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.

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

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

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

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

BRIEF OF INDIAN LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF FEDERAL AND TRIBAL DEFENDANTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors and scholars of federal Indian law whose scholarship and clinical practice focus on the subject matter areas of Indian law, tribal powers, and federal- and state-court jurisdiction.[2] *Amici* possess expertise in this area and an interest in ensuring that cases concerning these issues are decided consistently with the text of the United States Constitution, foundational principles in this area of law, and the express intent of Congress. *Amici* respectfully submit this brief to provide the Court history and context behind the Constitution's use of Indian status classifications and the inherently political determinations that the legislative and executive branches must make to carry out the United States' obligations to Indians and Indian tribes under the duty of protection.

Amici submit this brief in their individual capacities, not on behalf of any of the institutions with which they are associated.

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[1] Counsel for all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of *amici* appears in an appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized that "[f]ederal laws that treat Indians or Indian tribes differentially from other individuals or groups create political, not racial, classifications and are not subject to strict scrutiny under the equal protection component of the Fifth Amendment." Restatement of the Law of American Indians § 9(a) (2021). Instead, when Indian affairs legislation is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). This rule of deference recognizes the plenary authority of Congress in effectuating the United States' trust responsibility (originally known as the duty of protection) toward Indian tribes and respects the Constitution's commitment of such matters to the political branches.

Mancari's "political classification doctrine," better understood as a rational basis test applicable in the *sui generis* context of Indian affairs, remains the appropriate level of scrutiny this Court must apply to legislative classifications based on Indian status. So long as such classification remains rationally related to the fulfillment of the trust responsibility, that classification passes Constitutional muster. This deference is necessary because the act of defining the group of persons to whom the United States owes the duty of protection is an inherently political decision outside the ambit of Article III.

The Constitution itself confirms the validity and necessity of this political classification doctrine. The text of the Constitution acknowledges both "Indian

Tribes" and "Indians," yet leaves both terms undefined. This Court has recognized that these provisions, *inter alia*, confer Indian affairs powers and duties upon Congress and the executive branch. Inherent in these powers is the attendant need to define the class of persons or entities subject to such authority. Recent scholarship has shown that the Founding Generation possessed no single, definitive understanding of these terms but generally adopted a separatist perspective on "Indian Tribes" and "Indians." This research provides further support for both the existence of the power to define, and for substantial deference to the judgements of the political branches in making such classifications.

The placement of "Indian Tribes" and "Indians" within the text of the Constitution further supports deference to the political branches because the terms are found in provisions recognizing other uniquely political powers. The Framers identified "Indian Tribes" adjacent to provisions related to the admission of states and recognition of foreign sovereigns and their citizens. "Indians" appears in a provision that has been interpreted to describe citizenship classifications. These neighboring powers—the admission of states, recognition of foreign sovereigns, and citizenship determinations—all constitute political questions outside the authority of Article III. The decision to include "Indian Tribes" and "Indians" adjacent to these political powers suggests classifications made pursuant to the Indian affairs powers should be treated similarly. Of course, some of this Court's earliest Indian affairs jurisprudence identifies the "law of nations" as the source of the United States' duty of protection,

Worcester v. *Georgia*, 31 U.S. 515, 560-61 (1832)[3] (". . . the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection."), and finds no basis on which to distinguish Indian treaties from those made "with any foreign power," *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 60 (1831), underscoring the political nature of the relationship at issue.

The constitutional impetus to define "Indians" and "Indian Tribes" was not limited by the Reconstruction Amendments. Indeed, the Fourteenth Amendment retains the original Constitution's explicit reference to "Indians." What is more, the contemporary understanding of the Fourteenth Amendment demonstrates that it was not intended to alter or compromise the political relationship between the United States and Indians or Indian tribes. See *Elk* v. *Wilkins*, 112 U.S. 94 (1884).

As relevant here, the Indian Child Welfare Act (ICWA) is supported by detailed findings demonstrating that Congress enacted the law in fulfillment of the duty of protection. The challenged classifications—ICWA's definition of "Indian child" and preference for "other Indian families"—each bear more than a rational relationship to the fulfillment of the duty, and easily withstand the appropriate degree of scrutiny.

