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 *AMICI CURIAE* FAMILY DEFENSE PROVIDERS IN SUPPORT OF PETITIONERS IN NOS. 21-376 AND 21-377, AND IN SUPPORT OF RESPONDENTS IN NOS. 21-378 AND 21-380

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Additional Captions Listed On Inside Cover

CHEROKEE NATION, ET AL.,
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,

v.

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

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Statutes, Regulations and Rules

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that represent parents in dependency cases in California, Colorado, Illinois, New York, Oklahoma, Oregon, Maryland, Pennsylvania, and Washington. As such, *amici* understand how the Indian Child Welfare Act (ICWA) operates in practice and the critical protections that it provides our clients: parents seeking to preserve the integrity of their families.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

ICWA was enacted in response to the unjustified break-up of Indian families, and in that context its principal effect is to preserve families and parental rights. *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 668 (2013) (Scalia, J., dissenting) ("[P]arents have their rights, no less than children do. * * * There is no reason in law or policy to dilute that protection."). At its core, ICWA is oriented towards preserving family, respecting the rights of parents, and limiting unwarranted government intrusion into family life.

Plaintiffs and the states that support them mischaracterize what ICWA does and how it operates. They erroneously argue that ICWA prevents the emergency removal of children at risk of harm, a claim belied by ICWA's plain language. They mistakenly suggest that, absent ICWA, the only governing legal

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no party's counsel authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties have submitted blanket consents to the filing of *amicus* briefs.

standard in dependency cases would be the "best interests of the child," when in fact both state and federal laws apply a series of different, nuanced legal standards that govern such cases depending on the precise issue at hand and the stage of the case. They claim that, absent ICWA, there would be no preference for relative care, when in truth extended family relationships are protected by the Constitution and by state and federal statutes. And they assert, contrary to the very notion of due process, that basic procedural protections actually disadvantage litigants.

In contrast, the proper resolution of these cases requires an appreciation of how ICWA actually operates, particularly in dependency cases—the majority of cases to which it applies. In a typical dependency case, the government seeks to remove a child from their parent, to require a parent to participate in court-ordered rehabilitative services, and—if the parent is deemed unfit and the family ultimately unable to be reunified—to terminate the parent's rights to their child. Unlike family law matters that involve disputes between members of the same family, and unlike private adoption cases in which one or both of a child's parents have voluntarily surrendered their rights, at issue in every dependency case is the right of parents to raise their children free from government interference.

As practitioners in dependency courts, we daily challenge the government's decision to remove our clients' children—and win. And if their children are removed, our clients can and do heal and change; their families *do* subsequently reunite. Nationally, *only one quarter* of dependency proceedings end in adoption. U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fam., Children's Bureau, *2018 Child Welfare Outcomes Report to Congress* 25 (2018). Rather, *more than*

half of such cases result in children returning home to a parent. *Ibid.* Reunification, not adoption, is the goal of a dependency case. U.S. Dep't of Health & Hum. Servs., Children's Bureau, Child Welfare Information Gateway, *Supporting Successful Reunifications* 1 (2017).

At all stages of a dependency case, ICWA provides minimum procedural protections for parents to protect the integrity of the family. As such, ICWA benefits parents and families of Indian children, regardless of whether the parent is Indian. ICWA has even been enforced *against* Indian parents, to the benefit of non-Indian parents, when necessary to protect family integrity. When children must be separated from their parents, ICWA results in the placement of Indian children with members of their extended family, regardless of whether those relatives are Indians.

This brief grounds the discussion of ICWA in its actual application. First, the brief sets forth the deeply rooted constitutional rights at stake in all dependency cases. Second, it describes the typical progression of a dependency case and how ICWA intersects with state and other federal laws. Third, the brief explains the ways that ICWA adds to protections for families at various stages. Finally, the brief addresses misrepresentations made by ICWA's critics.

This Court should reject the constitutional challenges to ICWA raised in this case, which are premised on mischaracterizations of how the law operates. In truth, ICWA is well-designed to achieve its primary aim: to preserve and protect the integrity of families.

ARGUMENT

I. Parents and children share a fundamental liberty interest in keeping their family together, free of unwarranted government intervention.

A parent's interest in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000); accord *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972). In accordance with this fundamental right, "[i]t has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child." *Adoptive Couple*, 570 U.S. at 668 (Scalia, J., dissenting). Parents are entitled to constitutional protection "when the issue at stake is the dismemberment of [their] family." *Stanley*, 405 U.S. at 658.

Children have a reciprocal right to a relationship with their parents. See *Santosky*, 455 U.S. at 760 ("the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"); see also *Adoptive Couple,* 570 U.S. at 668 (Scalia, J., dissenting) (comparing parents' rights to children's rights); Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 Harv. C.R.-C.L. L. Rev. 267, 282-83 (2021) (majority of federal circuits have recognized a child's constitutionally protected right to family integrity).

Further, the sanctity of a child's *extended* family relationships is "equally venerable and equally deserving of constitutional recognition" as that of their nuclear family relationships. *Moore* v. *City of E. Cleveland, Ohio*, 431 U.S. 494, 504 (1977). The right of a

child to be with their family extends to "uncles, aunts, cousins, and especially grandparents." *Id.* at 503-504; *In re J.W.*, 226 P.3d 873, 880–81 (Wyo. 2010) (upholding the placement of foster children with relative as required by "ageless tradition"); *Rivera* v. *Marcus*, 696 F.2d 1016, 1024–25 (2d Cir. 1982) (finding constitutional right of relatives to care for loved ones in foster care).

