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.

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants - Appellants

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,
Intervenor Defendants - Appellants

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION
CASE NO. 4:17-CV-00868-O

AMICUS BRIEF OF NATIVE AMERICAN WOMEN, INDIAN TRIBES, AND ORGANIZATIONS IN SUPPORT OF APPELLANTS AND REVERSAL

Kendra J. Hall
kendra.hall@procopio.com
Kerry Patterson
(application for admission pending)
Racheal M. White Hawk
(application for admission pending)
Attorneys for *Amici Curiae*

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP
525 B Street, Suite 2200
San Diego, CA 92101
Telephone: 619.238.1900
Facsimile: 619.235.0398

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following list of persons and entities, in addition to those listed in the briefs of the parties and other *amici*, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate potential disqualification or recusal.

Amici Curiae

1. Rosa Soto Alvarez
2. Stephanie Benally
3. Carlene A. Chamberlain
4. Judi gaiashkibos
5. Erica Pinto
6. Kathy Talbert
7. Barona Band of Mission Indians of the Barona Reservation, California
8. Jamul Indian Village of California
9. Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California
10. Nebraska Commission on Indian Affairs
11. Southern Indian Health Council
12. Utah Foster Care

Counsel for *Amici Curiae*

1. Kendra J. Hall
2. Kerry Patterson (application for admission pending)
3. Racheal M. White Hawk (application for admission pending)

/s/ Kendra J. Hall
Kendra J. Hall
Attorney for *Amici Curiae*

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I. INTEREST OF *AMICI CURIAE*[1]

Amici are Native American women who are personally affected by the Indian Child Welfare Act ("ICWA"), including mothers and grandmothers with Indian children and grandchildren involved in the foster care system and Native American women who were themselves involved in the foster care system. *Amici* also include tribes as well as foster care, health care, and Indian affairs organizations that are involved in implementing ICWA. *Amici* include the following individuals and entities:

Rosa Soto Alvarez is a Councilwoman of the Pascua Yaqui Tribe and an enrolled member of the Pascua Yaqui Tribe. Ms. Alvarez went through the foster care system as a child and was placed with a Yaqui family through ICWA.

Stephanie Benally is a Native American Specialist/Foster-Adoptive Consultant for Utah Foster Care and an enrolled member of the Navajo Nation. Ms. Benally also has adopted two Indian children through ICWA.

[1] *Amici* are authorized to file this brief as all parties have consented to its filing and the brief complies with Federal Rule of Appellate Procedure 29. This brief avoids repetition of facts and legal arguments contained in other briefs, and this brief focuses on points not made or adequately discussed in other briefs. Undersigned counsel hereby certifies that: (1) no counsel for a party authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity—other than *amici curiae*, their members, or their counsel—contributed money intended to fund the preparation or submission of this brief.

Carlene A. Chamberlain is the Secretary and Enrollment Clerk for the Jamul Indian Village of California and an enrolled member of Jamul Indian Village. Ms. Chamberlain obtained custody of her Indian granddaughter through ICWA.

Erica Pinto is the Chairwoman of Jamul Indian Village and an enrolled member of Jamul Indian Village. Ms. Pinto assists with ICWA implementation as Chairwoman and she is the Aunt of the Indian child who was placed with *amicus* Ms. Chamberlain through ICWA.

Kathy Talbert is an ICWA Guardian Ad Litem in Minneapolis, Minnesota, and is an enrolled member of the Sisseton Wahpeton Oyate Tribe. Ms. Talbert has over twelve years of experience implementing ICWA through the Minnesota court system as an ICWA Guardian Ad Litem.

The Jamul Indian Village of California, **the Barona Band of Mission Indians of the Barona Reservation, California, and the Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California**, are federally recognized Indian tribes.