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[3] Although this Court recently limited certain aspects of the *Worcester* decision, this aspect—the duty of protection—remains intact. See *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486, 2502-03 (2022).

ARGUMENT

I. The Text and Structure of the Constitution Require Deference to Legislative Classifications Based on Indian Status.

The political classification doctrine first articulated by this Court in *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974), establishes a rational basis test applicable in the context of the federal government's Indian affairs powers. So long as a statute aimed at a class of Indians "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments" do not violate due process. *Id*. *Mancari* has been the law of the land for nearly half a century, and this Court has repeatedly relied on it to reject equal protection challenges arising in the context of Indian affairs. *See United States* v. *Antelope*, 430 U.S. 641, 645-47 (1977) (rejecting equal protection challenge to assertion of federal criminal jurisdiction over Indians); *Fisher* v. *District Court*, 424 U.S. 382, 382 (1974) (rejecting racial discrimination challenge to exclusive jurisdiction of tribal court).

Mancari is oft cited for the simplified premise that Indian status is political, not racial. See Gregory Ablavsky, *"With the Indian Tribes:" Race, Citizenship, and Original Constitutional Meanings*, 70 Stan. L. Rev. 1025, 1028 (2018) ("[S]ubsequent interpreters have compressed the holding to a single footnote in which the Court reasoned that because Indian status required membership in a 'federally recognized' tribe[], . . . the preference [was] political rather than racial in nature."). But this Court's reasoning in *Mancari*, and the political classification doctrine articulated therein, actually recognize the broader and more fundamental relationship between the United

States and Indians and tribes as inherently political. See *Mancari*, 417 U.S. at 551-52 (recognizing that resolution of the question presented "turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress,"); see also *id*. at 552 (citing *Board of Comm'rs of Creek County v. Seber*, 318 U.S. 705, 715 (1943) (discussing the origin of the duty of protection as an exercise of the war and treaty powers)); see also Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. Pa. L. Rev. 549, 576-86 (2022) (exploring the Framers' understanding of tribal sovereignty and the Indian canon of construction).

The political classification doctrine then is best understood as a rule of deference that observes the United States' assumption of a duty of protection over Indians and Indian tribes, and respects the Constitution's delegation of Indian affairs powers to the political branches. See *Mancari*, 417 U.S. at 551-52 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."). Because the relationship of the United States to "Indians" and "Indian Tribes" is inherently political, and the Constitution empowers the political branches to make Indian status classifications, those classifications fall outside the framework of this Court's Fourteenth and Fifth Amendment equal protection jurisprudence. This is not merely the settled law of the land, but the result compelled by the text and structure of the Constitution.

A. The Constitution Authorizes and Requires the Political Branches to Define "Indians" and "Indian Tribes."

The Constitution imbues Congress with powers and duties relative to both "Indians" and "Indian Tribes," but defines neither. See U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. I, § 2, cl. 3, *repealed and restated in relevant part by* U.S. Const. amend. XIV, § 2.

First, the Commerce Clause provides in part that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes* . . ." U.S. Const. art. I, § 8, cl. 3 (emphasis added). This Court has recognized that this provision (the "Indian Commerce Clause") grants Congress "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989). When Congress acts within the authority granted by this provision, logic dictates that it must first define the sovereigns with which it seeks to "regulate commerce." The Constitution therefore requires Congress to define, or establish standards to determine which groups may constitute, "Indian Tribes."

Second, the original text of Article I stated:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding *Indians not taxed*, three fifths of all other Persons . . .

U.S. Const. art. I. § 2, cl. 3 (repealed) (emphasis added).[4] This provision charged Congress with apportioning taxes and representation based on a count of certain persons and the exclusion of others. By requiring Congress to conduct a census and specifying the classes of persons to be excluded from the apportionment based on that census, the Constitution authorized and required Congress to make a determination about which persons are "Indians."