In every dependency case, including those governed by ICWA, there is a risk that these most sacred of relationships will be severed forever. *Santosky*, 455 U.S. at 761. At its core, ICWA serves to protect these relationships and to keep families together.

II. Federal and state dependency laws, including ICWA, establish detailed procedures for ensuring child safety and protecting family integrity.

ICWA operates alongside state and other federal laws to account for the complex array of interests at stake in cases involving Indian children. As described below, ICWA creates a baseline set of procedures to ensure that state courts protect the right to family integrity and ensure the health and safety of dependent Indian children. ICWA's procedures are minimum standards—states are free to, as some do, offer legal protections above ICWA's floor.

A. Emergency hearings

In every state, and in all cases governed by ICWA, children may be removed from their families on an emergency basis when necessary to ensure the child's safety.[2] Families are entitled to a hearing regarding

[2] See, *e.g.*, Tex. Fam. Code § 262.104 (2021); Okla. Stat. tit. 10A § 1-4-201 (2022); Wash. Rev. Code §§ 26.44.050, .056 (2022); Colo.

the necessity of removal, which occurs either before the child is removed or after the removal, if the removal was conducted on an emergency basis.[3] If the child is removed before a hearing takes place, the initial hearing typically occurs within twenty-four to seventy-two hours after removal.[4]

Although the legal standard governing emergency removal varies from state to state, these standards typically focus on the need to prevent imminent harm to the child.[5] State officials may not separate a child from their family simply because officials believe that it would be in the child's "best interests" to live in a

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Rev. Stat. § 19-3-405 (2022); Ind. Code § 31-34-2.3-2 (2022); N.Y. Fam. Ct. Act § 1024 (2022); Va. Code Ann. § 16.1-251 (2022); 25 U.S.C. § 1922.

[3] See, *e.g.*, Tex. Fam. Code § 262.106 (2021); Okla. Stat. tit. 10A § 1-4-203 (2022); Wash. Rev. Code § 13.34.065 (2022); Colo. Rev. Stat. § 19-3-403 (2022); Ind. Code § 31-34-5-1 (2022); Ky. Rev. Stat. Ann. § 620.080 (2022); N.Y. Fam. Ct. Act §§ 1027, 1028 (2022); Va. Code Ann. § 16.1-251 (2022); 25 C.F.R. § 23.113.

[4] See, *e.g.,* Tex. Fam. Code § 262.105(a)(3) (2021) (hearing "no later than the first business day after the date the child is taken into possession" when a child is removed without prior court order); Okla. Stat. tit. 10A § 1-4-203 (2022) (hearing within two judicial days); Wash. Rev. Code § 13.34.060 (2022) (hearing within 72 hours); Colo. Rev. Stat. § 19-3-403 (2022) (same).

[5] Okla. Stat. tit. 10A § 1-4-201 (2022) ("an imminent safety threat exists and continuation in the home of the child is contrary to the child's welfare"); Engrossed Second Substitute H.B. 1227, 67th Leg., Reg. Sess. (Wash. 2021) (amending, among other things, Wash. Rev. Code 13.34.065(5)(a)(ii)(B) (2022) to include an "imminent physical harm" standard); Colo. Rev. Stat. § 19-3-405 (2022) ("danger to that child's life or health in the reasonably foreseeable future"); N.Y. Fam. Ct. Act § 1027(b)(i) (2022) ("necessary to avoid imminent risk to the child's life or health"); N.M. Stat. Ann. § 32A-4-6 (2022) ("immediate threat to the child's safety").

different family. *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'"); *Adoptive Couple*, 570 U.S. at 668 (Scalia, J., dissenting) ("It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is 'in the best interest of the child.'")

The standard for emergency removal of a child under ICWA "mirror[s] the constitutional standard for removal of *any* child from his or her parents without providing due process." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* 23 (2016); *compare* 25 U.S.C. § 1922 (emergency removal allowed "to prevent imminent physical damage or harm to the child"), with Tex. Fam. Code § 262.104 (emergency removal allowed when "there is an immediate danger to the physical health or safety of the child"). Notably, ICWA's provisions governing foster care placements *do not apply* in emergency proceedings. 25 U.S.C. § 1922; 25 C.F.R. § 23.104.[6]

At the initial removal hearing, in both ICWA and non-ICWA cases, federal law requires the state to demonstrate that it made "reasonable efforts" to prevent or eliminate the need for removal and that it is

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[6] See also *In re Esther V.*, 248 P.3d 863, 873 (N.M. 2011) (25 U.S.C. § 1922 intended to permit emergency removal notwithstanding other statutory provisions); *In re J.M.W.*, No. 99481-1, 2022 WL 2840324, at *1 (Wash. July 21, 2022) (applying state law, rather than ICWA, to emergency removal of Indian child).

"contrary to the welfare of the child" to be returned home.[7]

In some cases, in lieu of removing the child on an emergency basis, the state may seek a parent's agreement to "voluntarily" place their child in out-of-home care, *i.e.*, with relatives or family friends, or in foster care. See Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 Stan. L. Rev. 841 (2020). In non-ICWA cases, these agreements typically take place outside of court. Under ICWA, parents have certain rights: to have any voluntary placement of a child in foster care explained by a judge; to withdraw consent to a voluntary placement; and to have their child returned. 25 U.S.C. § 1913 (a)-(c). If a parent withdraws consent, the state retains the authority to remove the child on an emergency basis, and the parent would be entitled to an emergency hearing to challenge the removal.

