NO. 21-376, 21-377, 21-378, 21-380

In the Supreme Court of the United States

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

CHEROKEE NATION, ET AL., *Petitioners*
v.
CHAD EVERET BRACKEEN, ET AL., *Respondents*

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

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

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

BRIEF OF AMICUS CURIAE SENATOR JAMES ABOUREZK IN SUPPORT OF FEDERAL AND TRIBAL PARTIES

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INTEREST OF *AMICUS CURIAE*[1]

SENATOR JAMES ABOUREZK represented South Dakota in the United States Senate from 1973 to 1979, and before that he represented South Dakota in the United States House of Representatives from 1971 to 1973. From 1977 to 1979, Senator Abourezk served as chair of the Senate Select Committee on Indian Affairs. As Senator, he helped author and was a principal sponsor of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq*. Senator Abourezk also served as chair of the American Indian Policy Review Commission, the hearings and official findings of which ultimately gave rise to the enactment of ICWA. Throughout the legislative process, from the initial Senate hearings in 1974 until the law's passage in 1978, Senator Abourezk played a guiding role in ICWA's construction.

Since 2004, Senator Abourezk has been the chair of the Advisory Committee of the Lakota People's Law Project (Lakota Law). This 501(c)(3) public interest legal organization was founded in 2004 in response to the continued crisis of the removal of Indian children by state adoption and foster care agencies in the Dakotas. In 2011, Lakota Law partnered with National Public Radio journalist Laura Sullivan in her reporting on the Indian child welfare emergency

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than the amicus or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties in this case have consented to amicus' filing of this brief.

in South Dakota. *See About*, *Lakota People's Law Project*, https://lakotalaw.org/about (last visited Jul. 28, 2022). After over a year of research supported by Lakota Law staff, Sullivan produced a Peabody Award-winning series of reports about the foster care crisis in Lakota Country. In a review of state records, the reports documented widespread failures in South Dakota's compliance with ICWA, including regarding the proper placement of Indian children with their relatives or Tribes. *See* Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011), https://tinyurl.com/3f2fszb6 (last visited Jul. 28, 2022). The investigation revealed routine patterns of physical and mental abuse of Indian children caught up in South Dakota's foster care system and showed, that despite comprising less than fifteen percent of South Dakota's child population, Indian children made up more than fifty percent of the children in foster care. *See id.* The reports also found that nearly ninety percent of Indian children sent to foster care in South Dakota were placed in non-Indian homes. *See id.*

In the years since, Lakota Law has focused much of its work on facilitating the return of Lakota children to their families, Tribes, and communities. Lakota Law has helped secure federal funding to assist the Standing Rock Sioux Tribe of North and South Dakota and the Ogalala Sioux Tribe on Pine Ridge Indian Reservation in administering foster care and adoption services. Lakota Law also provides educational resources for Indian families involved in child welfare cases. Among these resources is a handbook that guides parents and families through the steps of applying ICWA in abuse and neglect cases arising from the improper removal of

their children by state adoption agencies. *See* Lakota People's Law Project, ICWA: A GUIDE TO RIGHTS, RECOMMENDATIONS AND COURT PROCESSES FOR PARENTS IN ABUSE AND NEGLECT CASES (2011), https://tinyurl.com/x7vevdah. Given his pivotal role in ICWA's enactment and his continued work with child welfare in Indian Country, Senator Abourezk seeks to assist the Court in resolving the questions presented.

SUMMARY OF ARGUMENT

As an architect and primary sponsor of ICWA, Senator Abourezk was integrally involved with the law's years-long development and its enactment in 1978. ICWA was crafted in response to the failures of state courts and state and private child welfare agencies to provide adequate due process protections and reunification services to Indian children and their parents. 25 U.S.C. §§ 1901(4)-(5). Senator Abourezk, as chair of the Senate Select Committee on Indian Affairs, conducted hearings and reviewed evidence concerning the Indian child welfare crisis nationwide. The dire need for ICWA was vindicated by the testimony of Indian children and family members as well as child welfare advocates, in addition to research and statistics presented before the Select Committee by entities such as the American Indian Policy Review Commission and the Association on American Indian Affairs.

