IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11479

CHAD EVERETT BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; STATE OF INDIANA; STATE OF LOUISIANA; ALTAGRACIA SOCORRO HERNANDEZ; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,
Plaintiffs-Appellees,

v.

DAVID BERNHARDT, in his official capacity as Acting Secretary of the U.S. Department of the Interior; TARA SWEENEY, in her official capacity as Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; U.S. 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; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants-Appellants,

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

On Appeal from the United States District Court for the Northern District of Texas
No. 4:17-cv-00868-O (Hon. Reed O'Connor)

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA IN SUPPORT OF DEFENDANTS-APPELLANTS

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The United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB"), a federally recognized Cherokee Indian tribe, moves the Court for leave to file a brief in support of Defendants-Appellants as amicus curiae. The amicus curiae brief accompanies this motion. In support of this motion, the UKB states as follows:

1. As one of three federally recognized Cherokee Indian tribal governments—along with the Cherokee Nation of Oklahoma and the Eastern Band of Cherokee Indians—the UKB has a significant interest in the outcome of this case.

2. The UKB is a tribal nation headquartered in Tahlequah, Oklahoma, with more than 14,000 enrolled Keetoowah Cherokee citizens.

3. The UKB maintains an Indian Child Welfare Office to work on behalf of Keetoowah Cherokee children and their families.

4. The services provided by the UKB Indian Child Welfare Office include identifying kinship placements for deprived and neglected Keetoowah Cherokee children enrolled in or eligible for enrollment in the UKB, appearing before courts in which a UKB-eligible child has been removed from the home, including the UKB tribal court, working with the State of Oklahoma and other state's child welfare services to identify deprived or neglected Cherokee children enrolled in or eligible for enrollment in the UKB, among other things.

5. The UKB has not obtained permission from all parties to file a brief as amicus curiae.

6. Nevertheless, the UKB, as a federally recognized Cherokee tribal government, desires to see the Indian Child Welfare Act upheld and would show the court in its proposed amicus curiae brief the Indian Child Welfare Act is not a race-based law, but a law based on membership in a federally recognized tribe, such as the UKB.

Respectfully Submitted,

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January 16, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(g)(1) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. Local Rule 32.2, the brief contains 279 words. I relied upon my word processor to obtain the count and it is Microsoft Word 2013.

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Date: January 16, 2019

/s/ Bryan N.B. King
Bryan N.B. King

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that: (1) all required privacy redactions have been made in accordance with Fed. R. App. P. 25(a)(5) and 5th Cir. Rule 25.2.13; (2) every document submitted in digital form or scanned PDF format is an exact copy of the hard copy filed with the Clerk when called for; and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Kaspersky Endpoint Security 10, Version 10.3.0.6294, last updated January 16, 2019, and according to the program, are free from viruses.

Dated this 16th day of January, 2019.

/s/ Bryan N.B. King
Bryan N.B. King

CERTIFICATE OF SERVICE

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EXHIBIT 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11479

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COPORATE DISCLOSURE STATEMENT

The United Keetoowah Band of Cherokee Indians, pursuant to Fed. R. App. P. 29(a)(4)(A), certifies that it is a federally recognized Indian Tribe, which has no stock and therefore no publicly held corporation owns 10% or more of its stock.

/s/ Bryan N.B. King
Bryan N.B. King

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") is a federally recognized Indian Tribe headquartered in Tahlequah, Oklahoma, with more than 14,000 enrolled Keetoowah Cherokee members. The source of the UKB's authority to file this Brief will be an order of the Court granting the UKB's Motion for Leave to File Amicus Curiae Brief (if such Motion is granted). No party's counsel has authored this Brief in whole or in part. No party or party's counsel has contributed money intended to fund preparing or submitting the Brief. No person other than the UKB, its members, and its counsel contributed money intended to fund preparing or submitting this Brief.

Together with the Cherokee Nation of Oklahoma and the Eastern Band of Cherokee Indians, these three Tribal Nations constitute the only federally recognized Cherokee tribal governments in the United States. Today, their citizens share a living language, culture, and history, and have, collectively, survived wars, the Trail of Tears, allotment, and other federal actions intended to eradicate Cherokee governments and the inherent right of the Cherokee Tribes to define their own citizenry. Each of these Tribes maintains a significant interest in deterring false claims of being "Cherokee."

Appellees' arguments that the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §1902 *et seq*., applies to any child with purported "Cherokee" or "Indian

ancestry" is wrong as a matter of law, and ultimately threatens the inherent and sovereign right of the Cherokee Tribes to determine their own citizenship.[1] "Cherokee" is not a race. An individual's claim to "Cherokee ancestry" means nothing more than that: it is not to be conflated with citizenship in a sovereign Cherokee Tribe. To be "Cherokee" one must be a member of the Eastern Band, the UKB, or the Cherokee Nation of Oklahoma—each of which distinctly and separately define their citizenship requirements as federally recognized Indian Tribes.

