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 AMICI CURIAE GOLDWATER INSTITUTE, CATO INSTITUTE, TEXAS PUBLIC POLICY FOUNDATION, AND FAMILIES AFFECTED BY ICWA* IN SUPPORT OF BRACKEEN, ET AL. AND STATE OF TEXAS

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[Additional Captions Listed On Inside Cover]

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CHEROKEE NATION, et al.,

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THE STATE OF TEXAS,

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DEB HAALAND, Secretary of the
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IDENTITY AND INTEREST OF AMICI[1]

The Goldwater Institute (GI) is the nation's leading organization devoted to defending Native children and families against the Indian Child Welfare Act (ICWA)'s unjust and unconstitutional provisions. GI has litigated numerous ICWA cases and published ground-breaking research on ICWA's well-intentioned but flawed rules. *See*, *e.g.*, Flatten, *Death on a Reservation* (Goldwater Institute, 2015)[2]; Sandefur, *Escaping the ICWA Penalty Box*, 37 Child. Legal Rts. J. 1 (2017). The Cato Institute and Texas Public Policy Foundation (TPPF) are public policy research foundations dedicated to principles of individual liberty and personal responsibility. They publish books and studies, conduct conferences, and file amicus briefs in this and other courts. GI, Cato, and TPPF have been amici at every stage of this case.

Paul and Jena Clark are adoptive parents to a 15-year-old "Indian child" whose birth mother chose them to adopt her. Although the tribe initially agreed, its officials refused to sign required paperwork upon her birth, necessitating years of litigation that climaxed in *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008), finding ICWA unconstitutional as applied. Further litigation was

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[1] Pursuant to Rule 29(a)(4)(e), amici affirm that no counsel for any party authored the brief in whole or part, no person other than amici curiae, members, or counsel contributed money to fund its preparation or submission, and all parties have consented to its filing.

[2] http://www.flipsnack.com/9EB886CF8D6/final-epic-pamplet.html.

nevertheless required, resulting in settlement that allowed the Clarks to adopt her at the age of three.

Garrett Sholl is father to two Arizona children. In 2012, he sought to terminate his ex-wife's parental rights due to abandonment. Because the children were "Indian children," that case was subject not to Arizona law but to ICWA—with the result that he was barred from terminating her rights because he had not made "active efforts" to reunite the children with the ex-wife he considered unfit. *See S.S. v. Stephanie H.*, 388 P.3d 569, 572 (Ariz. App. 2017).

Joshua and Shasta Petersen are foster parents who cared for Native child J.F., beginning when he was weeks old. He lived with them for four years while his case remained unresolved. When they sought permanent placement, however, the Sun'aq tribe moved pursuant to ICWA to take jurisdiction over his case—even though J.F. was not eligible for membership in Sun'aq. Instead, his tribe, Tangirnaq Native Village, purported to authorize Sun'aq to act on its behalf. The Sun'aq court ordered J.F. removed from the Petersens' care and—on 24 hours notice—sent to live in New Mexico. His Alaskan-based relatives have not heard from him since. *J.P. v. State*, No. S-18107, 2022 WL 817583 (Alaska Mar. 18, 2022).

Rusty and Summer Page are a California couple who fostered "Lexi" for four of her six years of life. Because her great-great-great-great-grandparent was a full-blood Choctaw, she was deemed "Indian," and consequently taken from the Pages and sent to live in

Oklahoma instead. California courts said the trauma inflicted on her thereby was not reason to depart from ICWA's placement mandates. *In re Alexandria P.*, 204 Cal.Rptr.3d 617 (App. 2016).

Jeanine Kersey-Russell is foster mother of the late Laurynn Whiteshield, who was taken from Kersey-Russell's care pursuant to ICWA and sent to live on the Spirit Lake Reservation with a family known to be abusive. Shortly thereafter, that family member murdered Laurynn. Tragically, Laurynn is only one of countless children whose lives have been lost thanks to ICWA elevating tribal governments' desires over children's best interests.

SUMMARY OF ARGUMENT

ICWA was motivated by good intentions. But today, it imposes race-based mandates and prohibitions that make it harder for state officials to protect Native American children against abuse—and nearly impossible for these children to find loving, permanent, adoptive homes when needed. This harms children—and violates the Constitution, notably its due process and the anti-commandeering principles.

ICWA is complicated, and discussions of it generate intense emotions, resulting in many inaccuracies and falsehoods. This brief therefore addresses, in

question-and-answer format, some common misconceptions and confusions in discussions of ICWA.

ARGUMENT

I. Doesn't ICWA protect Indian children?

ICWA is a *detriment* to Indian children.

For example, it mandates a higher burden of proof in termination of parental rights (TPR) cases than applies to non-Indian children. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982), said the standard for TPR cases must be "clear and convincing evidence"; it rejected the "beyond a reasonable doubt" standard because that would "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption." But ICWA requires not only "beyond a reasonable doubt," but *also* expert witness testimony. 25 U.S.C. § 1912(f). That means there must be *more* evidence of abuse before the state can rescue an abused Indian child, as opposed to an abused non-Indian child. *See* Sandefur, *Escaping the ICWA Penalty Box*, 37 Child. Legal Rts. J. 1, 42–50 (2017).

ICWA also imposes an "active efforts" requirement that differs from the "reasonable efforts" rule that governs non-Indian children. *Id.* at 36–42. "Reasonable efforts" means that when the state takes a child into protective custody, it must help the family unit repair itself. *See*, *e.g.*, *In re B.B.*, 746 N.W.2d 411, 415 ¶ 14 (N.D. 2008). This is *not* required, however, where

"aggravated circumstances," such as molestation, exist—because it would be counterproductive to return children to homes that are known to be dangerous. 42 U.S.C. § 671(a)(15)(D)(i).

