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

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

BRIEF OF AMICUS CURIAE 325 FEDERALLY RECOGNIZED TRIBES, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, AND OTHER INDIAN ORGANIZATIONS IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

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.

INDIVIDUAL PLAINTIFFS – APPELLEES:

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Heather Lynn Libretti
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Oneida Nation
Quinault Indian Nation
Morongo Band of Mission Indians

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Bryan Rice, Director of Bureau of Indian Affairs
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AMICI STATES SUPPORTING UNITED STATES AND INTERVENOR TRIBES AND REVERSAL:

State of California
State of Alaska
State of Arizona
State of Colorado
State of Idaho
State of Illinois
State of Iowa
State of Maine
Commonwealth of Massachusetts
State of Michigan
State of Minnesota
State of Mississippi
State of Montana
State of New Jersey
State of New Mexico
State of Oregon
State of Rhode Island
State of Utah
State of Virginia
State of Washington
State of Wisconsin

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Robert W. Ferguson
(Attorney General State of Washington)
Joshua L. Kaul
(Attorney General State of Wisconsin)

AMICUS CURIAE NATIONAL TRIBAL ORGANIZATIONS ON THIS BRIEF:

***Amicus* Association on American Indian Affairs** ("AAIA") is a 96-year-old Indian advocacy organization that began its active involvement in Indian child welfare issues in 1967. AAIA's studies were a central focus of the Congressional hearings and committee reports underlying ICWA's passage. At Congress's invitation, AAIA was closely involved in the drafting of the Act. Since 1978, AAIA has continued to work with tribes to implement ICWA.

***Amicus* National Congress of American Indians** ("NCAI"), established in 1944, is the oldest and largest national organization made of Alaska Native and American Indian tribal governments to address their own interests. As part of its efforts, NCAI works closely with state governments and private organizations to develop productive models of state-tribal cooperation, including cooperation relating to Indian child welfare.

***Amicus* National Indian Child Welfare Association** ("NICWA") is a non-profit membership organization founded in 1987 and dedicated to the well-being of American Indian and Alaska Native children and families. NICWA is committed to protecting and preserving ICWA while promoting ICWA compliance through trainings, technical assistance, research, advocacy, and information sharing.

COUNSEL FOR AMICUS CURIAE AAIA, NCAI, AND NICWA:

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Dan Lewerenz
(Native American Rights Fund)
Samuel F. Daughety
Rose N. Petoskey
Samuel E. Kohn
(Dentons US LLP)

AMICUS CURIAE OTHER NATIONAL AND REGIONAL TRIBAL ORGANIZATIONS ON THIS BRIEF:

***Amicus* Alaska Federation of Natives** ("AFN") is the largest and oldest statewide

Native organization in Alaska, representing hundreds of thousands of Alaska Natives. AFN's membership includes 186 federally recognized tribes and 12 regional inter-tribal non-profit consortia. For over 50 years, AFN has been the principal forum in addressing critical public policy issues that affect the cultural and economic well-being of Alaska Native peoples, including child welfare.

***Amicus* Alaska Tribal Unity** ("ATU") is an assembly of Alaska tribes that advocates for tribal interests at the statewide level as well as nationally, as needed. ATU has made public safety a top priority, and as part of this work, ATU advocates for the health, safety, and welfare of tribal children and families.

***Amicus* Aleutian Pribilof Islands Association, Inc.** ("APIA") is a non-profit organization of federally recognized tribes of the Aleut people of Alaska. APIA serves the 13 tribes of the Aleutian and Pribilof region by providing human, social, and other culturally relevant services throughout the 100,000 square mile Aleutian and Pribilof area.

***Amicus* All Pueblo Council of Governors** consists of the governors of the 20 federally recognized Indian pueblos in New Mexico and Texas. The mission of the All Pueblo Council of Governors is to advocate, foster, protect and encourage the social, cultural, and traditional well-being of our Pueblo Nations. Through inherent and sovereign rights, All Pueblo Council of Governors promotes the language, health, economic, and educational advancement of all Pueblo people.

***Amicus* Arctic Slope Native Association** ("ASNA") is an is an intertribal Alaska Native health and social services provider based in the northern-most region of Alaska, serving the villages of Anaktuvuk Pass, Atqasuk, Kaktovik, Nuiqsut, Point Hope, Point Lay, Utqiagvik, and Wainwright. Among other things, ASNA manages child welfare services for several tribes and their member families within its region.

***Amicus* Association of Village Council Presidents** ("AVCP") is an inter-tribal non-profit consortium. It is based in Bethel, Alaska, and is controlled by 56 federally-recognized tribes. AVCP provides human, social, and other culturally relevant services to its member tribes, which are located in villages throughout the Yukon-Kuskokwim Delta in an area of approximately 59,000 square miles.

***Amicus* Bristol Bay Native Association** ("BBNA") is an inter-tribal non-profit consortium. It is based in Dillingham, Alaska, and is controlled by 31 federally-recognized tribes. BBNA provides human, social, and other culturally relevant

services to its member tribes, which are located in villages throughout the Bristol Bay Region in an area of approximately 46,500 square miles.

Amicus **California Association of Tribal Governments** is a non-profit consortium of 34 federally recognized tribal governments in California, chartered to promote mutual cooperation and represent its members' common interests with federal, state, and local governments.

Amicus **Chugachmiut** is the tribal consortium that provides traditional and culturally appropriate health and social services, education and training, and technical assistance to the Chugach Native people. Chugachmiut is governed by a seven member Board of Directors made up of one Director from each of the seven tribes in the Chugach region, which consists of an area approximately 50,000 square miles.

Amicus **Cook Inlet Tribal Council** ("CITC") is a tribal non-profit organization that connects Alaska Native and American Indian people residing in the Cook Inlet Region of southcentral Alaska to their potential as individuals and families. CITC is one of the nation's preeminent culturally responsive social-service organizations, serving nearly 10,000 people annually with an array of support services in a broad continuum of care, including education, employment and training services, workforce development, and child welfare services, in particular, intensive family preservation and reunification.

Amicus **Copper River Native Association** ("CRNA") is an Alaska Native tribal organization that provides health care and social services for five federally recognized tribes in the Copper River region of Alaska: Native Village of Kluti-Kaah, Native Village of Tazlina, Native Village of Gulkana, Native Village of Gakona, and the Native Village of Cantwell. CRNA provides services under a compact and funding agreement with the State of Alaska and the United States Government.

Amicus **Eight Northern Indian Pueblos Council, Inc.** ("ENIPC") is a tribal consortium of the eight northernmost Indian Pueblos in New Mexico, all federally recognized tribes: Taos, Picuris, Oahkay Owingeh, Santa Clara, San Ildefonso, Pojoaque, Tesuque, and Nambe. Through ENIPC, these eight tribes act collectively to provide a wide variety of governmental services to their communities, including but not limited to behavioral health services, that support implementation of the Indian Child Welfare Act by these tribal governments.

***Amicus* Great Plains Tribal Chairman's Association** ("GPTCA") is an association of the 16 tribal Chairmen, Presidents, and Chairpersons of the tribes in North Dakota, South Dakota, and Nebraska. GPTCA works to promote improvements to the health, safety, and welfare of its member tribes, as well as protect the sovereignty and uphold the treaties of its member tribes, which hold over 10 million acres across the Great Plains with a total population of nearly 200,000, half of whom are under the age of 18.

***Amicus* Inter Tribal Association of Arizona, Inc.** ("ITAA") is an association of the highest elected officials from 21 federally-recognized Indian tribes located in Arizona. These tribal leaders meet to collectively address issues of importance in Arizona Indian Country and to facilitate communication and coordination between its member tribes and the State of Arizona.

***Amicus* Kawerak, Inc.** is a non-profit tribal consortium comprised of 20 federally recognized tribal governments located in the Bering Strait region of Northwest Alaska. Kawerak provides social, economic, educational, and cultural programs and services to the residents of the Bering Strait region, in an area roughly 23,000 square miles.

***Amicus* Kodiak Area Native Association** ("KANA") formed in 1966 as a non-profit corporation to provide health and social services to Alaska Native people in the Koniag region, including the City of Kodiak and six outlying villages: Akhiok, Karluk, Larsen Bay, Old Harbor, Ouzinkie, and Port Lions. KANA operates Community Health Centers in six communities and provides primary medical, dental, and behavioral health services. KANA also provides social and other culturally relevant services to its beneficiaries.

***Amicus* Maniilaq Association** ("Maniilaq") is an inter-tribal non-profit consortium. It is based in Kotzebue, Alaska, and is controlled by 12 federally-recognized tribes. Maniilaq provides culturally relevant health, social, and tribal government services to its member tribes, which are located in villages throughout Northwest Alaska in an area of approximately 38,000 square miles.

