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

In The

Supreme Court of the United States

DEB HAALAND, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR, et al.,

Petitioners and Cross-Respondents,

v.

CHAD EVERET BRACKEEN, et al.,

Respondents and Cross-Petitioners.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF OF AUBREY NELSON AND SAM EVANS-BROWN, AS *AMICUS CURIAE*, IN SUPPORT OF TRIBAL AND FEDERAL DEFENDANTS

APRIL E. OLSON,
Counsel of Record
GLENNAS'BA AUGBORNE ARENTS
WOUTER ZWART
ROTHSTEIN DONATELLI LLP
1501 West Fountainhead Pkwy.,
Suite 360
Tempe, AZ 85282
(480) 921-9296
aeolson@rothsteinlaw.com

Counsel for Amicus Curiae

[Additional Captions Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CHEROKEE NATION, et al.,

Petitioners,

v.

CHAD EVERET BRACKEEN, et al.,

Respondents.

THE STATE OF TEXAS,

Petitioner,

v.

DEB HAALAND, Secretary of the
U.S. Department of the Interior, et al.,

Respondents.

CHAD EVERET BRACKEEN, et al.,

Petitioners,

v.

DEB HAALAND, Secretary,
U.S. Department of the Interior, et al.,

Respondents.

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. OPENNESS IN ADOPTION AND CONNECTION TO FAMILIES AND TRIBES IS IN THE BEST INTEREST OF CHILDREN 4

A. Openness in Adoption 5

B. Sam and Aubrey's Adoption Story 8

C. Openness in Adoption Benefits Indian Children 14

II. THE ICWA DOES NOT PREVENT NON-INDIANS FROM ADOPTING OR FOSTERING INDIAN CHILDREN 18

A. The ICWA does not exclude non-Indians from placement 19

B. Nearly All States Have Laws Similar to the ICWA's Preference for Extended Family 21

C. The Good Cause Exception Facilitates the Protection of Indian Children's Best Interests in Specific Cases 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) 20, 21

In re Appeal in Pima County Juvenile Action No. S-903, 130 Ariz. 202, 635 P.2d 187 (App. 1981) 17

In re Betty Z., No. A-20-509, 2021 WL 1100127 (Neb. Ct. App. Mar. 23, 2021), *review denied* (May 11, 2021) 25

In re D.L., 2013 OK CIV APP 30, 298 P.3d 1203 19

In re Guardianship of Q.G.M., 1991 OK 29, 808 P.2d 684 20

In re N.S., 55 Cal. App. 5th 816, 269 Cal. Rptr. 3d 732 (2020) 25

Matter of D.A., 314 Or. App. 385, 499 P.3d 876 *review denied sub nom. Dep't of Hum. Servs. v. D.E.A.*, 368 Or. 787, 498 P.3d 808 (2021) 25

Matter of Welfare of Child of K. M.-A. R.-L., No. A21-1660, 2022 WL 2125164 (Minn. Ct. App. June 13, 2022) 25

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) 15, 22

Navajo Nation v. Ariz. Dep't of Econ. Sec., 230 Ariz. 339 (App. 2012) 26

Navajo Nation v. Dep't of Child Safety, No. 1 CA-JV 21-0225, 2022 WL 402700 (Ariz. Ct. App. Feb. 10, 2022) 25

TABLE OF AUTHORITIES—Continued

Page

Pearson Y. v. Dep't of Child Safety, L.Y., No. 1 CA-JV 20-0097, 2020 WL 5200968 (Ariz. App. Sept. 1, 2020) 25

Samuelson v. Little River Band of Ottawa Indians-Enrollment Comm'n, 06-113-AP, 2007 WL 6900788 (Little River Ct. App. 2007) 12, 16

State in Int. of A.R.F., 2021 UT App. 31, 484 P.3d 1185 (Utah Ct. App. Mar. 18, 2021) 25

United States v. Wheeler, 435 U.S. 313 (1978) 18

STATUTES

10 Okla. Stat. Ann. § 10-40.4 (2022) 4

25 U.S.C. § 1902 15

25 U.S.C. § 1903(4) 18

25 U.S.C. § 1911(d) 18

25 U.S.C. § 1912(a) 4

25 U.S.C. § 1915(a) 21, 24, 25

25 U.S.C. § 1915(a)(1) 19

25 U.S.C. § 1915(b) 24

25 U.S.C. § 1915(b)(i) 19

25 U.S.C. § 1915(c) 18

42 U.S.C. § 671(a)(19) 23

Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963 .... *passim*

Tex. Fam. Code § 262.114(c) 21

TABLE OF AUTHORITIES—Continued

Page

Tex. Fam. Code § 262.752 21

Tex. Fam. Code § 264.751 21

Ariz. Rev. Stat. § 8-104 11

Ariz. Rev. Stat. § 8-514 22

Ind. Code § 31-34-4-2 22

Ind. Code § 31-9-2-107 22

Iowa Code Ann. § 232B.5(8) (2022) 4

LSA-Ch.C. Art. 622 22

Minn. Stat. Ann. § 260.761(3) (2021) 4

N.M. Stat. Ann. § 32A-28-2 5

N.M. Stat. Ann. § 32A-28-5 5

LEGISLATIVE MATERIALS

S. Rep. No. 95-587 (1977) 24

OTHER AUTHORITIES

25 C.F.R. § 23.132(c)(1) 11

25 C.F.R. § 23.132(c)(1)-(5) 24

40 Tex. Admin. Code § 700.1309 21

Ariz. R. P. Juv. Ct. 320 22

Deborah H. Siegel, *Open Adoption and Adolescence*, 89 FAM. IN SOC. 366 (2008) 7

TABLE OF AUTHORITIES—Continued

Page

Deborah H. Siegel & Susan Livingston Smith, *Openness in Adoption from Secrecy and Stigma to Knowledge and Connections*, Evan B. Donaldson Adoption Institute (Mar. 2012) 5, 6