Finally, the UKB has implemented programs to serve their minor citizens in accordance with ICWA. For example, the UKB's Indian Child Welfare Office, "works on behalf of [] Keetoowah Cherokee children and their families."[2]

Accordingly, the leaders of the UKB are committed to protecting "Cherokee" status from those would seek to take it, alter it, or use it as a weapon in litigation designed to attack the inherent sovereignty and right of all Tribal Nations to define their own tribal citizenship and protect their children.

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[1] Appellees have repeatedly challenged the Cherokee Tribes' right to determine citizenship and/or define who is Cherokee and therefore "Indian" under both tribal and federal law. *See, e.g.*, 2d Am. Compl. ECF No. 35 ¶ 8, ¶ 23-25, ¶ 83-84, ¶ 97-98, ¶ 104, ¶ 127, ¶ 138, ¶ 232, ¶ 250-51, ¶ 255, ¶ 301, ¶ 306-307, ¶ 314, ¶ 326-31, ¶ 373; State Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss and Memorandum in Support of Motion for Summary Judgment, ECF No. 74, 54-58; Brief in Opposition to Defendants' Motion to Dismiss and in Support of Individual Plaintiffs' Motion for Summary Judgment, ECF No. 80, 1, 14-16, 45-51; Individual Plaintiffs' Reply in Support of Their Motion for Summary Judgment, ECF No. 143, 2, 10, 24.

[2] https://www.keetoowahcherokee.org/services/indian-child-welfare.html

II. SUMMARY OF ARGUMENT

The District Court declared ICWA unconstitutional on the basis that "ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race. . . ." Order at 26. And Appellees, in the court below, have asserted "[m]embership in the . . . Cherokee Nation is . . . based on racial ancestry." Brief in Opposition to Defendants' Motion to Dismiss and in Support of Individual Plaintiffs' Motion for Summary Judgment, ECF No. 80, 47. These two conclusions form the foundation of the District Court's declaration that ICWA employs a race-based classification. Both are incorrect.

ICWA identifies the children to whom it applies, and does so by means of tribal citizenship, not ancestry. *See* 25 U.S.C. § 1903(4). Many individuals may legitimately claim "Cherokee ancestry," but cannot enroll as citizens because they do not meet the unique citizenship requirements of the Cherokee Tribe in which they would like to become a citizen. Claims to "Cherokee ancestry," therefore, do not make someone "Cherokee" or an "Indian child" under ICWA.

"Ancestry" neither guarantees, nor precludes, citizenship in a sovereign Tribal Nation. In this regard, the District Court's erroneous conclusion fails to take into account the treaties the United States signed with Tribal Nations rendering those with no "Indian ancestry" citizens of a Tribal Nation. For instance, following the Civil War in 1866, the United States signed a treaty with the historical

Cherokee Nation, thereby granting Cherokee Nation citizenship to all freed Cherokee slaves and future generations of descendants—despite their inability to claim the amorphous "Cherokee racial ancestry" that Appellees claim trigger ICWA's protections.

Although Tribal Nations no longer incorporate non-Indians as citizens in the ways they once did, the fact remains the United States has repeatedly, through treaty and by statute, consummated the tribal citizenship of those who have no "Indian ancestry." Thus it is true citizens of Tribal Nations today—like the citizens of the United States—reflect the diversity of the various races who have, over the course of history, come to live within a particular nation's borders.

Citizenship in a Tribal Nation, accordingly, is a consensual political relationship between a citizen and his or her nation. ICWA's definition of "Indian child" cannot trigger scrutiny under the Fourteenth Amendment's Equal Protection Clause because the definition is entirely contingent upon a consensual political relationship that a child's parent has elected to maintain—just as United States law applies to children whose parents have elected to maintain their citizenship in the United States. Individuals who qualify for citizenship in a Tribal Nation may disenroll themselves at any time,[3] just as United States citizens are capable of

[3] Of Course, a relinquishment of tribal citizenship must be effectuated in accordance with the laws of the Tribal Nation. *See, e.g., In re M.K.T.*, 2016 OK 4, ¶ 1, 368 P.3d 775, 795-797 (Feb. 1, 2016).

renouncing their citizenship from the United States. Appellees' contention ICWA applies to any individual with "Indian ancestry" regardless of whether that individual (1) qualifies for citizenship in a Tribal Nation *and* (2) has a parent who elected to establish and maintain that citizenship, therefore, constitutes a patent mischaracterization of the plain letter of law.