***Amicus* Tanana Chiefs Conference** ("TCC") is a tribal consortium that provides a wide range of health and social services in a way that balances traditional Athabascan and Alaska Native values with modern demands, to 42 Alaskan communities, including 37 federally recognized tribes in Alaska's vast interior region.

Amicus **United South and Eastern Tribes, Inc.** ("USET") is a non-profit organization representing 27 federally recognized tribal nations in 13 states stretching from Texas to Maine. Established in 1969, USET works at the regional and national level to educate federal, state, and local governments about the unique historic and political status of its member tribal nations.

Amicus **California Tribal Families Coalition** is a membership organization formed to promote and protect the health, safety, and welfare of tribal children and families, which are inherent tribal governmental functions and are at the core of tribal sovereignty and tribal governance.

Amicus **Community Initiative for Native Children and Families** ("CINCF"), based in Sioux City, Iowa, is a collaboration of Indian and non-Indian child welfare professionals, advocates, activists and individuals who work to build bridges and foster understanding among the many interests involved in Indian child welfare matters. CINCF works to help Indian families secure their parental rights, strengthen their families, and get the necessary support to allow them to grow and flourish.

Amicus **Indian Child and Family Preservation Program** ("ICFPP") is a 30-year old tribal non-profit comprised of federally-recognized tribes dedicated to ICWA compliance and protecting the rights and interests of tribes, tribal children, and families. ICFPP currently oversees cases in over 30 counties in California and a dozen other states. ICFPP provides qualified expert witnesses, tribally-approved homes, active efforts case planning, cultural resources, ICWA training on curriculum and code development, and legislative oversight and testimony.

Amicus **Nebraska Indian Child Welfare Coalition** is a statewide organization made up of tribal representatives, ICWA specialists, attorneys, and other advocates working for more than a decade to promote the best interests of Indian children by helping to improve ICWA compliance in Nebraska.

Amicus **Oklahoma Indian Child Welfare Association** ("OICWA") is a statewide tribal consortium that represents the interests of all federally recognized tribes in Oklahoma regarding child welfare issues. OICWA works to promote the well-being of American Indian children, their families, and their tribes, with a special focus on children who have been removed from their families.

Amicus **Alaska Native Health Board** ("ATHB") is the statewide advocacy organization for the Alaska Tribal Health System ("ATHS"). ATHB is an

affiliation of over 30 Alaska tribes and tribal health organizations that have fully assumed the administration of health programs previously provided by the Indian Health Service and have developed a comprehensive, statewide health system serving over 175,000 Alaska Native and American Indian people. Members of ATHS regularly provide health care services to Indian families, including Indian children, and they have an interest in ensuring that all Indian children have access to health care services.

Amicus **Alaska Native Tribal Health Consortium** ("ANTHC") is an inter-tribal consortia serving the unique healthcare needs of 229 federally-recognized Alaska Native tribes by providing a wide range of medical, community health, and other services for more than 175,000 Alaska Native and American Indian people statewide. ANTHC has a strong interest in ensuring the vitality of laws that recognize tribal sovereignty and promote tribal self-determination.

Amicus **Americans for Indian Opportunity** ("AIO") works to advance, from an Indigenous worldview, the cultural, political, and economic rights of Indigenous peoples in the United States and around the world. This work includes advocating for laws and policies that honor and protect Native American children, as well as their families and Native American traditions.

Amicus **Bristol Bay Area Health Corporation** ("BBAHC") is a regional tribal organization representing 27 federally recognized tribes in the Bristol Bay region of Alaska that provides a wide range of prevention, care and treatment programs, and services to the region's 8,000 inhabitants. BBAHC was formed by a consortium of Bristol Bay tribes (Yup'ik, Dena'ina, and Supiak/Alutiiq) in 1973 to provide comprehensive health care services. BBAHC manages Kanakanak Hospital, a critical access facility, and 21 village based clinics.

Amicus **California Indian Law Association** ("CILA") is a California statewide bar association whose purpose is to serve as the representative of the Indian law legal profession in California. In support of its members and mission, CILA is dedicated to enhancing the legal profession and tribal justice systems in California. CILA works to promote the best interests of Indian children and improving ICWA compliance in California by providing quality educational programs to its members.

Amicus **California Indian Legal Services** ("CILS") is the oldest non-profit Indian law firm in California serving tribes and communities for over 50 years. A major area of CILS's legal work is representing tribes in state court child custody

proceedings subject to ICWA. CILS works to protect ICWA on the national and state level as well as through both federal and state courts. CILS is dedicated to protecting Indian children, families and tribes.

Amicus **Chapa-De Indian Health** ("Chapa-De") operates non-profit community health centers northeast of Sacramento in Auburn and Grass Valley, California, providing low-cost and no-cost health services and medications to members of federally recognized American Indian and Alaska Native tribes. Chapa-De was founded in 1974 after research revealed widespread health problems among California Indians, including Indian children. Chapa-De remains committed to promoting and serving the health of Indian people, Indian families, and Indian children.

Amicus **Consolidated Tribal Health Project, Inc.** ("CTHP") is a non-profit community health clinic governed by a consortium of eight federally recognized tribes (Cahto Tribe of the Laytonville Rancheria; Coyote Valley Band of Pomo Indians, Guidiville Rancheria of California, Hopland Band of Pomo Indians, Pinoleville Pomo Nation, Potter Valley Tribe, Redwood Valley Band of Pomo Indians of California, and Sherwood Valley Rancheria of Pomo Indians of California). CTHP regularly provides health care services to Indian families, including Indian children, and has an interest in ensuring that all Indian children have access to health care services.

Amicus **Feather River Tribal Health** ("FRTH") is a tribal governmental health consortium founded and operated by three federally recognized tribes that provides health care services to Native Americans and their families in Butte and Sutter Counties, California. FRTH's mission is to protect and promote the health and wellness of its tribal communities, patients, and their families through culturally competent, high quality health care services.

Amicus **Indian Health Council, Inc.** ("IHC") is a consortium of nine tribes in northern San Diego County, California that provides a full spectrum of on-site and outreach services to IHC's member tribes. IHC serves 15,000 clients with a range of programs, providing culturally appropriate health care and related services including direct medical care, wellness, and counseling. IHC also provides child welfare and family services, and is committed to the best interests, stability, and security of children and families in our communities.

Amicus **Indigenous Peoples Law and Policy Program at the University of Arizona Law** ("IPLP Program") was established in 2001 in order to protect and

promote indigenous peoples' rights and increase the representation of Native and indigenous lawyers and advocates within the practice of law and legal academia. The IPLP Program partners with tribes, tribal organizations, and indigenous communities across the United States and world on precedent-setting cases focusing on indigenous peoples' rights.

Amicus **Mariposa, Amador, Calaveras & Tuolumne Health Board, Inc.** operates multiple health care facilities in four counties in central California. Its primary mission is to improve the health status of the American Indian/Alaska Native population through a comprehensive health care system, which is designed to preserve and promote the traditional well-being and cultural sensitivity of the tribal communities to whom it serves.

Amicus **Michigan Indian Legal Services, Inc.** ("MILS") was organized in 1975 to provide legal services to low income Indian individuals and tribes to further sustainable economic development and self-government, protection of tribal cultures and religious freedoms, overcome discrimination, and preserve Indian families. Today, MILS provides legal services statewide to income-eligible individuals and tribes, advocates for the rights of individuals, which advances systems of justice, and works to preserve Indian families through state and tribal courts.

Amicus **Morning Star Institute** is a national, non-profit Native rights organization founded in 1984. Morning Star is a leader in the development of the Native Peoples' cultural rights agenda, from the protection and repatriation of sacred places, ancestors, sacred objects, cultural patrimony, ceremonies and ceremonial grounds, to the promotion of human rights, including highlighting positive imagery and the esteemed position of Native women and children in Native cultural history, symbology, and languages.

Amicus **National Council of Urban Indian Health** ("NCUIH") is the premier national representative of the 41 urban Indian organizations providing health care services pursuant to a grant or contract with the Indian Health Service under Title V of the Indian Health Care Improvement Act. Founded in 1998, NCUIH is a 501(c)(3) organization created to support the development of quality, accessible, and culturally sensitive health care programs for American Indians and Alaska Natives living in urban communities.

Amicus **National Indian Education Association** ("NIEA") is the most inclusive nation-wide organization advocating for improved educational opportunities for

American Indians, Alaska Natives, and Native Hawaiians. Founded in 1969, NIEA advances comprehensive culture-based education options and wrap-around services for Indian children to thrive in the classroom and beyond.