Gretchen M. Wrobel et al., *Openness In Adoption and the Level of Child Participation*, 67 CHILD DEV. 2358 (1996) 8

Guidelines for Implementing the Indian Child Welfare Act, BUREAU OF INDIAN AFFAIRS (Dec. 2016), https://www.bia.gov/sites/default/files/dup/assets/bia/ois/pdf/idc2-056831.pdf...................24

Harriet E. Gross, *Open Adoption: A Research-Based Literature Review and New Data*, 72 CHILD WELFARE 269 (1993).......................................7

Harold D. Grotevant, *Chapter 4: Re-Thinking "Family" in the US* to REPRODUCTIVE DISRUPTIONS: GENDER, TECH., AND BIOPOLITICS IN THE NEW MILLENNIUM (2007)...7

Harold D. Grotevant & Ruth D. McRoy, *Openness in Adoption: Exploring Family Connections* (1998)...7

Harold D. Grotevant et al., *Openness in Adoption: Outcomes for Adolescents within Their Adoptive Kinship Networks*, APA PSYCHINFO (2005)...7

Irving N. Berlin, *Anglo Adoptions of Native-Americans: Repercussions in Adolescents*, 17 AM. ACAD. CHILD PSYCHIATRY 387 (1978)................16

TABLE OF AUTHORITIES—Continued

Page

Jerica M. Berge et al., *Adolescents' Feelings About Openness in Adoption: Implications for Adoption Agencies*, 85 CHILD WELFARE 1011 (2006) 7

Julie K. Kohler et al., *Adopted Adolescents' Preoccupation with Adoption: The Impact on Adoptive Family Relationships*, 64 J. MARRIAGE & FAMILY 93 (2002) 8

Kimberly A. Powell & Tamara D. Afifi, *Uncertainty Management and Adoptees' Ambiguous Loss of their Birth Parents*, 22 J. SOC. & PERS. RELATIONSHIPS 129 (2005) 8

Linda F. Cushman et al., *Chapter 4: Openness in Adoption: Experiences and Social Psychological Outcomes Among Birth Mothers* to FAMILIES AND ADOPTION (Harriet E. Gross & Marvin B. Sussman eds.) (1997) 7

Marianne Berry et al., *The Role of Open Adoption in the Adjustment of Adopted Children and Their Families*, 20 CHILD. & YOUTH SERV. REV. 151 (1998) 7

Martin D. Topper, *Drinking Patterns, Culture Change, Sociability, and Navajo Adolescents*, 1 ADDICTIVE DISEASES: AN INT'L J. 97 (1974) 16

Placement of Children with Relatives, CHILD WELFARE INFORMATION GATEWAY (Jan. 2018), https://www.childwelfare.gov/pubPDFs/placement.pdf 23

TABLE OF AUTHORITIES—Continued

Page

Susan M. Henney et al., *Evolution and resolution: Birthmothers' Experience of Grief And Loss at Different Levels of Adoption Openness,* 24 J. Soc. & Personal Relationships 875 (2007) 7

The Indian Child Welfare Act: The Gold Standard of Child Welfare Practice Brief, Partners for Our Children (Feb. 2019)....................21

Xiaojia Ge et al., *Bridging the Divide: Openness in Adoption and Post-adoption Psychosocial Adjustment Among Birth and Adoptive Parents,* 22 J. Fam. Psych. 529 (2008) 7

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae are a non-Indian couple, Aubrey Nelson and Sam Evans-Brown, who adopted an Indian child, M.E. Aubrey and Sam decided to adopt because they wanted to grow their family, share their love with a child who needed a home, and give their first child a sibling while Aubrey was recovering from complications attributable to birth injuries. Their adoption attorney referred them to an agency in Arizona, which connected them with a birthmother named "Tina."[2] Aubrey and Sam were overjoyed that Tina chose them but were confused about pressure from the adoption attorneys involved to keep the adoption closed to any contact with M.E.'s Tribes. Aubrey and Sam strongly believe in the importance of open adoptions because openness confers many long-term benefits on all parties—adoptive parents, birth parents, and children, Indian and non-Indian alike.

Aubrey and Sam support the Indian Child Welfare Act (the ICWA), including the placement preferences, because it promotes open adoptions for Indian

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] To protect the birth mother's privacy, *Amicus Curiae* refer to her by a pseudonym. In addition, although some birth mothers prefer other language, such as "first mother," *Amicus Curiae* use "birth mother" or "birth parent" because those terms are commonly used in adoption literature.

children, and they believe keeping M.E. connected to her time-honored tribal customs and traditions is in her best interests. Had a member of M.E.'s family been available to adopt her, Aubrey and Sam would have supported such a placement because they believe it is important to keep families together when possible and believe that familial placement would have kept M.E. directly connected with her tribal community. It is because Aubrey and Sam love their daughter so fiercely and believe that M.E. has a right to know her Tribes, her culture, and her extended family, that they submit this brief in support of the ICWA.

INTRODUCTION AND SUMMARY OF ARGUMENT

The benefits of adoption are well established. Adoption allows birth parents to give their children a family when they are unable to provide one; adoptive parents can start or grow a family and raise happy, healthy children; and adoption gives children the gift of a loving, supportive home. The ICWA's procedural and substantive requirements increase the benefits of adoptions by creating a platform for openness in adoptions and a conduit to Tribal identity.