The District Court's determination ICWA's "Indian child" definition violates equal protection principles is further flawed because the framers of the Fourteenth Amendment specifically excluded "Indians"—when used to identify citizens of Tribal Nations—from the Amendment's reach. Because the Fourteenth Amendment was designed to "*not* annul the treaties previously made between [Tribal Nations] and the United States" S. Rep. No. 41-268, at 1 (emphasis added), nothing in the Amendment prohibits Congress from utilizing the word "Indian" in legislation to identify the citizens of Tribal Nations with whom the United States signed treaties—and to whom the United States owes ongoing trust duties and obligations.

Congress is the branch of the United States government tasked with passing the legislation necessary to effectuate these treaty trust duties and responsibilities. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011) ("Throughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign

function subject to the plenary authority of Congress."). Because "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution," *United States v. Antelope*, 430 U.S. 641, 645 (1977) (citing U.S. Const. art. I, § 8), such legislation "has repeatedly been sustained by this Court against claims of unlawful racial discrimination." *Id.* ICWA falls precisely within this constitutionally permissible category.

By concluding that using "Indian" to identify citizens of Tribal Nations violates equal protection, the District Court threatens to upset hundreds of years of precedent, the plain language of the Fourteenth Amendment's Equal Protection Clause and the intentions of its framers, and ultimately, the sovereign-to-sovereign relationship between Tribal Nations and the United States.

III. ARGUMENT

A. Using "Indian" To Identify Citizens Of Tribal Nations, And Their Eligible Children, Does Not Constitute A Race-Based Classification.

The District Court erroneously applied strict scrutiny to ICWA's use of the term "Indian child" based on the Court's conclusion that ICWA uses "ancestry" as a proxy for race. *See* Order at 26 (holding "the ICWA's jurisdictional definition of 'Indian children' *uses ancestry as a proxy for race* and therefore 'must be analyzed by a reviewing court under strict scrutiny.'") (citations and certain quotation marks omitted) (emphasis added). To reach this flawed conclusion, the District Court

misconstrued (1) the original intent of the Equal Protection Clause—which has no application to classifications based on citizenship in a Tribal Nation, (2) the plain language of the definition of "Indian child" in ICWA, (3) the actual requirements for citizenship in Tribal Nations, and (4) the holding in the United States Supreme Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000).

i. The Fourteenth Amendment Specifically Precludes The Application Of Equal Protection To Prohibit Classifications Based On Citizenship In A Tribal Nation.

The District Court's conclusion that ICWA's "Indian child" definition violates equal protection principles cannot be squared with the plain language of the Fourteenth Amendment, nor with the intent of its framers.[4] The framers of the Fourteenth Amendment's Equal Protection Clause considered whether to extend the Amendment to preclude classifications that identify "Indians" as citizens of Tribal Nations—and ultimately refused to do so. That is, Indians were explicitly excluded from the Fourteenth Amendment not as a function of their race, but rather, on account of their political allegiance to separate sovereign nations. *See* Cong. Globe, 37th Cong., 2d Sess. 1639 (1862) (noting that Tribal Nations were "recognized at the organization of this Government as independent

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[4] Because "the Fourteenth Amendment [] applies only to the states," *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954), any equal protection challenge to ICWA's classification of "Indian child" arises from the equal protection principles embodied in the Fifth Amendment's Due Process Clause. *See id.* And although the Fifth Amendment does not contain the equal protection language found in the Fourteenth Amendment, courts "employ the same test to evaluate alleged equal protection violations under the Fifth Amendment as under the Fourteenth Amendment." D. Ct. Order at 22 (quoting *Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995)).

sovereignties.”). Thus, the notion that the Fourteenth Amendment would somehow preclude classifications based on citizenship in a Tribal Nation was explicitly rejected by the Senate at the time the Fourteenth Amendment was passed. *See* S. Rep. No. 41-268, at 1 (1870).

Congress ratified the Fourteenth Amendment in 1868 as a part of the Reconstruction policies intended to stabilize the turbulent South after the Civil War. Section 1 of the Amendment was drafted to grant citizenship to the freed slaves and ensure that the newly emancipated African American population would enjoy full citizenship in the United States and equal protection under the laws of the states that once enslaved them. *See* Cong. Globe, 37th Cong., 2d Sess. 1640-45 (1862); *see also* Cong. Globe, 39th Cong., 1st Sess. 2890 (1866).

Section 1 of the Fourteenth Amendment—which contains the “equal protection” text upon which the Supreme Court and all lower federal courts base their equal protection jurisprudence—states in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Const. Am. XIV, § 1.

