

Nos. 21-376, 21-377, 21-378, 21-380

In The
Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

CHAD EVERET BRACKEEN, ET AL.,
Respondents.

*On Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

**BRIEF OF CASEY FAMILY PROGRAMS AND
TWENTY-SIX OTHER CHILD WELFARE AND
ADOPTION ORGANIZATIONS AS *AMICI
CURIAE* IN SUPPORT OF FEDERAL AND
TRIBAL DEFENDANTS**

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[Additional Captions Listed on Inside Cover]

CHEROKEE NATION; ONEIDA NATION; QUINAULT
INDIAN NATION; MORONGO BAND OF MISSION INDIANS,
Petitioners,

v.

CHAD EVERET BRACKEEN, ET AL.,
Respondents.

STATE OF TEXAS,
Petitioner,

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

CHAD EVERET BRACKEEN, ET AL.,
Petitioners,

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DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

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INTEREST OF *AMICI CURIAE*¹

Amici are organizations with decades of experience in research, education, advocacy, and providing services related to child welfare and adoption, all designed to support children, parents, and families. *Amici* have firsthand experience developing and implementing best practices for child welfare decision-making. *Amici*'s perspective, based on decades of working directly with child welfare systems across the nation, is that the Indian Child Welfare Act (ICWA) serves the best interests of children covered by the Act and their families. Because ICWA's principles are critical to *amici*'s work safeguarding the welfare of children and families, many *amici* have filed briefs in other cases interpreting and applying ICWA. *See, e.g., Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). A list of *amici* follows.

Casey Family Programs is the nation's largest operating foundation focused on safely reducing the need for foster care. Casey has provided direct services to children and families involved in foster care for more than 50 years, consulting with state child welfare agencies in all 50 states, the District of Columbia, two territories, and sixteen tribal nations.

Adopt America Network is a national adoption charity that works to find adoptive families for the over 120,000 children waiting in U.S. foster care and

¹ Counsel of record for all parties consented to the filing of this brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

to support families united by adoption. Adopt America welcomes all families and is committed to achieving permanency for the children and youth in U.S. foster care.

The American Adoption Congress began in 1978, and officially formed in 1980 with the goal of championing adoptee rights, with emphasis on gaining universal access to original birth certificates for adoptees.

Ampersand Families provides permanency and adoption services to older youth and families who face barriers to equity in child welfare, and champions systemic changes that advance belonging, dignity and hope.

The Annie E. Casey Foundation is a private philanthropy that creates a brighter future for children by developing solutions to strengthen families and transform struggling communities into safer and healthier places. The Foundation aims to advance racial and ethnic equity and inclusion and build paths to opportunity so that all children can realize their potential.

Black Administrators in Child Welfare, Inc. is the nation's oldest member organization devoted to ensuring that the racial, ethnic, and cultural experiences of Black children and families are understood and served by child welfare agencies. BACW's membership consists of individuals and agencies that provide services to all children and families engaged in the child welfare system.

The Champion Foundation works to prevent youth homelessness. Child welfare system involvement is a

leading predictor of youth homelessness. The Foundation's advocacy extends to ensuring the child welfare system functions effectively so that young people have the support needed to prevent lifelong housing challenges.

The Center for Native American Youth at the Aspen Institute is a national education and advocacy organization that works alongside Native youth across the country to improve their health, safety, and overall well-being. The Center believes Native youth deserve to lead healthy lives and are worthy of a future rooted in their culture and resilience.

The Center for the Study of Social Policy is a national non-profit organization committed to ensuring that all children and youth served by public systems achieve positive outcomes. Central to this work is a focus on transforming child welfare systems to effectively serve children and families, including American Indian/Alaska Native children and families.

The Child Welfare League of America is a coalition of hundreds of private and public agencies that since 1920 has worked to serve children and families who are vulnerable. CWLA's expertise, leadership and innovation on policies, programs, and practices help improve the lives of millions of children across the country.

The Children's Defense Fund has worked for nearly five decades to ensure a level playing field for all children, especially poor children and children of color. CDF works collaboratively to achieve reforms to keep children safely with family; to seek safe reunification; and only when reunification is not appropriate, to move children to new permanent

families.

The Dave Thomas Foundation for Adoption is a national nonprofit public charity dedicated exclusively to finding permanent homes for the more than 140,000 children waiting in North America's foster care systems. The Foundation is committed to working for justice for all children, including Native American children impacted by ICWA.

FosterAdopt Connect works with children, youth, and families as they navigate the complexities of the child welfare system. With over 20 years of effectively working in the Kansas and Missouri foster care systems, we advocate for solutions that lead to better outcomes for our kids and the families that care for them.

FosterClub is the national network for young people who experience foster care. FosterClub believes when young people have the support they need and opportunity to drive change in their life, they become self-determined and do better. FosterClub also believes that when the system listens to young people, it does better.

Generations United is a national advocacy organization whose mission is to improve the lives of children, youth, and older adults through intergenerational collaboration, public policies, and programs for the enduring benefit for all. It is home to the National Center on Grandfamilies, a leading voice for families headed by grandparents, other relatives, and close family friends.

The National Alliance of Child Abuse Prevention Funds (commonly known as the Children's Trust Fund

Alliance) is the membership organization for state children's trust funds, with the primary goal of strengthening families to prevent child abuse and neglect. The Alliance's members invest about \$260 million annually in community-based prevention programs.