Openness in adoptions reflects the understanding that communication between birth parents, adoptive parents, and children confers distinct and important advantages to all parties. Openness in adoption benefits all parties by giving access to vital information

such as medical and genetic history. It also allows children to maintain important connections to culture and extended family. Open adoptions are particularly important for Indian children because openness allows Indian children to maintain political ties to their Indian Tribes and receive the advantages that come with tribal membership. Without the ICWA's substantive and procedural bulwarks it is too easy for Indian children to lose essential connection to their Tribal identity.

In addition to cultivating a landscape of openness, the ICWA allows, and sometimes gives greater preference to, non-Indians seeking to adopt or foster Indian children, as demonstrated by Aubrey and Sam's and the Individual Plaintiffs' stories of successful adoption. And these stories are not unique. Indian children are adopted or fostered by non-Indian families every year. Even if the ICWA prohibited adoption or fostering by non-Indians, which it does not, there simply are not enough Indian homes for Indian children. Non-Indian families are therefore needed to give Indian children loving homes.

Moreover, the first preference under the ICWA for adoption or foster care is placement with extended family, a category that includes both Indians and non-Indians because the ICWA does not differentiate between the two when it discusses family. The ICWA's preference for placement with extended family is consistent with numerous state laws that give preference to extended family placements. Additionally, when multiple placement options are available, the "good

cause" exception to the ICWA's placement preferences allows courts to balance the best interests of the Indian child against other factors that may warrant placement outside of the preferences.

ARGUMENT

I. OPENNESS IN ADOPTION AND CONNECTION TO FAMILIES AND TRIBES IS IN THE BEST INTEREST OF CHILDREN.

The ICWA serves as a crucial tool for openness in adoptions because it informs Indian children of their identity and heritage. Without the ICWA's conduit connecting Indian children to their Tribes, many adoptions, such as the one Aubrey and Sam experienced, are shrouded in secrecy, a process which only serves to hurt children, birth parents, and adoptive parents. The ICWA gives Tribes the tools necessary to participate in placement proceedings to ensure that Indian children remain connected and aware of their customs and traditions. *See*, *e.g.*, 25 U.S.C. § 1912(a) (providing notice requirements so that Tribes are informed when Indian children are in involuntary placement proceedings).[3]

[3] The requirement of notice under 25 U.S.C. § 1912(a) does not apply to voluntary adoption proceedings such as Aubrey and Sam's. However, providing notice to Tribes in voluntary proceedings fosters openness and several states have enacted notice requirements that also apply to voluntary proceedings. *See*, *e.g.*, Iowa Code Ann. § 232B.5(8) (2022) (providing notice to Tribes in voluntary proceedings); Minn. Stat. Ann. § 260.761(3) (2021) (providing notice to Tribes in voluntary adoptive and preadoptive proceedings); 10 Okla. Stat. Ann. § 10-40.4 (2022) (providing

The ICWA therefore fosters a culture of openness in adoption that leads to many positive outcomes from open adoptions and a connection to one's familial and cultural identity.

A. Openness in Adoption.

For much of the 20th century, adoptions were secretive affairs where parents did not tell their children that they were adopted or who their birth parents were. *See* Deborah H. Siegel & Susan Livingston Smith, *Openness in Adoption from Secrecy and Stigma to Knowledge and Connections*, Evan B. Donaldson Adoption Institute at 5 (Mar. 2012). Closed adoptions—where there is little to no contact between children and their birth parents—reflect societal attitudes from the early and mid-20th century, when parents and state legislatures sought to protect adopted children from the stigma of illegitimacy, misplaced fear that birth parents would eventually "take back" the child, and the mistaken belief that adopted children could simply—and without question—assume their adoptive parents' family history and culture. Secrecy and confidentiality, despite the adoptive parents' best intentions and efforts, often led to adopted adolescents having unresolved identity questions concerning their family history and the reason for their adoption.

notice to Tribes in voluntary proceedings); N.M. Stat. Ann. § 32A-28-2 (defining child custody proceeding to include adoptive placement) and § 32A-28-5 (requiring notice for all child custody proceedings).

Societal attitudes shifted slowly towards some form of open adoptions—in which children are aware who their birth parents are and have varying degrees of contact with them—or some form of mediated adoption—in which the adoption agency facilitates some form of regular contact between birth parents and their children.[4] In 1997, for instance, only 16% of respondents to a national survey by the Evan B. Donaldson Adoption Institute approved of birth mothers sending cards or letters to adoptive families, with the majority of respondents saying it was only acceptable in some or very few cases.[5] The last few decades, however, have seen a paradigmatic shift—so much so that, as of 2012, closed adoptions represented only about 5% of placements, whereas 55% of placements were fully disclosed, and 40% were mediated.[6]

The shift toward openness is an important development that reflects the now-widespread understanding that secrecy in adoptions has a negative impact on adopted children, birth parents, and adoptive parents. Open adoptions come with many benefits including measurably increased satisfaction and peace of mind

---

[4] *Amicus Curiae* recognize that open adoptions may not be possible in some cases, such as international adoption, or may not be advisable in some cases, such as if severe abuse was involved.

[5] *See* Deborah H. Siegel & Susan Livingston Smith, *Openness in Adoption from Secrecy and Stigma to Knowledge and Connections*, Evan B. Donaldson Adoption Institute at 6 (Mar. 2012).

[6] *Id.* at 7.

for all participants.[7] Birth parents report less grief, regret, and worry in open adoptions than do birth parents in closed adoptions.[8] Adoptive parents also benefit from open adoptions, experiencing greater empathy toward birth parents and more open communication with their children about adoption.[9]

Open adoptions offer adopted children access to their birth relatives and, through them, access to their medical, genealogical, family, and cultural histories.[10]

---

[7] *See* Harriet E. Gross, *Open Adoption: A Research-Based Literature Review and New Data*, 72 CHILD WELFARE 269, 269-284 (1993); Harold D. Grotevant & Ruth D. McRoy, *Openness in Adoption: Exploring Family Connections* (1998); Harold D. Grotevant et al., *Openness in Adoption: Outcomes for Adolescents within Their Adoptive Kinship Networks*, APA PSYCHINFO (2005); Xiaojia Ge et al., *Bridging the Divide: Openness in Adoption and Post-adoption Psychosocial Adjustment Among Birth and Adoptive Parents*, 22 J. FAM. PSYCH. 529 (2008).