During the Senate debates surrounding the passage of the Fourteenth Amendment, Michigan Senator Jacob Howard introduced the citizenship clause of Section 1, known as the “Howard Amendment.” *Id.*; Cons. Am. XIV § 1 (“All

persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.") Senator Howard specifically included the phrase "subject to the jurisdiction thereof" as a clarification on the applicability of citizenship to Indians who were *not* subject to the jurisdiction of the United States. *See* Cong. Globe, 39th Cong., 1st Sess. 2890 (Statement of Sen. Howard) ("Indians born within the limits of the United States, and who maintain their tribal relations, are not . . . born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being *quasi* foreign nations.").

Senator Howard's colleagues were in agreement. *See, e.g., id.* at 2893 (Statement of Sen. Trumbull) ("It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is 'subject to the jurisdiction of the United States.'"); *id.* (Statement of Sen. Doolittle) ("I presume the honorable Senator from Michigan does not intend by this amendment to include the Indians."); *id.* at 2890 (Statement of Sen. Howard) ("[I]t has been the habit of the Government from the beginning to treat with the Indian tribes as sovereign Powers . . . They have a national independence."). *id.* at 2895.

For more than 150 years, the Supreme Court and lower federal courts have consistently adhered to the true intent of the Fourteenth Amendment's framers and have repeatedly concluded that classifications of "Indian" tethered to citizenship in

a Tribe are political, not racial, and therefore, are not circumscribed by the Fourteenth Amendment's equal protection principles. *See, e.g.*, *United States v. Lara,* 541 U.S. 193*,* 209 (2004) (rejecting the argument that "Congress' use of the words 'all Indians' . . ." violates equal protection principles); *Fisher v. District Court,* 424 U.S. 382, 390-91 (1976) (concluding "Indian" classification relates not to race but "the quasi-sovereign status of the [tribe] under Federal law."); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (same); *Elk v. Wilkins*, 112 U.S. 94 (1884) (same); *Ex parte Reynolds*, 20 F. Cas. 582 (W.D. Ark. 1879) (same).

The first case before the Supreme Court to interpret the applicability of the Fourteenth Amendment to Indians was *Elk v. Wilkins*, wherein an Omaha Indian living in the newly formed state of Nebraska brought an action against the registrar of one of the wards of the city of Omaha for refusing to register him as a qualified voter. *See* 112 U.S. at 94. The Indian plaintiff claimed that he was a U.S. citizen under Section 1 of the Fourteenth Amendment, and that the registrar had discriminated against him due to his race as an Indian in violation of the Equal Protection Clause. *Id*. at 96.

The Supreme Court held the registrar did not discriminate against the plaintiff on the basis of *race*, because the plaintiff's status as an "Indian" instead was a matter of *citizenship*, rendering the classification political and not racial. *See id.* at 99-100 (concluding the Fourteenth Amendment does not apply to Indians

because at the time of the Amendment's passage, they were citizens of "distinct political communities."). The Supreme Court confirmed Indians would not become U.S. citizens "except under explicit provisions of treaty or statute to that effect . . ." *Id*. at 100.

And this is precisely what happened in 1924, when Congress passed the Indian Citizenship Act ("1924 Act"), which, like ICWA, identifies "Indians" by their citizenship in a federally recognized Indian Tribe. The 1924 Act grants United States citizenship to any person who is "born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe. . . ." 1924 Indian Citizenship Act ("1924 Act"), ch.233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)). Accordingly, citizens of many Tribal Nations, including the UKB, did not become United States citizens until 1924.

Today, citizens of the UKB enjoy dual citizenship in both the United States and their Tribal Nation. However, if congressional classifications of "Indian" are deemed categorically unconstitutional, then the very congressional act that made Indians citizens of the United States would be rendered unconstitutional.

ii. The Plain Language Of ICWA Precludes The Conclusion That Ancestry Serves As A Proxy For Race.

The District Court further erred when the Court misconstrued the plain language of ICWA's "Indian children" definition to conclude ICWA uses "ancestry as a proxy for race. . . ." *See* Order at 26. ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). The statutory definition does not include the word "ancestry," and therefore, does not use "ancestry" at all, let alone as a proxy.

According to the plain text of the Act, for ICWA to apply, either the child must already be a citizen at the time of the state court proceedings, or the child's biological parent must be a citizen and the child must also be eligible for citizenship under his or her Tribe's unique citizenship requirements. *See id.* This limited definition confirms the congressional purpose behind ICWA: in instances where a child already is a citizen, or is eligible for citizenship and his or her parent has elected to maintain their citizenship, then both the child's interest in her political relationship with the Tribe *and* the Tribe's sovereign, political interest in the child's welfare are preserved.

In constructing ICWA, Congress remained cognizant that, "for an adult Indian, there is an absolute right of expatriation from one's tribe." H.R. Rep. No.