The National Association of Social Workers, established in 1955, is the largest association of professional social workers in the United States, with over 110,000 members. To improve the effectiveness of social work practice, NASW promulgates professional standards through the NASW Code of Ethics, provides continuing education, and develops policy on issues of importance to the profession.

The mission of the National Center on Adoption and Permanency is to transform child welfare practice from "child placement" to "family success." NCAP's multidisciplinary team advances this change by providing research, education, training, and other expertise that enables public and private agencies, organizational leaders, advocacy groups, and other professionals to empower, strengthen, and support all families.

Nebraska Appleseed Center for Law in the Public Interest is a legal advocacy organization fighting for justice and opportunity for all Nebraskans. Appleseed uses policy and legal advocacy to improve Nebraska's child welfare system, including helping to lead major reforms to Nebraska's Indian Child Welfare Act, and assisting in implementation, education, and enforcement.

The North American Council on Adoptable Children works to ensure that every child in foster

care has a permanent, loving family. NACAC supports adoptive, foster, and kinship families; educates parents and child welfare professionals; develops youth and parent advocates; and highlights child welfare best practices, including those codified in ICWA.

The Oregon Post Adoption Resource Center, a program of the greater regional Northwest Resource Associates, serves guardianship, kinship, foster, resource, and adoptive families statewide, including Tribal families and children engaging with the child welfare system.

Spaulding for Children is nationally and internationally recognized as a premier resource for innovative program development and evidence-informed curricula to improve the wellbeing of those affected by foster care. As a direct provider of services geared toward permanency since 1968, Spaulding understands the challenges faced by children in care, their families, and caregivers.

Think of Us operates as a research and design lab for child welfare, re-architecting the system so people with lived experience are at the center of designing, imagining, and building. Think of Us strategically engages projects across the ecosystem to catalyze radical transformation that bridges policy, practice, and people.

Voice for Adoption is a membership advocacy organization with a network of grassroots adoption and child welfare advocates throughout the country. VFA develops and advocates for improved adoption policies, and its members recruit and support adoptive families.

The W. Haywood Burns Institute is a black-led national non-profit with a diverse team of bold visionaries, working to transform the administration of justice. BI employs strategies and tactics to establish a community centered approach to the administration of human services anchored in structural well-being.

Yakima Valley Community Foundation works to create equity in education, health, and community engagement through programs and millions in grants annually. The Foundation is home to the Investing in Children Coalition—a collective of over 35 agencies representing work in early learning, K-12, health care, and human services, among others, advocating for families with young children.

Yarg Foundation promotes social equity by supporting Oregon communities to effectively create, steward, and adapt the systems that shape our lives. The five-year, \$6 million-plus Healthy Families Initiative funds policies and programs that improve social, emotional, and physical wellbeing of children and their families.

Amici agree with the United States and the Tribal Defendants that ICWA is constitutional and serves vital interests in protecting Indian children specifically, as well as their families and their tribes. *Amici* write separately to clarify for the Court, based on decades of experience and rigorous research, how ICWA is a context-specific application of child welfare practices that best serve *all* children, not only children who meet ICWA’s definition of “Indian child.”

In *amici*’s view, claims that ICWA harms children or makes it difficult for states to protect child

welfare are simply wrong. *See, e.g.*, Texas Br. 50-51; Br. of Goldwater Inst. et al. as *Amici Curiae* 4-6 (Goldwater Br.); Br. of Academy of Adoption and Assisted Reproduction Attorneys et al. as *Amici Curiae* 3-5 (Adoption Att'ys Br.). Far from being a unique burden or detriment to Indian children, the Act both embodies and has served as a model for child welfare policies that are best practices for all children.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is universal agreement that child welfare practices and standards should further children's well-being. That was Congress's objective in enacting ICWA. 25 U.S.C. § 1902. It is the objective of state child welfare systems. And *amici* work every day to achieve it. The question is, how? Experts now agree on one overriding and universally applicable principle: Children are best served by preserving and strengthening their family and community relationships to the fullest degree that safety allows. This principle encompasses all relationships that surround a child from birth, from the closest ties (birth parents, siblings), to extended family, and radiating out to the child's broader community and culture. Safety and best interests are the goal; appropriate relationship preservation is the gold standard way to get there.

Because of the tragic history of unjustified removals of Indian children from their families, Congress enacted ICWA to reduce the risk that Indian children would be needlessly separated from their families. ICWA's standards thus reflect the specific

context of Indian children's interests in maintaining familial ties and cultural connections to their tribes, as well as Congress's authority and responsibility related to tribal nations. But the standards have also served as a model for putting family integrity and community connection at the heart of removal and placement decisions for all children.

When ICWA's standards are closely adhered to, they work. No system or set of standards is perfect. Tragedy sometimes results in any child welfare system, whether cases are governed by ICWA's standards or other rules. But the data show that ICWA compliance achieves better outcomes: Children are reunified with their families more often than not. They are more often placed with extended family. And those children in need of a loving adoptive family are more likely to get one: American Indian and Alaska Native children have a lower rate of "aging out" of foster care without a permanent family than other children. These results are a testament to the effectiveness of the Act's focus on strengthening, and not unnecessarily severing, a child's birth ties.