All three *amici* Indian tribes are members of *amicus* **Southern Indian Health Council ("SIHC")**. SIHC is a Native American organization consisting of seven federally recognized Indian tribes. SIHC is committed to protecting and improving the physical, mental, and spiritual health of the American Indian

community. SIHC implements ICWA through its Indian Child Social Services program, providing services to Indian families such as preventing Indian child removal, working with other child welfare services toward Indian parent-child reunification, facilitating foster care, and providing general social services and case management assistance.

The Nebraska Commission on Indian Affairs ("Commission") is the state liaison between the four headquarter tribes of the Omaha, Ponca, Santee Sioux, and Winnebago Tribes of Nebraska and consists of fourteen Indian commissioners appointed by the Governor of Nebraska. The Commission's statutory mission is "to do all things which it may determine to enhance the cause of Indian rights and to develop solutions to problems common to all Nebraska Indians." In carrying out this mission, the Commission advocates, educates, and promotes through legislation the improvement and implementation of ICWA in Nebraska. The Commission also works closely with the Nebraska ICWA Coalition, consisting of tribal representatives, ICWA specialists, attorneys, and other advocates, to better the lives of Indian children and families in Nebraska's foster care system. *Amicus* **Judi gaiashkibos** is the Executive Director of the Commission and is an enrolled member of the Ponca Tribe of Nebraska.

Utah Foster Care is a nationally-recognized non-profit that finds, trains, and supports Utah families who are willing and able to provide a nurturing home

for children in foster care. Utah Foster Care has Native American Specialists, such as *amicus* Ms. Benally, who work on its behalf to implement ICWA's provisions in Utah.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

As Wilma Mankiller—the first female Principal Chief of Cherokee Nation—has said, "No matter where indigenous women gather or for what purpose, they almost always talk about family and community and express concern about traditional values, culture, and lifeways slipping away." WILMA MANKILLER, EVERY DAY IS A GOOD DAY, REFLECTIONS BY CONTEMPORARY INDIGENOUS WOMEN xxviii (mem'l ed. 2011). Indeed, "[i]t is the women who are responsible for bringing about the next generation to carry the culture forward." *Id.* Children are the most vital cultural resources to tribes, as Congress recognized when enacting ICWA. *See* 25 U.S.C. § 1901(3). *Amici* Native American women along with tribes and organizations as protectors of tribal families and cultures urge this Court to reverse the district court's unprecedented ruling that ICWA is unconstitutional.

Contrary to the district court's holding, ICWA does not violate the equal protection component of the Fifth Amendment to the United States Constitution. Congress enacted ICWA to, *inter alia*, preserve tribal families and cultures, and it has the plenary power to enact ICWA through the Indian Commerce Clause and

Treaty Clause of the Constitution. These constitutional clauses should be interpreted using customary international law, which provides that tribes have the right to self-determination, including the right to self-governance and cultural integrity. These rights prohibit assimilationist policies such as the removal of Indian children from Indian homes, which ICWA is designed to prevent. Furthermore, under rational basis review, ICWA's treatment of Indian tribes and individuals is rationally related to fulfilling Congress' unique obligation to Indians, as evidenced by the stories of *amici* Native American Women. Even under strict scrutiny review, Congress had a compelling interest in enacting ICWA. This Court should reverse the district court's unprecedented ruling that ICWA is unconstitutional, because ICWA is necessary for the protection of the rights of indigenous peoples, especially women and children, and for the continued existence of tribes as distinct governments and cultures.

III. ARGUMENT

A. Congress Properly Enacted ICWA Through its Constitutional Plenary Power, and the Constitution Should be Interpreted According to Customary International Law Protecting the Rights of Indigenous Peoples.

As the Supreme Court has held, determining whether a "preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment . . . turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress." *Morton v. Mancari*, 417

U.S. 535, 552 (1974). Congress' plenary power over Indian tribes and individuals is "drawn both explicitly and implicitly from the Constitution." *Id.* at 551–52. Explicit sources of power include the Indian Commerce Clause and the Treaty Clause. U.S. CONST., Art. I, § 8, cl. 3, Art. II, § 2.