95-1386, at 20 (citing *U.S. ex. rel. Standing Bear v. Crook*, 25 F. Cas. 695 (1879)); *see also Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005) ("[Petitioner] has chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe. His Indian status is therefore political, not merely racial."). For this reason, Congress intentionally refrained from extending ICWA's application to children of parents who have terminated their citizenship with the Tribe or simply never enrolled. *See* 25 U.S.C. § 1903(4)(b). For non-enrolled children, ICWA extends only to those who have a parent who has maintained citizenship in the Tribe, thereby manifesting a voluntary intention to abide by the Tribe's sovereignty as a Nation. *Id.*; *see also Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011) (concluding that a child eligible for membership in the Cherokee Nation of Oklahoma, but who had not been enrolled and whose parents were not members, was not an "Indian child" for purposes of ICWA).

ICWA's definition also excludes children who themselves are not eligible for citizenship, despite the fact that one or both of their parents may be enrolled citizens of a Tribal Nation. *See* 25 U.S.C. § 1903(4). In excluding such children, Congress refrained from imposing its own definition for citizenship in a federally recognized Tribe, demonstrating respect for the Supreme Court's decision that "[a] tribe's right to define its own membership for tribal purposes has long been

recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

Nor can the District Court's decision be justified on the basis that somehow "eligibility for membership" serves as a proxy for "ancestry" in § 1903(4). Merriam-Webster defines "proxy" as referring to something that "acts as a substitute for another. . . ."[5] However, if substituted for the words "membership in an Indian tribe," the word "ancestry" would completely alter the congressionally defined meaning of "Indian child." That is, if ICWA's definition actually used "ancestry" instead of "membership," the scope of who constitutes an "Indian child" would change dramatically. That is not the function of a "proxy."

Accordingly, "ancestry" does not function as a substitute for "membership in an Indian tribe," and § 1903(4), therefore, does not use "ancestry" as a proxy for race.

iii. Citizenship In A Tribal Nation Is Not Based On Ancestry But Is Predicated On Political Relations.

The District Court's conclusion that ICWA constitutes a race-based classification is further erroneous because the District Court reached this conclusion by reasoning that "tribal membership eligibility standards [are] based on ancestry. . . ." Order at 26. Citizenship in a Tribal Nation, however, is not

[5] https://www.merriam-webster.com/dictionary/proxy#other-words

contingent on "ancestry," but rather, hinges on an individual's contemporary political relationship with a sovereign nation.

To be sure, Tribal Nations are similar to the United States in that the majority of Tribal Nations extend citizenship to the offspring of citizen parents. Thus, just as United States citizens give birth to the next generation of United States citizens, citizenship in many Tribal Nations is often passed from one generation to the next. And consequently, just as citizenship in the United States is not tethered to some identifiable "ancestor" who once lived in the United States, citizenship in a Tribal Nation is not based on "ancestry" but is the consequence of a willful political relationship maintained between a Nation and its citizen.

The misunderstanding that tribal citizenship is synonymous with "Indian ancestry" is further illustrated by the existence of many modern-day citizens of Tribal Nations who, with no "Indian ancestry" whatsoever, gained citizenship in a Tribal Nation through treaties signed with the United States.

For instance, following the Civil War and President Abraham Lincoln's Emancipation Proclamation, the status of slaves belonging to citizens of Tribal Nations remained unclear, as the Emancipation Proclamation had no legal effect in jurisdictions other than the United States. *Emancipation Proclamation* (January 1, 1863). To resolve this question, the United States and the historical Cherokee Nation entered into a treaty. *See Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 123

(D.D.C. 2017) ("[T]he history of the 1866 Treaty reflects that the United States made clear from the outset that the emancipation and incorporation of freedmen into the Cherokee Nation . . . was an ultimatum and imperative of any treaty negotiation."); *see also* Treaty With The Cherokee, 1866, U.S.-Cherokee Nation of Indians, art. 9, July 19, 1866, 14 Stat. 799 (hereinafter "1866 Treaty").

In that treaty, the historical Cherokee Nation promised that "never here-after shall either slavery or involuntary servitude exist in their nation . . ." and "all freedmen . . . and their descendants, shall have all the rights of native Cherokees . . . ."1866 Treaty, art. 9`. As the United States District Court for the District of Columbia recently concluded, "the 1866 Treaty alone, [] guarantees for qualifying freedmen the right to citizenship" in the Cherokee Nation of Oklahoma. *Nash,* 267 F. Supp. 3d at 122.