ICWA's focus on family and tribal ties also accounts for the realities of the children it serves. Child welfare proceedings commonly involve older children who have been removed from tribally connected families in which they have lived their entire lives. Most often, children who have been removed are returned to their parents or placed with extended family. Adoptive parents play a crucial role in providing safe, permanent homes to children when needed. But adoption is the outcome in a minority of cases, and adoptions involving infants are an even

smaller share. ICWA safeguards the children it serves because the evidence-based best practice in child welfare is first to do everything possible to help families raise their children safely. When it is not possible to do so, the next best option is to place children where they can develop and maintain as many of their birth ties as possible.

ICWA more than exemplifies these best practices; it helped shape them. Its provisions on removal, termination of parental rights, and temporary and adoptive placements work in harmony to prioritize safely maintaining a child within the child's birth family first; placement with extended family next (even if they have no tribal connection); then placement with members of the child's broader community, including the child's tribe; and finally placement with another Indian family, a provision that reflects the inter-tribal relationships that are common for many families with Indian children. For temporary placements, moreover, ICWA requires children to be placed near their homes. The role of tribal placements within that framework is a context-specific application of the universal best practice of developing and preserving as many of a child's community connections as possible. These priorities have proved over decades of research and experience to serve the best interests of all children. But the Act does not insist on these preferences at all costs. Rather, it provides for case-specific departures upon a showing of good cause.

ICWA's strong commitment to preserving Indian children's family and community ties is essential to protecting their best interests. All children would

benefit from such a commitment. Although the evolution is slow, and the work is far from done, Congress and many states have begun to recognize as much, slowly changing child welfare standards to reflect the best practices embodied in ICWA—focusing on preserving family and community ties to achieve the best possible outcomes for children at risk.

ARGUMENT

ICWA’s Focus On Preserving Family And Community Ties Exemplifies Child Welfare Best Practices.

A. ICWA Is Consistent with Child Welfare’s Shift in Focus to Strengthening Families.

1. Over decades, child welfare practice has moved from a “child rescue” approach to a family preservation approach.

ICWA is a “child welfare” statute. Child welfare’s goals are “preventing child abuse and neglect by strengthening families, protecting children from further maltreatment, reuniting children safely with their families, and finding permanent families for children who cannot safely return home.” Child Welfare Info. Gateway, *How the Child Welfare System Works* 2 (2020), <https://tinyurl.com/v93vbuf9>.

The current focus on “strengthening families,” *id.*, emerged from decades of experience with a child welfare system that started with a very different

presumption: that children were best served by removing them from “unfit” families. Casey Family Programs, *The Evolution of Hope* 13 (2017), <https://tinyurl.com/yx4vyzkb>. In the 19th and early 20th centuries, private charities “pushed to ‘rescue’ children” by removing them from “unsuitable home[s].” *Id.* The “orphan train” program exemplified this approach, with private charities sending between 150,000 and 200,000 children westward from eastern cities to be placed mostly with farming families on the nation’s frontier. See Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 *Modern Am.* 3, 4, 7-8 (2009). Although called “orphan trains,” many of the children were not orphans but rather children “made into orphans by forced removal from their biological families to be placed out in other states,” often when families had temporarily relinquished children to the care of a charity due to poverty. *Id.* at 4-5.

Many of the children sent westward were from immigrant families, including from Ireland, Italy, and Germany; the largest proportion were Irish Catholic. See *id.* at 5; Stephen O’Connor, *Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed* 109, 168-69 (2004). In time, social work became a profession, and organizations like the Hull House began to provide “in-home assistance for families and children,” an effort which was supported by the federal Children’s Bureau, established in 1912. Trammell, *supra*, at 6. By the 1920s, orphan trains were ended because charities “develop[ed] programs to support destitute and needy families,” which “limit[ed] the need for intervention to place out children.” *Id.*

A shift toward family preservation had thus begun, long before ICWA's passage—but this shift moved slowly and was not applied equally to all families. See Casey Family Programs, *Evolution*, *supra*, at 13. Instead, as detailed by *amici* tribes, the federal government adopted a policy of removing Indian children from their families. Br. for Indian Tribes and Tribal Orgs. as *Amici Curiae* I.A (Tribal Amici Br.). And even after federal policy had changed, state child welfare practices continued to result in American Indian and Alaska Native families facing the “wholesale removal of Indian children from their homes” before ICWA's enactment. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); see Tribal Amici Br. I.B.

2. ICWA implements a strong family preservation approach to protect Indian children.

In response to the “alarmingly high percentage of Indian families [that] are broken up by the removal, often unwarranted, of their children,” 25 U.S.C. § 1901(4), Congress adopted strong family preservation standards within ICWA. ICWA was designed to address the stark crisis presented by removals of Indian children, in the unique context of Congress's “vital responsibilities in the field of tribal affairs.” *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1934 (2022). As an exercise of Congress's “plenary power ... in the field of Indian affairs,” *United States v. Lara*, 541 U.S. 193, 200 (2004), and its trust obligation to Indian children, Tribal Amici Br. I.A, Congress's choices within ICWA are crafted to address

the specific needs of Indian children to maintain ties with their nuclear and extended families and their tribal communities. Rather than departing from universal best practices, however, ICWA embodies a context-specific implementation of those universal best practices.

ICWA principally protects families from the unwarranted removal of children by providing procedural and substantive safeguards for termination of parental rights or any “foster care placement.”² Most of the children subject to such proceedings have lived in their family homes and communities for years before removal; the median age of children placed in foster care is 6.3 years old. *See* Child Welfare Info. Gateway, *Foster Care Statistics 2019* 8 (2021), <https://tinyurl.com/2nzej62f>.