The use of Indian and tribal classifications in the Constitution therefore "single[] Indians out as a proper subject for separate legislation." *Mancari*, 417 U.S. at 552; see also *Rice* v. *Cayetano*, 528 U.S. 495, 519 (2000) (collecting cases for the proposition that "[o]f course . . . Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs"). But which persons were "Indians" or which groups "Indian Tribes" was not obvious at the Founding, as no single accepted definition existed at the time, let alone one sufficiently specific to frame legislation. *See* Ablavsky, *"With the Indian Tribes,"* 70 Stan. L. Rev. at 1042, 1049-50 ("Indian" as an identifier primarily "convey[ed] their difference from Europeans"; use of "tribe" represented an effort to "describ[e] what made Indian societies different from" Anglo societies).

The Framers moreover understood that these terms potentially encompassed large and varying classes of individuals, as the United States entered into

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[4] This Court never had occasion to interpret the meaning of "Indians Not Taxed," but the notorious *Dred Scott* decision treated the "not taxed" provision as a citizenship analogy. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403-04 (1857).

nearly 400 treaties with hundreds of Indian tribes during the treaty making era. See Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 Mont. L. Rev. 97, 98 (2015). Given this awareness, the Framers' contemporaneous decision to include these broad and undefined classifications in the Constitution afforded Congress necessary discretion to define these terms in the exercise of its Indian affairs powers and duties.

B. Congress's Power Necessarily Encompasses the Authority to Draw Classifications Based on Race.

The relationship between the United States, Indian tribes, and individual Indians is "truly *sui generis*." See *Mancari*, 417 U.S. at 554 (describing the Bureau of Indian Affairs). In this unique context, even classifications based on descent, kinship, or race remain within Congress's political power to define.

At the Founding, the common understanding of "Indians" bore both racial and political connotations:

> Sometimes, the defining characteristic was race: Anglo-Americans, classifying themselves as 'white,' labeled Indians 'not white'—most frequently, 'red.' At other times, the key difference was political allegiance: Anglo-Americans were citizens of the United States, while Indians were members of their respective nations.

Ablavsky, *"With the Indian Tribes,"* 70 Stan. L. Rev. at 1049-50. What is more, the Framers' use of the word "tribe" as opposed to "nation" also connoted a distinction based on race or ancestry. *Id*. at 1046 (early Americans understood "tribes" to be defined through

common ancestry). In other words, the Framers' decision to identify "Indians" and "Indian Tribes" in the Constitution necessarily contemplated Congress's ability to legislate on behalf of a class of persons based on race.

Mancari recognizes this nuance as well. The hiring preference at issue there applied where "an individual [possessed] one-fourth or more degree Indian blood" and "member[ship in] a Federally-recognized tribe." *Mancari*, 417 U.S. at 553 n.24; see Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal* Sovereignty, 87 Wash. L. Rev. 1041, 1058 (2012) (observing that the classification at issue in *Mancari* "narrowed the political category (tribal members) further with the blood quantum requirement"). Nevertheless, this Court upheld the preference at issue as "political rather than racial in nature." *Mancari*, 417 U.S. at 553 n.24.

C. The Fourteenth Amendment Did Not Disturb Congress's Authority in This Area.

Although the Reconstruction Amendments repealed the original Constitution's reference to "Indians not taxed," the Fourteenth Amendment retained the language, providing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding *Indians not taxed*." U.S. Const. amend. XIV, § 2 (emphasis added). The decision to retain an apportionment exemption for "Indians" in the text of the Amendment plainly demonstrates the continuing validity of the political branches' authority to make classifications based on Indian status.