The Constitution provides Congress' power to legislate over Indian tribes and individuals. In addition to the arguments advanced by the Defendants-Appellants and Intervenor Defendants-Appellants in this case regarding Congress' power, *see* Dkt. No. 145 at 21–29; Dkt. No. 147 at 7–13, *amici* assert that international law also supports Congress' plenary power to enact ICWA. As recognized in Cohen's Handbook, a source often cited by the United States Supreme Court, "[t]he field of federal Indian law has its roots in international law." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01[2], at 386 (Nell Jessup Newton ed., 2012) [hereinafter Cohen's Handbook]. Furthermore, "[m]any Supreme Court decisions regarding Indian affairs drew directly on the law of nations to explain and justify the relationship between the national government and Indian tribes." *Id.* (citing *Worcester v. Georgia*, 31 U.S. 515, 520, 561 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 53 (1831); *Johnson v. M'Intosh*, 21 U.S. 543, 571–84 (1823)). Courts should continue to look to international law when interpreting the Constitution and Congress' plenary power over Indian tribes and individuals as international law has been used since the foundations of Indian law

were laid and has since been referenced by the Supreme Court when interpreting Congress' authority over Indian tribes and individuals. *See United States v. Lara*, 541 U.S. 193, 201–02 (2004).

Courts in the United States generally apply international law in two ways—"as part of customary international law applied as federal common law, and as an interpretive aid in the construction of United States constitutional or statutory law." Cohen's Handbook, § 5.07[4][a], at 480. The Supreme Court has held that, when possible, federal statutes should be construed in a way that does not conflict with customary international law. *See, e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *see also* Cohen's Handbook, § 5.07[4][a], at 483 (citing *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *Murray*, 6 U.S. at 118).

One applicable piece of international law is the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), adopted by the United Nations General Assembly in 2007 and supported by the United States. *See* UNDRIP, General Assembly Res. No. 61/295, U.N. Doc. A/61/L.67 (2007). UNDRIP contains several provisions designed to protect tribal families and cultures.

Native American attorney and international law scholar Walter Echo-Hawk has noted that "many experts believe that key rights in [UNDRIP] arise from, are connected to, and constitute settled rules of customary international human rights law, such as . . . [a] right to self-determination . . . [and a] right to culture,

including the right not to be subjected to genocide and ethnocide." WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 65 (2013). UNDRIP's specific provisions therefore may be enforced by United States courts "to the extent they reflect customary international law." *Id.* at 64.

Scholars have found that the indigenous right to self-determination is settled customary international law and that the right to self-determination is comprised of, among other rights, the right to self-governance and the right to cultural integrity. *Id.* at 65, 82–84 (citing JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 69–70 (2004 ed.); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM RTRS. J. 57, 109 (1999)). The right to self-governance includes having "political institutions that reflect [indigenous peoples'] specific cultural patterns and that permit [indigenous peoples] to be generally associated with all decisions affecting them on a continuous basis." *Id.* at 65 (quoting JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 112 (1996 ed.)). The right to cultural integrity includes "the survival and flourishing of indigenous cultures through mechanisms devised in accordance with the preferences of the indigenous peoples concerned." *Id.* (quoting JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 104 (1996 ed.)).

Reflecting customary international law, UNDRIP specifically provides for the right of indigenous peoples to self-determination in Article 3. UNDRIP further provides in Article 7 that "[i]ndigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group." Similar to Article 7, Article 8 of UNDRIP provides that "[i]ndigenous peoples . . . have the right not to be subjected to forced assimilation or destruction of their culture" and that "States shall provide effective mechanisms for prevention of . . . [a]ny form of forced assimilation or integration."