[8] *See* Linda F. Cushman et al., *Chapter 4: Openness in Adoption: Experiences and Social Psychological Outcomes Among Birth Mothers* to FAMILIES AND ADOPTION 7-18 (Harriet E. Gross & Marvin B. Sussman eds.) (1997); Susan M. Henney et al., *Evolution and resolution: Birthmothers' Experience of Grief And Loss at Different Levels of Adoption Openness*, 24 J. SOC. & PERSONAL RELATIONSHIPS 875 (2007).

[9] *See* Marianne Berry et al., *The Role of Open Adoption in the Adjustment of Adopted Children and Their Families*, 20 CHILD. & YOUTH SERV. REV. 151 (1998); Grotevant & McRoy, *supra*; Grotevant et al., *supra*; Deborah H. Siegel, *Open Adoption and Adolescence*, 89 FAM. IN SOC. 366 (2008).

[10] *See* Jerica M. Berge et al., *Adolescents' Feelings About Openness in Adoption: Implications for Adoption Agencies*, 85 CHILD WELFARE 1011 (2006); Harold D. Grotevant, *Chapter 4: Re-Thinking "Family" in the US* to REPRODUCTIVE DISRUPTIONS: GENDER, TECH., AND BIOPOLITICS IN THE NEW MILLENNIUM 122

Adolescents report being more satisfied with open adoptions than closed adoptions because contact with birth parents helps them come to terms with the reasons for their adoption, and contact helps them identify where their personal traits came from. This type of information facilitates identity formation, as well as positive feelings toward their birth parents and others. Further, open adoptions help children cope with the uncertainty and the ambiguous sense of loss that come from "losing" birth parents, because openness gives children a link to their biological families and community.[11] In addition, children in open adoptions reported higher self-esteem, their parents rated them lower in behavioral problems, and their families reported more trust for their parents, fewer feelings of alienation and better overall family functioning.[12]

B. Sam and Aubrey's Adoption Story.

In early 2020, Aubrey Nelson and Sam Evans-Brown wanted to grow their family and give their first child a sibling. However, a year and a half after their son was born, Aubrey was still recovering from complications stemming from birth injuries. As a result, the

---

(2007); Gretchen M. Wrobel et al., *Openness In Adoption and the Level of Child Participation*, 67 CHILD DEV. 2358 (1996).

[11] *See* Kimberly A. Powell & Tamara D. Afifi, *Uncertainty Management and Adoptees' Ambiguous Loss of their Birth Parents*, 22 J. SOC. & PERS. RELATIONSHIPS 129 (2005).

[12] *See* Julie K. Kohler et al., *Adopted Adolescents' Preoccupation with Adoption: The Impact on Adoptive Family Relationships*, 64 J. MARRIAGE & FAMILY 93 (2002).

couple decided to share their love with a child who needed a home, and they began exploring adoption. The couple reside in New Hampshire, and through word of mouth they settled on a well-known New Hampshire adoption attorney, completed the necessary paperwork and home study, and paid the attorney's fees. Their New Hampshire attorney worked with a lawyer in Arizona and an agency, Arizona Adoption Help, to locate potential birth mothers.

After completing their paperwork, Aubrey and Sam began receiving emails from Arizona Adoption Help about potential birth mothers and potential adoptive children. If they were "interested" in the child, the adoption agency instructed them to indicate their interest, at which point the agency would "share" their profile with the birth mother. For each of these profiles, the adoption agency estimated the cost of the adoption, which typically was $30,000 for the Arizona attorney (which included birth parent living expenses), $2,500 for a counselor hired by the adoption agency (who, in Aubrey and Sam's case, also served as the notary on the adoption paperwork), and $14,000 for the New Hampshire attorney. The cost to adopt would therefore range from $40,000 to $50,000, and adoption was not guaranteed. The costs for each adoption were mostly the same, but with added complication and cost for adopting an Indian child. Sam and Aubrey were later informed that this was due to the need to comply with the ICWA, but aside from hiring another attorney at an extra cost and a longer stay in Arizona in order to "deal with ICWA," no other details were readily

provided about what was required to comply. This was somewhat perplexing to Sam and Aubrey because the adoption agency also strongly discouraged any communication with an Indian child's Tribe.

A birth mother named Tina living in Phoenix, Arizona, ultimately selected Aubrey and Sam as adoptive parents. Tina reported that her great grandmother was Cherokee. The alleged father of the baby girl was a Navajo tribal member but was not involved in the adoption or in a relationship with Tina, and he never established paternity. Neither the Cherokee nor the Navajo Nations were involved in the adoption, and Tina's adoption attorney from Arizona Adoption Help advised Aubrey and Sam that, due to the Indian ancestry involved, "the safest course would be for your clients to retain [another attorney] to represent birth parents in taking ICWA consents." The lawyers in the case also strongly discouraged any contact with Tina during the process. Aubrey and Sam were thrilled that Tina chose them but were confused about the secrecy surrounding M.E.'s tribal status.