Further proof that the Framers' original deference to the political branches persisted in the Amendment can be found in the documented contemporaneous understanding of the citizenship status of individual Indians and Congress's repeatedly expressed intent not to disturb that status. Congress engaged in extensive debate over Indian citizenship during the Reconstruction era, including in the period leading up to the passage of the 1866 bill that granted the same to freed slaves. See Bethany Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 Cal. L. Rev. 1165, 1174-76 (2010); George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, "Subject to the Jurisdiction Thereof" and Section II, "Excluding Indians Not Taxed,"* 28 Am. Indian Culture & Res. J. 37, 37-38 (2004); R. Alton Lee, *Indian Citizenship and the Fourteenth Amendment*, 4 S.D. Hist. 198, 212 (1974). During the subsequent debates on the Fourteenth Amendment, Congress reconfirmed its intent to preclude Indian birthright citizenship. Matthew L.M. Fletcher, *Federal Indian Law* § 3.8 at 93 (2016). Finally, after the ratification of the Fourteenth Amendment, the Senate issued a report confirming this understanding:

> It is worthy of mention that those who framed the fourteenth amendment, and the Congress which proposed it, as well as the legislatures which adopted it, understood that the Indian tribes were not made citizens, but were excluded by the restricting phrase, "and subject to the jurisdiction," and that such has been the universal understanding of all our public men since that amendment became a part of the Constitution . . .

S. Rep. 41-268, at 10 (Dec. 14, 1870). The Report further explained that, because "former slaves had become citizens," the three-fifths clause would be omitted, "but the clause 'excluding the Indians not taxed' is retained" for purposes of "determining the basis of representation." *Id*. The Senate expressed specific concern that the amendment should not be read to abrogate Indian treaties. *Id*. at 10-11; *see also* Restatement of the Law of American Indians § 7, cmt. c. (the 1871 Act that ended treaty-making with Indian tribes did not affect Congress's Indian-affairs powers or abrogate existing treaties).

Shortly thereafter, this Court also confirmed that the Fourteenth Amendment did not change the status of Indians. In *Elk* v. *Wilkins*, 112 U.S. 94 (1884), an Indian man born in Iowa claimed that he was a citizen under Section 1 of the Fourteenth Amendment and brought an equal protection challenge against the state officials who refused to register him to vote on account of his Indian status. This Court rejected the claim. Noting that tribes were "alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit," this Court held that Indians were "no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government." *Id.* at 99-100, 102; see also Bethany Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 Cardozo L.

Rev. 1185, 1236 (2016) (discussing continuity between intent of Fourteenth Amendment and *Elk* v. *Wilkins*).[5]

In other words, the wellspring of the instant equal protection challenge, the Fourteenth Amendment, was specifically intended to leave undisturbed Congress's authority to legislate on behalf of Indians. In accordance with the original understanding of the terms used in the Constitution itself, that power encompassed the authority to draw Indian status classifications based on race. Therefore, even if Congress employs a racial (or presumed racial) classification, that political choice would still fall outside the realm of equal protection, and remain valid so long as it was "tied rationally to the fulfillment of" the duty of protection, or the federal government's general trust relationship with Indians and Indian tribes. *Mancari*. 417 U.S. at 555.

D. The Structure of the Constitution Compels Deferential Review of Indian Status Classifications as Inherently Political Determinations.

The placement of the Constitution's references to Indians and Indian tribes further demonstrate that Indian status classifications constitute political determinations akin to recognition of a foreign nation or the admission of a state into the Union.

As discussed, the Constitution gives Congress the power "to regulate Commerce with foreign Nations,

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[5] The *Elk* Court observed that Congress could choose to extend citizenship to the Indians, and Congress ultimately did extend citizenship in 1924 to all "person[s] born in the United States to a member of an Indian . . .tribe," a definition remarkably similar to ICWA's definition of Indian Child. 8 U.S.C. § 1401(b).

and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The placement of "Indian Tribes" alongside "foreign Nations" and "the several States" provides insight into the Framers' treatment of Indian tribes. This choice suggests that classifications made in service of this Clause should receive similar treatment under judicial review.[6]

An unbroken line of authority deferring to the political branches on questions regarding recognition of the foreign, state and tribal sovereigns identified in the Commerce Clause demonstrates that Article III courts should play a limited role in reviewing decisions about the scope of the federal government's relationship with Indian tribes.