ICWA protects these children by ensuring that states can remove them when necessary “to prevent imminent physical damage or harm,” 25 U.S.C. § 1922; 25 C.F.R. § 23.113, while at the same time providing that, in the absence of an emergency, courts may remove a child only upon finding “that the continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(e).

When there is no emergency, ICWA also bars a court from ordering removal unless “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the

² Defined to include “any action removing an Indian child from its parent ... where the parent ... cannot have the child returned upon demand.” 25 U.S.C. § 1903(1)(i).

breakup of the Indian family and these efforts have proved unsuccessful.” *Id.* § 1912(d). If a child is removed, active efforts must also be made to reunify the family. 25 C.F.R. § 23.2. Each case is different, but such efforts commonly include ensuring that siblings are kept together; visits between children and parents occur regularly; extended family members who can provide support are consulted; parents are able to access community resources for transportation, housing, financial, or medical services; and tribal resources that may assist the family are made available. *See id.*

If children must be removed temporarily from their parents, ICWA prioritizes placing them with kin or someone who can best help them maintain ties to their families and communities. 25 U.S.C. § 1915(b). These placements must be made in the most family-like setting that meets a child’s needs “within reasonable proximity to [a child’s] home.” *Id.* First preference is placement with “a member of the Indian child’s extended family.” *Id.* Second and third preferences are for a foster home licensed by the child’s tribe or an Indian foster home licensed by a non-Indian authority (e.g., states or local governments), subject to the reasonable proximity requirement. *Id.* In all cases, a different placement may be made based on good cause. *Id.*

ICWA’s adoption standards parallel the standards for foster care placement, but with a higher standard for terminating parental rights (beyond a reasonable doubt). *Id.* § 1912(f). As with foster care placement, the adoption provisions emphasize maintaining connections with extended family and a

child's tribe and community, while allowing for case-by-case deviations when appropriate. *Id.* § 1915(a).

3. ICWA's approach works.

Based on decades of experience in child welfare, *amici* know that ICWA's standards exemplify best practices applicable to all children, as implemented within the specific context of Indian children. *Amici* could not disagree more strongly with the view of Plaintiffs and their *amici* that ICWA harms Indian children. *See, e.g.*, Texas Br. 6-9. The empirical data show otherwise.

The data show that ICWA works when applied conscientiously. Just having ICWA on the books is not, of course, a panacea. Some state courts do a much better job applying ICWA than others. For example, in some states, American Indian or Alaska Native children are between 4 and 17 times more likely than other children to be placed in foster care; in other states, the rate of foster care placement is about the same for all children. *See* Casey Family Programs, *Native American/Alaska Native Children Overview 2* (2022), <https://tinyurl.com/32aym6t4> (Data Overview). Careful attention to ICWA's requirements matters because American Indian and Alaska Native children are more likely than other children to be involved in the child welfare system due to neglect, rather than abuse—a situation that is particularly susceptible to prevention and mitigation with the proper provision of services. *See* Att'y Gen.'s Advisory Cmte., *Ending Violence so Children Can Thrive* 87 (Nov. 2014), <https://tinyurl.com/4j9vmwat> (nearly 90% of American Indian and Alaska Native children involved in child

welfare system due to neglect and 21.2% for abuse, compared to 78% for neglect and 27.6% for abuse for all children) (total percentages exceed 100% because some cases involve both).³

When state courts focus on ICWA implementation, it helps keep children safely with their families. A recent study indicated that specialty state courts focused on ICWA compliance improved reunification rates from 48% to 53% and increased rates of placement with extended family from 18% to 28%. Capacity Building Ctr. for Cts., *ICWA Baseline Measures Project Findings Report* 17 (2020), <https://tinyurl.com/spa68nm>. Early tribal involvement cut in half the time for children to return home. *Id.* at 19. Tribal involvement often results in additional resources, including in-home services, parenting classes, and tribal benefits for children and families. David E. Simmons, Nat'l Indian Child Welfare Ass'n, *Improving the Well-being of American Indian and Alaska Native Children and Families through State-Level Efforts to Improve Indian Child Welfare Act Compliance* 5 (Oct. 2014), <https://tinyurl.com/y9ze2hfv>. In one county that implemented specialty ICWA courts, reunification rates nearly doubled in ICWA cases (from 38% to 68%). Pima Cnty. Juvenile Ct. Ctr., *Indian Child Welfare Act Court Data Brief* 5 (Mar. 2022), <https://tinyurl.com/ye28v4zu>.

³ It is difficult to provide a complete picture of outcomes in ICWA cases because existing federal data may be both over- or under-inclusive. The data capture only whether a state identified a child as being American Indian or Alaska Native, not whether a child's case was governed by ICWA.

National data show that efforts to enhance ICWA compliance have made a difference. For example, according to federal data, American Indian and Alaska Native children are more likely to be placed with kin than other children who enter foster care. Data Overview at 1. Moreover, when children cannot be reunified with their parents, fidelity to ICWA helps, not hinders, children's ability to find permanent families (*contra* Goldwater Br. 5-6). Specialty courts focused on ICWA implementation reduced by half the rate that children "aged out" of foster care without permanent families. Capacity Building Ctr. for Cts., *ICWA Baseline Measures Project, supra*, at 17. And American Indian and Alaska Native children have a lower rate of children aging out of foster care, compared to all other children. Data Overview at 4. These data indicate that far from being a burden foisted on Indian children against their interests, ICWA benefits children when courts closely adhere to its standards. ICWA furthers the goals at the heart of every child welfare program: more children safely reunified with their parents or placed with extended family, thereby maintaining connections with their communities and cultures, all without impeding the formation of new permanent families when needed.