Tina gave birth to a baby girl on September 11, 2020, in Phoenix, Arizona. Almost immediately, the baby girl was placed with Sam and Aubrey, and they named her M.E. Twelve days later, the mother's attorney filed a consent to voluntary termination of parental rights on behalf of Tina in the Coconino County Superior Court in Flagstaff, Arizona, a court over 150 miles from Tina's residence. In Arizona, an adoption petition should be filed in the court of the county where

the prospective adoptive parent resides,[13] and no party to the case resided in Coconino County. Aubrey and Sam were later informed by mother's attorney that Coconino County was a better forum for ICWA cases. Aubrey and Sam believe the forum was chosen to prevent any tribal involvement.

Fourteen days after M.E. was born, the Judge in Coconino County issued an Order terminating the parental rights of Tina. The Judge held that although the ICWA applied to M.E., there was "good cause" to deviate from the placement preferences based on the Tina's request to deviate from the preferences,[14] and placed the child with Aubrey and Sam. Again, although they were happy that the Court placed M.E. with them, they had concerns that Tina was not fully informed about ICWA or her options. This concern arose because the attorneys involved only permitted limited contact with Tina, especially before M.E.'s birth. The attorneys told Aubrey and Sam they should not ask Tina about M.E.'s heritage and the attorneys themselves ignored Sam and Aubrey's request that they obtain and share details about M.E.'s Cherokee heritage. Aubrey and Sam were also prevented from discussing other adoption details with Tina, including her preferences about contacting M.E.'s Tribes. Although Aubrey and Sam now

[13] *See* Ariz. Rev. Stat. § 8-104 (providing that venue for adoption proceedings is appropriate "in the county where the prospective adoptive parent resides or, if applicable, in the county where the child is a ward").

[14] Good cause may be based on the preference of the parent. *See* 25 C.F.R. § 23.132(c)(1).

exchange messages with Tina regarding M.E., Aubrey and Sam still do not understand why the adoption was shrouded in secrecy when Aubrey, Sam and Tina's goals were M.E.'s best interests, which necessarily includes open communication about M.E.'s tribal membership and heritage.

The attorneys involved in M.E.'s adoption also asked Aubrey and Sam to submit written verification that they would not enroll M.E. or have any contact with the Navajo or Cherokee Nations for at least five years. Although they felt pressured to sign the document, they declined. Aubrey and Sam want their daughter, M.E., to know where she comes from, and they believe that it is in her best interest to have a connection to her Tribes, because of the importance of family history, access to honored Tribal customs and traditions, and political membership. *See, e.g.*, *Samuelson v. Little River Band of Ottawa Indians-Enrollment Comm'n*, 06-113-AP, 2007 WL 6900788, at *2 (Little River Ct. App. 2007) ("Tribal membership for Indian people . . . is the essence of one's identity, belonging to community, connection to one's heritage and an affirmation of their human being place in this life and world."). Had things been different—for instance if M.E.'s family, such as an aunt, uncle or grandparent, or other extended family, were available to adopt M.E.—Aubrey and Sam would have supported application of the placement preferences and not sought to deviate under a good cause exception. They support keeping children with their families when possible, especially if that means that a child retains a close

connection with their family, Tribe, and community. In addition, during the adoption Aubrey and Sam were aware that the ICWA did not require them to keep M.E.'s adoption a secret or refrain from contacting the Navajo or the Cherokee Nations. To the contrary, Aubrey and Sam believe the ICWA encourages connection between Indian children and their Tribes and determines that these relationships are in their best interests.

Aubrey and Sam believe that the private adoption industry, or at least some of its participants, purposely obfuscate the ICWA's requirements and unnecessarily push adoptive parents towards closed adoptions, regardless of an adoptive parents' wishes, in order to keep Indian children like M.E. separated from their Tribes. In the end, these secretive practices only serve to hurt children and prospective adoptive families and impede the ICWA's procedural requirements that facilitate openness in adoption. Aubrey and Sam's priority is M.E.'s well-being, and they understand that the ICWA serves M.E.'s best interests by establishing a connection with her tribal community and by ensuring that M.E. is placed in a loving and caring home.

For instance, Aubrey and Sam only learned about *awéé' ch'ideeldloh* (first laugh ceremony)—a traditional Navajo celebration that marks a baby's progression toward a healthy life and is customarily organized by the person who made a new baby laugh for the first time—nearly a year after it would have been appropriate to hold this gathering. This is just one early missed opportunity to connect M.E. and the rest of her family

to her heritage, and an example of why many children in closed adoptions struggle to form strong identities. Despite missing this important Navajo tradition, Aubrey and Sam have taken steps to open the adoption. For instance, they remain in touch with Tina, and provide her with updates about M.E. Tina has expressed her hopes for M.E. and helped connect Aubrey and Sam to the putative father. Sam and Aubrey also wrote to one of M.E.'s Tribes and asked for information on how they might establish a relationship with an individual willing to serve as a cultural mentor for their family. The information Sam and Aubrey have learned has been helpful in planning to support M.E.'s exposure to her culture and traditions as she grows older and might begin to question her identity.

C. Openness in Adoption Benefits Indian Children.

The story of Sam, Aubrey and M.E. illustrates the importance of openness in adoption, particularly for Indian children. It is crucial for adopted children to have access to their birth relatives, and thus to their birth family and cultural histories. Equipped with this knowledge, children can begin to understand the reasons leading to their adoption and to answer fundamental questions such as "Who am I?"; "Where do I come from?"; "Why do I look the way I do?"; "What is family?"; and "Do I have other brothers or sisters?" Open adoption also gives these children access to important medical, genealogical, and cultural information. Without this knowledge, many adoptive

children struggle with ongoing uncertainty and have no way to answer these fundamental identity questions.