The right to self-determination, and the underlying rights to self-governance and cultural integrity, are evidence of customary international law, and should be used by courts when interpreting the Constitution and federal laws pertaining to Indian tribes and individuals. In particular, Congress' plenary power to legislate for Indian tribes and individuals through ICWA should and does include an ability to ensure the self-determination of tribes, including the survival and flourishing of tribal governments and cultures, as evidenced in Article 3 of UNDRIP. Without tribal involvement in the placement of Indian children under ICWA, *see* 25 U.S.C. § 1915, tribes are subject to the destruction of their cultures and forced assimilation, in violation of customary international law evidenced in Articles 7 and 8 of UNDRIP. Congress itself noted that ICWA was intended to, among other

things, prevent assimilation and protect tribal cultures. Congress reported that "[o]ne of the most pervasive components of the various assimilation or termination phases of American policy has been the notion that the way to destroy Indian tribal integrity and culture, usually justified as 'civilizing Indians,' is to remove Indian children from their homes and tribal settings." TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 78–79 (Comm. Print July 1976).

The power of Congress to legislate over Indian tribes and individuals is directly tied to the tribes' legal status as distinct governments with their own cultures and as the Supreme Court put it, "this unique legal status is of long standing." *Mancari*, 417 U.S. at 555. The Constitution's provisions provide Congress with the power to enact ICWA as the Defendants-Appellants and Intervenor Defendants-Appellants have argued before the district court. Additional support for Congress' plenary power is found in customary international law as evidenced by UNDRIP, which provides guidance in interpreting the Constitution and demonstrates that Congress has the power to enact ICWA. ICWA is an effective mechanism for the protection of tribal self-determination and the prevention of tribal cultural destruction and assimilation. This Court should uphold Congress' plenary power to enact ICWA under the Constitution.

B. Congress' Special Treatment of Tribes Under ICWA is Rationally Related to the Fulfillment of Congress' Unique Obligation to Indian Tribes and Individuals, as Evidenced by the Stories of *Amici* Native American Women.

The statutory language and legislative history of ICWA make it clear that Congress enacted ICWA to, *inter alia*, preserve tribal families and cultures. In enacting ICWA, Congress took a holistic approach to the best interests of Indian children, establishing presumptive preferences that Indian children would be best placed with family members, 25 U.S.C. § 1915(a)–(b), or in homes that "reflect the unique values of Indian culture." H.R. Rep. No. 95-1386, at 8. Congress further found that ICWA's enactment was necessary because "many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." H.R. Rep. No. 95-1386, at 10.

Amicus Kathy Talbert, an enrolled member of the Sisseton Wahpeton Oyate Tribe who has served as an ICWA Guardian Ad Litem in Minnesota for over twelve years, believes that cultural barriers often arise in her work. As an ICWA Guardian Ad Litem, Ms. Talbert works with numerous social workers and Native American families. In her experience, encountering two to three children in one bedroom or having families stay over is normal in Indian households, but that situation is generally less common in non-Indian households. She indicates that

oftentimes in the state foster care system, social workers do not tend to trust individuals in the parents' house, even if they are extended family members.

These present-day issues that *amicus* Ms. Talbert faces regarding cultural misunderstandings were prevalent when ICWA was passed. Congress recognized then that "[a]n Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family," but that "[m]any social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." H.R. Rep. No. 95-1386, at 10. ICWA is still very much needed today because under ICWA tribes are involved in the placement of Indian children, and, as *amicus* Ms. Talbert notes, this ensures cultural misunderstandings do not result in findings of neglect that would lead to the removal of Indian children.

Congress encapsulated ICWA's legislative history within the statutory text, by acknowledging that "States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(4). Congress also recognized its unique position with regard to Indian tribes, i.e., Congress is "responsib[le] for the protection and preservation of Indian tribes and their resources." *Id.* § 1901(1).