Amicus **National Indian Head Start Directors Association** was formed in 1979 to create an organized voice for Indian Head Start programs and the children and families they serve. The Association focuses on: advocating for federal legislative and regulatory improvements to ensure that early childhood development and education services are culturally appropriate and relevant; and providing training opportunities for program directors and management staff of local programs to build leadership capacity.

Amicus **National Indian Health Board** ("NIHB") is a tribally-created and governed organization that seeks to reinforce tribal sovereignty by supporting laws and policies that fulfill its mission to achieve high levels of health, public health, and wellbeing in Indian Country. This includes protecting and preserving tribal traditions as well as the health, wellness, and sanctity of tribal family relations.

Amicus **National Indian Justice Center** ("NIJC") is a non-profit training and technical assistance organization working with tribes, states, and organizations throughout the nation. NIJC was created in 1983 for the purpose of improving the administration of justice in Indian Country. NIJC is committed to the safety and cultural identity of American Indian and Alaska Native children and provides ICWA training programs to tribal and state social workers and court personnel.

Amicus **Native American Budget and Policy Institute** based in Albuquerque, New Mexico is governed by an eleven-member Governance Council. Its primary purpose is to address budget and policy issues affecting tribal sovereignty and the cultural and economic well-being of Native American Tribes including the commitment to comply with ICWA and to protect Native American children, families and communities.

Amicus **Native American Disability Law Center** ("the Law Center") is a non-profit organization that serves the unique legal needs of Native Americans with disabilities. For the past ten years, the Law Center has represented Native American children who are in the custody of the State of New Mexico because of abuse and neglect. All of these children are eligible for the protections provided by ICWA. The Law Center's attorneys have direct experience in the importance of ICWA in serving the best interests of Native American children and their families.

Amicus **Northwest Portland Area Indian Health Board** ("NPAIHB"), established in 1972, is a Public Law 93-638 tribal organization representing the 43 federally recognized tribes in Idaho, Oregon, and Washington on health care issues. NPAIHB is committed to assisting the Northwest Tribes, which have strong cultural and spiritual practices that are critical to the health and well-being of Indian children.

Amicus **Norton Sound Health Corporation** ("NSHC") is a tribally owned and operated, independent, non-profit health care organization, founded in 1970 to meet the health care needs of the Inupiat, Siberian Yup'ik, and Yu'pik people of the Bering Strait region. NSHC is governed by a 22-member board of directors who represent all communities and areas of the Bering Strait region, a 44,000 square-mile section of northwestern Alaska.

Amicus **Oklahoma Indian Legal Services, Inc.** ("OILS") is an Oklahoma non-profit legal aid organization first incorporated in 1981. OILS is a statewide organization providing free legal representation to low-income tribal members. OILS attorneys provide direct representation in cases that are connected to a person's status as tribal members, which often center on the Indian Child Welfare Act. OILS also publishes and updates The Indian Child Welfare Act: Case, Regulation, and Analysis handbook annually.

Amicus **Riverside San Bernardino County Indian Health, Inc.** ("RSBCIHI") is a tribal governmental health consortium operated by nine federally recognized tribes that provides health care services to Native Americans and their families at seven Indian Health Clinics located throughout Riverside and San Bernardino Counties, California. RSBCIHI provides culturally sensitive, high quality health care to the tribal communities and patients it serves while promoting tribal traditions, health, and wellness for Indian families.

Amicus **Self-Governance Communication and Education Tribal Consortium** ("SGCETC") is a non-profit representing more than 370 tribal nations participating in self-governance initiatives at the Department of the Interior and/or the Indian Health Service. Through self-governance initiatives, many of the tribal nations represented by SGCETC have taken over administration of the social service programs, including child welfare, that serve their communities.

Amicus **Sonoma County Indian Health Project** ("SCIHP") is a tribal governmental health consortium operated by six federally recognized tribes that provides health care services to Native Americans and their families living

throughout Sonoma County, California. SCHIP provides a comprehensive, high quality healthcare system to serve the needs and traditional values of its tribal communities, patients and families.

Amicus **Society of Indian Psychologists** ("SIP") advocates for the mental well-being of Native peoples by increasing the knowledge and awareness of issues affecting Native mental health. SIP and its member professionals utilize the latest social science research to inform mental health and well-being determinations, including determinations of the best interests of Indian children.

Amicus **Tribal Education Departments National Assembly** ("TEDNA") is a Native non-profit that provides technical assistance and support to tribal education departments as they develop educational goals and programs that are specific to their individual community. TEDNA does this, in part, by working to foster effective relationships between tribal education departments, state and federal agencies, and education organizations.

Amicus **Tribal Justice Collaborative** strengthens collaboration among state courts, tribal courts, child welfare services, and tribes to improve outcomes for Native American children and families. The Tribal Justice Collaborative is a non-profit in San Diego, California and guided by a judicial advisory committee with a partnership of local tribes, national, state, county child welfare, and court improvement agencies.

AMICUS CURIAE FEDERALLY RECOGNIZED TRIBES ON THIS BRIEF:

The following amici are federally recognized tribes within the jurisdiction of the Fifth U.S. Circuit Court of Appeals:

Louisiana
Chitimacha Tribe of Louisiana
Coushatta Tribe of Louisiana
Jena Band of Choctaw Indians
Tunica-Biloxi Indian Tribe

Mississippi
Mississippi Band of Choctaw Indians

Texas
Alabama-Coushatta Tribe of Texas
Kickapoo Traditional Tribe of Texas
Ysleta del Sur Pueblo

The following amici are federally recognized tribes within the jurisdiction of the other U.S. Circuit Courts of Appeal:

Alabama
Poarch Band of Creek Indians

Alaska
Akiachak Native Community
Akiak Native Community
Alakanuk Tribal Council
Alatna Village Council
Anvik Tribe
Asa'carsarmiut Tribe
Beaver Village Council
Central Council of the Tlingit & Haida Indian Tribes of Alaska
Chilkat Indian Village
Chilkoot Indian Association, Haines
Chinik Eskimo Community (Golovin)
Circle Native Community
Craig Tribal Association
Chuloonawick Native Village
Galena Village (aka Louden Tribal Council)
Hoonah Indian Association
Huslia Tribal Council
Inupiat Community of the Arctic Slope
Iqurmuit Traditional Council
Kasigluk Traditional Council
Kenaitze Indian Tribe
King Island Native Community
King Salmon Tribe
Kotlik Tribal Council
Koyukuk Native Village
McGrath Native Village
Native Village of Afognak
Native Village of Barrow Inupiat Traditional Government
Native Village of Bill Moore's Slough
Native Village of Brevig Mission
Native Village of Buckland
Native Village of Elim
Native Village of Eyak
Native Village of Gakona
Native Village of Gambell
Native Village of Georgetown
Native Village of Goodnews Bay
Native Village of Hamilton
Native Village of Kalskag
Native Village of Kluti-Kaah
Native Village of Kwigillingok
Native Village of Marshall
Native Village of Mary's Igloo
Native Village of Mekoryuk
Native Village of Minto
Native Village of Newhalen
Native Village of Noatak
Native Village of Perryville
Native Village of Pitka's Point
Native Village of Port Graham
Native Village of Port Heiden
Native Village of Port Lions
Native Village of Ruby
Native Village of Savoonga
Native Village of Saint Michael
Native Village of Scammon Bay
Native Village of Tanacross
Native Village of Tanana
Native Village of Tazlina
Native Village of Teller
Native Village of Tetlin
Native Village of Tununak
Native Village of Tyonek
Native Village of Unalakleet

Native Village of White Mountain
New Stuyahok Traditional Council
Nome Eskimo Community
Nondalton Tribal Council
Noorvik Native Community
Northway Village
Nulato Tribal Council
Nunakauyarmiut Tribe
Organized Village of Kake
Organized Village of Kwethluk
Organized Village of Saxman
Orutsararmiut Traditional Native Council
Petersburg Indian Association
Pilot Station Traditional Village
Portage Creek Village
Pribilof Islands Aleut Community of St. Paul Island Tribal Government
Shageluk Native Village
Sitka Tribe of Alaska
Tangirnaq Native Village
Twin Hills Village
Ugashik Traditional Village
Village of Atmautluak
Village of Chefornak
Village of Dot Lake
Village of Lower Kalskag
Village of Sleetmute
Village of Solomon
Village of Venetie
Yakutat Tlingit Tribe

Arizona

Ak-Chin Indian Community
Cocopah Tribe
Colorado River Indian Tribes
Gila River Indian Community
The Havasupai Tribe
The Hopi Tribe
Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona
Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona
Pascua Yaqui Tribe
Salt River Pima-Maricopa Indian Community
San Carlos Apache Tribe
White Mountain Apache Tribe
Yavapai-Apache Nation