These potential harms are particularly significant for Indian children. There is an extensive history of active erasure of Indian identity through boarding schools and other policies aimed at disrupting Indian families.[15] *See* 25 U.S.C. § 1902 (acknowledging the importance of the "unique values of Indian culture"). The ICWA's stated goal is therefore "to protect the best interests of Indian children," in part by keeping Indian children connected to their Tribes. *Id.*

Moreover, historical policies of separating children from parents have resulted in increased detrimental impacts on Indian children and families. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49–50 (1989) ("Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture."). Child development scholars have long recognized that adolescent crime, drug abuse, alcoholism, and suicide are more pervasive for an Indian child

---

[15] *See generally* Brief of *Amici Curiae* Historian Organizations in Support of Respondent § II, Haaland et al. v. Brackeen et al., No. 21-376 (discussing how the State and local governments followed the federal government's lead during the boarding school era); Brief of Indian Tribes and Tribal and Indian Organizations as *Amici Curiae* in Support of Deb Haaland et al., § I, Haaland et al. v. Brackeen et al., No. 21-376 (discussing the ICWA's historical backdrop).

raised in non-Indian foster homes or without exposure to their cultures. *See* Irving N. Berlin, *Anglo Adoptions of Native-Americans: Repercussions in Adolescents*, 17 AM. ACAD. CHILD PSYCHIATRY 387, 388 (1978) ("Many of these adolescents lost an understanding of their native language and had no memory or comprehension of tribal history, culture, customs, and strivings. They became strangers among their own people.") (citing Martin D. Topper, *Drinking Patterns, Culture Change, Sociability, and Navajo Adolescents*, 1 ADDICTIVE DISEASES: AN INT'L J. 97 (1974)). Allowing openness in adoption mitigates these impacts by keeping Indian children connected to their communities.

The ICWA also serves to keep Indian children culturally and politically connected to their Tribes and offers many advantages that come with tribal citizenship. *E.g.*, *Samuelson*, 2007 WL 6900788, at *2 ("Tribal membership completes the circle for the member's physical, mental, emotional, and spiritual aspects of human life."). These political advantages can include access to medical and dental services, per capita funds (which Tribes often keep in trust for a child until they turn eighteen), tribal housing, and scholarships for education, to name just a few.[16] When Indian children

[16] Like the political advantages of being a state citizen, such as eligibility for in-state college tuition and varying health care benefits, or the advantages of United States citizenship, such as certain protections while traveling abroad including access to U.S. embassies and bargained-for release if ever detained by a foreign government, tribal governments also provide political advantages to tribal members. *See generally* Brief of Indian Tribes and Tribal and Indian Organizations as Amici Curiae in Support

remain connected to their Tribes they are afforded the opportunity to embrace their long-standing cultural inheritance by participating in important tribal milestones such as a first laugh ceremony, puberty rites, and tribal naming and healing ceremonies. For instance, maintaining a connection with her Navajo customs and traditions gives M.E. the opportunity to learn how to care for her hair and tie a traditional *tsiiyéél* (hair bun), have a *kinaaldá* (a female coming of age ceremony), and learn the importance of weaving and other arts to the Navajo. Although M.E. was not able to have her own, a connection to her Navajo culture and community would also give M.E. the opportunity to ensure her own children celebrate an *awéé' ch'ideeldloh* (first laugh ceremony). The ICWA provides a connection between an Indian child and her Tribe, so that even if a non-Indian family adopts her, she has a much easier road on which to build connections to heritage, genealogy, medical history, and customs. Indian children should be given the opportunity to know and embrace their tribal political identities.

Further, unlike state citizenship requirements, tribal citizenship status can be established, and the advantages of membership can be received, regardless of where an Indian child is located. Tribal political membership is not entirely based on "outmoded geographical concepts of presence or domicile," *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 204, 635 P.2d 187, 189 (App. 1981), in part because

---

of Deb Haaland et al., § II(A)(1), Haaland et al. v. Brackeen et al., No. 21-376 (discussing the importance of tribal membership).

Tribes have the right to determine their own membership eligibility, *see United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978) ("[U]nless limited by treaty or statute, a Tribe has the power to determine Tribe membership."). The ICWA protects individuals' rights to tribal membership and provides Indian children who are at least eligible for enrollment with an opportunity to know who they are, where they come from, and to participate in their tribal communities at any time. *See* 25 U.S.C. § 1903(4).[17]

II. THE ICWA DOES NOT PREVENT NON-INDIANS FROM ADOPTING OR FOSTERING INDIAN CHILDREN.

Non-Indians regularly foster or adopt Indian children. Aubrey and Sam are direct evidence of this. The Individual Plaintiffs further affirm this fact: Chad and Jennifer Brackeen adopted a Navajo child and enrolled member, A.L.M., over three years ago in January of 2018. *See* Petitioner State of Texas Appendix to the Petition for Writ of Certiorari, Brackeen v. Haaland at 48a. On December 19, 2018, Nick and Heather Libretti adopted Baby O., a child who is a member of the Ysleta del Sur Pueblo. *Id.* at 49a. The only Individual

---

[17] In other areas, the ICWA expressly incorporates a Tribe's exercise of inherent sovereignty over its Indian children by recognizing a Tribe's placement preferences. *See* 25 U.S.C. § 1915(c) (providing that an Indian child's Tribe may establish a different order of placement preference); *Id.* § 1911(d) (giving full faith and credit to Indian legal resources related to Indian child custody proceedings).

Plaintiffs who did not adopt an Indian child are foster parents Jason and Danielle Clifford. *Id.* at 50a. Instead, that child was moved to the home of her maternal grandmother. *Amicus Curiae* Robyn Bradshaw, Section D, Statement of the Case and "Bradshaw Appendix," at 58a, 60a.

These examples are not anomalies because these placements are a product of the ICWA's structure, which explicitly allows for placement of Indian children with non-Indian families in many circumstances and in other situations, the ICWA does not exclude non-Indian placement. Furthermore, the ICWA placement preferences are not unique because nearly all states have laws similar to the ICWA's preference for extended family. Lastly, the good cause exception facilitates the protection of Indian children's best interests in specific cases.