Traditionally, Native women played an important role in passing on cultural knowledge within many tribal families. Audrey Shenandoah, an Onondaga Nation Clan Mother, described women as playing a central role in her culture—"[t]he Clan Mothers, the grandmothers, the aunts, and the elders were the ones who had the honor and responsibility of nurturing young minds of the children." MANKILLER, *supra*, at 105. The children learned everything from their grandmothers, including "how to take care of one another[,] . . . survival skills, how to gather medicine, and how to determine what was good and bad." *Id.*

However, federal policies toward Native Americans vastly changed the role of women in many traditional societies. From the early 1800s until the mid-1920s—over a century—federal policies toward Indian tribes focused on removing tribes from their ancestral homelands, placing Indians on reservations and "civilizing" them, and taking collective tribal land and allotting it to Indian individuals in order to assimilate them into American culture as middle-class farmers. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 15–25 (6th ed. 2015). During the 1930s until the 1950s, federal policies shifted toward protecting tribal governments and lands, but then shifted back to assimilation policies involving the termination of tribes and relocation of Indians from reservations to metropolitan areas until the late 1960s. *Id.* at 25–30. Beginning in the late 1960s, the federal government took the approach still in place today—self-

determination, which enables tribes to control their own destinies through self-governance. *Id.* at 30–34.

These policies had fundamental effects on the roles of Native women in many tribal societies and families. *See* Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 8 (1997). Traditionally, women "had responsibility for cultivating the land in most American tribes," contrary to their non-Native counterparts. *Id.* In many tribal cultures, women decided what food to grow, how to prepare it, and what clothing and blankets to make. *Id.* at 17. Women not only held significant property rights, but also wielded great political power. *Id*. at 17–18. The power of women in tribal societies, often "sat very uneasily with judges of the nineteenth and early twentieth centuries." *Id.* at 18. For instance, the mother-child relationship "was often treated with suspicion or resistance by the courts"; "[i]f the mother had not renounced tribal ways, her status would often stigmatize the child and was viewed as an impediment to the child's interest in assimilation." *Id.*

ICWA seeks to remedy these past assimilationist policies with preferences for the placement of Indian children designed to preserve tribal families and cultures, rather than destroy them. The Supreme Court has referred to these placement preferences as the "most important substantive requirement" of ICWA. *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 36–37 (1989). For

adoptive placement, ICWA requires that preference be given to members of the child's extended family, to members of the child's tribe, or to other Indian families. 25 U.S.C. § 1915(a). The foster care or preadoptive placement provisions of ICWA contain similar preferences to the child's extended family, to Indian foster homes, or to institutions approved by tribes or operated by Indian organizations. *Id.* § 1915(b). Courts may override these provisions by finding good cause exists to deviate from ICWA's preferences. *Id.* § 1915(a), (b). These placement provisions serve to implement ICWA's legislative history and statutory findings that Indian children should be placed with family or in homes that reflect their tribal cultural values. Such placement is critical to ensuring the best interests of Indian children and promoting the stability and security of tribal families.

These placement provisions of ICWA ensured that *amicus* Rosa Soto Alvarez was able to be placed in a tribal home when she was a child. Ms. Alvarez is a Councilwoman for, and an enrolled member of, the Pascua Yaqui Tribe. When she was around six years old, she was placed in non-Indian foster homes. While in foster care, Ms. Alvarez experienced abuse and neglect, including being locked in a closet for several hours for misbehavior and being spat upon by a foster sibling. Once the Pascua Yaqui Tribe was notified through ICWA of her foster care placement, the tribe intervened and Ms. Alvarez's case was transferred from state court to tribal court. The tribe placed Ms. Alvarez and her biological sister with a

Yaqui foster family and they were raised on the tribe's reservation. The family had already taken in two of Ms. Alvarez's biological siblings, and readily agreed to take in Ms. Alvarez and her sister as well. All four siblings were raised by the Yaqui family that Ms. Alvarez describes as very loving and caring. The Yaqui family was traditional and heavily involved in the Yaqui community, practicing the tribe's ceremonies and teaching them to Ms. Alvarez and her siblings. Now Ms. Alvarez passes on traditional knowledge and ceremonies to her children and grandchildren, who are all Yaqui. In 2012, Ms. Alvarez ran for a seat on Tribal Council and won with the second highest number of votes. She now advocates nationally, including to members of Congress, for the protection of ICWA, education, and her tribe's sovereignty and land. Ms. Alvarez's experience illustrates why ICWA is such an important law that ensures the well-being of Indian children and the survival of tribes and their cultures.