B. Dependency and dispositional hearings

Whether a child is removed or returned at an emergency hearing, the state often proceeds on the

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[7] These federal conditions, necessary to receive federal reimbursement for foster care, are mistakenly described by Plaintiffs as an aspect of state law. See 45 C.F.R. § 1356.21(a)-(c); Tex. Fam. Code §§ 262.101-102, 262.107 (2021) (incorporating federally mandated standard). Every state receives funds under Title IV-E of the Social Security Act and, therefore, every state must have provisions to ensure compliance with these federal requirements. U.S. Dep't of Health and Hum. Servs., Children's Bureau, Child Welfare Information Gateway, *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, https://www.childwelfare.gov/pubpdfs/reunify.pdf.

underlying petition alleging that the child is dependent.[8] The family is then entitled to a full trial on the merits of those allegations.

The first step to establishing dependency is fact-finding, where the court will either dismiss the petition or enter a finding of dependency. Although states differ in what legal standard must be met for such a finding, the central issue is parental fitness; the legal standard is not simply the "best interests of the child."[9] If the court finds that the child is not dependent, the case is dismissed and, if the child had been removed from their family, they are returned home.

If the court enters a finding of dependency, the next step is for the court to determine the "disposition" of the case. Although not perfectly analogous, a finding of dependency is similar to a finding of guilt in a criminal case: it is a determination that a parent has deficiencies that render the child "dependent." The disposition is roughly equivalent to the sentencing phase: it is where the court determines what should happen as a result of the dependency finding.

As part of the disposition, the court indicates what services the parents must complete to correct any deficiencies on which the dependency determination was

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[8] Different states have different names for dependency; for example, Oklahoma uses the term "deprivation" and Alaska "Child in Need of Aid." The terminology for the stages of the case also varies. Fact-finding is called an adversary hearing, adjudicatory hearing, and detention hearing, among other things.

[9] See, *e.g.*, Tex. Fam. Code § 262.404(d) (2021); Okla. Stat. tit. 10A § 1-1-105.21 (2022) (defining "deprived child"); Wash. Rev. Code § 13.34.030(6) (2021) (defining "dependent child"); Colo. Rev. Stat. §§ 19-3-102, 19-3-505 (2022); N.Y. Fam. Ct. Act § 1051 (2022); Ind. Code § 31-34-11-1 (2022); Idaho Code § 16-1619 (2022).

based. In keeping with the remedial purpose for which these systems are designed, at this early stage of a case the underlying goal of the proceeding is, with very limited exceptions, to reunify the child with their parents.[10] Indeed, the vast majority of dependency cases involve allegations of neglect, attributable to poverty or treatable conditions like substance use and mental health disorders.[11] The purpose of the disposition is to develop a plan to assist the parent in overcoming those issues and reunifying with their children.

At disposition, the court will also consider where the child will live during the remainder of the dependency case. The court may order the child to remain in or return to their parents' care under supervision by the state child welfare agency (see, *e.g., In re S.A.D.*, 555 A.2d 123, 126 (Pa. Super. Ct. 1989) (recognizing that dependent children can be placed at home with their parents)), or it may order that the child be removed to or remain in foster care. State statutes governing the decision to place children out-of-home at disposition vary slightly, but typically require a finding that ongoing removal is necessary to ensure the safety of the child.[12] In other words, the legal standard

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[10] See, *e.g.*, Tex. Fam. Code § 262.406 (2021); Okla. Stat. tit. 10A § 1-4-704 (2022); Wash. Rev. Code § 13.34.136(1) (2022); Colo. Rev. Stat. §§ 19-3-100.5(1), 19-3-508(1)(e) (2022); Ind. Code § 31-34-21-5.5(b) (2022); Ky. Rev. Stat. Ann. § 620.130(2) (2022); Ohio Rev. Code Ann. § 2151.419(A)(1) (2022).

[11] U.S. Dep't of Health and Human Servs., Admin. for Children and Families, Admin. on Children, Youth and Families, Children's Bureau, *The AFCARS Report #28,* 2 (2021) (identifying circumstances of removal).

[12] See, *e.g.*, Tex. Fam. Code § 262.201(g) (2021); Wash. Rev. Code § 13.34.130(6) (2022); 42 Pa. Cons. Stat. § 6351(b) (West 2022); Colo. Rev. Stat. § 19-3-507 (2022).

for removal post-dependency is typically something more than just the "best interests" of the child.

It is at the disposition stage that states typically apply ICWA's requirements for a foster care placement. See, *e.g.*, *In re Dependency of A.L.K.*, 478 P.3d 63, 69-70 (Wash. 2020); *New York City Dep't of Soc. Servs. ex rel. Oscar C., Jr.* v. *Oscar C.*, 600 N.Y.S.2d 957, 961 (N.Y. App. Div. 1993); *Diego K.* v. *State, Dep't of Health & Soc. Servs., Off. of Children's Servs.,* 411 P.3d 622, 627 (Alaska 2018); *In re N.D.*, 259 Cal. Rptr. 3d 826, 828 (2020), review denied (July 29, 2020); but se*e In re Esther V.*, 248 P.3d at 875 (25 U.S.C. § 1912 applies at state equivalent of fact finding, not disposition).