First, the political branches possess the exclusive power to recognize foreign sovereigns. *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 22 (2015). Specifically, the executive branch possesses exclusive power to recognize foreign sovereigns, while the Constitution also compels Congress—including by the Commerce Clause—to legislate in the "political process" of foreign affairs. *Id*. at 17. Whatever the contours of these powers among the political branches, the recognition decision remains nonjusticiable because "the Judiciary is

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[6] Although the Framers included both States and Indian Tribes in the list of sovereigns within Congress's commerce power, this Court has long recognized that those powers have distinct origins and distinct parameters. *See Cotton Petroleum Corp.*, 490 U.S. at 192 ("[W]hile the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, . . . the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs . . . .").

not responsible for recognizing foreign nations." *Id*. at 22.

Second, the Constitution explicitly affords Congress the exclusive power to admit states to the Union. U.S. Const. art IV, § 3, cl. 1. This "textually demonstrable constitutional commitment of the issue to" Congress renders the decision to admit a state nonjusticiable. See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

Third, decisions by Congress and the Executive branch to "recognize" Indian tribes are subject to an extremely deferential standard of review.[7] Congress's decision to recognize an Indian Tribe has never been reviewed by the judiciary on the merits. The leading case on the question of the scope of Congress's political discretion to acknowledge Indian tribes is *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407 (1865). There, this Court expressly held that determinations of federal recognition by Congress are political decisions that may not be reviewed by an Article III court:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. *If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes,*

[7] This Court has analogized the admission of new states into the Union to the acknowledgment of Indian tribes, stating that both are political questions not subject to review by Article III courts. *United States v. Sandoval*, 231 U.S. 28, 38 (1913) (citing *Coyle v. Smith*, 221 U.S. 559, 574 (1911)).

> *within the control of the laws of Congress. . . . This power residing in Congress, that body is necessarily supreme in its exercise*. This has been too often decided by this court to require argument, or even reference to authority.

Id. at 419 (emphasis added).

Modern federal recognition continues to occur primarily through Congress, but may also occur through the executive branch (Department of the Interior) by an administrative process. See Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 Ind. L.J. 955, 972 (2016) (Congress recognized more tribes than the Executive Branch from 1979 to 2013). For those recognition decisions made through the administrative process, Congress has provided for judicial review pursuant to the Administrative Procedures Act, which provides that they may be set aside only if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A). Although these final agency actions are justiciable, courts afford substantial deference to agency discretion. See *Miami Nation of Indians of Ind., Inc.* v. *Dept. of the Interior*, 255 F.3d 342, 348-51 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002).

In sum, the political branches' decisions to recognize or admit the three sovereigns identified in the Commerce Clause are generally exempt from judicial review. In the one limited exception to this unbroken line of authority, an extremely deferential standard of review applies.

This authority strongly suggests that the Constitution mandates deferential review of Indian status classifications. Recognition decisions determine the nature and scope of the United States' relationship and duties vis-à-vis other sovereigns. See*, e.g.* H.R. Rep. 103-781, 2-3 (1994) (federal recognition of Indian tribes "permanently establishes a government-to-government relationship between the United States and the recognized tribe . . . [and] imposes on the government a fiduciary trust relationship to the tribe and its members."); see also *Zivotofsky*, 576 U.S. at 11 (observing that "legal consequences," including "sovereign immunity" and "diplomatic relations" "follow formal recognition"). As Indian status classifications define the scope of the United States' trust responsibility to Indians and Indian tribes by specifying the classes of persons and sovereigns within that relationship, the Constitution's commitment of those powers to the political branches merits similar deference.

E. The Political Question Doctrine Presents a Compelling Analogy in Favor of Judicial Deference.

Although not directly applicable, this Court's treatment of political questions provides a useful analogue illustrating the separation of powers concerns that abound in judicial scrutiny of legislative classifications of Indians. A political question is one that is nonjusticiable as "a function of the separation of powers." *Baker*, 369 U.S. at 210. This Court has articulated several factors[8] that might indicate an issue is a

[8] These factors include: "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for

political question. Several of these factors are present here.

At a minimum, the Constitution makes a "textually demonstrable constitutional commitment" of this issue to Congress by delegating the Indian affairs powers to that body in Article I. See Part I.A., supra.