These placement provisions also ensured that *amicus* Carlene Chamberlain, was able to obtain custody of her granddaughter, an Indian child. Ms. Chamberlain is the Secretary and Enrollment Clerk for Jamul Indian Village and is an enrolled member of the Jamul Indian Village. Ms. Chamberlain received notice of her five-year-old granddaughter's foster care placement through ICWA's required notification to the tribe of the child's placement in foster care. Ms. Chamberlain recalls visiting her granddaughter while she was in foster care, and

seeing her granddaughter appear severely malnourished and scared. Through ICWA's extended family member placement preference, Ms. Chamberlain was able to take her granddaughter out of foster care and obtain custody of her. Now her granddaughter is in middle school and is on the honor roll. Ms. Chamberlain is grateful to be able to care for her granddaughter and pass on the stories of their family's strong Indian women ancestors. Her granddaughter is learning the language, history, ceremonies, and practices of her tribe. Ms. Chamberlain's granddaughter is also able to learn important cultural lessons from her aunt, *amicus* Erica Pinto, who is the Chairwoman of their tribe, the Jamul Indian Village.

ICWA's placement provisions have also helped *amicus* Stephanie Benally, an enrolled member of the Navajo Nation and a Native American Specialist with Utah Foster Care, to adopt two Indian children who are also members of the Navajo Nation. She and her husband became licensed as an adoptive home through Navajo Nation. In their home, they teach their children Navajo language, culture, and traditions. In Ms. Benally's work experience, she notes that oftentimes it is difficult for non-Indian foster parents to provide the same cultural knowledge and experiences that Indian foster and adoptive homes provide. Culture to Ms. Benally includes language, food, humor, traditions, and an everyday lifestyle. For instance, Ms. Benally teaches her children about taboos in her Navajo culture, which may also be taboo in other Indian cultures, but not

necessarily in non-Indian cultures, such as looking at owls or snakes. Such animals may frequently appear in the cartoons that children generally watch or the clothes that children generally wear. Ms. Benally also notes that certain tribal ceremonies are not published or well-known because of the sudden nature of the ceremony, such as the celebration of an infant's first laugh. Through her experience as a Native American Specialist at Utah Foster Care, and as an adoptive parent, Ms. Benally has seen the ability of ICWA to protect Indian children as well as tribal cultures and traditions.

In sum, the legislative history and text of ICWA make it clear that Congress enacted the law to, *inter alia*, preserve tribal families and cultures. Traditionally, Native women played critical roles in passing on the cultural values of many tribal communities, but their roles have often been eroded by assimilationist policies. Many times Native women are nonetheless still the keepers of tribal cultures, and their stories illustrate that ICWA is very much needed today to, among other things, preserve cultural bonds in tribal families by ensuring Indian children are placed in appropriate homes. These reasons for enacting ICWA rationally relate to Congress' unique obligation to Indian tribes and individuals, *see Mancari*, 417 U.S. at 555, and ICWA therefore does not violate the equal protection component of the Fifth Amendment's Due Process Clause.

C. Even Under Strict Scrutiny Review, Congress has a Compelling Interest in Enacting ICWA Because ICWA Is Vital to Ensuring the Protection of Tribal Families and Cultures.