California

Agua Caliente Band of Cahuilla Indians
Bear River Band of the Rohnerville Rancheria
Big Lagoon Rancheria
Big Pine Paiute Tribe of the Owens Valley
Big Sandy Rancheria of Western Mono Indians of California
Big Valley Band of Pomo Indians of the Big Valley Rancheria
Bishop Paiute Tribe
Blue Lake Rancheria, California
Cabazon Band of Mission Indians
Cachil Dehe Band of Wintun Indians of the Colusa Community
Campo Band of Mission Indians
Cahuilla Band of Indians
Chemehuevi Indian Tribe of the Chemehuevi Reservation, California
Cher-Ae Heights Indian Community of the Trinidad Rancheria
Chicken Ranch Rancheria of Me-Wuk Indians of California
Cortina Rancheria Kletsel Dehe Band of Wintun Indians

Coyote Valley Band of Pomo Indians
Dry Creek Rancheria Band of Pomo Indians
Elk Valley Rancheria, California
Enterprise Rancheria Estom Yumeka Maidu Tribe
Ewiiaapaayp Band of Kumeyaay Indians
Federated Indians of Graton Rancheria
Fort Bidwell Indian Community
Fort Independence Indian Reservation
Habematolel Pomo of Upper Lake
Hoopa Valley Tribe
Hopland Band of Pomo Indians
Ione Band of Miwok Indians
Karuk Tribe
Kashia Band of Pomo Indians of the Stewarts Point Rancheria
La Jolla Band of Luiseno Indians
Lone Pine Paiute Shoshone Reservation
Los Coyotes Band of Cahuilla and Cupeno Indians, California
Lytton Rancheria of California
Manchester-Point Arena Band of Pomo Indians Tribe
Mechoopda Indian Tribe of Chico Rancheria
Mesa Grande Band of Mission Indians
Middletown Rancheria of Pomo Indians of California
North Fork Rancheria of Mono Indians of California
Pala Band of Mission Indians
Paskenta Band of Nomlaki Indians
Pechanga Band of Luiseño Indians
Picayune Rancheria of the Chukchansi Indians
Pit River Tribe
Redding Rancheria
Redwood Valley Little River Band of Pomo Indians
Resighini Rancheria
Rincon Band of Luiseño Indians
Robinson Rancheria
Round Valley Indian Tribes
San Manuel Band of Mission Indians
San Pasqual Band of Mission Indians
Santa Rosa Band of Cahuilla Indians
Santa Rosa Indian Community of the Santa Rosa Rancheria Tachi Tribe
Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California
Scotts Valley Band of Pomo Indians
Shingle Springs Band of Miwok Indians
Soboba Band of Luiseno Indians
Susanville Indian Rancheria
Sycuan Band of the Kumeyaay Nation
Tejon Indian Tribe
Tolowa Dee-ni' Nation
Torres Martinez Desert Cahuilla Indians
Toulumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California
Tule River Indian Tribe of California
Twenty-Nine Palms Band of Mission Indians
United Auburn Indian Community
Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation
Viejas Band of Kumeyaay Indians
Wilton Rancheria
Yocha Dehe Wintun Nation
Yurok Tribe

Colorado
Southern Ute Indian Tribe
Ute Mountain Ute Tribe

Connecticut
Mashantucket (Western) Pequot Tribe
Mohegan Tribe of Indians of Connecticut

Florida
Miccosukee Tribe of Indians of Florida
Seminole Tribe of Florida

Idaho
Coeur d'Alene Tribe
Kootenai Tribe of Idaho
Nez Perce Tribe
Shoshone-Bannock Tribes

Indiana
Pokagon Band of Potawatomi Indians, Michigan and Indiana

Iowa
Sac & Fox Tribe of the Mississippi in Iowa

Kansas
Iowa Tribe of Kansas and Nebraska
Kickapoo Tribe in Kansas
Prairie Band Potawatomi Nation
Sac and Fox Nation of Missouri in Kansas and Nebraska

Maine
Houlton Band of Maliseet Indians
Passamaquoddy Tribe – Indian Township
Penobscot Nation

Massachusetts
Mashpee Wampanoag Tribe
Wampanoag Tribe of Gay Head (Aquinnah)

Michigan
Bay Mills Indian Community, Michigan
Grand Traverse Band of Ottawa and Chippewa Indians
Keweenaw Bay Indian Community
Lac Vieux Desert Band of Lake Superior Chippewa Indians
Little River Band of Ottawa Indians
Little Traverse Bay Bands of Odawa Indians
Match-e-be-nash-she-wish Band of Potawatomi Indians of Michigan
Nottawaseppi Huron Band of the Potawatomi
Saginaw Chippewa Indian Tribe of Michigan
Sault Ste. Marie Tribe of Chippewa Indians

Minnesota
Minnesota Chippewa Tribe and its six component reservations: Bois Forte Band (Nett Lake), Fond du Lac Band of Lake Superior Chippewa, Grand Portage Band of Lake Superior Chippewa, Leech Lake Band of Ojibwe, Mille Lacs Band of Ojibwe, and White Earth Band of the Minnesota Chippewa Tribe.
Prairie Island Indian Community
Red Lake Band of Chippewa Indians
Shakopee Mdewakanton Sioux Community

Montana
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation
Blackfeet Tribe
Chippewa Cree Tribe
Crow Tribe of Montana
Fort Belknap Indian Community of the Fort Belknap Reservation of Montana
The Confederated Salish and Kootenai Tribes

Nebraska
Omaha Tribe of Nebraska and Iowa
Ponca Tribe of Nebraska
Santee Sioux Nation
Winnebago Tribe of Nebraska

Nevada
Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada
Las Vegas Paiute Tribe
Walker River Paiute Tribe
Washoe Tribe of Nevada and California

New Mexico
Pueblo of Acoma
Pueblo de Cochiti
Pueblo of Laguna
Pueblo of Picuris
Pueblo of Pojoaque
Pueblo of San Felipe
Pueblo of Sandia
Pueblo of Santa Ana
Pueblo of Santa Clara
Taos Pueblo
Zuni Tribe of the Zuni Reservation, New Mexico

New York
Cayuga Nation
Oneida Indian Nation
Shinnecock Indian Nation
Saint Regis Mohawk Tribe
Seneca Nation
Tuscarora Nation

North Carolina
Eastern Band of Cherokee Indians

North Dakota
Standing Rock Sioux Tribe
Turtle Mountain Band of Chippewa Indians

Oklahoma
Absentee Shawnee Tribe of Indians of Oklahoma
Alabama-Quassarte Tribal Town
Caddo Nation of Oklahoma
Cheyenne and Arapaho Tribes
The Chickasaw Nation
Choctaw Nation of Oklahoma
Citizen Potawatomi Nation
Eastern Shawnee Tribe of Oklahoma
Kaw Nation
Kickapoo Tribe of Oklahoma
Kiowa Tribe
Miami Tribe of Oklahoma
Muscogee (Creek) Nation
Osage Nation
Ottawa Tribe of Oklahoma
Peoria Tribe of Indians of Oklahoma
Sac and Fox Nation
The Seminole Nation of Oklahoma
Shawnee Tribe
Thlopthlocco Tribal Town
Tonkawa Tribe of Indians of Oklahoma

Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie), Oklahoma
Wyandotte Nation

Oregon
Confederated Tribes of the Grand Ronde Community of Oregon
Confederated Tribes of Siletz Indians
Confederated Tribes of the Umatilla Indian Reservation
Confederated Tribes of the Warm Springs Reservation of Oregon
Cow Creek Band of Umpqua Tribe of Indians
Klamath Tribes

South Carolina
Catawba Indian Nation

South Dakota
Cheyenne River Sioux Tribe
Oglala Sioux Tribe
Rosebud Sioux Tribe
Yankton Sioux Tribe

Utah
Confederated Tribes of the Goshute Reservation
The Paiute Indian Tribe of Utah

Virginia
Pamunkey Indian Tribe
Rappahannock Tribe

Washington
Confederated Tribes and Bands of the Yakama Nation
Confederated Tribes of the Colville Reservation
Hoh Indian Tribe
Jamestown S'Klallam Tribe
Kalispel Tribe of Indians
Lower Elwha Klallam Tribe
Muckleshoot Indian Tribe
Nisqually Indian Tribe
Nooksack Indian Tribe
Port Gamble S'Klallam Tribe
Puyallup Tribe of Indians
Samish Indian Nation
Sauk-Suiattle Indian Tribe
Shoalwater Bay Indian Tribe
Skokomish Indian Tribe
Snoqualmie Indian Tribe
Squaxin Island Tribe
Suquamish Tribe
Swinomish Indian Tribal Community
Tulalip Tribes

Wisconsin
Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin
Forest County Potawatomi Community
Ho-Chunk Nation
Lac Courte Oreilles Band of Lake Superior Chippewa Indians
Lac du Flambeau Band of Lake Superior Chippewa Indians
Menominee Indian Tribe of Wisconsin
Red Cliff Band of Lake Superior Chippewa Indians
Sokaogon Chippewa Community
St. Croix Chippewa Indians of Wisconsin
Stockbridge-Munsee Community

Wyoming
Eastern Shoshone Tribe of the Wind River Reservation

COUNSEL FOR AMICUS CURIAE OTHER NATIONAL AND REGIONAL TRIBAL ORGANIZATIONS AND FEDERALLY RECOGNIZED TRIBES ON THIS BRIEF:

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None of *Amici Curiae* on this brief has a parent corporation. No publicly held company owns more than 10% of stock in any of *Amici Curiae* on this brief.

