been rooted in the denial of the legal equality to which they are entitled. ICWA perpetuates that inequality by subjecting "Indian children" to separate and less-protective rules—rules that prioritize other factors over their individual needs and "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 653–54 (2013); *see also* Elizabeth Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, Phoenix New Times, Sept. 7, 2016[17] (describing how ICWA deters foster and adoptive parents from helping "Indian children.")

B. Allegations that Indian children are psychologically harmed by being adopted by non-Indians are unsupported.

It's often said that Indian children suffer unique psychological distress when they are adopted by non-Indian adults. *See, e.g.*, Catherine Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future*, 27 Creighton L. Rev. 661, 668 (1994). But these claims are unreliable, based on flawed psychological surveys, such as Carol Locust, *Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children*, 44 Ontario Ass'n. Child. Soc'y. J. 11 (2000). The "Split Feathers" study was

[17] https://goo.gl/hvo45Z.

unscientific and was "implemented so poorly that we cannot draw conclusions from it." Bonnie Cleaveland, *Split Feather: An Untested Construct* (2015).[18] It involved only 20 adults; its methodology was not disclosed; there was no control group; and it made no attempt to consider other potential causes of trauma.

Similar flaws taint other surveys that claim to show that Indian children are uniquely harmed when adopted by non-Indians—surveys such as the "Apple Syndrome" analyses of Joseph Westermeyer, which Professor Randall Kennedy has called "utterly subjective" and "junk social science." Randall Kennedy, *Interracial Intimacies* 499, 502–3 (2003). Most notably, such surveys fail to determine whether the psychological trauma at issue was the result of the mistreatment or neglect that *led to* those children being adopted, as opposed to being the result of adoption itself. Other, more rigorous research has failed to establish a link between adoption by non-Indians and any distinctive form of childhood distress. *See* Christine Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 543, 547–49 (1996) (detailing research); David Fanshel, *Far from The Reservation* 323 (1972) (Indian children adopted by non-Indians do "remarkably well"); Rita Simon & Sarah Hernandez, *Native American Transracial Adoptees*

[18] https://goo.gl/ibsr8j.

Tell Their Stories 13-14 (2008) (interviews with subjects in which 16 of 20 Indians adopted into non-Indian families reported positive experiences).

C. This case and similar cases have nothing to do with "removing" Indians from Indian families.

ICWA was intended to prevent "the removal, often unwarranted, of [Indian] children from [their families] by nontribal … agencies." 25 U.S.C. § 1901(4). Yet this case and many others have nothing to do with the removal of children from their families. The Brackeens sought adoption of a child whose birth parents *agreed* to, and testified in *support* of, that adoption. And in *In re S.S.*, *supra*, *In re T.A.W.*, *supra*, *Renteria*, *supra*, and many other cases, no children were being removed, and no agencies were involved. Yet courts applied ICWA's race-based mandates anyway.

Obviously the abuse of a child welfare agency's authority, and unjustified removal of children from families, are grave concerns. Cases such as *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 763 (D.S.D. 2015), *vacated sub nom. Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018), reveal that serious wrongdoing continues. But such wrongs already violate non-ICWA laws, such as the Due Process Clause, *see id.* at 769–72, so the decision below would have no effect on courts' ability to redress those wrongs.

V. ISN'T ICWA THE "GOLD STANDARD"?

A. The "gold standard" soundbite originated in a single *amicus* brief that used the term to refer to one aspect of ICWA.

Perhaps the most commonly heard soundbite among defenders of the status quo in ICWA cases is that the statute is "the gold standard" for child welfare. That claim is simply false. First, that phrase originated in an *amicus* brief filed in *Adoptive Couple v. Baby Girl* (2013 WL 1279468 at *1), and originally referred, not to ICWA as a whole, but to the "active efforts" requirement in Section 1912(d)—and the principle that the state should, when possible, "support and develop the bonds between a child and her fit birth parents." *Id*. at *2. Of course, nobody disputes that placement with parents is ideal. The problem is that ICWA's "active efforts" provision is not limited to *fit* parents, but also restricts state's ability to protect Indian children from *unfit* parents.

B. ICWA's "active efforts" provision is no gold standard.

The difference between ICWA's "active efforts" requirement and the state-law "reasonable efforts" requirement is crucial. *See generally* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1, 36–42 (2017). State law requires child welfare workers to make "reasonable efforts" to restore families after state intervention; this includes, e.g., making rehabilitation opportunities available. *See, e.g., In re A.L.H.*, 468 S.W.3d 738, 744–45 (Tex. App. 2015). But reasonable efforts are

excused where "aggravated circumstances," such as systematic abuse or molestation exist—because the state shouldn't return children to homes where they'll be abused again. *Id.*

But ICWA's "active efforts" requirement overrides that law. It requires *more* from the state than "reasonable efforts" does, *People ex rel. A.R.*, 310 P.3d 1007, 1014–15 ¶ 28 (Colo. App. 2012), and it is *not* excused in cases of aggravated circumstances. *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 618 ¶ 20 (S.D. 2005).