B. ICWA Exemplifies Child Welfare Best Practices.

ICWA is vitally important to serve the needs of Indian families. It works by implementing a family-preservation and community-focused framework that research and experience show leads to the best outcomes for children. Although grounded in the

specific context of Indian communities, ICWA has also been a beacon for the entire child welfare field. In their work, *amici* seek to follow similar practices and encourage child welfare agencies to adopt them for all children.

1. *Extensive research supports ICWA’s provisions promoting and maintaining family ties.*

a. Evidence-based research and operational experience confirm that, when possible to do so safely, children are best served by staying with their families. Therefore, the first priority in any effective child welfare system is to limit the separation of children from parents, and to encourage reunification after a separation has occurred. *See, e.g.,* Kristine Nelson et al., *A Ten-Year Review of Family Preservation Research* 1 (2009), <https://tinyurl.com/4953nvj9>; Annie E. Casey Found., *Every Kid Needs a Family* 11 (2015), <https://tinyurl.com/9d74zk7k> (“Whenever possible, children should remain at home with their parents or with a caring relative[.]”). Removal is traumatic. Amy M. Salazar et al., *Trauma Exposure and PTSD Among Older Adolescents in Foster Care*, 48 *Soc. Psychiatry & Psychiatric Epidemiology* 545, 547, 550 (2013). In *amici*’s firsthand experience, children who have been removed from their biological family suffer significantly because their sense of security and belonging are injured.

Therefore, well-functioning child welfare systems provide robust services to prevent the separation of children from their parents. Nationally, more than 75% of child maltreatment cases involve neglect, not

abuse. U.S. Dep't of Health & Hum. Servs. (HHS), *Child Maltreatment 2020* xi (2022), <https://tinyurl.com/2p8b2ahx>. Financial and related social services can often help families remedy and prevent potential neglect. The recent Family First Prevention Services Act reflects Congress's judgment—consistent with ICWA and the evolving child welfare consensus—that providing such services is the best first option for helping children and their families thrive. *See* Pub. L. No. 115-123, § 50702, 132 Stat. 64, 232 (2018) (enabling states to use federal funds to “prevent foster care placements through ... mental health and substance abuse prevention and treatment services, [and] in-home parent skill-based programs”); Child Welfare League of America (CWLA), *Standards of Excellence for Services to Strengthen and Preserve Families with Children* 20 (2003) (recognizing the importance of “provid[ing] [parents] with services and support” so that “children c[an] be safely protected and treated within their own homes”). In line with these best practices, ICWA has a particularly strong emphasis on “active efforts” to provide remedial and rehabilitative services. 25 U.S.C. § 1912(d). Many states share ICWA's emphasis on family preservation, and federal law encourages that approach for all children, with good reason. *Br. for Nat'l Ass'n of Counsel for Children et al. as Amici Curiae* II.A (NACC Br.).

Plaintiffs and their *amici* describe ICWA's family-preservation provisions as harmful to children, contending that ICWA's active efforts and removal standards are too onerous. *See* Texas Br. 6-7; Goldwater Br. 4-5. But ICWA makes clear that active

efforts are not required in emergency proceedings. 25 U.S.C. § 1922. And although the “active efforts” requirement is different from the “reasonable efforts” standard under state law, 81 Fed. Reg. 38,777, 38,791 (June 14, 2016), ICWA’s requirement of “active efforts” to keep families together protects children, rather than harming them, by avoiding their unnecessary removal from families who can care for them safely with support. Plaintiffs’ *amici* complain that ICWA’s “active efforts” provision lacks a facial exception for “aggravated circumstances,” unlike Texas’s “reasonable efforts” requirement, Tex. Fam. Code § 262.201(g)(2); *see* Goldwater Br. 4-5. But the Bureau of Indian Affairs has made clear that the analysis of “active efforts” can consider aggravated circumstances, along with other “facts and circumstances of the case.” 25 C.F.R. § 23.2; *see* 81 Fed. Reg. at 38,814.

Furthermore, ICWA’s removal standard (requiring evidence of likely serious harm, 25 U.S.C. § 1912(e)) reflects the well-documented damage that removal itself causes to children. *See* 65 Fed. Reg. 4051, 4052 (Jan. 25, 2000) (“[T]here is a profound effect on the child and family once a child is removed from home, even for a short time, that cannot be undone.”); Monique B. Mitchell & Leon Kuczynski, *Does Anyone Know What is Going On? Examining Children’s Lived Experience of the Transition into Foster Care*, 32 Child & Youth Servs. Rev. 437, 438 (2009). Substantiated cases of abuse will normally result in removal, while the serious-harm standard helps ensure that children are not unnecessarily removed, particularly in cases of neglect. This avoids

the trauma of unnecessary removal and leads to better outcomes. *See, e.g.*, Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 *Am. Econ. Rev.* 1583 (2007) (finding for marginal removal decisions, where there was disagreement among case workers, children who remained at home had better long-term well-being than children who were removed).