By: /s/
Erin C. Dougherty Lynch

January 16, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

U.S. Constitution

Statutes

Rules and Regulations

Legislative Materials

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

Amici are 325 federally recognized Indian tribes (including all eight federally recognized tribes located within this Circuit), tribal consortia, and national and regional organizations dedicated to the rights of American Indians and tribes. *Amici* share a commitment to the well-being of Indian children and an understanding that the Indian Child Welfare Act of 1978 ("ICWA" or "the Act"), 25 U.S.C. § 1901 *et seq.,* is essential to achieving the best interests of Indian children while preserving Indian families and their tribes. *Amici* share a substantial interest in promoting and securing national conformity with ICWA's procedural and substantive mandates in state child welfare and adoption proceedings involving Indian children.

INTRODUCTION

ICWA establishes minimum federal standards for state child welfare proceedings involving Indian children. Congress enacted ICWA in response to a nationwide crisis—the wholesale removal of Indian children from their families by state child welfare agencies at rates far higher than those of non-Indian families, often without due process. In response, Congress carefully crafted ICWA to

[1] Undersigned counsel hereby certifies that: all parties have consented to *Amici's* submission of this brief; no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and 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.

promote the best interests of Indian children and to protect the rights of parents, while balancing the jurisdiction and political interests of tribes and states.

Amici agree with Defendants–Appellants that the decision below must be reversed, and write separately for three reasons. First, *amici* detail the factual and legal history leading to ICWA's enactment, and show how—even though rational basis is the appropriate level of review—ICWA was narrowly tailored to address compelling governmental interests and, therefore, withstands even strict scrutiny. Second, *amici* illustrate how the District Court's equal protection analysis began from a premise—that Congress's Indian affairs authority is limited to on- or near-reservation Indians—that is belied both by long-established Supreme Court precedent and by more than a century of Congressional practice. Finally, *amici* demonstrate the error of the District Court's non-delegation holding, which disregarded tribal sovereignty and binding Supreme Court precedent.

ARGUMENT

I. After Years of Hearings, Congress Enacted ICWA as a Narrowly Tailored Response to Abuses by State Courts and State and Private Child Welfare Agencies that Resulted in the Widespread Displacement of Indian Children from their Families.

A. Congress Enacted ICWA Against the Historical Backdrop of Disproportionate Removal of Native Children Compared to Non-Native Children.

During the years prior to ICWA's passage, congressionally commissioned reports and wide-ranging testimony taken from interested Indians and non-Indians,

and from governmental and nongovernmental agencies, wove together a chilling narrative—state and private child welfare agencies, with the backing of state courts, systematically removed Indian children from their families without evidence of harm, and without due process of law. *See, e.g.*, H.R. REP. NO. 95-1386, at 27-28 (1978) ("1978 House Report"). The Association on American Indian Affairs ("AAIA") documented that Indian children were removed to foster care at much higher rates than non-Indian children. *Id.* at 9. Indian placement rates by state ranged from double to more than 20 times the non-Indian rate, with the percentage of Indian children placed in non-Indian foster homes ranging from 53% to 97%.[2] Nationwide, "[t]he adoption rate of Indian children was eight times that of non-Indian children [and] [a]pproximately 90% of the . . . Indian placements were in non-Indian homes."[3]

In Minnesota—home to Child P. in the matter before this Court—as many as 97% of the Indian children taken from their families were placed in non-Indian homes. 1977 Senate Hearing at 537-603. Indeed, in 1971 and 1972, nearly one-quarter of *all* Indian children in Minnesota under one year of age were adopted.

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[2] *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 1, 539 (1977) ("1977 Senate Hearing").

[3] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1989) (citing *Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs, S. Comm. on Interior and Insular Affairs*, 93rd Cong. 1, 3, 75-83 (1974) ("1974 Senate Hearings") (statement of William Byler)).

1978 House Report at 9. In Arizona—birthplace of Child A.L.M.—Indian children were four times more likely than non-Indian children to be placed for adoption. 124 Cong. Rec. 38102 (1978) (statement of Rep. Udall). In Nevada—home to Baby O.—Indian children were seven times more likely than non-Indian children to be removed and placed in foster care. *Id.* at 574; *see also* 1974 Senate Hearings at 40-44. Overall, the evidence presented to Congress was both stunning and bleak: "25-35% of . . . Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Holyfield*, 490 U.S. at 32.

The crisis of Indian child removals and adoptions arose in large part from decades of official federal policy aimed at the compulsory assimilation of Indians, particularly Indian children, into mainstream society, and the complicity of state entities in these practices. Throughout the late 19th and early 20th centuries, the federal government forcibly removed Indian children from their families to military-style boarding schools. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 76 (Nell Jessup Newton ed. 2012) ("COHEN'S HANDBOOK"); 1978 House Report, at 9 (noting that federal boarding school programs "contribute[d] to the destruction of Indian family and community life."). In the 1950s, the federal government partnered with state and private agencies to form the Indian Adoption Project, which furthered the then-prevailing policy of "Indian extraction," whereby Indian children would be adopted out primarily to non-Indian families in order to

reduce reservation populations, reduce spending on boarding schools, and satisfy a "large demand for Indian children on the part of Anglo parents." ELLEN SLAUGHTER, UNIVERSITY OF DENVER RESEARCH INSTITUTE, INDIAN CHILD WELFARE: A REVIEW OF THE LITERATURE 61 (1976), *available at* http://files.eric.ed.gov/fulltext/ED138422.pdf.

During the same decade, the Bureau Indian Affairs ("BIA") began the Urban Indian Relocation Program to encourage tribal members to leave their reservations and relocate to urban areas around the country. Thomas A. Britten, *Urban American Indian Centers in the late 1960s-1970s: An Examination of their Function and Purpose*, Vol. 27, No. 3 INDIGENOUS POL'Y J. 1, 2 (Winter 2017). By 1970, the BIA had engineered the relocation of nearly 87,000 Indians from their reservations to urban areas around the country—more than a quarter of the 340,000 Native Americans living in urban areas at the time.[4] One of the primary relocation cities was Dallas, Texas, where the BIA established a relocation assistance center. Britten, *supra*, at 2. By 1969, Dallas was home to an estimated 15,000 Indians representing 84 tribes, some as far away as Alaska.[5]

[4] U.S. DEP'T OF HEALTH, EDUC., & WELFARE, OFFICE OF SPECIAL CONCERNS, A STUDY OF SELECTED SOCIO-ECONOMIC CHARACTERISTICS OF ETHNIC MINORITIES BASED ON THE 1970 CENSUS, VOL. III: AMERICAN INDIANS 83, Table J-1 (July 1974).

[5] Mary Patrick, *Indian Urbanization in Dallas: A Second Trail of Tears?*, 1 ORAL HIST. REV. 48, 49 (1973).

The federal government continued to provide additional support for these large and growing off-reservation Indian communities. Relocated Indians faced a host of social and economic problems, including intense racial prejudice, sporadic or underemployment, low pay, inadequate housing, insufficient health care, crime, and high student drop-out rates—factors that contributed to family stress and child welfare issues. Britten, *supra*, at 3. With the BIA's urban offices ill-equipped to address the issues that relocation had created, Congress recognized its obligations to off-reservation Indians and funded 58 urban Indian centers between 1970 and 1975 to provide more than 140,000 relocatees with housing and employment assistance, legal aid, social gathering places, and a "'safe place' for the observance and preservation of Indian values." Britten, *supra* at 5; *see also*, Native Americans Programs Act of 1974, Pub. L. No. 93-644, 88 Stat. 2324 (specifically including Indian organizations located in urban and non-reservation areas for funding); REPORT ON URBAN AND RURAL NON-RESERVATION INDIANS, TASK FORCE NO.8, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 10 (1976) (discussing statistics concerning urban Indian centers).