ICWA's "active efforts" requirement is different: it mandates *more* than "reasonable" efforts, and it is *not* excused by aggravated circumstances. *See*, *e.g.*, *In re J.S.B., Jr.*, 691 N.W.2d 611, 618 ¶¶ 20–21 (S.D. 2005). That means state officials must repeatedly return abused Indian children to homes they know are abusive. This explains such horrific cases as those of Declan Stewart, Anthony Renova, Laurynn Whiteshield, Josiah Gishie, etc. *See* Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. 55, 84 (2022).[3] In each instance, ICWA forced state officials to return Indian children to households they knew were dangerous—and the children were killed as a result. That would never have happened if the children had been white, black, Asian, or Hispanic.

Section 1915's placement preferences also hinder the ability of Indian children to find permanent homes when needed. Due to the drastic shortage of Indian foster homes,[4] Indian children are frequently placed in "non-compliant" care, meaning they can be—and often are—repeatedly removed and put in different foster homes, at the behest of tribal governments. This

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[3] http://shorturl.at/hstGI.

[4] *See*, *e.g.*, Heimpel, *L.A.'s One-and-Only Native American Foster Mom*, The Imprint, June 14, 2016, https://imprintnews.org/news-2/l-a-s-one-native-american-foster-mom/18823.

deprives children of the stability essential to their happiness.

And because ICWA makes it prohibitively difficult for non-Indian families to adopt Indian children, ICWA puts these kids "at a unique disadvantage in finding a permanent and loving home." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 653–54 (2013). In these and other ways, ICWA is not a benefit to Indian children, but a detriment.

II. Does ICWA create a racial category or a *Mancari*-style political category?

A. ICWA creates a racial category because it's triggered exclusively by ancestry.

ICWA applies to "Indian child[ren],"[5] defined as children who are either tribal members or who are (1) eligible for membership and (2) biological children of tribal members. 25 U.S.C. § 1903(4).

Tribes determine their own eligibility criteria, as is their right—but *all* do so based on biological factors alone; cultural or political relationships are never considered. To be a member of, e.g., Navajo, a child must have 25 percent Navajo blood—cultural, political, religious, or social affiliation with the tribe are

[5] The distinction between tribal membership and "Indian child" status under ICWA must always be borne in mind. *See In re Abbigail A.*, 375 P.3d 879, 885–86 (Cal. 2016). Membership is a function of *tribal* law; "Indian child" status under ICWA is a function of *federal and state* law, and therefore may only turn on racial or national-origin factors if strict scrutiny is satisfied.

unnecessary. Navajo Nation Code, tit. 1, § 701(B). The Choctaw require no minimum blood quantum, but require *biological* descent from a signer of the Dawes Rolls. Choctaw Const. art. II, § 1. Cultural or political factors are not considered.

Whatever their other differences, no tribe imposes any cultural, political, religious, or sociological criterion for membership. Therefore, children who are fully acculturated to a tribe—practice a Native religion, speak a Native language, follow tribal customs—will *not* qualify as "Indian" under ICWA if they lack the *biological* requisites. Children adopted by tribal families and acculturated to tribes, do *not* qualify, because they are not "biological children" of tribal members. *In re Francisco D.*, 178 Cal.Rptr.3d 388, 396 (App. 2014).

Thus William Holland Thomas, a racially white man who served as chief of the Oconaluftee band of Cherokee, would not have qualified because he would not have satisfied the biological criteria and was not the biological child of a tribal member. *See* Godbold & Russell, *Confederate Colonel and Cherokee Chief: The Life of William Holland Thomas* (1990).

By contrast, a child with *no* cultural, religious, political, or social relationship with a tribe, who has never visited tribal lands, and has no idea she has Native ancestry, *does* qualify if she has the requisite DNA—as in Lexi's case, *In re Alexandria P.*, 204 Cal.Rptr.3d 617 (App. 2016).

Therefore, Indian child status under ICWA is a racial, not political, category. In *Rice v. Cayetano*, 528 U.S.

495 (2000), this Court defined a racial classification as one "which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" *Id.* at 515 (citations omitted). ICWA does that. It imposes burdens on Indian children based on "immutable characteristic[s] determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)—specifically, their biological ancestry.

The racial nature of ICWA's categorization is reinforced by Section 1915's placement mandates. These require that Indian children be placed with "Indian families" or in "Indian" institutions, *regardless of tribe*. In other words, ICWA is predicated *not* on tribal affiliation, but on *generic "Indianness."* Generic "Indianness" is a racial, not a political classification.[6]

ICWA requires, not that Navajo children be placed with Navajo adults, or Cherokee children with Cherokees, but that "Indian children" be placed with "Indian adults." Its *express* purpose is to ensure that "'*Indian* child[ren] . . . remain in the *Indian* community.'" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (emphasis added; quoting a Congressional report). ICWA therefore creates a racial classification.

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[6] The concept of the "generic Indian" is "an arbitrary collectivization" imposed by Europeans. *See* Utley, *The Indian Frontier, 1846–1890* at 4-6 (Billington et al. eds., Univ. of N.M. Press rev. ed. 2003) (1984). *See also United States v. Bryant*, 579 U.S. 140, 160–61 (2016) (Thomas, J., concurring) ("Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions.").