In response to recent arguments that the Cherokee Freedmen should be denied citizenship in the Cherokee Nation of Oklahoma today based on their absence of Cherokee "race" or "ancestry," Chief Bill John Baker has fully acknowledged their citizenship, stating: "Our freedmen brothers and sisters made that Trail of Tears journey with us."[6]

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[6] Editorial, *Freedmen decision completes the Cherokee Nation*, Tulsa World (at page number if you have it) (Sept. 7, 2017), https://www.tulsaworld.com/opinion/editorials/tulsa-world-editorial-freedmen-decision-completes-the-cherokee-nation/article_6f32cac3-8ae4-5dd4-8b82-816bcea2c33c.html

Likewise, other Tribal Nations signed treaties with the United States affirming the incorporation of non-Indian United States citizens into the body politic of a Tribal Nation.[7] For instance, in 1828, the Choctaw Nation enacted a law granting citizenship to any "white man" who marries a Choctaw woman.[8] This Choctaw Nation law subsequently was consummated under United States federal law in a treaty signed between the United States, the Choctaw Nation, and the Chickasaw Nation, whereby "[e]very white person who, having married a Choctaw or Chickasaw, [and] resides in the said Choctaw or Chickasaw Nation . . . is to be deemed a member[] of said nation . . . ."[9]; *see also Ex parte Reynolds*, 5 Dill. 394 (W.D. Ark. 1879) (concluding that the defendant is "Indian" under federal law not because he is "Indian[] by birth" or "belong[s] to the race generally" but "by reason of [his] marriage to [a] person[] . . . who belong[s] to the Choctaw Nation . . ." as consummated by the treaty signed between the Choctaw Nation and United States).

In addition to treaties, the United States has recognized and confirmed non-Indian citizenship in Tribal Nations by law and congressional action. For instance,

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[7] The practice of adopting non-Indians also occurred among the Creeks and Seminoles, who adopted "Africans into their society because traditionally Creeks had no concept of race. Kinship, not physical features, distinguished one Creek individual from another . . . [through] matrilineal ties to Creek clans through birth or adoption." Theda Perdue, *Mixed Blood Indians: Racial Construction in the Early South* 4 (2005).

[8] Marcia Haag and Henry J. Willis, *A Gathering of Statesmen, Records of the Choctaw Council Meetings 1826-1828* at 100-01 (2013).

[9] Treaty with Choctaw and Chickasaw, 1866, art. 38, 14 Stat. 779.

through the creation and passage of the Curtis Act in 1906, Congress created the Dawes Commission and bestowed upon the Commission the requisite authority to create a membership roll that would account for all citizens of the historical Cherokee Nation (as well as the other "Five Civilized Tribes").[10] Congressman Curtis—for whom the Act was named—noted that "[o]n the Cherokee rolls there are 32,781 by blood, 4,094 freedmen, and 1,143 intermarried whites."[11] The Dawes Rolls, therefore, constituted congressional confirmation of earlier laws the historical Cherokee Nation had passed incorporating non-Indian spouses of Cherokee Nation citizens as citizens.[12]

Additionally, and historically, many Tribal Nations adopted citizens of other Nations and granted them full citizenship rights. For instance, a chief of the Eastern Cherokees, Yonaguska, adopted a white son by the name of William Holland Thomas who then became a citizen of the Eastern Cherokees.[13]

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[10] M. Kaye Tatro, Curtis Act (1898), OKLA. HIST. SOC'Y, http://www.okhistory.org/publications/enc/entry.php?entry=CU006 (last visited Jan. 7, 2019).

[11] 40 Cong. Rec. at 1241.

[12] As early as 1819, the historical Cherokee Nation government passed a law granting non-Indian men who married Cherokee women "the privilege of citizenship" in the Cherokee Nation. New Town, Cherokee Nation, Nov. 2, 1819, https://www.loc.gov/law/help/american-indian-consts/PDF/28014184.pdf. Indeed, privileges of being a Cherokee Nation citizen meant that Cherokees whose citizenship came as the result of marriage were entitled to the same treaty rights as Cherokees by blood, subject to the laws of the historical Cherokee Nation. *See Cherokee Intermarriage Cases*, 203 U.S. 76, 79-80 (1906).

[13] https://cherokeeregistry.com/william_holland_thomas.pdf

Yonaguska, prior to his death in 1839, advocated for his son to become chief of the Cherokee in North Carolina.[14]

These are just a few of the many examples of how ICWA's "Indian child" definition is, in no way, contingent upon any particular "ancestry."[15] Adopting the District Court's aforementioned conclusion, therefore, requires an indefensible disregard for numerous treaties, federal statutes, and much of the United States' own history.