Therefore, when a disposition involves an Indian child and the state seeks an out-of-home placement, ICWA requires the court to ensure that the parent received timely notice, 25 U.S.C. § 1912(a); received appointed counsel, 25 U.S.C. § 1912(b); and was able to examine all documents filed with the court, 25 U.S.C. § 1912(c). The court may not order the child removed from the parent absent "clear and convincing evidence," supported by the testimony of a qualified expert witness, that the parent's continued custody "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e).[13]

Further, in an ICWA case the court must also find that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that

[13] Some states have similar language under their own statutes for non-ICWA cases. *E.g.,* Wash. Rev. Code § 13.34.130(6)(c) (2022).

these efforts have proved unsuccessful." 25 U.S.C. § 1912(d).

In both ICWA and non-ICWA cases, if the court orders that the child be removed or remain in foster care, it will apply statutory placement preferences. Federal and state laws governing *all* children in foster care contain a variety of priorities regarding placement, including preferences for placing children with relatives or "fictive kin," such as neighbors, teachers, or family friends; keeping children in their communities, neighborhoods, and schools; placing children with foster families that practice the same religion as the child's family; keeping children with siblings; and placing children with foster parents who have the experience and training needed to meet their particularized needs.[14]

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[14] See, *e.g.*, 42 U.S.C. § 671(a)(29); U.S. Dep't of Health and Hum. Servs., Children's Bureau, Child Welfare Information Gateway, *Placement of children with relatives* (2018), https://www.childwelfare.gov/pubPDFs/placement.pdf; Tex. Fam. Code § 262.0022 (2021) (requiring ongoing review of whether a child can be placed with a relative and a consultation with child about possible caregivers "residing in the child's community"); Okla. Stat. tit. 10A §§ 1-4-705, 707(A)(2) (2022) (preference for placement with "persons of the same religious faith as that of the parents of the child"); Ga. Code Ann. § 15-11-211 (2022) (requiring that "diligent search" for relatives who might be able to care for a child be initiated at the beginning of the case and continued throughout); Idaho Code § 16-1619(7)(b) (2002) (requiring efforts to place children with siblings and keep them in the schools attended before removal); N.Y. Fam. Ct. Act § 116(b) (2022) (requiring that children be placed in homes of the same religious faith as their parents whenever practicable); Wash. Rev. Code § 13.34.130(6),(8) (2022) (preference for relative placement and placement that allows the child to remain in the school they attended prior to dependency proceeding).

As in all cases, under ICWA the court must give preference to a family placement. 25 U.S.C. § 1915(b). The preference for relative care under ICWA applies equally to *all* relatives, regardless of whether the extended family members are Indian. Only after the court has determined that a child cannot safely be at home or with relatives would the court look to other statutory placement preferences, including a preference for homes with members of the child's tribe. 25 C.F.R. § 23.132.

Under ICWA, as in all dependency cases, when there is only one suitable home available for a child, the state court will place the child in that home. ICWA's placement preferences come to bear only in those rare cases when there are multiple placement options, each of which might be best for a child, and a state court is forced to choose among them.

C. Ongoing assessments of a child's placement

While the parent works to address the issues that led to the removal of their child, the court continues to assess, on an ongoing basis, whether the child is placed in the appropriate setting and whether they can be returned home.

In all cases, including cases not governed by ICWA, a child's needs may change. The child may require a different kind of placement or to reside in a home with more skilled foster parents. See, *e.g.*, *In re Elianne M.*, 592 N.Y.S.2d 296, 297 (N.Y. App. Div. 1992) (upholding transfer from home in which child was initially placed because foster parents were not preserving her faith); *In re K.L.T.*, 845 S.E.2d 28, 32 (N.C. 2020) (child required a higher level of care, moved to therapeutic foster home).

The circumstances of the child's family can change as well. Relatives who initially were not informed of a child's removal may step forward to help, or the relative who initially took in a child may no longer be able to care for them. See, *e.g.*, *In re Paige G.*, 989 N.Y.S.2d 135, 137 (N.Y. App. Div. 2014) (it was in the best interests of child to be moved to reside with grandmother rather than remain in non-kinship foster home); *In re Dependency of K.W.*, 504 P.3d 207, 223 (Wash. 2022) (child who had been removed from relative's care and placed with prospective adoptive family should be returned to relative).

Foster families, too, can experience changed circumstances. Foster parents get divorced or ill, lose their license to provide foster care, or decide that they no longer want to care for a particular child or any foster children at all. See, *e.g.*, *In re Adoption of Missy M.*, 133 P.3d 645, 647 (Alaska 2006) (child moved after foster parents chose not to foster); *In re E. L.*, No. F046824, 2005 WL 1163004, at *2 (Cal. Ct. App. May 17, 2005) (foster mother no longer wanted to care for foster child).

Practice in ICWA cases, applying the placement preferences set forth in 25 U.S.C. § 1915, is in this way no different from practice in non-ICWA cases: courts consider whether a child's placement is meeting the child's needs and protecting the child's right to family integrity. See 25 C.F.R. § 23.131 (requiring courts to consider ICWA's statutory placement preferences when ordering placement changes); *In re D. A.*, 499 P.3d 876, 880 (Or. Ct. App.), review denied sub nom. *Dep't of Hum. Servs.* v. *D. E. A.*, 498 P.3d 808 (2021) (after parents failed to make progress towards reunification, children's placement changed from home in Oregon to home in Texas so that siblings could be placed together with a relative).

When a dependency case functions as intended, the child ultimately will be returned home and the case dismissed. Until then, issues regarding a child's placement, including whether a child can be returned home or placed with a relative, are reassessed throughout the life of the case based on ever-changing circumstances: the parents' progress, the availability of relative placements, the skills and availability of appropriate foster caregivers, and the unique needs of the child.