It's often said that ICWA is not race-based because not all Native children qualify. But "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Rice*, 528 U.S. at 516–17. A law that only applied to left-handed black people, for example, would still create an unconstitutional racial classification even though it did not apply to right-handed black people. Executive Order 9066 did not apply to Japanese-Americans of less than 1/16th Japanese ancestry, but it was still a racial classification. Sandefur, *Unconstitutionality*, *supra* at 65. ICWA does not apply to all children with Native ancestry—but it *only* applies to children with that ancestry, and *because of* that ancestry.

The court below said ICWA does not classify by race because it merely classifies "based on whatever criteria [tribes] may prescribe"; thus the fact that tribes employ ancestral criteria cannot be attributed to the government. Pet.App. 151a. That is fallacious. While non-state institutions may indeed set membership criteria however they choose, whenever state or federal governments subsequently impose benefits or burdens based on someone's membership (or potential membership) in that institution, those membership criteria then become state action—and, consequently, a racial classification. That was the reasoning of the "white primary" cases; for example: parties may impose racial criteria—but if state election laws transform that "private" action into disenfranchisement, the discrimination cannot be excused as merely private.

See, *e.g.*, *Terry v. Adams*, 345 U.S. 461, 469 (1953). *See also Sokolow v. Cnty. of San Mateo*, 261 Cal.Rptr. 520, 527 (App. 1989) (where government based promotions of membership in a private organization that only admitted men, it became a sex-based classification).

As this Court put it in another case involving race and adoption, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). ICWA violates that rule.

Consider also the implications of the en banc court's ruling. If a child's genetic eligibility for tribal membership permits the government to impose different laws on her—and the adults who love her—that would mean the government could also treat people differently based on the fact that their *unborn* child's genetic makeup would make that child eligible for membership. If "not-yet-formalized tribal affiliation" based on genetic eligibility is a rational-basis political classification, Pet.App. 427a, there's no reason the government could not also impose restrictions on Indian adults who might *someday* become parents, on the theory that their future children may someday formalize a tribal affiliation. This is *not* a fanciful conjecture. Attorneys and law professors are already arguing that surrogacy contracts by Native mothers and sperm donation by Native men are prohibited by ICWA because the resulting children will fit ICWA's racial profile. *See*, *e.g.*, Korthase, *Seminal Choices: The Definition of "Indian Child" in a Time of Assisted Reproductive Technology*, 31 J. Am. Acad. Matrim. Law. 131, 146–47

(2018); Cardenas, *ICWA in a World with Assisted Reproductive Technology*, Ariz. Atty, Apr. 2019, at 18, 20.[7]

Final evidence of ICWA's race-based nature comes from the history of the "existing Indian family doctrine" (EIFD), a legal theory that required proof that a purported Indian child had some connection with a tribe *other than* biological before ICWA could apply. *See*, *e.g.*, *Matter of Baby Boy L.*, 643 P.2d 168 (Kan. 1982). The EIFD was a saving construction intended to prevent ICWA from being a race-based law. *In re Bridget R.*, 49 Cal.Rptr.2d 507, 516 (App. 1996). Yet tribal governments emphatically condemned it, and it has now been abandoned by most courts. *See*, *e.g.*, *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009). Consequently, the question whether a child is an "Indian child" *does* not, and in those states rejecting the EIFD, *cannot*, include consideration of political, cultural, etc., factors. Rather, it *must* be based *solely* on biology—i.e., race.

B. *Mancari*'s rational-basis rule does not apply because ICWA is "directed towards a 'racial' group consisting of 'Indians.'"

Morton v. Mancari, 417 U.S. 535 (1974), upheld employment preferences for Native Americans at the Bureau of Indian Affairs (BIA) against the argument that they were unconstitutional racial preferences. But *Mancari* emphasized that the preferences were "not directed towards a 'racial' group consisting of 'Indians.'"

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[7] https://www.azattorneymag-digital.com/azattorneymag/201904/MobilePagedReplica.action?pm=2&folio=18#pg21.

Id. at 553 n.24. It therefore did not hold that *all* laws treating Indians differently are subject to rational basis. A law directed toward a racial group consisting of Indians falls outside that precedent. *Accord, United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977).[8]

The *Mancari* rule was designed to address the limited question of laws that treat people differently based on their choice to become or remain members of tribal political societies. But ICWA categorizes based on genetics alone—not culture, political affiliation, or treaty rights. It therefore applies to children who may never become tribal members. That means it creates not a political, but a racial classification.

C. Even if ICWA does not create a racial classification, it still creates a *national-origin-based* classification.

National origin classifications are just as suspect as racial ones, and are equally subject to strict scrutiny. *Dawavendewa v. Salt River Project*, 154 F.3d 1117, 1120 (9th Cir. 1998). As this Court said in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), the term "national origin" does *not* refer only to foreign *citizenship*, *id.* at 89, but to classifications based on national "ancestry." *Id.* at 95. So, just as tribal membership is a

[8] *Antelope* said a (hypothetical) law imposing different evidentiary standards for cases involving Indians would likely be unconstitutional. *Id.* at 649 n.11. ICWA *does* that: it imposes a special "beyond a reasonable doubt" standard in TPR cases, for example. 25 U.S.C. § 1912(f).

form of citizenship, so a person's genetic connection to a tribal nation is a national origin.

Oyama v. California, 332 U.S. 633, 645 (1948), found a state law invalid because it was triggered by the nationality of a child's parents: "[A]s between the citizen children of a Chinese or English father and the citizen children of a Japanese father, there is discrimination." ICWA does the same thing: distinguishing between American citizen children whose ancestry renders them eligible for tribal membership and those whose ancestry does not.