Although the incorporation of non-Indian tribal citizens through treaties and congressional action no longer continues today, the citizenship that was first recognized by treaty or federal law is in no way diminished by the lack of what Plaintiffs-Appellees refer to as "Indian ancestry" on behalf of a tribal citizen. As the United States District Court determined in *Cherokee Nation v. Nash*, to

[14] *Id.*

[15] The historical Cherokee Nation also granted citizenship to members of other Tribes despite their lack of "Cherokee blood" or "ancestry." For instance, in 1843, the historical Cherokee Nation admitted a group of Creek Indians who had emigrated alongside "the several detachments of Cherokees that removed in 1838 and arrived in 1839 . . . and thereby bec[ame] a part of the Cherokee people and subject to the Cherokee laws . . . ." An Act, Admitting to the Right of Citizenship Certain Creek Indians, Nov. 13, 1843.

This and other acts granting Cherokee citizenship to citizens of other Tribal Nations was consummated under federal law in the 1866 Treaty between the United States and the historical Cherokee Nation, which granted full citizenship rights to citizens of other Tribal Nations living within the historical Cherokee Nation's borders. *See Nash*, 267 F. Supp. 3d at 120 ("the 1866 Treaty automatically makes incorporated tribes citizens of the Cherokee Nation") (citing 1866 Treaty). For instance, both the Delaware Tribe of Indians and the Loyal Shawnee entered into agreements with the historical Cherokee Nation and thus became Cherokee Nation citizens pursuant to the terms of the 1866 Treaty. *See* Articles of Agreement Between the Cherokee and Delaware, April 8, 1867 (approved April 11, 1867); *see also* Agreement Between Shawnees and Cherokees, June 7, 1869 (approved June 9, 1869).

conclude these individuals are no longer tribal citizens would require the United States to violate its own treaties, which once signed by the President and ratified by the Senate, become the "supreme Law of the Land." U.S. Const., art. VI.; *see also* 267 F. Supp. 3d at 140, enforced sub nom. *In re Effect of Cherokee Nation v. Nash*, No. SC-17-07, 2017 WL 10057514 (Cherokee Sup. Ct. Sept. 1, 2017). Accordingly, it cannot be said that tribal citizenship equates exclusively with "Indian ancestry."

Just as the United States' citizenry is not comprised of one group of people or race, the citizenry of the Cherokee Nation—as well as the Eastern Band, the UKB, and many other Tribal Nations—reflects the diversity of those who came from elsewhere to live within one of their borders. Tribal citizenship, therefore, is not based on "ancestry" alone—and certainly not on race—and ICWA's incorporation of citizenship into the Act's definition of "Indian child" is, therefore, entirely harmonious with the United States' historic treatment of Tribal Nations as separate, sovereign nations.

iv. The District Court Erred When It Relied On *Rice v. Cayetano* To Conclude That "Indian Child" Constitutes A Race-Based Classification.

Finally, the District Court erroneously concluded "[t]he specific classification at issue in this case mirrors the impermissible racial classification in *Rice* . . . ." Order at 25 (citing *Rice*, 528 U.S. at 499).

The Supreme Court's decision in *Rice* has no application here. In *Rice*, the Supreme Court considered the constitutionality of a "voting structure" implemented by the State of Hawaii that limited the right to vote to individuals who qualify as "Native Hawaiians," which the statute then defined to '"mean[] any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended . . . ."' *Rice*, 528 U.S. at 516 (quoting Haw. Rev. Stat. § 10–2 (1993)). As the Supreme Court noted, the definition itself uses the term "part of the races," and the Supreme Court determined this meant descendancy—or ancestry—is being used as a "proxy for race." *See Rice*, 528 U.S. at 514 (concluding the "voting structure in this case is neither subtle nor indirect; it specifically grants the vote to persons of the defined ancestry and to no others.").

That is not the case here. ICWA's "Indian child" definition makes no mention of "descendant" or "races." In contrast to the classification at issue in *Rice*, Congress rendered ICWA's application contingent upon the parent's citizenship in a sovereign Tribal Nation (a federally recognized Indian Tribe), not ancestry or descendancy from any particular person or group of peoples. In fact, Congress knowingly excluded individuals who are racially Indian but who are not citizens of a Tribal Nation, in line with the Supreme Court's holdings in *Mancari* and *Antelope*. *See Indian Child Welfare Act of 1978: Hearings on S. 1214 Before*

the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs, 95th Cong. 78 at 151 (1978) (noting ICWA's definition of "Indian child" excludes individuals with Native ancestry who are not citizens of a federally recognized Tribe); *see also* S. Rep. No. 104-288, at 4 (Congress refused to extend ICWA to "persons of Indian descent.").

Rice did not consider a federal statute's use of the term "membership in a Tribe" to define the scope of a statute that affirms the historic sovereign-to-sovereign relationship between the United States and Tribal Nations. This sovereign relationship, of course, precludes the application of the Supreme Court's equal protection jurisprudence in *Rice*. As the framers of the Equal Protection Clause noted, Tribal Nations and their citizens were "recognized at the organization of this Government as independent sovereignties[,]" and accordingly, they were excluded from the Fourteenth Amendment. *See* Cong. Globe, 37th Cong., 2d Sess. 1639 (1862).