If this Court were to find that ICWA relies on racial classifications, which it should not, ICWA would need to pass strict scrutiny. Under strict scrutiny review, the federal government would need to establish that the "racial" classification it has made is "narrowly tailored to further a compelling government interest." *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Because other briefs in this appeal discuss narrow tailoring, this brief will only address the unique perspective *amici* have regarding the compelling interest of Congress in passing ICWA.

During the enactment of ICWA, Congress expressed great concern for the health and well-being of Indian children who were removed from their families and for the cultural continuation of tribes in general. The stories of *amici* Native American women above illustrate that Congress had a compelling interest in enacting ICWA to address these concerns and illustrate how ICWA has been implemented to address those concerns. Additionally, *amici* assert that Congress' compelling interest is represented in the several other statutes that it has enacted for the protection of tribes and their cultures. These statutes represent important methods for preserving tribal families and cultures today. ICWA is the legislation that ties these statutes together, including the Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA"), the National Historic Preservation

Act of 1966 ("NHPA"), the Indian Arts and Crafts Act of 1990 ("IACA"), and the Native American Graves Protection Act of 1990 ("NAGPRA"). As discussed below, ICWA ensures that other statutes designed to protect tribal cultures may carry out their purposes because ICWA keeps tribal families together and safeguards the next generation of tribal members.

1. **The Indian Self-Determination and Education Assistance Act.**

Generally, the ISDEAA allows tribal governments to take over the federal government's responsibility in "plan[ning], conduct[ing], and administer[ing] programs or portions thereof," including educational programs, that are "for the benefit of Indians because of their status as Indians." 25 U.S.C. § 450f(a). Tribes are able to contract with the federal government through ISDEAA to provide their members with vital services, increasing tribal control over such services. Congress found that "parental and community control of the educational process is of crucial importance to the Indian people." *Id.* § 450(b)(3) (emphasis added). Such control ensures the continuation of tribal cultures through tribal education systems. While the ISDEAA allows tribes to take control of various governmental services including education and provide them to tribal members, ICWA protects tribal families so that the next generation of tribal members may receive such services.

2. **The National Historic Preservation Act.**

Under the NHPA, Congress created special programs to help tribes preserve their historic properties to ensure that remainders of tribal culture will endure into the future. *See* 54 U.S.C. § 302701. The NHPA provides tribes with the power to assume the functions of State Historic Preservation Officers, who identify historic and cultural places of significance. *Id.* § 302702. While the NHPA recognizes the importance of preserving historic symbols of Indian culture, ICWA facilitates the actual passing of Indian culture from generation to generation through, *inter alia*, its placement preferences.

3. **The Indian Arts and Crafts Act.**

The IACA provides civil and criminal penalties for individuals or businesses that misrepresent Indian arts and crafts when claiming to market or sell such goods. 25 U.S.C. §§ 305d, 305e; 18 U.S.C. § 1159. When enacting the IACA, Representative Jon Kyl of Arizona stated that "[m]isrepresenting products as genuine Indian is not only an unfair marketing practice . . . it is a threat to the historical and cultural traditions that are entailed in the manufacture of Indian arts and crafts." 101 Cong. Rec. 8,293 (1990) (statement of Rep. Kyl). Representative Robert Kastenmeier of Wisconsin further elaborated that the IACA was to "provide much needed support and protection for an irreplaceable part of American culture, and a valuable national resource: native American arts and crafts." 101

Cong. Rec. 8,293 (1990) (statement of Rep. Kastenmeier). Members of the Hopi Tribe stated during hearings on the IACA that Native American handmade works have inherent cultural values, *see To Expand the Powers of the Indian Arts and Crafts Board: Hearing on H.R. 2006 Before the H. Committee on Interior and Insular Affairs*, 101st Cong. 56 (1989) (statement of Ivan Sidney, Chairman of Hopi Tribal Council), and that those cultural values are "passed down from generation to generation." *Id.* (statement of Wallace Yonvella, Hopi Tribe artisan).

