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.,
v.
CHAD EVERET BRACKEEN, ET AL.

CHEROKEE NATION, ET AL.,
v.
CHAD EVERET BRACKEEN, ET AL.

STATE OF TEXAS,
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

CHAD EVERET BRACKEEN, ET AL.,
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE PROJECT ON FAIR REPRESENTATION AS AMICUS CURIAE IN SUPPORT OF TEXAS AND BRACKEEN, ET AL.

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INTEREST OF AMICUS CURIAE

The Project on Fair Representation is a public-interest organization dedicated to equal opportunity and racial harmony.[1] The Project works to advance race-neutral principles in education, government action, and voting. Through its resident and visiting academics and fellows, the Project conducts seminars and releases publications about the Voting Rights Act and the Equal Protection Clause. The Project has been involved in several cases before the Court involving these important issues. *E.g.*, *Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 579 U.S. 365 (2016); *Evenwel v. Abbott*, 578 U.S. 54 (2016); *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009). The Project also has submitted amicus briefs in cases before the Court on these issues. *E.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. The Inclusive Cmty. Project*, 576 U.S. 519 (2015); *Perry v. Perez*, 565 U.S. 388 (2012); *Riley v. Kennedy*, 553 U.S. 406 (2008); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

The Project has a direct interest in this important case. The Project opposes government-imposed racial preferences, including racial preferences in state-administered adoption proceedings. Racial preferences,

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties consented to the filing of this brief.

like those mandated by the Indian Child Welfare Act, contradict the Project's principles and the American ideal of individual equality.

SUMMARY OF THE ARGUMENT

The Indian Child Welfare Act ("ICWA") requires that, when States determine the "adoptive placement of an Indian child under State law, a preference shall be given" to placing the child with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families," instead of with non-Indian adoptive parents. 25 U.S.C. §1915(a). This provision forces States to place Indian children with Indian strangers, often over the objection of their birth parents and their foster parents who have nurtured them from an early age. In other words, but for the race of the child and the race of the adoptive family, such disruptive and traumatizing forced separations wouldn't happen.

The Fifth Circuit correctly affirmed the district court's conclusion that ICWA's "other Indian families" placement provision is unconstitutional. Pet. App. 4a. But it nevertheless upheld the statute's other two placement preferences. Pet. App. 4a. According to the eight-judge Dennis opinion, ICWA's placement preferences were subject only to rational basis review because the statute's "Indian child" definition is a "political classification." Pet. App. 154a.[2] And the placement provisions survived rational basis review, those judges believed, because they had a "rational

[2] Citations to Pet. App. are to the petition appendix in *Texas v. Haaland*, No. 21-378.

connection to Congress's goal of fulfilling its broad and enduring trust obligations to the Indian tribes." Pet. App. 156a-57a.

That holding was wrong. ICWA classifies individuals not based on their political or tribal affiliations, but based on their race. Section 1915(a) makes an Indian child's race the sole criterion in determining that child's adoptive placement, elevating race as a trump card over compelling factors such as the child's best interests and the birth parents' wishes. "[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications" such as these "be subjected to the most rigid scrutiny." *Fisher I*, 570 U.S. at 309 (cleaned up). ICWA cannot survive that review.

ICWA's classifications often result in court orders forcibly depriving Indian children of the homes where they secured attachments and were nurtured, cared for, and loved for most of their young lives, solely because they are Indian and the foster families seeking to adopt them are not. This not only causes grievous harm to Indian children and their adoptive families, but also flagrantly violates the foundational constitutional principle of equal treatment. The Court should affirm in part and reverse in part.

ARGUMENT

I. Section 1915(a)'s classifications are racial, not political.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any

person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. This safeguard applies equally to the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). The "central mandate" of equal protection "is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause."). "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *see also Loving v. Virginia*, 388 U.S. 1, 11 (1967). As a consequence, the Constitution requires the law to treat each person as an individual and not simply as a member of a racial group. *See Miller*, 515 U.S. at 911.

The right to equal protection of the laws, "by its terms, [is] guaranteed to the individual," *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), and obtains irrespective of "the race of those burdened or benefited by a particular classification," *Croson*, 488 U.S. at 472. In other words, regardless of the basis for the discrimination or the race of the person disadvantaged, disparate treatment "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw*, 509 U.S. at 643; *see also Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 230 (1995) ("[A]ny individual suffers an injury when he or she is disadvantaged by the government because

of his or her race, whatever that race may be."). These protections apply to children as well as adults. *See In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."); *e.g.*, *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 711 (2007).