D. Review hearings and resolution of the case

If a child is not returned home at disposition, the dispositional hearing will be followed by a series of federally mandated "permanency hearings" at six-month intervals to address the family's and government's progress toward reunification and to determine an end plan for resolution of the case.[15]

Those hearings continue until the dependency case ends, which occurs either when (1) the child is returned home; (2) the child turns 18; (3) the child is appointed a permanent legal guardian or placed in the permanent custody of a relative; or (4) the parents' rights are terminated and the child is adopted or ages out of care without legal parents.[16]

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[15] See, *e.g.,* Tex. Fam. Code §§ 263.304, .305 (2021) (initial permanency hearing must take place within 180 days and subsequent permanency hearings must occur at least every 120 days); Ohio Rev. Code Ann. § 2151.417(c) (2022); Wash. Rev. Code §§ 13.34.136, .138, .145 (2022).

[16] U.S. Dep't of Health and Hum. Servs., Children's Bureau, Child Welfare Information Gateway, *Court Hearings for the Permanent Placement of Children* (2020).

If the state wishes to pursue adoption, the agency will file a petition seeking termination of the parents' rights. The parents have the right to a full trial and a dispositional hearing on this petition as well. Again, at a termination trial the central legal issue is the fitness of the parents. See, *e.g., Santosky*, 455 U.S. at 759–60 (termination trial does not "determine whether the natural parents or the foster parents would provide the better home" but whether "the parents are unfit to raise their own children"). Only *after* legal grounds for termination have been established will the court consider, at the termination disposition, what result is in the child's "best interests." *Ibid.*

If the termination petition involves an Indian child, the legal standard for terminating parental rights requires evidence beyond a reasonable doubt—including testimony of qualified expert witnesses—that the continued custody of the child by the parent is likely to result in "serious emotional or physical damage." 25 U.S.C. § 1912(f).

Significantly, by the time a termination order is entered in a dependency case, the issue of placement already has been addressed many times—at the emergency hearing, at the dispositional hearing, at multiple permanency hearings, and whenever the need arises, as it often does when people's lives shift in unexpected ways.

Throughout the process, foster caregivers may hope to adopt a child temporarily placed with them during the dependency case, but that is *never* a certainty. Courts have consistently recognized that foster caregivers have no right to adopt children they foster. *Lofton* v. *Sec'y Dep't Children & Family Servs.*, 358 F.3d 804, 815 (11th Cir. 2004) (even decade-long fos-

ter care arrangements are not entitled to the constitutional protections accorded to natural and adoptive families); accord *Wildauer* v. *Frederick Cnty.*, 993 F.2d 369, 373 (4th Cir. 1993); *Backlund* v. *Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985). This Court has recognized that foster care relationships are government creations, distinct from families. See *Smith* v. *Org. of Foster Fams. For Equal. & Reform*, 431 U.S. 816, 845 (1977) ("whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset"); see also *Renfro* v. *Cuyahoga Cnty. Dep't of Hum. Servs.*, 884 F.2d 943, 944 (6th Cir. 1989). Accordingly, even a caseworker's promise of an adoption cannot create a right to adopt. *Procopio* v. *Johnson*, 994 F.2d 325, 327 (7th Cir. 1993) (official's representations that a foster child was "97% adoptable" did not give rise to a constitutionally protected right).

Dependency cases should not become competitions over a child. Instead, children benefit when foster caregivers embrace their temporary role and devote themselves to the child while also supporting family reunification.[17] In those instances, a dependency case can add loving adults to a child's life, who can support the child's parents and maintain relationships even after the case ends.

As described below, ICWA furthers the underlying remedial purpose of dependency proceedings by ensuring that parents and families of Indian children, whether or not they are Indian, receive basic due process and meaningful assistance from the state.

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[17] See Children's Trust Fund Alliance, *Birth and Foster Parent Partnership*, https://bit.ly/3dx1eSN.

III. ICWA correctly prioritizes the rights of parents and children.

ICWA is crafted to protect the rights of parents and their children above all else—including above the sovereign interests of tribes and any interest asserted by a child's foster caregivers or prospective adoptive parents. In the typical state dependency case, ICWA operates primarily to the benefit of parents and children by keeping the family together.

ICWA's core purpose is consistent with a value deeply rooted in our nation's history: to safeguard the sanctity of the family. See *Moore*, 431 U.S. at 503 ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."). Consistent with longstanding constitutional protections of families, ICWA protects the rights of families to be together, irrespective of race.

A. ICWA provides parents of Indian children with baseline protections against state interference.

ICWA protects the rights of *all* parents of Indian children, irrespective of the parent's race or tribal citizenship.[18] Non-Indian parents can and do avail themselves of ICWA's protections in state courts. See Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* 13 (2016) ("[A] non-Indian parent may avail himself or herself of protections

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[18] Race and tribal citizenship are distinct. *Morton* v. *Mancari*, 417 U.S. 535, 553–54 (1974). As courts have recognized, ICWA's definition of an "Indian child" pursuant to 25 U.S.C. § 1903(5) is a political designation, not a racial one. See, *e.g.*, *In re Dependency & Neglect of A.L.*, 442 N.W.2d 233, 235 (S.D. 1989).

provided to parents by ICWA if [their] child is an 'Indian child.'"); see, *e.g.*, *In re Baby Boy Doe*, 902 P.2d 477, 481 (Idaho 1995) (allowing non-Indian mother to withdraw voluntary relinquishment because ICWA was not followed).