In short, when the en banc majority said ICWA is triggered by the fact that the child is a "potential member of a quasi-sovereign political entity," Pet.App. 154a, it was reinventing the wheel: a wheel the law calls *national-origin classification*.

Again, imagine what it would mean if Congress can treat people differently based on biologically-determined "potential member[ship]" in a sovereign political entity. *Id*. Israeli law makes anyone born of a Jewish mother eligible for Israeli citizenship. Law of Return, 5710-1950, 4 LSI 114 (1949–1950). Ireland, Greece, and other countries make people eligible for citizenship based on ancestry. *See* Pet.App. 150a n.51. But it would obviously be a national-origin classification for our governments to treat American citizen children differently based on the fact that they're Jewish, or have Irish or Greek ancestry. Some of American history's worst examples of discrimination are traceable to this notion that government may treat people

differently because their ancestry makes them "potential members" of another sovereignty. That was the rationale behind Executive Order 9066.[9]

For the same reason, the argument that ICWA doesn't discriminate based on biology, but merely accommodates the legal principle of *jus sanguinis* citizenship, is irrelevant. ICWA governs child welfare, not citizenship. It imposes different (less-protective) rules on children who are biologically eligible for tribal citizenship. But even foreign nationals residing in the United States must obey *state* laws relating to abuse and neglect, and these laws don't differentiate between children based on their (or their ancestors') citizenship. Nor could they. *See* Sandefur, *Unconstitutionality, supra* at 68–69.

In any event**, all Indian children are citizens of the United States,** 8 U.S.C. § 1401(b), so the fact that they may be eligible for citizenship in another sovereignty is irrelevant to how state and federal governments may treat them. Their American citizenship makes any analogy to international adoption untenable, since the government may not treat Americans differently based solely on the fact that their genetic ancestry entitles them to citizenship in a foreign

[9] Japanese law at the time entitled Japanese-Americans to dual citizenship, which was one of the reasons cited for interning them. *Korematsu v. United States*, 323 U.S. 214, 237 (1944) (Murphy, J., dissenting).

nation. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu*).

III. What about the government-to-government relationship?

A. Even when dealing government-to-government, Congress must respect constitutional limits, which ICWA disregards.

The en banc court held that anything rationally related to the "special government-to-government political relationship between the United States and the Indian tribes" satisfies constitutional scrutiny. Pet.App. 143a. That is false.

Reid v. Covert, 354 U.S. 1 (1957), said Congress lacks authority, even under the treaty power, to force American citizens into a legal system that lacks due process protections. Yet ICWA does precisely that.

Reid involved offenses committed by wives of servicemen stationed overseas. Pursuant to treaty, they were tried by military tribunal. *See id.* at 14–16. This Court found that unconstitutional, because as civilian American citizens, they were entitled to trial in civilian courts, with their "express safeguards" for defendants' rights. *Id.* at 22. "It would be manifestly contrary" to "our entire constitutional history and tradition" to allow Congress to adopt a treaty whereby American citizens were subjected to a legal process that deprived them of Bill of Rights protections. *Id.* at 17.

ICWA violates that rule in two ways. For cases in state court, it strips Indian children of legal protections provided by state law, by, *inter alia*, imposing different burdens of proof than apply to children of other races. *See* Sandefur, *Penalty Box, supra* at 42–50. For other cases, it subjects American citizens—Indian children and the adults who love them—to the jurisdiction of tribal courts, where the Bill of Rights does not apply. *See Bryant*, 579 U.S. at 149. Therefore, like the treaty provisions in *Reid*, the provisions of ICWA that force Indian children and adults—all U.S. citizens—into tribal courts are "illegitimate and unconstitutional." 354 U.S. at 39–40.

In short, ICWA would exceed Congress's treaty powers if it were a treaty. Congress cannot make treaties that violate the Constitution, *id*. at 18, and could not make a treaty with, say, Japan, which subjected lawsuits involving Americans of Japanese ancestry to different evidentiary standards than apply to cases involving other American citizens. ICWA's separate evidentiary standards (which commandeer state judges, *see* Section V) and procedural requirements (mandating jurisdiction transfer and giving tribes authority to dictate treatment of state-law child welfare cases) are therefore unconstitutional *even if* the treaty analogy held. To emphasize: If, as the court below said, anything rationally related to the government-to-government relationship passes constitutional muster, Pet.App. 144a, Congress could forbid tribal members from relinquishing tribal membership, or leaving reservations, or marrying outside the tribe, or adopting

non-Native children, or using birth control—or from advising others to do these things—because such prohibitions would all rationally relate to preventing the loss of tribal populations. Such things would obviously violate the fundamental rights of Native American citizens.

The court below called such hypotheticals "far-fetched," Pet.App. 137a n.47, but they are not more far-fetched than ICWA itself, which makes it harder for states to protect Native children from abuse and effectively forbids their adoption by adults of other races.

B. ICWA violates the fundamental right of Indian parents to direct the upbringing of their children.

Another way ICWA strengthens tribal governments is by giving them legal authority over children as "distinct from but on a parity with the interest of the parents." *Holyfield*, 490 U.S. at 52 (citation omitted). For instance, it lets tribal governments veto adoption decisions made by Indian parents, as in this case. But *Troxel v. Granville*, 530 U.S. 57 (2000), said it's unconstitutional for the government to give a third party authority over a child on a parity with, or superior to, that of the parents. Instead, the law must give "special weight . . . to [a parent's] determination of her [child's] best interests." *Id*. at 69.