The IACA recognizes the importance of the authenticity of American Indian culture and seeks to protect that authenticity from corruption and extinguishment. Similarly, Congress' purpose in enacting ICWA was to, among other purposes, ensure that Indian culture may be passed on from generation to generation.

4. **The Native American Graves Protection Act.**

NAGPRA provides legal standards and procedures for the repatriation and protection of Native American human remains and funerary objects, sacred objects, and objects of cultural patrimony as well as for ownership of such objects. 25 U.S.C. §§ 3001–13. Before the enactment of NAGPRA, "American legal protections for the dead did not take into account unique Native mortuary practices." Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 46 (1992). The law also did not "recognize that Native people maintain close

religious connections with ancient dead; instead, the right to protect the dead was limited to the decedent's immediate next of kin," as in European culture. *Id.*

Senator Daniel Inouye of Hawaii introduced NAGPRA to Congress, and in doing so stated the act was "critical to the continued well-being and perpetuation of Native American cultures" and that "the ability to exercise traditional practices is essential to the survival of any people and any culture." 135 Cong. Rec. 16,799 (1989) (statement of Sen. Inouye). Representative Patsy Mink of Hawaii further stated that preserving Native American cultures is "in the interest of all Americans, for these unique cultures are a part of the history and heritage of our Nation." 136 Cong. Rec. 10,991 (1990) (statement of Rep. Mink). Tribal council representatives stressed the importance of remains and objects today, stating for example that "the objects and the human remains have a very real meaning to the culture and society of living Native Americans" and are "vital to the well-being of Native American culture" in general. *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearing on H.R. 1381, 1646, 5237 Before the H. Comm. on Interior and Insular Affairs*, 101st Cong. 62 at 126 (1991) (statement of Patrick Lefthand, Councilman, Confederated Salish and Kootenai Tribes of the Flathead Nation).

ICWA ensures that the next generation of tribal members is able to care for the remains of tribal ancestors, funerary and sacred objects, and objects of cultural

patrimony repatriated to tribes through NAGPRA. ICWA further ensures that tribal members are able to pass on the cultural knowledge of the remains and objects subject to NAGPRA.

Overall, the stories of *amici* Native American women described in Section III.B. as well as the statutes addressed in Section III.C. above demonstrate that Congress had a compelling interest in enacting ICWA. ICWA's provisions reflect Congress' concern for the well-being of Indian children as well as for the cultural continuation of tribes in general. Of the numerous statutes Congress has enacted for the protection of tribes and their cultures, ICWA ensures that other statutes designed to protect tribal cultures may carry out their purposes. Therefore, if this Court determines that ICWA is subject to strict scrutiny, Congress had a compelling interest in enacting ICWA and it therefore does not violate the equal protection component of the Fifth Amendment's Due Process Clause.

IV. CONCLUSION

For the reasons stated above, *amici* support the Appellants and respectfully urge this Court to reverse the district court's decision below.

Respectfully submitted,

DATED: January 16, 2019

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ Kendra J. Hall

Kendra J. Hall
Kerry Patterson (application for admission pending)
Racheal M. White Hawk (application for admission pending)
Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that pursuant to Federal Rules of Appellate Procedure 29 and 32 that the attached brief is proportionally spaced, has a typeface (Times New Roman) of 14 points, and contains 5,561 words (excluding, as permitted by Fed. R. App. P. 32(f), the cover page, supplemental statement of interested persons, table of contents, table of authorities, certificate of compliance, and certificate of service), as counted by the Microsoft Word processing system used to produce this brief.

Dated: January 16, 2019

/s/ Kendra J. Hall
Kendra J. Hall
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that, on January 16, 2019, I filed the foregoing Brief of *Amici Curiae* using the Court's ECF system. Service on all counsel of record for all parties was accomplished electronically using the Court's CM/ECF system.

Dated: January 16, 2019

/s/ Kendra J. Hall
Kendra J. Hall
Attorney for *Amici Curiae*