For example, ICWA articulates a minimum evidentiary burden to be applied to decisions that could result in the separation of an Indian child from their family. 25 U.S.C. § 1912(e). This burden equally protects Indian and non-Indian parents of Indian children and ensures that when courts are making critically important decisions about family separation, they carefully consider all the evidence. See, *e.g., In re D.S.*, 577 N.E.2d 572, 575 (Ind. 1991) (reversing order of termination because the trial court failed to apply the correct burden).

Further, in keeping with ICWA's focus on ensuring the rights of parents, when a state statute provides heightened procedural protections in dependency cases, ICWA dictates that courts must apply state law to the extent it is more protective of *parental rights* than ICWA. 25 U.S.C. § 1921. ICWA thus provides a national "baseline" of procedural protections for parents of Indian children that states are free to build upon. 25 U.S.C. § 1902 (ICWA sets the "*minimum* Federal standards") (emphasis added); see also *In re J.R.B.*, 715 P.2d 1170, 1172 (Alaska 1986) ("The Alaska statute [for foster care placement] requires findings additional to that required by the ICWA."). Indeed, ICWA does not necessarily displace state law; instead, it is often applied together with relevant state provisions. See, *e.g., In re D.S.P.*, 480 N.W.2d 234, 236 (Wis. 1992) (applying a dual burden of proof, applying both ICWA and the Wisconsin Children's Code); *K.E.* v. *State*, 912 P.2d 1002, 1004 (Utah Ct. App. 1996)

(holding "ICWA expressly provides for continued viability of state laws that impose differing standards of protection to the rights of the parent or Indian custodian.").

ICWA's provisions also recognize the ways in which the parenting styles of Indian parents in particular have been misunderstood and, too often, wrongly discredited. *E.g.*, Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38780 (June 14, 2016) (describing how Indian practice of leaving children in the care of extended family was viewed as neglect). ICWA was passed in part to address the disproportionate destruction of Indian families based "solely upon the testimony of social workers who possessed *neither* the specialized professional education *nor* the familiarity with Native culture necessary to distinguish between cultural variations in child-rearing practices and actual abuse or neglect." *L.G.* v. *State Dep't of Health and Soc. Servs.*, 14 P.3d 946, 952–53 (Alaska 2000), abrogated by *State* v. *Cissy A.*, No. S-18088, 2022 WL 2899551, at *12 (Alaska July 22, 2022) (further strengthening the expert witness requirement); *State ex rel. Juv. Dep't of Multnomah Cnty.* v. *Charles*, 688 P.2d 1354, 1360 (Or. Ct. App. 1984) ("trial court's reliance on the testimony of the state's social worker unfamiliar with Indian culture represents the very problem Congress attempted to solve with passage of the ICWA").

ICWA's expert witness requirement, in particular, provides dependency courts with the opportunity to consider important information about the child-rearing practices of the child's tribe. 25 U.S.C. § 1912(e), (f). By requiring courts to consider this evidence, ICWA does not direct the outcome of any hearing, but rather requires that courts evaluate information relevant to the determination before them.

When correctly applied, ICWA's procedural protections have profound impacts for parents and their Indian children, "preventing erroneous termination of their natural relationship." *Santosky*, 455 U.S. at 760; see, *e.g.*, *In re I.T.S.*, 490 P.3d 127, 135 (Okla. 2021) (reversing termination of mother's rights due to court's failure to provide legal representation as required by ICWA). Perhaps this is why some parents have argued that ICWA's protections should be extended to all parents. See, *e.g.*, *In re Marcus S.*, 638 A.2d 1158, 1159 (Me. 1994); *Dep't of Soc. Servs.* v. *Firlet*, 451 N.W.2d 576, 578-79 (Mich. Ct. App. 1990).

B. ICWA requires the state to make "active efforts" to reunite parents with their children and avoid the unnecessary breakup of families.

State and federal laws governing child welfare proceedings recognize that most parents have the capacity for change—if provided the appropriate resources and support. See, *e.g., Oregon ex rel. Dep't of Human Servs.* v. *C.R.*, 134 P.3d 940, 946 (Or. 2006) ("parents *can* change their conduct and * * * if the change is both genuine and lasting, the state may not terminate their parental rights for unfitness."). After all, "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky*, 455 U.S. at 753.

In light of these principles, ICWA requires the party seeking to affect a foster care placement or termination of parental rights to show that they made active efforts to prevent the breakup of the Indian family and that these efforts have proved unsuc-

cessful. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.2. The "active efforts" requirement is considered the "'gold standard' of what services should be provided in all child-welfare proceedings." U.S. Dep't of Interior, Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* 39 (2016).

The "active efforts" provisions are crucial to realizing ICWA's goal of preventing the erroneous separation of children from their parents and the erroneous termination of parental rights. See, *e.g., South Dakota ex rel. C.H.*, 962 N.W.2d 632, 639-640 (S.D. 2021) (reversing termination where mother and child were closely bonded but state agency failed to make "active efforts" for nine months, thus delaying mother's ultimately successful resolution of her marijuana addiction and housing issues). The provision of "active efforts" can speed up the resolution of cases by requiring the offer of timely assistance to families. See, *e.g., In re Dependency of G.J.A.*, 489 P.3d 631, 652 (Wash. 2021) (requiring "timely referrals" as part of "active efforts.")