The *Troxel* majority agreed that parents have a fundamental right to direct the upbringing of their own children. *Id.* at 65 (plurality); *id.* at 77 (Souter, J.,

concurring); *id.* at 80 (Thomas, J., concurring). Notably, this is not limited to *raising* one's children, but encompasses the right to *direct their upbringing*, including the right to make decisions regarding "custody, care and nurture." *Id.* at 65 (citation omitted). That must include the right to choose an adoptive family when necessary. Yet ICWA authorizes tribal governments to override the decisions of Native birth parents in this regard.

Worse, ICWA overrides the choices of Native parents who seek to protect their children from harm. This is especially notable in TPR cases. Birth parents must sometimes terminate the rights of abusive ex-spouses—for example, so their new spouses can legally adopt their children. But ICWA's "beyond a reasonable doubt" standard blocks this option. *See*, *e.g.*, *S.S.*, 388 P.3d at 576 ¶ 27 (ICWA barred tribal father from terminating rights of ex-wife); *In re T.A.W.*, 383 P.3d 492 (Wash. 2016) (tribal member mother barred from terminating the rights of *non-Native* ex-husband). *See further* Sandefur, *Escaping, supra* at 45–47.

Thus ICWA violates the fundamental rights of Native parents as well as the rights of their children.

IV. Doesn't Congress have plenary authority with respect to tribes?

A. Indians are fellow citizens, not a subject populace.

The court below repeatedly invoked the idea that Congress's power with respect to tribes is "plenary."

Pet.App. 23a, 28a, 73a. This word has led to considerable confusion.

Whatever it means, it does not mean *absolute*. *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977). And it cannot mean Congress is free to disregard constitutional limits on its authority.

This "plenary" power—which Professor Ablavsky rightly calls "[a] nineteenth-century innovation" not found in ratification-era writings,[10] *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1053 (2015)—is supposedly grounded in a combination of the diplomacy, commerce, and war powers. Pet.App. 21a–26a. Simply put, "plenary" power is premised on the idea that Indians are a subjugated people over whom the government has the same absolute power that a conqueror would have over a vanquished enemy.

This, however, ignores the fact that **Indians are citizens**.[11] This is an overwhelmingly significant fact—yet the court below ignored it. Native Americans

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[10] The framers *intentionally* omitted a clause giving Congress power to govern Indian "affairs," and chose instead only to give Congress power to regulate "commerce" with tribes. *See* Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. 413 (2021). Congress therefore has the same power with respect to tribes that it has with respect to foreign nations and among the states—and no more. *See* Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201, 215 (2007).

[11] Remember: ICWA does not apply in tribal courts, which govern reservation land. ICWA applies to children who live *off* reservation; also it is enforced *exclusively* by state officials. It is the only federal statute of which that is true.

"share in the territorial and political sovereignty of the United States," *Duro v. Reina*, 495 U.S. 676, 693 (1990), and are entitled to the same legal protections other Americans enjoy. But ICWA deprives them of those protections.

The Indian Citizenship Act "did not and could not yield a plenary power over the new citizens. After all, the federal government does not have plenary power over all U.S. citizens." Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1116–17 (2004).

B. Congress's authority is always subject to constitutional limits, including due process and the anti-commandeering rule.

This Court has used the word "plenary" to refer to other constitutional powers which are nevertheless limited by the same constitutional principles asserted here.

Congress's *interstate commerce* power is "plenary," *Gonzales v. Raich*, 545 U.S. 1, 29 (2005); *Gibbons v. Ogden*, 22 U.S. 1, 46 (1824)—but it is subordinate to principles such as due process or the anti-commandeering rule.

Congress's power with respect to *international relations* is "plenary," *Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933), as is its power over the military, *Chappell v. Wallace*, 462 U.S. 296, 301

(1983)—yet these powers remain subordinate to the *Reid* rule.

The Court has said Congress has "plenary" power over the District of Columbia, *El Paso & N.E. Ry. Co. v. Gutierrez*, 215 U.S. 87, 94 (1909), and immigration, *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972), and over "all persons and things for [purposes of] taxation," *Smith v. Turner*, 48 U.S. 283, 421 (1849)—but all these powers must be exercised within constitutional limits.

In short, the word "plenary" does not mean "exempt from the Constitution." If it were otherwise—if Congress's "plenary" power with respect to tribes entitled it to do whatever it considers "reasonably related to the special government-to-government political relationship between the United States and the Indian tribes," Pet.App. 143a—then, as noted above, it could forbid tribal members from marrying outside the tribe, living off-reservation, adopting non-Indian children—or whatever else Congress thought would help tribes persist.

The decision below actually reached an even more extreme conclusion than this. It said Congress can use its "plenary" power to impose whatever rules it considers rationally related to its duty of preserving tribes, in situations involving children who are merely *eligible* for *future* membership. Given that Congress also has "plenary" power over the military, over Washington, D.C., etc., this reasoning would lead to the conclusion that Congress can also dictate to states how to decide

lawsuits involving children who might someday join the military—or might someday move to Washington. This is obviously absurd. *See further* Sandefur, *The Federalism Problems with the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. __ (forthcoming, 2022).[12]

"Plenary" is best read as synonymous with the Supremacy Clause—i.e., a Congressional exercise of *constitutional* power with respect to tribes precludes state interference. That is what "plenary" means in the Interstate Commerce context. When exercising that power, Congress must still obey such principles as the anti-commandeering rule, and the same is true here.