The Court has permitted different treatment of Indians when it is rooted in the federal government's "unique" treaty obligations, which "confer enforceable special benefits on signatory Indian tribes." *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979). But those cases are strictly limited to matters concerning "the internal affair[s] of a quasi-sovereign." *Rice v. Cayetano*, 528 U.S. 495, 519-20 (2000). When an Indian tribe's self-governance or property is at issue, classifications drawn along tribal lines are "political rather than racial in nature" because they are tied to the balance of power between the federal government and a quasi-sovereign. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

Section 1915(a)'s classifications cannot be characterized as "political in nature" because the statute is unrelated to tribal self-governance. It does not implicate internal matters of a quasi-sovereign, such as the prosecution and investigation of crimes committed on reservations by Indians domiciled there, *United States v. Antelope*, 430 U.S. 641, 645-47 (1977); the administration of an agency charged with governing the lives and activities of Indians, *Mancari*, 417 U.S. at 554; or even the adoption of Indian children registered with a reservation and residing on tribal land, *Fisher v. District Court of Sixteenth Judicial Dist. of*

Mont., 424 U.S. 382, 390-91 (1976). Adoption proceedings concerning children that neither reside on, nor are domiciled on, tribal land instead "are the affair[s] of the State of [Texas]." *Rice*, 528 U.S. at 520; *see also In re Santos Y.*, 92 Cal. App. 4th 1274, 1321 (2d Dist. 2001) (holding that because "child custody or dependency proceedings [do not] involve uniquely Native American concerns," ICWA's classifications are racial, not political).

The classifications in §1915(a) are explicitly stated in terms of race, void of any ties to a child's tribal identity or the sovereignty of any tribe. The statute applies to *any* "Indian child"—regardless whether the child is domiciled or residing on a reservation, and regardless whether the child is even a member of an Indian tribe.[3] And it gives preference to *any* Indian family—regardless whether they share a tribal identity or allegiance with the child. *Cf.* 25 U.S.C. §1911(a) (limiting a grant of exclusive jurisdiction to proceedings "involving an Indian child *who resides or is domiciled within the reservation*" (emphasis added)); *id.* §1922 (discussing emergency removal of "an Indian child *who is a resident of or is domiciled on a reservation*" (emphasis added)). In fact, state and federal statutes that forbid racial discrimination in adoption proceedings expressly exempt cases

[3] The placement preferences of §1915(a) apply not only to Indian children who are "member[s] of an Indian tribe," but also to those who are "eligible for membership in an Indian tribe and [are] the biological child[ren] of … member[s] of an Indian tribe." 25 U.S.C. §1903(4). As Judge Duncan correctly noted, "[t]his means ICWA applies to a child who is not, and may never become, a tribe member." Pet. App. 273a.

administered under ICWA, proving the statute draws racial lines. *See, e.g.,* Tex. Fam. Code Ann. §162.015; 42 U.S.C. §1996(b)(3). Section 1915(a) simply "do[es] not regulate Indian tribes as tribes." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 665 (2013) (Thomas, J., concurring).

Any other conclusion would contradict this Court's decision in *Adoptive Couple*. There, a state court denied a couple's attempt to adopt a baby girl, who was "3/256 Cherokee," and instead awarded custody to her Cherokee father, "whom she had never met." *Id.* at 645-46. The Court read ICWA not to cover this situation. *Id.* at 646-56. In rejecting the applicability of §1915(a), the Court relied on constitutional avoidance. Reading ICWA to disadvantage children "solely because an ancestor—even a remote one—was an Indian," the Court explained, "would raise equal protection concerns." *Id.* at 655-56. The dissent thought the majority's invocation of equal protection contradicted precedents, including *Mancari*, holding that "classifications based on Indian tribal membership are not impermissible racial classifications." *Id.* at 690 (Sotomayor, J., dissenting). But the majority did not ignore *Mancari*; it understood that the principle in that case is narrow and cannot be extended to statutes, like ICWA, that classify individuals based on their ancestry. The Court invoked equal protection in *Adoptive Couple* because it saw §1915(a) for what it is: a racial, not a political, classification.