These policies had a profound effect on Indian children and families. During the lead-up to ICWA's passage, witnesses described the "constant two-way movement of Indian families and individuals between reservations and urban areas," 1977 Senate Hearing at 350 (letter from Don Milligan, State of Washington

Department of Social and Health Services as testimony for Urban and Rural Non-Reservation Task Force), and the high rate of separation for families living off-reservation. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and a member of the National Tribal Chairmen's Association, testified concerning the "incredibly insensitive and oftentimes hostile removal" of children from their homes "under color of state and federal authority," and that "[t]he problem exists both among reservation Indians and Indians living off the reservation in urban communities . . . . The rate of separation is much higher among Indians than in non-Indian communities." *To Establish Standards for Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for other Purposes: Hearings on S. 1214 Before the Subcomm. On Indian Affairs and Public Lands of the H. Comm. on Interior and Insular* Affairs, 95th Cong. 1, 190-91 (1978) ("1978 House Hearings"). In some states, off-reservation Indian children made up the majority of Indian children in state custody who were eventually adopted out to non-Native families. 1977 Senate Hearing at 351; *see also* 1974 Senate Hearings at 38 (testimony of Bertram Hirsch, AAIA). This was true for Native children across the board, from those in state and private foster care programs to those who eventually were adopted. For example, Washington State reported that in 1975 approximately 75% of the Indian children in state custody were located in non-reservation areas. 1977 Senate Hearing at 351. For Indian

children in the custody of private foster care programs, 90% were living off reservation. *Id*.

B. Congress Recognized that States Frequently Disregarded Due Process, Tribal Family Practices and Tribal Sovereignty in Removing Indian Children.

By the time Congress began its formal investigation into the removal of Indian children from their families, state child welfare practices bore significant responsibility for this crisis. The House Committee on Interior and Insular Affairs noted that states had failed "to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future." 1978 House Report at 19; *see also Holyfield*, 490 U.S. at 45 ("Congress perceived the States and their courts as partly responsible for the problem it intended to correct."). Congress ultimately found that the "States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, 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(5).

Among Indian children removed from their homes, studies showed that an overwhelming majority were removed for vague reasons such as "neglect" or "social deprivation," or upon the assertion that the children might be subject to

emotional damage by continuing to live with their Indian families. 1978 House Report at 10. One of the most frequent complaints was the tendency of social workers to apply standards that ignored the realities of Indian societies and cultures:

> [T]he dynamics of Indian extended families are largely misunderstood. . . . The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing.

Id. at 10, 20. The failure to account for these cultural practices led "many social workers, ignorant of Indian cultural values and social norms, [to] make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." *Id.* at 10; *see also* 1977 Senate Hearing at 73 (statement of Sen. Abourezk) ("non-Indian agencies . . . consistently thought that it was better for the child to be out of the Indian home whenever possible"). Children often were removed or threatened with removal because they were placed in the care of relatives or their homes lacked the amenities that could be found in non-Indian society.[6]

Nor were these abuses limited to involuntary removals; state and private adoption agencies also coerced parents into signing "voluntary" consents to adoption. *See, e.g.*, 1978 House Report at 10-12; *see also* TASK FORCE FOUR:

[6] *See, e.g.*, 1977 Senate Hearing at 77-78, 166, 316; 1978 House Hearings at 115.

FEDERAL, STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 86 (Comm. Print July 1976), *available at* https://www.narf.org/nill/documents/icwa/federal/lh/76rep/76rep.pdf; 1977 Senate Hearing at 141; 1974 Senate Hearings at 463 (statement of Sen. Abourezk) ("[i]n many cases [parents] were lied to, they were given documents to sign and they were deceived about the contents of the documents.").

State courts allowed these abuses to occur in virtually an unfettered fashion. "The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law." 1978 House Report at 10-12. Testimony before Congress revealed "substantial abuses of proper legal procedures," and that Indian parents were "often unaware of their rights and were not informed of them, and they were not given adequate advice or legal assistance at the time when they lost custody of their children." 123 Cong. Rec. 21042, 21043 (1977) (statement of Sen. Abourezk). Tribes, too, frequently were kept in the dark about the removal of Indian children from their families. *See, e.g.*, 1977 Senate Hearing at 156 (Statement of Hon. Calvin Isaacs) (noting that "[r]emoval is generally accomplished without notice to or consultation with responsible tribal authorities").

C. Congress Found that the Removal of Indian Children to Out-of-Home, Non-Indian Placements Was Not in the Best Interests of Indian Children, Families, and Tribes.

"Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture." *Holyfield*, 490 U.S. at 49-50. Testimony at congressional hearings was replete with examples of Indian children placed in non-Indian homes who later suffered from identity crises in adolescence and adulthood. *See, e.g.*, 1974 Senate Hearings at 113-14 (testimony of Dr. James H. Shore, Psychiatry Training Program and William W. Nichols, Director, Confederated Tribes of the Warm Springs Reservation Tribal Health Program); *id.* at 46 (testimony of Dr. Joseph Westermeyer, Department of Psychiatry, University of Minnesota). This phenomenon led to significant disparities between children raised in their tribal culture, who maintained a high cultural identity, and those with a comparatively low cultural identity. The former group "were statistically more apt to be employed; if they had been in the services, they had honorable discharges; they were mostly married and caring for their children . . . [and] had a low incidence of history of social problems such as imprisonment, commitment to a State mental health institute" and the like. The "reverse [was] true" for the latter group, who "tend[ed] to have poor coping and also significant social problems." *Id.* at 46-47 (testimony of Dr. Westermeyer). Such testimony led the American

Indian Policy Review Commission to conclude that "[r]emoval of Indians from Indian society has serious long- and short-term effects . . . for the individual child . . . who may suffer untold social and psychological consequences." S. REP. NO. 95-597, at 43.

Finally, the legislative record reflects "considerable emphasis on the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34. "For Indians generally and tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as ongoing, self-governing communities." 124 Cong. Rec. 38103 (1978) (statement of Rep. Lagomarsino); *see also id*. at 38102 (statement of sponsor Rep. Udall) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy.").

D. ICWA Was Carefully and Narrowly Tailored to Address the Nationwide Crisis that Congress Identified.

Following years of hearings and deliberation, Congress enacted ICWA to remedy the widespread harms that states had helped to enable. At its core, ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. ICWA's substantive and procedural mandates were carefully crafted to address the harms identified during Congressional hearings, thereby

reflecting "a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37 (quoting 1978 House Report at 23).

As noted further below, and as well-argued by Defendants-Appellants below, ICWA is well within Congress's Indian affairs power and thus is properly afforded rational basis scrutiny. Therefore, the court below erred in applying strict scrutiny to determine whether the Act complied with the Constitution's equal protection clause. The court compounded its error by finding that the Act was not narrowly tailored to meet the compelling interests that spurred its passage. In the court's view, this was because ICWA provided for the placement of "*potential* Indian children"—the court's term for children who are eligible for membership in a federally recognized tribe and the biological child of a tribal member—with "any Indian, regardless of whether the child is eligible for membership in that person's tribe" or with "family members who may not be tribal members at all." ROA.4035-36 (emphasis original) (citing 25 U.S.C. §§ 1903(4) and 1915(a)(3) and (a)(1)).

But Congress readily supplied evidence to support these provisions. First, ICWA's ambit includes some children who are not (yet) tribal members to ensure that parents and the child's tribe had the opportunity to perfect tribal membership, and thus ICWA's protection, for their children. *See, e.g.*, 1978 House Report, at 17

("The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.").[7] Cognizant of adult adoptees who had lost their "right to share in the cultural and property benefits" of tribal membership, 124 Cong. Rec. 38103 (statement of Rep. Udall), ICWA also provided a mechanism for the disclosure of "information necessary for the enrollment or for determining any rights or benefits associated with that membership" for such individuals. *See* 25 U.S.C. § 1951(b).

Second, and as set forth above, "[o]ne of the particular points of concern [underlying ICWA's passage] was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society." *Holyfield*, 490 U.S. at 35 n.4. The provisions in ICWA's placement preferences provide for placement with Indian or non-Indian relatives and "other Indian families." 25 U.S.C. § 1915(a)(1) and (a)(3). These provisions recognize and effectively codify protections for the extended family dynamic discussed at length in testimony, which, Congress found, had certain commonalities that spanned tribal cultures.

[7] These requirements are consistent with United States citizenship practices, *see, e.g.*, 8 U.S.C. §§ 1401(c)-(g), 1431(a) (children born outside U.S. qualify for citizenship if one or both parents are U.S. citizens and other conditions are met).