But the separation of powers concerns do not end there. Indian status classifications remain necessary to the execution of Congress's Indian affairs powers and the duty of protection. As such, legislating on behalf of Indians requires "an initial policy determination of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S. at 217, about the fundamental scope of Congress's powers and duties because the Constitution does not supply a definition for "Indians" or "Indian Tribes."

The sheer breadth and volume of federal legislation in Indian affairs and the varying definitions (or lack thereof) on which each is based demonstrate the unwieldiness of judicial review (or the "lack of judicially discoverable and manageable standards") in this space. See *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019) ("Among the political question cases this Court has identified are those that lack 'judicially discoverable and manageable standards for resolving [them].'"

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resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217.

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(quoting *Baker*, 369 U.S. at 217)). Such variation also demonstrates "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217.

Take, for example, Congress' first exercise of its plenary power in Indian affairs: the Trade and Intercourse Act of 1790. An Act to Regulate Trade and Intercourse with the Indian tribes, ch. XXXIII, 1 Stat. 137 (1790). This broadly preemptive statute forbids states and individual American citizens from trading with or committing a crime against Indians, and imposes criminal penalties for the same, yet the statute does not define "Indian." See *id*. Neither does the Major Crimes Act nor the Indian Country Crimes Act, which form the backbone of Indian country criminal jurisdiction. 18 U.S.C. § 1153; 18 U.S.C. § 1152.

Other federal statutes utilize blood quantum or tribal membership to define "Indian." Specifically, the Indian Reorganization Act offers both among its three alternative definitions of "Indian." 25 U.S.C. § 5129. The use of "blood quantum," the fictional "degree" of Indian blood an individual is determined to possess based on ancestry, to define "Indians" dates back to the treaty-making era. See, e.g., *Treaty with the Winnebago*, art. 4, Nov. 1, 1837, 7 Stat. 544, 545 ("Indians, having not less than one quarter of Winnebago blood").

Additionally, Congress and the executive branch have at times treated classes of non-Indians as Indians, most notably the freedmen once held as slaves by southern tribes who became citizens of Indian tribes

by treaty in the aftermath of the civil war.[9] See generally Circe Sturm, *Blood Politics, Racial Classification, and Cherokee National Identity: The Trials and Tribulations of the Cherokee Freedmen*, 22 Am. Indian. Q. 230 (1998). Some tribes have done the same. See Const. of the Kiowa Tribe, art. IV, § 1 (tribal membership afforded to original allottees of "Kiowa Captive blood" or their descendants possessing at least "one-fourth degree Kiowa Indian and/or Kiowa Captive blood").

Not only has Congress utilized varied definitions of "Indian" since 1790, all of Congress's classifications are reasonable within the original understanding of "Indian" and "Indian Tribe" by the Founding Generation. See Section I.B., supra. Any judicial determination that would narrow these undefined classifications, for example to federally recognized Indian tribes and their members, would violate separation of powers by usurping the power to define these terms committed exclusively to the political branches by the Constitution.

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[9] Notably, the 1866 treaties that extended tribal citizenship to freedmen were necessitated by the fact that the Fourteenth Amendment did not apply to the tribes. These treaties, between the federal government and the former slaveholding tribes, mandated that the tribes adopt the people they formerly held as slaves. Those individuals were to have the political identity of their former slaveholding tribe with all the rights and privileges of native citizens of that tribe. As a result of these treaties and subsequent intermarriage, the Cherokee Nation, for example, has Cherokee citizens who are racially Black or African American, citizens who are racially White or Caucasian, and citizens who identify racially as "Indian." Those Cherokee citizens who identify racially as African American or White are also "Indian" because being Cherokee is a political identity.

II. The Duty of Protection Also Requires Deference to Congress's Determinations Regarding the Scope of That Duty.

In addition to the Constitution's explicit delegation of powers and duties in Indian affairs, Congress also derives its power in this area from the United States' assumption of a duty of protection over Indians and Indian tribes. *Worcester* v. *Georgia*, 31 U.S. 515, 520 (1832). This commitment, derived from the nation-to-nation relationship evidenced in Indian treaties, allowed Tribes to maintain their nationhood and independence while accepting the protection of the United States. *Id*. at 560-61. The duty of protection underlies the entire federal-tribal relationship. It is a separate source of authority for Congress to act, and it differentiates the Indian affairs political context from a traditional nonjusticiable political question.