Although ICWA's removal standard is distinct, it embodies the best practice of recognizing the harm that removal causes, and some states now expressly require courts to consider the harm of removal alongside potential harm within the family at different points in the process. *See, e.g.*, Alaska Stat. § 47.10.080(a); N.M. Stat. § 32A-4-21(B)(2); *Nicholson v. Scopetta*, 820 N.E.2d 840, 852 (N.Y. 2004); D.C. Super. Ct. R. Neglect & Abuse Proc. 13(e).

b. Unfortunately, it is not always possible to avoid removing children from their parents. If children must be removed (whether temporarily or for permanent adoption), the child welfare best practice is to place them with extended family. *See* Nat'l Council of Juvenile and Family Ct. Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 11 (2000), <https://tinyurl.com/jfbc5hxx> ("An appropriate relative who is willing to provide care is almost always a preferable caretaker to a non-relative."); CWLA, *Standards of Excellence for Adoption Services* § 1.10 (2000) ("extended family members" are "first option").

Kinship care "maximizes a child's connection to his or her family." CWLA, *Standards of Excellence for Adoption Services*, *supra*, at § 8.24; *see also* Tiffany

Conway & Rutledge Q. Hutson, *Is Kinship Care Good for Kids?* 2 (2007), <https://tinyurl.com/2bp6deck> (finding research supports kinship care). The benefits to children of maintaining parental ties is one reason that most states (including Texas) provide for kinship guardianship. See Tex. Admin. Code § 700.1027(5); Child Welfare Info. Gateway, *Kinship Guardianship as a Permanency Option* 2 (July 2018), <https://tinyurl.com/5k8ywyda>. Because this “usually does not require termination of parental rights, the child is able to maintain family connections while gaining the stability of a permanent home with a relative caregiver.” Child Welfare Info. Gateway, *Kinship Guardianship*, *supra*, at 2.

ICWA adopted the beyond-reasonable-doubt standard for termination of parental rights to mitigate the particular crisis facing Indian families. But the high priority ICWA places on parental relationships has helped foster an evolving understanding that all children can often achieve the permanency they need through the kinship guardian process without formally severing parental ties—and be better off for it.

As for temporary kinship care, among other beneficial outcomes, children are less likely to experience multiple placements. See Annie E. Casey Found., *Variations in the Use of Kinship Diversion among Child Welfare Agencies* 8 (2019), <https://tinyurl.com/bdaruud> (“[K]inship care placements ... appear more stable than placements in non-kin care.”). Additionally, kinship care results in fewer behavioral problems, fewer mental health disorders, and better well-being, while minimizing trauma. Marc

A. Winokur et al., Cochrane Database Sys. Rev., *Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment* (2014).

With ICWA as a model, all states (including Texas) now agree that preference should be given to extended family placements. See NACC Br. II.A. Moreover, all states accepting federal funds must exercise due diligence in identifying a child's relatives, 42 U.S.C. § 671(a)(29), and about half of states have adopted their own diligent-search requirements under state law, see Child Welfare Info. Gateway, *Placement of Children with Relatives* 2 (2018), <https://tinyurl.com/2nhj2uz9> (26 states). Although Individual Plaintiffs characterize even the extended-family preference as discriminatory simply because tribes (like states) can define who counts as family, see Individual Plaintiffs' Br. 41, kinship placement is a universally accepted best practice that applies to a child's family members regardless of their membership in or association with any tribe.

2. ICWA's community placement provisions also implement best practices.

When extended family members are not available, ICWA next looks to a child's web of connections beyond relatives: the child's community. In the context of Indian children, a child's community includes his or her tribe or related tribes. 25 U.S.C. § 1915(a), (b); see Child Welfare Info. Gateway, *Permanency and the Child and Family Services Reviews*, <https://tinyurl.com/6xjdcfpa> (Permanency

Reviews) (describing child's connection to his tribe among other community connections, including child's faith community). The tribal placement preferences within ICWA address the specific needs of Indian children, but they do not depart from universally applicable best practices—they implement those practices in a context-specific way. In *amici's* firsthand experience, a child who has been removed from her biological family can suffer deep rifts in her sense of identity and connection to a shared history. A community-focused approach to child welfare recognizes the importance of maintaining a child's connection to a broader network of caring adults, her culture, and familiar settings. ICWA recognizes the context-specific need to maintain a child's connection with her tribe, but it has served as a universal model for prioritizing placements connected to a child's community. Doing so serves several interests.

First, placement within a child's community or network serves the interest of stability. Out-of-home placements are very disruptive, and community placement can help the child to "maintain a continuity of schools, providers and participation in their community." Casey Family Programs, *Child and Family Services Practice Model* 10 (2018), <https://tinyurl.com/2p8xb4eb> (Casey Practice Model). "Keeping children within their own community and relying on the community for services and support have been part of good child welfare practice for decades." Child Welfare Info. Gateway, *Community-Based Resources: Keystone to the System of Care 2* (2009), <https://tinyurl.com/vbed9aau>. Despite its arguments against ICWA here, Texas generally

recognizes the benefit of community placements. *See* Tex. Dep’t of Fam. & Protective Servs., *Community-Based Care* (Apr 2022), <https://tinyurl.com/3phae7jy> (implementing new programs to ensure that children are not placed “outside of their communities, leaving behind family, friends, schools, churches, homes, and support systems”).