See, e.g., 1978 House Hearings at 69 (statement of LeRoy Wilder, AAIA) ("Indian cultures universally recognize a very large extended family."). But far from treating "all Indians as an undifferentiated mass," ROA.4035 (quoting *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring)), Section 1915(c) allows tribes, should the needs of their members differ from ICWA's framework, to exercise their inherent authority to establish different preferences that meet these needs.[8]

E. ICWA Remains Vital for the Protection of Indian Children, Families, and Tribes.

ICWA's protections for Indian children and families are now widely praised among national child welfare organizations and family court judges and practitioners alike.[9] However, while ICWA's procedural safeguards have significantly improved Indian child welfare outcomes, this progress is not universal. As the American Psychological Association testified nearly 20 years after ICWA's passage, "[m]any of the controversial cases surrounding the adoption of Indian children appear to have developed as a result of poor or non-existent enforcement of ICWA provisions." *Joint Hearing Before the S. Comm. on Indian Affairs and the H. Comm. on Resources on S. 569 and H.R. 1082, To Amend the*

[8] This subsection and its treatment by the court below is addressed more thoroughly in Section III.

[9] *Amici* Casey Family Programs et al. detail this point, and undersigned *amici* urge this Court's attention to this brief.

Indian Child Welfare Act of 1978, 105th Cong. 1, 228 (1997). Many states continue to have vastly disproportionate rates of Indian children in out-of-home placements compared to the general child population.[10] In addition, serious due process violations in child custody proceedings involving Indian children were uncovered recently in South Dakota, where a state judge conducted cursory removal hearings lasting just a few minutes at which Indian parents were not allowed even to view documents outlining the case against them. *See Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 770 (D.S.D. 2015), *on reconsideration in part sub nom. Oglala Sioux Tribe v. Hunnik*, No. CV 13-5020-JLV (D.S.D. Feb. 19, 2016), *rev'd on other grounds sub nom. Oglala Sioux Tribe v. Fleming*, 904 F.3d 608 (8th Cir. 2018).

In recognition of the evident need for thorough and consistent implementation of ICWA, the Department of the Interior's Final Rule for Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38777 (June 14, 2016), furthers the

[10] *See* NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE 5-6 (Sept. 2017), *available at* https://www.ncjfcj.org/sites/default/files/NCJFCJ-Disproportionality-TAB-2015_0.pdf. In Minnesota, for example, Indian children have been placed in out-of-home care at a rate more than twice that of any other group and were 12 times more likely than white children to spend time in placement. CENTER FOR ADVANCED STUDIES IN CHILD WELFARE, POLICY BRIEF, CHILD WELL-BEING IN MINNESOTA 2 (2013), *available at* http://cascw.umn.edu/wp-content/uploads/2013/11/policyreport3_web-versionFINAL.pdf. In Alaska, Indian children make up only 18.9% of the overall population of Alaskan children, but represent 55% of children removed by the state and placed in out-of-home care. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILDREN'S BUREAU, CHILD AND FAMILY SERVICES REVIEW: 2017 STATEWIDE ASSESSMENT 2 (2017), *available at* http://dhss.alaska.gov/ocs/Documents/CFSR.pdf.

Act's laudable goals by synthesizing nearly forty years of case law, legislative changes, and evolution in social work practice to provide state courts with additional clarity in implementing the law. *Amici* were not alone in supporting these efforts to properly implement the law. As Defendants–Appellants previously noted, Texas's Department of Family Protective Services submitted (albeit untimely) comments stating that it "fully supports the Indian Child Welfare Act." ROA.855. It is clear that ICWA's protections for Indian children, families, and tribes remain as vital as they were 40 years ago.

II. The District Court's Attempt to Limit Congressional Authority Over Indians to Those "On or Near Reservations" is Inconsistent With Supreme Court Precedent and Would Lead to Absurd Results.

A. The "Political Class" Doctrine Articulated in *Mancari* and Subsequent Cases is Not Limited by Geography.

In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court drew upon almost two centuries of Indian law in concluding that an employment preference for Indians in the Bureau of Indian Affairs ("BIA") and the Indian Health Service ("IHS") "does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference." *Id.* at 553. Rather, the Constitution "singles Indians out as a proper subject for separate legislation," *id.* at 551-52, due to "the unique legal status of Tribal Nations under federal law and upon the plenary power of Congress [drawn from the Constitution], based on a history of treaties and the assumption of a guardian-ward status." *Id.* at 551. This seminal holding is one of the

cornerstones of federal Indian law and has been applied in many cases upholding actions carrying out the unique obligations the United States owes to Indians.

Nevertheless, in its finding that ICWA violates equal protection, the District Court opined that the political classification "provided special treatment only to Indians living on or near reservations." ROA.4031. Such a physical location requirement, however, has no basis in *Mancari*. The statute at issue in that case did not limit the employment preference to "on or near reservation" Indians, but rather extended the preference to qualified Indian applicants regardless of where they live or the locations of their BIA or IHS offices. 25 U.S.C. § 5116 (*previously codified at* 25 U.S.C. § 472); *Mancari*, 417 U.S. at 537-39. Further, the *Mancari* Court wrote nothing that would limit the political classification to on-reservation Indians. In fact, during the very term that the Court decided *Mancari*, it also unanimously decided *Morton v. Ruiz*, where it explored the meaning of "on or near reservations," and explicitly noted that certain federal Indian programs, such as the Relocation Program discussed above in Section I, "explicitly extend beyond the reservation [and] are not limited to 'on or near.'" 415 U.S. 199, 228 (1974).[11]

[11] Congress has enacted a variety of statutes directed specifically at off-reservation Indians. *See, e.g.*, 25 U.S.C. § 1651 *et seq.* (provision of health services for urban Indians off-reservation); 42 U.S.C. § 9836(h) ("For purposes of this subchapter, a community may be . . . Indians in any off-reservation area designated by an appropriate tribal government . . . to operate a Head Start program."); 29 U.S.C. § 764(b)(13) ("Research grants may be used to conduct studies of . . . effective mechanisms for the delivery of rehabilitation services to Indians residing on and off reservations."); *see also* 25 U.S.C. § 5116 (BIA employment preference for Indians with no

Such a result is entirely consistent with the Constitution, which after all contains no geographical limitation on Congress' power "to regulate commerce . . . with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. It should not be surprising, then, that this Court applied *Mancari* to uphold an exemption for the use of peyote that similarly did not contain an "on or near reservation" requirement. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F. 2d 1210, 1212 (5th Cir. 1991).

Moreover, such a requirement would have excluded hundreds of thousands of off-reservation Indians—and hundreds of tribes and all of their members—from Congress's reach. As noted above, for some 20 years preceding *Mancari* and *Ruiz*, Congress had funded the Relocation Program, which established off-reservation BIA offices in cities around the country; by 1970, over 340,000 Indians—nearly half the Native population—had moved to urban areas, largely as a result of federal action.[12] The District Court's unprecedented reading of *Mancari* would have excluded hundreds of off-reservation BIA and IHS employees from the employment preference at issue, and would have effectively terminated the Indian status of the 340,000 Indians then living off-reservation. That neither Congress nor the Court intended such a result is evident in the 1978 House Report, which relied on *Mancari* and other precedent to note that "[t]he power of Congress to

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geographic restriction); 25 U.S.C. § 5307(b) (granting a preference for hiring Native American contractors with no geographic restriction).

[12] *See* n. 4, *supra*, and accompanying text.

regulate or prohibit traffic with tribal Indians within a State *whether upon or off an Indian reservation* is well settled . . . ." 1978 House Report at 15 (emphasis original) (quoting *United States v. Nice*, 241 U.S. 591, 597 (1916)).[13]

B. The District Court's Off-Reservation Rule Would Create Absurd Results, Effectively Making ICWA a Nullity in Areas That Have No Indian Reservations, Including Virtually All of Alaska.

The District Court's attempt to limit *Mancari*'s political classification doctrine only to Indians who live on or near reservations—and, by extension, to limit ICWA's application to on- or near-reservation Indian children—makes even less sense given the large numbers of tribes that lacked reservations when ICWA was enacted.

For example, there are 229 federally recognized tribes in Alaska, 40% of the nation's 573 tribes.[14] Yet only one of these 229 tribes has a reservation. Most of the lands in and around these 228 tribal communities were conveyed under the Alaska Native Claims Settlement Act of 1971 ("ANCSA").[15] Enacted seven years before ICWA, ANCSA revoked the reservation status of all Alaska Native villages

[13] *See also* 1977 Senate Hearing 104, 106-07 (testimony of Gregory Frazier) (discussing the federal relocation policy and estimating that, by the time of the hearing, nearly 500,000 Indians—then fully half of all Indians in the country—resided in urban areas).