A. The ICWA does not exclude non-Indians from placement.

The ICWA placement preferences value an Indian child's relationships—which may lead to placement preference with a non-Indian family or home. For example, the first placement preferences for foster care, pre-adoptive and adoptive placement preferences under the ICWA are for "extended family." 25 U.S.C. § 1915(a)(1) & (b)(i). Extended family includes non-Indians and under the ICWA, courts have placed Indian children with a non-Indian relative over an Indian foster home. *See*, *e.g.*, *In re D.L.*, 2013 OK CIV APP

30, ¶ 9, 298 P.3d 1203, 1206 (upholding placement with non-Indian extended family member over placement with tribal foster home and explaining "[a]lthough it is true that a purpose of ICWA is preservation of the Indian Tribe, the language of the Act demonstrates that the placement preference is for the child's extended family over other members of the child's Tribe, with no requirement that the extended family be members of the child's Tribe."); *In re Guardianship of Q.G.M.*, 1991 OK 29, ¶ 7, 808 P.2d 684, 691 (Simms, J., dissenting) ("The [ICWA] does not give Indian relatives priority over non-Indian relatives with regard to placement of custody of Indian children.").

The other ICWA placement preferences do not expressly exclude non-Indians and often include them. Courts should follow this descending order of preference: (1) extended family; (2) a foster home, licensed, approved or specified by the Indian child's Tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian Tribe or operated by an Indian organization. Notably, preferences 1, 2, and 4 do not require that the placement be Indian. For example, a foster home "approved" by the Tribe could be a non-Indian home that the Tribe prefers, and an institution "approved" by the Tribe could be a county group home. Therefore, many ICWA appropriate placements include placements with non-Indians. Even this Court has recognized that the placement preferences do not prohibit adoption by non-Indians. *See Adoptive Couple v. Baby Girl*, 570 U.S.

637, 642 (2013) (Alito, J.) ("clarify[ing] that § 1915(a), which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family like Adoptive Couple from adopting an Indian child. . . .").

B. Nearly All States Have Laws Similar to the ICWA's Preference for Extended Family.

Today, nearly all States have statutes that give placement preference in child custody proceedings to relatives, including Texas.[18] In Texas, the state child welfare agency will place a child with a relative or a designated caregiver, including a child's preferred placement from his or her community.[19] If a relative or designated caregiver is not appropriate or available, the state agency will consider a previous foster placement.[20] In determining whether a placement is consistent with the best interest of a child, Texas prefers "[p]lacement with a relative or other person with whom the child has a long-standing and significant relationship . . . over placement with a non-related caregiver." 40 Tex. Admin. Code § 700.1309(2). Further, in Texas, the law generally presumes that it is in any

---

[18] *See The Indian Child Welfare Act: The Gold Standard of Child Welfare Practice Brief*, PARTNERS FOR OUR CHILDREN (Feb. 2019), https://partnersforourchildren.org/sites/default/files/ICWA%20BRIEF%20final.pdf.

[19] Tex. Fam. Code §§ 262.114(c), 262.752; *see* Tex. Fam. Code § 264.751 (defining "relative" and "designated caregiver").

[20] Tex. Fam. Code § 262.114(c).

child's best interest to be placed with a family member first, and then with individuals with a significant relationship to the child, before considering any other out-of-home placement.

Other states have similar preferences, including former parties to this litigation: Louisiana and Indiana. *See*, *e.g.*, LSA-Ch.C. Art. 622; Ind. Code §§ 31-34-4-2 & 31-9-2-107 (defining "relative"); Ariz. R. P. Juv. Ct. 320; Ariz. Rev. Stat. § 8-514 (the State "shall place a child in the least restrictive type of placement available, consistent with the best interests of the child" in the following order: "1. With a parent. 2. With a grandparent. 3. In kinship care with another member of the child's extended family, including a person who has a significant relationship with the child . . . 4. In licensed family foster care. . . .").

This general placement preference hierarchy is substantially similar to the ICWA's placement preferences, which prefers placement first with a family member. Indeed, the ICWA and state child welfare laws both seek to preserve and promote family integrity and relative placement in the best interest of children—Indian and non-Indian alike. By preserving and promoting continued connection to family, culture, and community, the ICWA's protections lessen the trauma intrinsic to child custody proceedings and of any necessary removal.[21]

---

[21] *See Holyfield*, 490 U.S. at 50 (stating that the ICWA aims to reduce the "damaging social and psychological impact" Indian

In addition, moving a foster child from a foster home to a relative for permanent placement is not unusual in a child welfare case, nor is it unique to the ICWA context. In fact, Federal Foster Care Programs under Title VI-E of the Social Security Act must consider giving preference to relative placements,[22] and as of 2018, 48 states, the District of Columbia, Guam, and Puerto Rico have relative specific language in their statutes. The ICWA placement preference for extended family is therefore very much like other federal and state laws.

C. The Good Cause Exception Facilitates the Protection of Indian Children's Best Interests in Specific Cases.

Even in the limited instances where an Indian home is preferred over a non-Indian home, exceptions have been written into the ICWA that effectively balance the child's best interests. Under the ICWA, for adoption, foster care, and pre-adoptive placements, a

---

children suffer from removal from their families and culture) (quoting S. Rep. No. 95-597 (1977)).