Indeed, the en banc majority *conceded* this when it remarked that it was "unremarkable" that Congress's "plenary" power must still be exercised "consistent[ly] with the anticommandeering doctrine and other constitutional principles." Pet.App. 136a n.47. But if that's true, invoking the term "plenary" adds nothing to the analysis and merely begs the question.

C. Congress has an obligation to the sovereignty of *states*, too.

It's often argued that Congress has a duty to preserve tribal sovereignty. But whatever obligation it may have to perpetuate tribes, Congress also has an obligation to protect the legitimate sovereignty of states. *See Texas v. White*, 74 U.S. 700, 725 (1868) ("the

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[12] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853970 at 41-42.

preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union.").

While Congress may supersede state authority when exercising enumerated powers, it must nevertheless preserve states' constitutionally appropriate autonomy. *See Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers"); *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("Various textual provisions of the Constitution assume the States' continued existence."). How to balance these considerations depends on circumstances. The point here is that the federalism problems raised by ICWA's intrusion into state autonomy cannot be waved away by talismanic reference to the tribal trust relationship.

V. Would invalidating ICWA harm tribal sovereignty and undermine all Federal Indian law?

A. No other federal Indian law uses ICWA's race-based "eligibility" criterion.

No. Fears expressed in popular media that challenges to ICWA threaten the underpinnings of all Indian law are absurdly exaggerated.

ICWA is the *only* federal Indian statute triggered by biological *eligibility* for membership. The Indian Regulatory Act doesn't do this—it applies to tribal members and tribal trust lands. 25 U.S.C. §§ 5129,

2703(4), (5). The Indian Self-Determination and Education Assistance Act applies to members. *Id*. § 5304. The Native American Graves Protection and Repatriation Act applies to things that have cultural affiliations with existing tribes. *Id*. § 3002. *Only* ICWA applies *not* to tribal members, but to "*potential* Indian children, including those who will never be members of their ancestral tribe." Pet.App. 504a (emphasis added).

The only other law that comes close to ICWA's biological trigger is the Indian Major Crimes Act, 18 U.S.C. § 1153, but it does not actually include such a provision; it's just been interpreted as *possibly* applicable to persons who are only potential members. *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015). That interpretation has been criticized for "transform[ing]" the Act "into a creature previously unheard of in federal law: a criminal statute whose application turns on whether a defendant is of a particular race." *Id.* at 1116 (Kozinski, J., concurring). But even under *Zepeda*, eligibility for tribal membership is not dispositive, as it is in ICWA; it's viewed as one factor to be weighed among others. *United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005).

Only ICWA makes biology the sole triggering factor. A child must be *biologically* eligible for tribal membership and the *biological* child of a member. Nothing else counts. Efforts by states to require consideration of other factors—under the EIFD—have been repudiated. Because ICWA's biology-only trigger is unique, declaring ICWA unconstitutional would have *no* effect on other Indian laws.

B. The challenged provisions of ICWA do not constitutionally promote tribal sovereignty.

The theory that ICWA is essential to preserving tribal sovereignty is predicated on three assumptions: *first*, that ICWA ensures that states accord full faith and credit to tribal court adjudication of child welfare cases—thereby giving tribal governments the respect they deserve; *second*, that ICWA supports tribes' capacity to determine their own citizenship; *third*, that it prevents diminishment of tribal populations. None of these support the conclusion that ICWA promotes tribal sovereignty in a constitutional manner.

1. True, ICWA mandates full faith and credit for tribal court decisions, and that's unobjectionable where a tribal court has jurisdiction—for example, with regard to on-reservation cases—and where its proceedings provide basic due process. The problem arises when tribal courts try to adjudicate cases in which jurisdiction is lacking. They do this because ICWA purports to give them jurisdiction over matters relating to Indian children even without the required "minimum contacts." Consequently, tribal courts often assert authority to decide cases based solely on the child's biological ancestry, even where the child has never been domiciled on reservation, *see*, *e.g.*, *Renteria v. Shingle Springs Band of Miwok Indians*, No. 2:16-CV-1685-MCE-AC, 2016 WL 4000984, at *3 (E.D. Cal. July 26, 2016), or has never visited tribal lands. *See*, *e.g.*, *In re C.J. Jr.*, 108 N.E.3d 677, 695–97 (Ohio App. 2018).

Race-based jurisdiction is unconstitutional, and tribal courts cannot complain when they are barred from asserting such authority. On the other hand, when they exercise legitimate jurisdiction, state courts would enforce their decisions as a matter of ordinary comity even without ICWA. *Cf. Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).

2. ICWA does not support tribes' ability to determine citizenship criteria, nor would invalidating it undermine such authority, because tribal membership is a matter of tribal law, while "Indian child" status under ICWA is a matter of federal, *not* tribal, law. *In re Abbigail A.*, 375 P.3d at 885–86. Affirmance would therefore have no effect on tribes' ability to determine their citizenship. It would only affect the way *state agencies* deal with cases involving children that federal law classifies as "Indian."

3. ICWA calls children "tribal resources," 25 U.S.C. § 1901, and seeks to preserve tribes as collective entities. *See* Duthu, *American Indians and the Law* 150–51 (2008). But whatever obligation Congress has to preserve tribal sovereignty, it may not do so in a manner that deprives U.S. citizens—including minors—of equal protection or due process. As noted above, Congress could not, e.g., outlaw marriage between tribal members and non-members, or forbid tribal members from waiving tribal membership—even though these prohibitions would certainly support "[a] tribe's communal interests in preserving its sovereign and cultural integrity." *Id.* at 151. Likewise,

Congress cannot deprive Indian children of their right to equal treatment, even if its goals are legitimate.