So utilizing "Indian" to identify citizens of Tribal Nations does not constitute a race-based classification, and the Supreme Court's decision in *Rice* in no way precludes Congress from identifying "Indians" as citizens of Tribal Nations.

B. The Effectuation Of Treaties Constitutes A Compelling Governmental Interest That Survives Strict Scrutiny Analysis.

Even if identifying citizens of Tribal Nations as "Indians" could be considered a race-based classification—it cannot—it is clear that effectuating the United States' treaty trust duties and obligations to citizens of Tribal Nations constitutes a sufficiently compelling governmental interest to survive strict scrutiny.

The Fourteenth Amendment's framers made clear that the Amendment did "not annul the treaties previously made between [Tribal Nations] and the United States." S. Rep. No. 41-268, at 1. Because the framers of the Fourteenth Amendment made clear that the Amendment would not prohibit enforcement of these treaties, the Amendment's Equal Protection Clause cannot be interpreted in a way that eradicates Congress' ability to effectuate them—and to be sure, effectuating the treaties signed between Tribal Nations and the United States necessarily involves legislation tailored to citizens of Tribal Nations, or "Indians."

As the Supreme Court has noted, Congress derives its authority over Indian affairs, in part, from the treaties the United States signed with Tribal Nations. *See Kagama*, 118 U.S. at 384 (Congress derives its power to regulate Indian affairs in large part from "the treaties in which [the federal government] promised . . . the duty of protection."). The Fourteenth Amendment's preservation of these treaties, therefore, necessarily preserves the ability of Congress to effectuate the United

States' "promised . . . duty of protection," or what are more commonly referred to as Congress' trust duties and obligations. *See id.*; *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (as a result of the treaties signed with Indian Tribes, the federal government "charged itself with moral obligations of the highest responsibility and trust."); *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (the moral obligations grounded in treaties have evolved into "a general trust relationship between the United States and the Indian people."). Intrinsic to this trust duty and relationship is Congress' ability to legislatively refer to "Indians" as citizens of Tribal Nations rather than as a "race."

Thus, even if identifying citizens of Tribal Nations as "Indian" could be considered a race-based classification, legislation that effectuates the United States' treaty trust duties and obligations to Tribal Nations and their citizens easily constitutes a "compelling governmental interest" for purposes of any equal protection analysis. *See Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. at 673 n.20 ("constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians.'"). Accordingly, so "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 551-55.

This is precisely what Congress did in ICWA. In passing ICWA, Congress invoked its unique obligation towards the Indians, specifically its "authority as trustee," 25 U.S.C. § 1901(3), and accordingly, the use of "Indian" in ICWA serves a compelling governmental interest as it ensures that Congress is able to effectuate its trust duties to Tribal Nations and their citizens.

ICWA's legislative record reflects Congress's "considered judgment" that "[t]he U.S. Government, pursuant to its trust responsibility to Indian tribes, has failed to protect the most valuable resource of any tribe—its children." Task Force Four: Federal, State, and Tribal Jurisdiction, *Report on Federal, State, and Tribal Jurisdiction*, *Final Report to the American Indian Policy Review Commission* 87 (Comm. Print 1976). Ultimately, Congress determined the Tribes' continued existence as self-governing communities depends upon their children remaining as citizens and eventually becoming governmental leaders.

Congress, however, cannot effectuate the United States' trust duties and obligations if identifying individuals based on their citizenship in a Tribal Nation is suddenly rendered unconstitutional based on an interpretation of the Fourteenth Amendment that its framers never intended (and expressly rejected). The District Court's decision, therefore, not only threatens to vitiate the clear intent of the Fourteenth Amendment's framers, the decision also threatens to place the United States Congress in a precarious place where it cannot abide the U.S. Constitution's

mandate that treaties, once signed by the President and ratified by the Senate constitute the "supreme Law of the Land." U.S. Const., art. VI.

IV. CONCLUSION

For the aforementioned reasons, this Court should overturn the District Court's decision declaring ICWA unconstitutional.

Respectfully Submitted,

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January 16, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(g)(1) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. Local Rule 32.2, the brief contains 6,135 words. I relied upon my word processor to obtain the count and it is Microsoft Word 2013.

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Date: January 16, 2019

/s/ Bryan N.B. King
Bryan N.B. King

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

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Dated this 16th day of January, 2019.

/s/ Bryan N.B. King
Bryan N.B. King

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I, Bryan N.B. King, hereby certify that on this 16th day of January, 2019, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system. Based on electronic records currently on file, the Clerk of Court will transmit a Notice of Docket Activity to the following ECF registrants:

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