The "active efforts" requirement applies to all parents of Indian children, regardless of the parent's tribal status. For example, the Supreme Court of Alaska recently reversed the termination of a non-Indian father's parental rights after concluding the State had failed to make "active efforts" to reunite him with his children. See, *e.g., Clark J.* v. *Dep't of Health & Social Servs., Office of Children's Servs.*, 483 P.3d 896, 904 (Alaska 2021); see also *In re Dependency of A.L.K.*, 478 P.3d at 69-70 (reversing dispositional order because state agency failed to provide "active efforts" to non-Indian mother); *In re K.L.*, 451 P.3d 518, 529 (Mont. 2019) (reversing termination of non-Indian father's rights because state agency failed to provide "active efforts").

Courts also have enforced the "active efforts" requirement *against Indian parents* seeking to terminate the rights of a *non-Indian parent*. For example, the Washington State Supreme Court reversed a termination order because the mother, who was a tribal citizen, sought termination against the non-Indian father, but had not shown the *non-Indian* father was provided with "active efforts." *In re Adoption of T.A.W.*, 383 P.3d 492, 494 (Wash. 2016).

The "active efforts" requirement is a key piece of ICWA's protective framework. This baseline standard ensures best practices to keep parents healthy and stable—regardless of tribal status—so their families can remain intact.

C. ICWA benefits parents by providing jurisdictional choice.

ICWA also creates choices for parents with regards to jurisdiction. Consistent with the superior rights of parents, ICWA ensures that parents of a child domiciled off reservation can petition to transfer a case to tribal court. 25 U.S.C. § 1911(b).

Conversely, either parent may unilaterally block a tribal court from taking jurisdiction over a case, even if their child is a tribal citizen. 25 U.S.C. § 1911(b); see, *e.g., Brown ex rel. Brown* v. *Rice*, 760 F. Supp. 1459, 1463 (D. Kan. 1991) (tribal court violated ICWA when it exerted jurisdiction over case involving enrolled children domiciled off reservation without parental consent); *In re W.L.*, 859 P.2d 1019, 1021 (Mont. 1993) (because father objected to transfer of jurisdiction to tribe, state court jurisdiction was proper); *B.R.T.* v. *Executive Director, Soc. Serv. Bd. of N. Dakota*, 391 N.W.2d 594, 599 (N.D. 1986) (mother's objection to tribal jurisdiction allowed state court to exercise jurisdiction). This choice is available to either

parent, regardless of tribal status. See *In re Adoption of Baby Boy L.*, 643 P.2d 168, 178 (Kan. 1982), overruled on other grounds by *In re A.J.S.*, 204 P.3d 543 (2009) (court properly honored non-Indian mother's objection to transfer of jurisdiction to tribe).

D. ICWA's placement preferences prioritize family and grant courts the discretion to make the best placement decision for a child.

ICWA promotes the right of families to be together by ensuring that state courts give equal preference to all members of a child's extended family, regardless of whether the family members in question are Indians. 25 U.S.C. § 1915. ICWA therefore comports with the constitutional requirement to protect children's relationships with their extended families. See, *e.g., Moore,* 431 U.S. at 503-04.

ICWA's placement preferences also respect parental preferences. Parents may assert that there is "good cause" to depart from ICWA's placement preferences, and state courts are required to consider the parent's requested alternative. 25 U.S.C. § 1915(a), (b); 25 C.F.R. § 23.132(c)(1); *In re Welfare of Child of K.M.-A.R.-L.*, No. 55-JV-20-3333, 2022 WL 2125164, at *2 (Minn. Ct. App. June 13, 2022) (upholding finding of good cause based on mother's preference); *In re Baby Boy Doe*, 902 P.2d 477, 487 (Idaho 1995) (departing from placement preferences based on request of mother). The good-cause exception respects parental choice while acknowledging that judges are in the best position to make nuanced decisions based on the unique needs of the children before them.

Although tribal governments have an opportunity to be considered on questions of placement, the opposition of a tribe is *not* good cause to depart from the

placement preferences. 25 C.F.R. § 23.132. Indeed, the listed good-cause bases focus on the preference of parents and children, the importance of keeping sibling groups together, and the needs of the *child*, rather than the interests of the tribe. 25 C.F.R. § 23.132(c).

A foster family's desire to adopt an Indian child is similarly not a basis for a good cause departure, nor is the "ordinary bonding or attachment that flow[s] from time spent in a non-preferred placement that was in violation of ICWA." 25 C.F.R. § 23.132. As this Court has acknowledged, it would be improper to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 54 (1989); see, *e.g., In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 636 (2016) (recognizing that courts should not incentivize delay caused by foster caregivers).

Ultimately, ICWA's true purpose is underscored by an accurate understanding of how the law operates in practice. As described above, ICWA equally protects both Indian *and* non-Indian parents, ensuring they have access to fair procedures and meaningful services to rehabilitate their families, as well as a meaningful say in where their children are placed. ICWA also ensures that state courts uphold a child's right, when separated from their parents, to be with relatives—regardless of whether those relatives are Indians. Above all else, ICWA is a powerful tool to protect the right of family integrity, long recognized by this Court as among the most important rights of every individual in this country. *Troxel*, 530 U.S. at 65.

IV. Plaintiffs' arguments misrepresent how ICWA operates in practice.

Plaintiffs incorrectly describe how ICWA operates, and their description presents a distorted picture by skipping from the very beginning of a dependency proceeding to after the termination of parental rights—failing to address the many important judicial determinations that occur in between those two points.

A. ICWA does not prevent the emergency removal of Indian children when necessary to ensure child safety.

ICWA's preference for keeping families together *does not* come at the expense of child safety. In asserting that "[b]efore removing an Indian child from an unsafe environment" the state must make "active efforts" to preserve the family (Texas Br. 6, 59, 62), Texas ignores ICWA's plain text: "Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child * * * under applicable State law, in order to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922. ICWA's standard correctly balances the right of family integrity with the need to ensure child safety.