II. Section 1915(a) cannot withstand strict scrutiny.

Because ICWA's classifications are based on race, they "are constitutional only if they are narrowly tailored measures that further compelling government interests." *Adarand*, 515 U.S. at 227. ICWA fails this test.

A. Section 1915(a) serves no compelling government interest.

The "government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. ICWA was enacted in response to "rising concern[s] in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Adoptive Couple*, 570 U.S. at 642 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). To the extent §1915(a)'s racial preferences are part of a "seem[ingly] benign" effort to remedy an injury arising from direct discrimination, *Fisher I*, 570 U.S. at 307, the government must justify their use by producing the detailed findings "necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510.[4] "Absent such findings, there

[4] To the extent the government's interest is remedying "societal discrimination," the use of racial classifications is unjustified and cannot survive strict scrutiny. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics." *Id.*

Although Congress made some findings regarding the high adoption rates for Indian children removed from Indian homes, nothing in the record suggests that these adoptions were the product of racial discrimination. *See Miss. Band of Choctaw Indians*, 490 U.S. at 32-36 (summarizing congressional findings); 25 U.S.C. §1901. And more importantly, there is no "evidence for [the] conclusion that remedial action [continues to be] necessary" nearly forty years later. *Croson*, 488 U.S. at 510. All "race-conscious" remedial schemes of government must have "a termination point" that serves to assure "all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (quoting *Croson*, 488 U.S. at 510). In the end, ICWA is without a "strong basis in evidence for [the] conclusion that remedial action was [or is] necessary." *Croson*, 488 U.S. at 500. It is unconstitutional for this reason alone.

B. Section 1915(a) is not narrowly tailored.

Even if the justifications for ICWA were compelling, §1915(a)'s racial preferences are not narrowly tailored to serve that interest. To be "narrowly tailored," the "means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw*, 517 U.S. at 908 (cleaned up). The government must demonstrate, among other things, that "race-neutral

alternatives that are both available and workable do not suffice." *Fisher II*, 579 U.S. at 377 (cleaned up).

Section 1915(a) is not narrowly tailored because it is overly broad and fails to tie the classifications to tribal affiliation and domicile, which would bring them closer to being political instead of racial. The statute's mandate applies to all Indian children, regardless whether they are domiciled or residing on a reservation, and regardless whether they are even a member of an Indian tribe. 25 U.S.C. §1915(a); *see also id.* §1903(4). Further, the statute gives preference to *any* Indian family, even members of a wholly separate tribe who lack an affiliation or connection to the child. *See id.* §1915(a). Other provisions of ICWA demonstrate that Congress is perfectly capable of tailoring statutory language to tribal interests in a narrower fashion than §1915(a)'s sweeping racial preferences. *See, e.g.*, *id.* §1911(a) (providing for exclusive jurisdiction over "any child custody proceeding involving an Indian child *who resides or is domiciled within the reservation of such tribe*" (emphasis added)); *id.* §1922 (discussing emergency removal of "an Indian child *who is a resident of or is domiciled on a reservation*" (emphasis added)).

This case is a perfect example of the ill fit between §1915(a)'s scope and Congress's interest in avoiding invidious removal of Indian children from their tribes. As the district court explained:

> This case arises because three children, in need of foster and adoptive placement, fortunately found loving adoptive parents who seek to provide for them. Because of [ICWA],

> however, these three children have been threatened with removal from, in some cases, the only family they know, to be placed in another state with strangers. Indeed, their removals are opposed by the children's guardians or biological parent(s), and in one instance a child was removed and placed in the custody of a relative who had previously been declared unfit to serve as a foster parent.

Pet. App. 468a. There is no justification for harming these children in this manner.

*   *   *

Section 1915(a) forces state governments to enforce odious racial classifications that deprive individuals of the most basic forms of dignity and equality. As this case demonstrates, such classifications cause a significant degree of disruption and trauma in the life of a child, simply because that child is Indian. Section 1915(a)'s overly broad use of racial preferences fails to serve a compelling state interest in a narrowly tailored way. The statute thus is unconstitutional on its face.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests that this Court affirm in part and reverse in part.

Respectfully submitted,

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