Second, placement within the child’s larger community—and specifically seeking out caring adults who may be unrelated, but still have significant ties with the child—supports the maintenance of a network of relationships with caring adults. A model child welfare system will assess a child’s “family friends ... and neighbors,” along with members of a child’s tribe or clan where applicable, “to determine their willingness and ability to provide care and protection” before making a more removed placement. CWLA, *Standards of Excellence for Kinship Care Services* § 2.8 (2000). Here again, ICWA has served as a guiding force, and more than half of states now provide a preference for “fictive kin”—unrelated adults who are known to the family, have a relationship with the child, and are willing and able to provide a home. *See* Child Welfare Info. Gateway, *Placement of Children with Relatives*, *supra*, at 2; Sixto Cancel, *I Will Never Forget That I Could Have Lived With People Who Loved Me*, N.Y. Times (Sept. 16, 2021), <https://tinyurl.com/625dctpm> (describing personal experiences with multiple foster care placements and urging child welfare systems to “expand[] the legal definition of kinship to encompass more of the loving adults who are in youths’ lives already” in order to “stop needlessly extracting youths

from their communities”); Richard A. Perry, *Relative Preference, Emotional Attachments, and the Best Interest of the Child in Need of Assistance*, 50 U. Balt. L.F. 83, 93 (2020) (placement with fictive kin whom the child “knows and feels comfortable with” can “lessen[] the trauma of the youth’s placement out of the home”).

Even when no single “fictive kin” is identified, it is a best practice to foster relationships with a core group of adults upon whom a child can rely for different forms of support, mentoring, and guidance—such as neighbors, family friends, teachers, or members of the child’s church or other community organization. See Annie E. Casey Found., *What Is Permanence?* (Feb. 6, 2012), <https://tinyurl.com/7ur36jmr>. This creation of a network of caring adults is sometimes called relational permanency. Maintaining “[c]onnection to family, community and culture creates relational permanency that ensures there are adults who are reliable and committed to the youth throughout their life.” Casey Practice Model at 7. The network that surrounds and protects a child can be drawn from caring adults who share any number of bonds or ties with a child, including religious or cultural traditions.

Relational permanency is essential for all children, especially those for whom efforts to secure permanency have failed as they age out of the foster care system without a legal family. It is so important that it is one of two permanency metrics the federal government uses to evaluate all child welfare systems. See *Permanency Reviews*, *supra*. The metric evaluates “whether, during the period under review, concerted efforts were made to maintain the child’s connections

to his or her neighborhood, community, faith, extended family, Tribe, school, and friends.” *Id.* Success at maintaining connection to community and culture is measured because such connection is essential for children to thrive. “Communities provide the context for daily life, the cultural lens for translating information and experience, and the network of supports and connections that help children and young people overcome difficulties and become contributing members of society.” CWLA, *Standards of Excellence for Services to Strengthen and Preserve Families with Children, supra*, at 2.

ICWA helps ensure that Indian children will not be deprived of these important community and cultural ties. In most cases, a child’s tribe will be part of the community in which they had lived before they were removed from their families, and the child will have developed relationships with other members of the tribe. Moreover, other tribes, beyond a child’s particular tribe, often share a social or cultural bond indicative of community, and, as the Children’s Bureau has recognized, placements serving a child’s cultural needs are important for all children. HHS, *Child Welfare Policy Manual* § 4.3, Question 3, <https://tinyurl.com/v544949v>. Texas acknowledges (Br. 48) that “[t]here may be cultural overlap between tribes,” but objects because shared cultural traditions are not an express factor in the placement preferences. ICWA’s placement preferences effectively presume that cultural overlap is likely. If the preferences are inconsistent with a child’s established relationships, however, a different placement can be made based on good cause. 25 U.S.C. § 1915(a)-(b). ICWA implements

the child welfare best practice of within-community placements and reflects the commonsense notion that, most of the time, a child's community will include their tribe, as well as other related tribes.

3. ICWA's guided decision-making framework is an essential component of best practices.

Successful implementation of these data-informed best practices requires a structured framework that guides placement determinations while at the same time permitting contextual, child-specific decision-making in every case. ICWA provides that framework by requiring that placements adhere as much as feasible to evidence-based child welfare priorities, while always permitting courts to make case-specific departures for good cause. *See* 25 U.S.C. §§ 1915(a)-(b). Plaintiffs' *amici* argue this structure defeats the pursuit of children's best interests, and that courts should simply seek the "best interests" of children in every case, without any tethering presumptions or guidelines. *See, e.g.,* Goldwater Br. 28-29; Br. for Pacific Legal Found. et al. as *Amici Curiae* 18 (Pacific Legal Br.).

But a structured system that balances evidence-based presumptions with individualized consideration is essential for quality outcomes. No well-functioning child welfare decision-making system operates in an open-ended, no-guardrails manner. Many states provide decision-making criteria that must be considered in evaluating the "best interests of the child." *See* NACC Br. II.A. Child welfare decision-

making is complex, and disputes frequently are emotionally charged. Different parties may each seek to serve the best interests of the child but nonetheless vehemently disagree about what that interest is. *See* Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations*, 6 Psychol. Sci. Pub. Int. 1, 7-8 (2005) (describing the “absence of scientific support” for many assessments designed to identify the best interests of children). A wholly open-ended system, that does not prioritize family integrity and community ties, invites a return to the days when courts unthinkingly presumed that an Indian child’s best interests were served by placement with a middle class, non-Indian family.