The assumption of this duty engendered a concomitant power in the United States. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 567 (1903) ("[T]here arises the duty of protection, and with it the power."); *Seber*, 318 U.S. at 715 ("From almost the beginning the existence of federal power to regulate and protect the Indians and their property . . . has been recognized."). Congress's plenary power in Indian affairs encompasses the duty and power to effect it, including the power to create legal classifications based on Indian status.

Congress's choices to exercise its power and determine the scope of its duty represent political decisions. *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial

department of the government[.]" (quoting *Lone Wolf*, 187 U.S. at 565)). Congress has repeatedly defined the scope of the duty of protection, including by establishing a complex federal-tribal governance mechanism, see Pub. L. No. 93-638, 88 Stat. 2203 (1975); by assuming criminal jurisdiction in Indian country, see 18 U.S.C. §§ 1152, 1153; by providing certain procedural rights to defendants in tribal court, see 25 U.S.C. § 1302; and, most recently, by restoring tribal criminal jurisdiction over non-members in certain circumstances, see 25 U.S.C. § 1304 and Pub. L. No. 117-103, § 804(5)(B), 136 Stat. 49, 898-905 (2022).

Congressional powers have also been limited in important ways. For example, recognized title cannot be taken by the United States without due compensation under the Fifth Amendment. See *United States* v. *Sioux Nation*, 448 U.S. 371 (1980); *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935). And, as relevant here, Congressional action may not be arbitrary but must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.[10] This second limitation reflects the duty of protection, which differentiates the

[10] Both Plaintiffs misstate *Mancari*'s standard, arguing that a political classification requires a connection to "Indian self-government." Texas Br. at 45; Indiv. Pls.' Br. at 31. But this Court was clear: a tie to tribal self-government was *an example sufficient*—not *a condition necessary*—to meet the established standard:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally

unique Indian affairs context from a traditional political question.

III. The Indian Child Welfare Act is Rationally Related to the Fulfillment of the Duty of Protection.

The Indian Child Welfare Act easily demonstrates a rational relationship to the fulfillment of the duty of protection. ICWA represents Congress's response to a crisis facing Indian children, families, and communities. See 25 U.S.C. § 1901. In the statute, Congress explicitly acknowledged its duty of protection to Indians and Indian tribes. 25 U.S.C. § 1901(2). Congress further demonstrated a rational relationship between tribal self-government and Indian child welfare. § 1901(3) (finding "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe. . ."). Additionally, Congress firmly placed the blame on the states for the Indian child removal crisis: "[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." § 1901(5).

In sum, the statute recognized Indian children as necessary to the continued existence of Indian tribes

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> designed to further Indian self-government, we cannot say that Congress' classification violates due process.

Mancari, 417 U.S. at 555.

as communities and polities, identified states as the source of an existential threat facing Indian families and communities, and sought to remedy the damage done. Such legislation serves Congress's modern policy of Indian self-determination. See Restatement of the Law of American Indians § 4, cmt. d ("Congress has repeatedly and without interruption expressly recognized and asserted that federal Indian policy is designed to promote tribal self-government. It is probably the most critical aspect of the protection the federal government agreed to provide Indians and tribes in treaties and statutes."). Modern policy aside, ICWA also adheres closely to the literal meaning of "protection." See *Worcester*, 31 U.S at 520 ("in order to provide for its safety, [a weaker sovereign] may place itself under the protection of one more powerful"). The statute therefore satisfies the appropriate level of scrutiny, and is a valid exercise of Congress's Indian affairs powers.

A. The Statute's Definition of "Indian Child" is Rationally Related to the Fulfillment of the Duty of Protection.

ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). This definition is rationally related to the duty of protection.