That means Indian children must be *more* abused, for *longer*, than children of other races, before the state can protect them, and must be returned time and again to abusive homes. The results are cases in which social workers know children are being abused, but cannot take action—whereas they would be able to act if the children were not biologically classified as "Indian."

In July 2018, after 1-year-old Josiah Gishie was murdered by his mother, Arizona child protection workers announced that they had known Josiah was being abused, but had been unable to act because of ICWA. *See, e.g.,* Ariz. Dep't of Child Safety, *Statement on the Death of One-year-old Josiah Gishie*, Oct. 12, 2018.[19] In 2007, Cherokee child Declan Stewart was beaten to death by his mother's boyfriend, even though Oklahoma social workers knew he was being abused; they had been forced to return him to the couple's custody by ICWA's

[19] https://goo.gl/8Ayjw2.

"active efforts" provision. *See* Mark Flatten, *Death on a Reservation* 25-26 (Goldwater Institute, 2015).[20] Between 2008 and 2015, three Nebraska girls were repeatedly abused by their father, *id.* at 20, and when officials tried to remove them from his custody, the state Supreme Court overruled that because officials had not made "active efforts" to reunite the girls with their abuser. *In re Shayla H.*, 855 N.W.2d 774 (Neb. 2014). These are just some of the countless cases in which officials have been *aware* that Indian children were being harmed—and were barred from protecting them by ICWA's "active efforts" requirement. That's not a "gold standard."

C. It's not a "gold standard" to override a child's best interests—but ICWA does so.

All U.S. states and territories have statutes requiring the application of the "best interest of the child" standard to decisions made regarding their custody, placement, and welfare. Yet ICWA bars states from applying that standard in cases involving Indian children. *See, e.g., Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. App. 1995) (describing the best interests standard as an "Anglo" standard that should not be applied to Indians); *In re Alexandria P.*, 1 Cal. App. 5th at 351 (best interests is the overriding consideration for children of *non-*

[20] https://goo.gl/TU9WVQ.

Indian descent, but only "one of the constellation of factors relevant" in an Indian child's case).

The argument for this is that ICWA declares what is *per se* in the best interests of all children deemed "Indian." The Montana Supreme Court, for instance, says the best interests rule is "appropriate …in custody cases under state law," but is "improper" in ICWA cases, because "ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences." *In re C.H.*, 997 P.2d 776, 782 ¶ 22 (Mont. 2000). In 2015, the BIA agreed: state courts should not apply a best-interests analysis in ICWA cases because ICWA's race-based "presumptions" are *per se* in the best interests of all "Indian children." Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10158 F.4(c)(3) (Feb. 25, 2015).

But Congress has no legitimate authority to decree what is "presumptively" in the best interests of all children who fit a specified racial profile.

Properly applied, the best-interests determination is inherently individualized. *In re Doe 2*, 19 S.W.3d 278, 283 (Tex. 2000). While "'[p]rocedure by presumption'" may be "'cheaper and easier than individualized determination[s],'" employing them instead of a case-by-case inquiry "'risks running roughshod over the important interests of both parent and child,'" and

"'therefore cannot stand.'" *In re B.G.S.*, 556 So. 2d 545, 553 (La. 1990) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972)). Courts may not simply rely on presumptions in child welfare cases, but must make findings about *this* child's *specific* circumstances. ICWA overrides that principle—which harms Indian children.

For Congress to decree what is in the best interests of all children of one genetic class is both unconstitutional and unconscionable. It harms children by disregarding and subordinating the specific needs of particular children to the *ipse dixit*, one-size-fits-all pronouncements of Congress—or an Indian tribe. That's no "gold standard." It's a violation of fundamental human rights.

CONCLUSION

The decision should be *affirmed*.

RESPECTFULLY SUBMITTED this 5th day of February, 2019 by:

/s/ Timothy Sandefur
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

/s/ Ilya Shapiro
Ilya Shapiro
CATO INSTITUTE

/s/ Robert Henneke
Robert Henneke
TEXAS PUBLIC POLICY FOUNDATION
Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

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 6,500 words.

Submitted this 5th day of February, 2019,

/s/ Timothy Sandefur
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2019, the foregoing brief was filed and served on all counsel of record via the ECF system.

/s/ Kris Schlott
Kris Schlott