[14] *See* Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34863, 34867-68 (July 23, 2018) (listing the 229 Alaska tribes as federally recognized tribes that have "the immunities and privileges available to federally recognized Indian Tribes . . . as well as the responsibilities, powers, limitations and obligations of such Tribes").

[15] 43 U.S.C. § 1601 *et seq*.

except the Metlakatla Indian Community. And the Supreme Court has held that such ANCSA lands do not constitute "Indian country" within the meaning of 18 U.S.C. § 1151.[16] As a result, most of the land held by 228 of Alaska's tribes is not within a "reservation," as that term is defined in ICWA.[17] Congress was well aware that the majority of Alaska tribes lacked reservation land, and also was aware that tens of thousands of Alaska Natives had moved thousands of miles away from Alaska. 1978 House Hearings, *supra* at 104 ("There are between 20,000 and 28,000 Alaska Natives in the Lower 48.") (testimony of Gregory Frazier, National Urban Indian Council). With that knowledge, Congress expressly included Alaska tribes in ICWA's definition of an "Indian tribe," 25 U.S.C. § 1903(3), and expressly included Alaska Natives within ICWA's definition of "Indians." *Id.* § 1903(8). Not surprisingly, ICWA's application in Alaska has been affirmed by both the Alaska Supreme Court, *State v. Native Vill. of Tanana*, 249 P.3d 734, 750-51 (Alaska 2011) (quoting *John v. Baker*, 982 P.2d 738, 747-59 (Alaska 1999) ("Congress's purpose in enacting ICWA reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes")),[18] and the United States Court of Appeals for the Ninth Circuit, *Kaltag*

[16] *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532-34 (1998).

[17] 25 U.S.C. § 1903(10).

[18] *See also In re C.R.H.*, 29 P.3d 849, 854 (Alaska 2001) (upholding the right of Alaska tribes to secure transfer jurisdiction under § 1911(b) and overruling previous decisions to the contrary).

Tribal Council v. Jackson, 344 Fed. Appx. 324 (9th Cir. 2009), *cert. denied* 131 S. Ct. 66 (2010).[19]

Alaska tribes are not alone in lacking reservations.[20] Yet the District Court's new and extreme limitation on the *Mancari* political classification—and on ICWA—to Indians who live on or near reservations would exclude over 40% of the nation's tribes. Such an extreme interpretation has never been adopted by any other court, makes no practical sense, is directly contrary to ICWA's policy and purpose, and finds no support in centuries of established federal Indian law.

III. The District Court Erred In Concluding That ICWA's Section 1915(c) is an Unconstitutional Delegation of Legislative Authority to Tribes.

A. Section 1915(c) Merely Acknowledges Inherent Tribal Sovereign Authority.

Section 1915(c) provides in pertinent part that "if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order . . . ." This is, quite plainly, not a delegation to tribes at all, but rather a recognition of authority that tribes already

[19] In *Kaltag*, the State of Alaska unsuccessfully argued that Alaska Tribes had no authority to hear "child protection proceedings arising outside of a reservation" and that ICWA's "plain language and its legislative history show that tribes without reservations do not have concurrent jurisdiction with the State over children's proceedings." Appellant's Opening Br. at 8, 15, *Kaltag Tribal Council v. Jackson*, 344 Fed. Appx. 324 (9th Cir. 2009) (No. 08-35343), 2008 WL 4298040.

[20] *See, e.g.*, *Mechoopda Indian Tribe of Chico Rancheria, CA v. Education Programs Admr., Sacramento Office, Bureau of Indian Affairs*, IBIA 97-9-A, IBIA 97-102-A, at 1 (Mar. 1, 2001) (recommending allocation of education assistance funds under federal law for benefit of certain Indian children of a "federally recognized but landless tribe . . ." in California).

possess. "From the earliest years of the republic, courts have recognized the political independence and self-governing status of Indian tribes." COHEN'S HANDBOOK, *supra*, at § 4.01[1][a], 209. Tribes are "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), "having institutions of their own, and governing themselves by their own laws." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-43 (1832); *see also id.* at 559 ("The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights."). Tribes' powers of self-governance "existed prior to the Constitution." *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

The Supreme Court has long recognized that Tribes retain "the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 382 (1886) (citing *Worcester*, 31 U.S. at 515-16, and *Cherokee Nation*, 30 U.S. at 1); *see also United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."). Accordingly, the Court has repeatedly recognized Tribes' legal authority over matters such as criminal justice,[21] marriage,[22] and child

[21] *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (Tribe's exercise of law enforcement authority is "part of its retained sovereignty"); *see also Kagama*, 118 U.S. at 382.

[22] *Carney v. Chapman*, 247 U.S. 102, 104 (1918); *United States v. Quiver*, 241 U.S. 602, 604 (1916); *Nofire v. United States*, 164 U.S. 657, 662 (1897).

welfare.[23] Tribes' exercise of these core self-governance functions "has never been taken away from them, either explicitly or implicitly, *and is attributable in no way to any delegation to them of federal authority.*" *Wheeler*, 435 U.S. at 328 (emphasis added).

In light of this established precedent, Section 1915(c) is not a delegation of power to tribes. Rather, through Section 1915(c) Congress expressed its policy preference that, where a tribe has exercised its inherent authority to establish adoptive, preadoptive, and foster care placements for its Indian children, and those tribal preferences differ from those provided in ICWA, those tribal preferences would not be displaced by ICWA.

B. Even If Section 1915(c) Does Delegate Authority to Tribes, the Supreme Court Has Affirmed the Constitutionality of Just Such a Delegation.

The District Court held Section 1915(c) to be unconstitutional both because tribes are not legitimate recipients of delegated authority, ROA.4039-40, and because it improperly delegates Congress's legislative authority. ROA.4037-38. Even if Section 1915(c) were a delegation of authority to tribes (it is not), the District Court still is wrong on both counts.

[23] *Holyfield*, 490 U.S. at 42 ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA."); *Fisher v. Dist. Ct., Sixth Judicial Dist. of Mont.*, 424 U.S. 382 (1976) (per curiam).

The District Court equated tribes with "private entit[ies]," then categorically held that, because tribes are not part of the Federal Government, "the Constitution does not permit Indian tribes to exercise *federal* legislative or executive regulatory power over non-tribal persons on non-tribal land." ROA.4039 (emphasis in original) (citing *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1253 (2015) (Thomas, J., concurring)). The District Court reached this conclusion, however, only by ignoring directly applicable Supreme Court precedent—*United States v. Mazurie*. 419 U.S. 544 (1975).

In *Mazurie*, the Court examined whether Congress could delegate to tribes the authority "to adopt ordinances controlling the introduction by non-Indians of alcoholic beverages onto non-Indian land." 419 U.S. at 550. The Circuit Court had concluded that such delegation, contained within 18 U.S.C. § 1161, was unconstitutional. *Id.* at 550, 556. Justice Rehnquist, writing for a unanimous Supreme Court, reversed:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus, it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations.

Id. at 556-57 (internal citations and quotations omitted). The Court's opinion contradicts every element of the District Court's holding. It expressly rejected any comparison between tribes and "private entit[ies]." *Id.* at 557 (describing tribes as "a good deal more than 'private, voluntary organizations,'" but rather "entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life"). It expressly rejected the proposition that Congress could not delegate to tribes authority over non-Indians, particularly where the conduct at issue involves Indians. *Id.* at 557-58. And it rejected the proposition that such a delegation was invalid concerning non-Indian land. *Id.* at 556-57 (recognizing tribes' sovereign authority "*over* both *their members* and their territory (emphasis added)).

Moreover, *Mazurie* rejected the strict legislative-regulatory dichotomy that the District Court found to be dispositive. Even acknowledging its own "recognized limits on the authority of Congress to delegate its *legislative power*," the unanimous *Mazurie* Court nevertheless affirmed the constitutionality of such a delegation because "the entity exercising the delegated authority"—*i.e.*, the tribe—"itself possesses independent authority over the subject matter." *Id* at 556-57 (emphasis added, internal citations omitted).

The District Court's failure to even acknowledge *Mazurie* in its analysis of the non-delegation doctrine, ROA.4036-40, is a remarkable and fatal flaw in the

Court's reasoning.[24] The District Court's holding on non-delegation is wholly incompatible with *Mazurie* and, therefore, should be reversed.

CONCLUSION

For the foregoing reasons, *amici* join Defendants-Appellants in respectfully urging that the decision below be reversed.

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[24] *Mazurie* appears in the District Court's decision only in a string citation wherein the District Court seeks to demonstrate that Congress's Indian affairs authority is limited to "affairs occurring in Indian country." ROA.4031 n.8.

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Respectfully submitted,

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January 16, 2019

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