Of course, individualized consideration of each child’s circumstances is critical, and ICWA’s placement preferences fully account for that. 25 U.S.C. §§ 1915(a)-(b). Plaintiffs’ and their *amici*’s experiences demonstrate that individualized consideration prevails: several children involved in this case are in adoptive placements that do not fall within ICWA’s placement preferences. *See* Individual Plaintiffs Br. 9, 11; Pacific Legal Br. 2. In 2020, 52% of adoptive placements of American Indian or Alaska Native children were with families who did not identify as American Indian or Alaska Native. Data Overview at 4. Some of these may be kinship placements—which do not depend on any tribal affiliation—but the data suggest that children’s placements are being driven by individual considerations when good cause warrants.

Plaintiffs’ and their *amici*’s principal objection to the good cause standard is that it does not permit consideration of attachment and bonding between

children and their temporary caregivers. *See* Individual Plaintiffs Br. 43; Adoption Att’ys Br. 5. But the rule does not bar all consideration of attachment. Rather, it bars finding good cause based “solely” on “ordinary attachment and bonding” that “flowed from ... a non-preferred placement *that was made in violation of ICWA.*” 25 C.F.R. § 23.132(e) (emphasis added). As this Court has recognized, even though separation following a non-compliant placement may “cause considerable pain,” the answer is to follow “the mandate of the ICWA” from the start, in which case “much potential anguish might [be] avoided.” *Holyfield*, 490 U.S. at 53-54. The “law cannot be applied so as automatically to reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.” *Id.* at 54.

The Bureau of Indian Affairs guidelines reflect a nuanced approach to this issue. The Guidelines advise courts to “carefully consider ... a relationship with a non-preferred placement” and balance that against “the long-term benefits to a child that can arise from maintaining connections to family and the Tribal community.” U.S. Dep’t of the Interior, *Guidelines for Implementing the Indian Child Welfare Act* § H.5 (Dec. 2016), <https://tinyurl.com/yyyx439> (Guidelines). *Amici* recognize that it can be difficult for children to shift from one placement to another. But, as recognized by the Guidelines, the concepts of bonding and attachment are also sometimes given undue weight. *See* David E. Arrendondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness*, 2 J. Ctr. for Fam. Children & Cts. 109, 110-111 (2000)

(discussing the ways that bonding and attachment theory “may mislead courts”). The way to avoid disruptive transitions is to mandate, from the outset, careful adherence to procedures that minimize errors in initial placements, and to “promote connections and bonding with extended family or other preferred placements” during a temporary placement. Guidelines § H.5.

Ultimately, no decision-making system is perfect, and *amici*—like all Americans—feel deeply the pain when children suffer harm that perhaps could have been prevented by different child welfare decisions. But any time a child is in circumstances where intervention by a child welfare agency is needed, it can give rise to tragedy. Such tragedies have occurred in ICWA and non-ICWA child welfare cases alike. The best way to avoid tragedies is to rely on evidence-based best practices, not retreat from them.

C. ICWA’s Standards Have Led the Way in Federal Efforts to Improve Child Welfare.

ICWA provides “minimum Federal standards” for state courts to apply in the exercise of the federal government’s “plenary power over Indian affairs.” 25 U.S.C. §§ 1901, 1902. It is particularly protective of Indian families because Congress was responding to a crisis involving the unwarranted removal of Indian children from their families. *Id.* § 1901. But just as it has served as a model for the child welfare field, ICWA has inspired further congressional efforts to encourage states to put family preservation first for all children, and to provide support for states to do so.

Four years before ICWA became law, Congress enacted the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974). That Act required states accepting federal welfare funds to establish child abuse reporting and investigation systems. *Id.* Not long after, Congress became concerned that too many children were being removed from their families unnecessarily, with inadequate effort to reunify families. In 1980, two years after ICWA, Congress enacted the Adoption Assistance and Child Welfare Act, which required states accepting federal funding to make “reasonable efforts” to “preserve and reunify families.” 42 U.S.C. § 672(a)(2)(A)(ii); *id.* § 671(a)(15). In 2008, Congress added the federal provisions encouraging kinship placement for all children. *Id.* § 671(a)(19), (29).

In recent years, Congress has continued to amend federal law to bring it into closer conformity with the family-preservation and community-focus principles embodied in ICWA. In 2018, for example, Congress enacted the Family First Prevention Services Act, which funds programs designed to prevent the break-up of families. See FamilyFirstAct.org, *About the Law*, <https://tinyurl.com/2p9dffka>. And the federal Children’s Bureau recently partnered with several states and *amici* to strengthen families by “proactively support[ing] child and family well-being” and preventing “unnecessary family separation.” HHS, *First-of-its-Kind National Partnership Aims to Redesign Child Welfare Into Child- and Family Well-Being Systems* (Sept. 9, 2020), <https://tinyurl.com/y7zwcsk8>. Many states have also changed their child welfare systems to hew more

closely to the best practices embodied in ICWA by focusing on preserving and strengthening families. Several have recognized ICWA's importance for Indian children by enacting state ICWA laws, some of which provide greater protections for Indian children than federal ICWA. *See* NACC Br. II.B.

These efforts are not complete, and they cannot stand in for ICWA's vital protections for Indian children and families. But they illustrate how ICWA has served as a lodestar for the evolution of child welfare practice more generally. ICWA protects children's family and community ties not because Congress discounted the best interests of Indian children, but because Congress concluded that such standards were essential to protect them, as they protect all children. *Amici's* experience has borne out the wisdom of Congress's judgment.

CONCLUSION

ICWA should be upheld.

Respectfully submitted.

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