In fact, a foster care placement hearing under ICWA, in which the state must demonstrate active efforts, *may not* occur until after an emergency hearing has already been held because there is insufficient time to provide required notice to parents and tribes in the hours and days before states hold emergency removal hearings. 25 U.S.C. § 1912; 25 C.F.R. § 23.112(a).

B. ICWA creates placement preferences but does not prohibit placement in ,on-Indian homes.

The Individual Plaintiffs wrongly suggest that, absent ICWA, there would be no preference for placement with a child's extended family. See Individual Plaintiffs' Br. 8, 11, 38 (arguing that absent ICWA the Clifford family would be on "equal footing" with the child's grandmother). In fact, the preference for relative care is protected by the Constitution. *Moore*, 431 U.S. at 503-04. Prioritizing relatives is also a requirement to receive federal foster care funds—which every state pursues, *supra* n. 7—and is separately reflected in state statutes, *supra* n. 14.

Plaintiffs further misstate the law when they assert that ICWA's placement preferences are inflexible mandates that limit judicial discretion. Texas Br. 48; Individual Plaintiffs' Br. 37-38.) ICWA's plain text establishes *preferences*, not mandates—preferences that may be overcome by a showing of "good cause." 25 U.S.C. § 1915(a)-(b). Those preferences reflect best practice and complement rather than supplant other laws. See, *e.g., In re M.K.T.*, 368 P.3d 771, 788 (Okla. 2016) (finding ICWA's placement preferences consistent with state law).

Indeed, Individual Plaintiffs wrongly characterize ICWA's placement preferences as preventing non-Indian people from adopting Indian children. The facts of their cases are instructive: the Brackeens adopted their first Indian child, A.L.M., when no other placement was available, so there was not cause for the court to apply a preference. *Brackeen* v. *Haaland*, 994

F.3d 249, 288 (5th Cir. 2021); see also 25 C.F.R. § 23.132(c)(5).[19]

And, although not before this Court, it appears that in a case involving A.L.M.'s sister, the trial court placed the sister with the Brackeens based on the biological mother's wishes and the close-in-age sibling relationship.[20] The court did not apply ICWA, but these are some of the *same criteria* that a court must consider in weighing a "good cause" departure from ICWA's placement preferences. 25 C.F.R. § 23.132(c)(1), (3) (court must consider parental preferences and the "presence of a sibling attachment"). Accordingly, an application of ICWA's placement framework may have resulted in the very same outcome the Brackeens now seek to defend.

C. ICWA provides basic procedural fairness, which Plaintiffs mistakenly characterize as a disadvantage to the parties.

Contrary to the claims of its critics, ICWA requires careful case-by-case decision-making, preventing rushed or poorly informed decisions about the placement of dependent children by requiring courts

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[19] With regard to this child's placement, much has been made of a conversation that apparently took place between representatives of the Navajo and Cherokee Nations in the hallway of the court. *E.g.,* Texas Br. 14. As practitioners in state dependency court, we know that negotiation regularly occurs in the hallways of these busy courts (as, indeed, likely occurs in virtually every courthouse in the country). Far from being suspect, ICWA actually requires state courts to allow this kind of negotiation between Tribes when it is uncertain to which of two or more Tribes the child belongs. 25 C.F.R. § 23.109(c).

[20] Jan Hoffman, *Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes*, N.Y. Times (June 5, 2019), https://nyti.ms/2K3KMcS.

to consider *more information, more carefully*. By creating baseline procedural protections, ICWA results in better judicial decisions.

For example, ICWA requires that parents receive notice of cases involving their children. 25 U.S.C. § 1912. Notice is the bedrock of procedural due process. *Mullane* v. *Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). Yet Texas objects to ICWA's notice provisions, wrongly casting this minimum due process requirement as a "disadvantage." Texas Br. 6.

Texas also mistakenly suggests that the evidentiary burden required by ICWA creates obstacles that prevent the state from protecting children. Texas Br. 6-7. Such an argument misunderstands the function of a burden of proof. "Increasing the burden of proof is one way to impress the factfinder with the importance of the decision." *Addington* v. *Texas*, 441 U.S. 418, 427 (1979); see also *Santosky*, 455 U.S. at 753–54 ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."). By establishing a high burden, Congress recognized the importance of the interests at stake and impressed on state courts that such decisions should be undertaken with care.

These procedural protections do not place children in harm's way, but require a more searching judicial inquiry that protects children from unnecessary family separation and, in so doing, promotes child safety and family integrity. By objecting to core procedural protections, Plaintiffs advocate for the quick removal of Indian children from their families with little or no judicial oversight. In so suggesting, they only affirm the ongoing need for ICWA.

CONCLUSION

For the foregoing reasons, this Court should reject challenges to ICWA's constitutionality.

Respectfully submitted.

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APPENDIX (LIST OF *AMICI*)

Ascend Justice

Bronx Defenders

Brooklyn Defender Services

Center for Family Representation, Inc.

Colorado Office of Respondent Parents' Counsel

Community Legal Services of Philadelphia

East Bay Family Defenders

King County Department of Public Defense

Legal Aid Services of Oklahoma, Inc.

Maryland Office of the Public Defender

Neighborhood Defender Service of Harlem

NYU School of Law Family Defense Clinic

Still She Rises

Univ. of Washington School of Law Tribal Court Public Defense Clinic

Washington Appellate Project

Washington State Office of Public Defense

Youth, Rights & Justice