Importantly, Congress's definition of "Indian child" is inherently political in nature because it applies only to children eligible for membership and thereby protects their claim to tribal citizenship. As a general

matter, Tribes do not automatically enroll Indian children at birth. Moreover, many Indian children are eligible for membership with more than one tribe, and almost all tribes prohibit dual enrollment. See*, e.g.,* Fort Peck Tribes Comprehensive Code of Justice IV, ch. 1, *Enrollment Ordinance No. 1* ("Each child of one-fourth (1/4) or more Assiniboine and/or Sioux blood born after the effective date of this ordinance to any member of the Assiniboine and Sioux Tribes provided that the child is not a member of some other tribe at the time of application for enrollment and provided further, that the child is a citizen of the United States at the time of the child's birth").

Even if the definition of "Indian child" were racial in nature, the same standard of review would apply. See Part I.B., supra. Because the classification remains rationally related to the fulfillment of the duty of protection, it remains a valid exercise of Congress's constitutionally committed political authority and outside the realm of equal protection.

B. The Statute's "Other Indian Families" Placement Preference is Rationally Related to the Fulfillment of the Duty of Protection.

"In any adoptive placement of an Indian child under State law," ICWA provides "a preference . . . to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). Congress's decision to prefer "other Indian families" as adoptive placements remains rationally related to the fulfillment of the duty of protection.

First, although all Tribes are distinct polities, all individual Indians share the same political status and

relationship to the United States. Placing an Indian child with an "other Indian famil[y]" preserves this political identity, which remains separate from the child's relationship to their tribe or their eligibility for tribal citizenship.

Second, many modern Indian tribes have experienced joinder or division as a result of colonization or shifting federal policies. For example, the federally recognized Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation is a single federally recognized Indian tribe, operating under a single tribal constitution, but culturally comprised of "two distinct American Indian nations" which are further divided into two bands of Assiniboine and three bands of Sioux. Fort Peck Tribes, *Introduction*, https://fortpecktribes.org/introduction/ (last accessed August 10, 2022); see also Constitution and By-Laws of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana (1960). The Hunkpapa, Sisseton, Wahpeton and Yankton Sioux at Fort Peck share cultural ties, kinship and treaties with numerous other federally recognized Sioux tribes located in other states. *Cf.* Dennis Zotigh, *The 1868 Treaty of Fort Laramie, Never Honored by the United States, Goes on Public View* (Oct. 30, 2018), https://www.smithsonianmag.com/blogs/national-museum-american-indian/2018/10/31/treaty-fort-laramie/.

As a result, federally recognized tribal governments may not always reflect historical tribal structures. The second placement preference (for a member of the Child's tribe) may therefore fail to capture all families with similar cultural practices and values.

Finally, when enacting ICWA, Congress observed numerous similarities across Indian country, such as respect for and reliance upon extended family. Unfortunately, many of these similarities came to Congress's attention because state social workers removed Indian children or disqualified potential Indian foster or adoptive placements either because of or without consideration for common cultural traits. See *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 63 (1974) (prepared statement of Drs. Mindell and Gurwitt) ("The standards used in making the placement reflect the majority culture's criteria for suitable placement . . . and do not take into sufficient account what may be modal within the child's socio-cultural milieu. Thus Indian families are discriminated against as potential foster families.").

In sum, ICWA's "other Indian families" placement preference serves multiple purposes related to the duty of protection. The preference preserves and maintains an Indian child's claim to Indian status in the eyes of the United States. It further observes cultural and political similarities among tribes that transcend the bounds of federal recognition. And finally, it respects "the child's socio-cultural milieu" by recognizing that numerous similarities persist throughout Indian country. Any of these purposes bears a rational relationship to the fulfillment of the duty of protection. The "other Indian families" placement preference should be upheld.

CONCLUSION

When Congress legislates in Indian affairs, the appropriate standard of review asks whether the legislation is rationally related to the fulfillment of the duty of protection. The Indian Child Welfare Act, the Act's definition of "Indian child" and its placement preference for "other Indian families" are all rationally related to the fulfillment of the duty of protection and must be upheld.

Respectfully submitted,

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