Nor can Congress, in an effort to preserve what are thought to be important social values, compel states to discriminate. *United States v. Windsor*, 570 U.S. 744, 769–70 (2013), held the Defense of Marriage Act unconstitutional partly because it overrode non-discriminatory state law and mandated discrimination on the subject of marriage (a quintessentially state-law matter). ICWA does the same: it forces states to treat children differently based on biological ancestry, in cases involving child welfare, foster care, and adoption, which are quintessentially state law matters. In *Windsor*, Congress "depart[ed]" from the "history and tradition of reliance on state law to define marriage" by compelling states to treat marriages as "unlike" when they wished to "treat[] [them] as alike." *Id*. at 768. So, too, ICWA forces states to treat children differently based on biological ancestry—when, absent ICWA, states would have treated them identically.

VI. Isn't ICWA the "gold standard"?

A. The "gold standard" soundbite has no application here.

One often hears the slogan that ICWA is "the gold standard" of child welfare. As explained in GI et al.'s brief in support of the cert petition (at 11–20), that is simply false.

That phrase originated in a brief filed in *Adoptive Couple* (2013 WL 1279468), which used it to describe the principle that states should "support . . . the bonds between a child and her *fit* birth parents." *Id*. at *4 (emphasis added). But nobody disputes that placement with *fit* parents is ideal. The problem is that ICWA restricts states' ability to protect Indian children from *unfit* parents. And it does so in a way that overrides the "best interests of the child" rule—which is the actual "gold standard."

ICWA's "active efforts" and "reasonable doubt" requirements are the opposite of a "gold standard." They require that Indian children be *more* abused, and for *longer*, than minors of other races before states can rescue them. That harms at-risk Indian children, resulting in cases in which state social workers know children are being hurt, but cannot take action—which would not happen to non-Indian children. The hideous consequences for Laurynn Whiteshield, Declan Stewart, Josiah Gishie, Anthony Renova, etc., etc., testify to the fact that ICWA is in no way a "gold standard."

B. The "gold standard" is the best interests of the child test—but ICWA overrides that test.

A true gold standard of child protection already exists: it's the "best interest of the child" standard. Yet ICWA bars states from applying that standard in cases involving Indian children. Indeed, some state courts have created a literal separate-but-equal rule,

according to which there is one "best interest" standard for white children, and a different "best interest" standard for Indian children. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. App. 1995) (describing the best interests standard as an "Anglo" standard that should not be applied to Indian children); *In re Alexandria P.*, 204 Cal.Rptr.3d at 634 (while for non-Indian children, best interests is the overriding consideration, best interests is only "one of the constellation of factors relevant" in an Indian child's case). That violates equal protection and deprives at-risk children of the legal protections they need. That's no "gold standard." *See* Sandefur, *Unconstitutionality, supra* at 89–94.

VII. How can "anti-commandeering" apply to state judges if they take an oath to enforce federal law?

A. ICWA dictates to state judges how to enforce *state* law—*not* how to enforce federal law.

Congress may adopt laws which state judges must apply as Congress requires. But ICWA doesn't do that. It dictates how state judges resolve cases "under State Law." 25 U.S.C. § 1915(a). That exceeds Congress's authority and is a form of commandeering.

Consider TPR. In TPR cases, judges must determine whether the statutory elements for TPR have been satisfied. Those statutory elements are set forth in *state* law—ICWA doesn't create a federal TPR cause

of action. In a TPR case, the plaintiff must prove these elements via a burden of proof, which in all states (for non-Indian children) is "clear and convincing evidence," as *Santosky* requires. ICWA, however, requires "beyond a reasonable doubt." All ICWA does is dictate the burden of proof—not the elements. Similarly, in foster care or adoption cases, the *substantive* showings that must be proven are established by state law, not ICWA; all ICWA does is command state judges to follow its preferences when enforcing *state* law.

In short, ICWA does not create substantive rights. It establishes procedural rules for applying state law.[13] No other federal statute attempts anything like this. Sandefur, *Federalism Problems, supra* at 32–42.

B. ICWA is not like federal laws that change deadlines or preempt contrary state law.

The en banc majority found this constitutional, citing cases involving ERISA, the Railroad Retirement Act, and laws relating to military retirement income. Pet.App. 312a. But those statutes *don't* instruct state courts how to apply their own state laws. Instead, they supersede state law and establish substantive federal rights—something ICWA doesn't do.

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[13] It creates no "substantive entitlement to relief," *Lindh v. Murphy*, 521 U.S. 320, 327 (1997), but only regulates "the manner of determining" cases—and is therefore procedural. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

For instance, the court cited *Egelhoff v. Breiner*, 532 U.S. 141 (2001), an ERISA case, as a situation where federal statute "preempted a state probate rule and so dictated, contrary to state law, the beneficiaries of pension and insurance proceeds." Pet.App. 312a. But *Egelhoff* was an ordinary preemption case in which state law (whereby divorce automatically terminated certain pension benefits to ex-spouses) was superseded by ERISA (which requires pension administrators to pay "a 'beneficiary' who is 'designated by a participant, or by the terms of [the] plan.' " 532 U.S. at 147 (citation omitted)). *Egelhoff* did not involve a federal effort to *instruct state judges how to apply* ***state*** *law.*

Egelhoff is therefore disanalogous: ERISA doesn't regulate judges, as ICWA does; it regulates plan administrators. ICWA doesn't establish a substantive federal right, as ERISA does; it affects the procedures by which *state* substantive law is applied. And while ERISA relies on background principles of state law, it doesn't tell state courts what evidentiary standards govern application of those state laws. It simply overrides state laws, and substitutes federal rules and rights which state courts must enforce—a typical exercise of the Supremacy Clause. ICWA, by contrast, directly regulates state courts *qua* state courts, and orders them to employ different standards than they normally would when applying *their own substantive laws* relating to TPR, adoption, foster care, etc.