[22] *See* 42 U.S.C. § 671(a)(19) (requiring states to "consider giving preference to an adult relative over a nonrelated caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant state child protection standards" to receive federal funds). *See also Placement of Children with Relatives*, CHILD WELFARE INFORMATION GATEWAY 1 (Jan. 2018), https://www.childwelfare.gov/pubPDFs/placement.pdf ("When a child is removed from the home and placed in out-of-home care, relatives are the preferred resource because this placement type maintains the child's connections with his or her family.").

state court can deviate from the ICWA placement preferences for "good cause." 25 U.S.C. § 1915(a), (b). Good cause could be the preference of a parent, as was the case with Aubrey and Sam where Tina chose to place M.E. with them; the preference of a child if old enough; the extraordinary emotional or physical needs of the child or any number of factors held to be good cause by the courts. *See id.*; *see also* 25 C.F.R. § 23.132(c)(1)-(5). *Cf*. Guidelines for Implementing the Indian Child Welfare Act § H.4, BUREAU OF INDIAN AFFAIRS (Dec. 2016), https://www.bia.gov/sites/default/files/dup/assets/bia/ois/pdf/idc2-056831.pdf (BIA Guidelines) ("The rule's list of [good cause factors] is not exhaustive.").

As noted in the legislative history of the ICWA, the good cause exception was "designed to provide state courts flexibility in determining the disposition of a placement proceeding involving an Indian child." S. Rep. No. 95-587, at 17 (1977). These good cause factors give courts plenty of tools to fashion appropriate placements for Indian children and do not dictate the outcome of where an Indian child will be placed. Indeed, the Bureau of Indian Affairs recognizes that the good cause exceptions give state "courts and agencies" "ultimate authority" and "discretion . . . to consider any unique needs of a particular Indian child in making a good cause determination." BIA Guidelines § H.4.

And the good cause exception works. In the case of Aubrey and Sam, Tina's preference—based on no direct contact with Aubrey and Sam—was sufficient good cause to have M.E. adopted by a non-Indian couple. Each year, state courts analyze this important issue

and affirm placements with non-relative, non-Indian families under the good cause exception. In the last two years alone, courts in Arizona, Minnesota, Nebraska, and Utah have addressed placing Indian children and have, where appropriate, affirmed placement with non-relative, non-Indian families. *See Matter of Welfare of Child of K. M.-A. R.-L.*, No. A21-1660, 2022 WL 2125164, at *8 (Minn. Ct. App. June 13, 2022) (affirming good cause to deviate from the ICWA's placement preferences and placing the Indian child with a non-Indian family); *Navajo Nation v. Dep't of Child Safety*, No. 1 CA-JV 21-0225, 2022 WL 402700, at *1 (Ariz. Ct. App. Feb. 10, 2022) (same); *In re Betty Z.*, No. A-20-509, 2021 WL 1100127, at *10 (Neb. Ct. App. Mar. 23, 2021), *review denied* (May 11, 2021) (same); *State in Int. of A.R.F.*, 2021 UT App. 31 ¶ 1, 484 P.3d 1185, 1188 (Utah Ct. App. Mar. 18, 2021) (same); *Pearson Y. v. Dep't of Child Safety, L.Y.*, No. 1 CA-JV 20-0097, 2020 WL 5200968, at *1 (Ariz. App. Sept. 1, 2020) (same). These cases, which represent nearly all of ICWA good cause appellate challenges in the past two-and-a-half years,[23] show that appellate courts will rarely disturb lower courts' discretionary determination that there is

[23] Only one case in the past two and a half years placed an Indian child with Indian family, however, there all parties were Indian. *See Matter of D.A.*, 314 Or. App. 385, 388, 499 P.3d 876, 878, *review denied sub nom. Dep't of Hum. Servs. v. D.E.A.*, 368 Or. 787, 498 P.3d 808 (2021) (affirming placement of Indian children with maternal Indian relatives against birth parent's wishes under 1915(a)). *See also In re N.S.*, 55 Cal. App. 5th 816, 824, 269 Cal. Rptr. 3d 732, 739 (2020) (affirming adoption of Indian child by non-Indian grandmother, but not dealing with a good cause challenge under § 1915(a)).

good cause to deviate from the ICWA's placement preferences and show that courts often conclude that placement of Indian children with non-Indian families is appropriate.[24] The ICWA therefore gives courts the tools to fashion best-interest outcomes for children while also creating the procedural framework that encourages openness in adoptions of Indian children.

CONCLUSION

Amicus Curiae adoptive parents Aubrey Nelson and Sam Evans-Brown believe that adopting a child is not a right, but rather a blessing, and is only appropriate if the adoption is best for the child. For Aubrey and Sam that best interest consideration includes a child's connection to their time-honored traditions and customs. And Aubrey and Sam believe that they should not remove children from their culture and society without permission and the blessing of the family and community they come from.

Aubrey and Sam therefore support the ICWA because it is a crucial tool that facilitates openness in adoptions and confers discrete benefits on the adoptive parents, birth parents, and children. As such, the Supreme Court should reject the idea that the ICWA

[24] Appellate courts rarely overturn decisions to deviate from the placement preferences under the abuse of discretion standard of review. *See* BIA Guidelines § H.4 ("The court retains the discretion. . . ." to deviate.); *e.g.*, *Navajo Nation v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 339, 343, ¶ 14 (App. 2012).

unfairly excludes non-Indian families from adopting or fostering Indian children because the placement preferences clearly include non-Indian families and, the data does not support that non-Indians are unfairly excluded from fostering or adopting Indian children.

Aubrey Nelson and Sam Evans-Brown respectfully request that this Court uphold the constitutionality of the ICWA.

Respectfully submitted,

April E. Olson,
Counsel of Record
Glennas'ba Augborne Arents
Wouter Zwart
Rothstein Donatelli LLP
1501 West Fountainhead Pkwy.,
Suite 360
Tempe, AZ 85282
(480) 921-9296
aeolson@rothsteinlaw.com

Counsel for Amicus Curiae