Judge Dennis said ICWA doesn't tell states how to apply their own laws, but merely "alter[s]" or "modifies" the "substantive aspects of state claims." Pet.App.

111a. He gave as examples several federal laws that change the rules governing state-law litigation, such as statutes that let people whose military service prevents them from participating in litigation reopen final state court judgments against them. If Congress can do this, he reasoned, it should have authority under its "plenary" Indian power to compel state courts to follow federal evidentiary or procedural standards in state-law cases.

But federal laws entitling servicemembers to postpone or reopen state court proceedings during service are not comparable to ICWA's mandates. ICWA changes the evidentiary standards state courts must use when adjudicating state-law causes of action, which alters *substantive outcomes* in ways that postponements or opportunities for relitigation don't. Indeed, the constitutionality of reopenings or postponements is a function of how minimal they are. *See Semler v. Oertwig*, 12 N.W.2d 265, 270 (Iowa 1943) (such laws "[are] to be used as a shield for defense, and not as a sword for attack, or as an instrument for the oppression of opposing parties."). In other words, federal statutory postponements or reopenings are "necessary and proper" for effectuating Congress's power to regulate the military, precisely because they do nothing more than delay litigation or prevent defaults. *Cf. Printz v. United States*, 521 U.S. 898, 923–24 (1997) (whether a law is "necessary and proper" is determined by reference to its effect on state sovereignty).

Consequently, delays or reopenings are *not* automatically given under these statutes. If postponement or reopening would prejudice a party under state law, courts can refuse that delay or reopening. *Keefe v. Spangenberg*, 533 F. Supp. 49, 50 (W.D. Okla. 1981). And someone seeking to reopen a state court judgment under these statutes must first show a meritorious claim or defense *under state law*. *Courtney v. Warner*, 290 So.2d 101, 103–04 (Fla. Dist. Ct. App. 1974). ICWA, by contrast, does not apply only where a party's case is *prima facie* meritorious under state law—on the contrary, it compels state judges to apply a *different* burden of proof than they otherwise would. And it contains no exception in the event of prejudice to a party—such prejudice is the whole purpose of ICWA! Finally, ICWA's evidentiary standards contain no "good cause" exception, which the laws postponing litigation or allowing reopening do.

Judge Dennis also pointed to the Foreign Sovereign Immunities Act (FSIA) and the Parental Kidnapping Prevention Act (PKPA) as examples of federal laws that change standards governing state-law causes of action. Pet.App. 110a. But these are disanalogous, too. FSIA deprives state courts of jurisdiction over cases against foreign governments, but ICWA's evidentiary requirements don't simply deprive state courts of jurisdiction; quite the contrary, they only apply to state courts that *retain* jurisdiction. And Congress probably cannot alter state law in this way even when legislating with respect to the "vast external realm" of foreign affairs, because federal authority in international

matters must "like every other governmental power . . . be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936).

PKPA is an exercise of Congress's authority to require state courts to grant full faith and credit to other states' acts, *see Valles v. Brown*, 639 P.2d 1181, 1184 (N.M. 1981), meaning it does not purport to dictate to state courts how to apply *their own* domestic laws in *intra*-state matters. Rather, it provides that under certain (*inter*state) circumstances, they must apply foreign state court judgments. That's not comparable to ICWA's provisions imposing different evidentiary standards in child custody matters brought under state law.

In fact, full faith and credit principles are instructive, because they *do not* require states to enforce foreign law in contravention of their own public policies—but ICWA leaves state courts with no comparable discretion. State judges are commanded to employ ICWA's different evidentiary standards when applying their own state statutes, regardless of—even contrary to—state public policy. *See further* Sandefur, *Federalism Problems, supra* at 32–47.

VIII. What about residential schools and other abuses against Natives in the past?

A. The injustices of the past are not cured by inflicting injustices today.

Native Americans have suffered terrible wrongs throughout history, including by governments seeking to force assimilation into white society. But inflicting injustices on children today only makes things worse. Injustices toward Natives have typically been rooted in the denial of the legal equality to which they are entitled—a denial ICWA perpetuates by subjecting "Indian children" to separate and substandard rules that prioritize other factors over their individual needs.

B. This case and similar cases have nothing to do with "removing" Indians from Indian families.

ICWA was intended to prevent the "removal" of children from families "by nontribal public and private agencies." 25 U.S.C. § 1901(4). Yet this and many other cases have nothing to do with *removing* children. The Brackeens sought to adopt a child whose birth parents volunteered her for, and testified in support of, that adoption. In *S.S., T.A.W., Renteria*, and many other cases, no children were being removed from families, and no agencies were involved. Yet courts applied ICWA's race-based mandates anyway.

Obviously the abuse of state agency authority, and unjustified removal of children from families, are grave concerns. But such wrongs already violate non-ICWA

laws, including the Due Process Clause, *see Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 769–72 (D.S.D. 2015), so finding ICWA unconstitutional would have no effect on the ability to redress those wrongs.

CONCLUSION

ICWA is unconstitutional.

Respectfully submitted,

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