ICWA is rooted in the federal government's long-standing trust responsibility to Tribes, and its enactment rested firmly within Congress's broad power over Indian affairs. In the decades since Senator Abourezk's work

on ICWA, the law has enabled consistent progress toward its intended aims of achieving the best interests of Indian children in child custody proceedings.[2] ICWA has proven to be a crucial baseline for the protection of Indian children and the empowerment of Tribes to look after the wellbeing of their young members. Any holding by this Court that ICWA is unconstitutional would reverse a half century of advancements in the welfare of Indian children and undo an Act of Congress rooted in longstanding legal precedent. ICWA's curtailment would constitute a repudiation of established law and policy, and the historic relationship between Congress and Indian Tribes that is grounded in the Indian Commerce Clause. Such a repudiation would not only threaten the wellbeing of Indian children, their families, and communities, it would also undermine the federal government's longstanding trust responsibility to Tribes.

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[2] ICWA defines "child custody proceeding" to include foster care placement, termination of parental rights, preadoptive placements, and adoptive placements. 25 U.S.C. § 1903(1). Each of those terms is further defined in ICWA. *Id.* at §§ 1903(1)(i)-(iv).

ARGUMENT

I. SENATOR ABOUREZK, AS CHAIR OF THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS AND SPONSOR OF ICWA, HELPED CONDUCT AND PARTICIPATED IN A COMPREHENSIVE LEGISLATIVE PROCESS THAT AFFIRMED THE ACT'S NECESSITY.

In 1978, in response to the persistent failure of state courts and state and private agencies nationwide to provide adequate protection or services to Indian children and their parents, Congress enacted the Indian Child Welfare Act. Senator Abourezk was significantly involved in ICWA's passage. As chair of the Senate Select Committee on Indian Affairs, the Senator facilitated hearings in which evidence submitted substantiated the critical need for legislation that would protect Indian children from harmful removal policies that disregarded the wellbeing and best interests of the child, as well as the child's family and community. *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affs.*, 95th Cong. 1 (1977), https://tinyurl.com/pmd9we67. For nearly a century, these policies had allowed for the unfettered removal of Indian children from their homes and communities for placement in foster and adoptive care, state welfare systems, and boarding schools, to forcibly assimilate these children by stripping them of their traditional cultures. *Id.*

Senator Abourezk chaired the Select Committee's hearings on S. 1214, the bill ultimately enacted as ICWA. In his opening remarks in an August 1977 hearing, the Senator noted that at least twenty-five

percent of Indian children at the time were in adoptive homes, foster care, or boarding schools. *Id.* In some states, that number was as high as thirty-five percent. *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, National Indian Child Welfare Association, https://tinyurl.com/4ztxtwrj. The Senator highlighted the drastic disparities between Indian and non-Indian children in their representation in state child welfare systems. In the years leading to ICWA's passage, Indian children in any given state were five times to twenty-five times more likely than non-Indian children to be removed from their homes and placed in foster or adoptive care. *See Hearing on S. 1214* at 1. In 1978, the year of ICWA's passage, eighty-five percent of Indian children removed were placed outside of their families or communities, even where willing and fit relatives were available. *See id.* These statistics signified, in the words of the Senator, that for decades Indian parents and their children had "been at the mercy of arbitrary or abusive action" of governmental and private adoption agencies. *Id.*

The Senator also called into question prevailing notions that Indian parents were unfit to raise children because of endemic poverty and discrimination. He critiqued the common conception that Indian communities could not "deal with the problems of child neglect when they do arise." *Id.* Rather, the Senator stressed that public and private welfare agencies at the time "seem[ed] to have operated on the premise that most Indian children would really be better off growing up non-Indian." *Id.* The result of such policies, left unchecked, amounted to abusive child welfare and removal practices that disregarded the needs and

wishes of Indian children, their families, and their communities.

In the various Senate hearings, Senator Abourezk heard testimony from Indian Country advocates and child welfare experts, as well as Indian children, their families, and adults who as children had been removed and placed into foster care with non-Indian families. *See Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affs.*, 95th Cong. 75 (1977), https://tinyurl.com/pmd9we67. The testimony rebuffed a common misconception promulgated by child welfare agencies: that Indian children needed to be removed from their families because they experienced high rates of physical abuse by their parents. Statistics and testimony showed that in no more than one percent of cases did Indian children removed from their homes experience physical abuse by their parents. *See Indian Child Welfare Program: Hearing Before the Subcomm. on Indian Affs. of the S. Comm. on Interior and Insular Affs.*, 93rd Cong. 9 (1974), https://tinyurl.com/3xs6u9ua.[3] Alarmingly, testimony confirmed that abuse and neglect of Indian children was occurring throughout state welfare systems and non-Indian foster homes. *See id.* at 117.

Most removal cases, as William Byler, executive director of the Association on American Indian Affairs (AAIA), told Senator Abourezk, were based on welfare

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[3] In fact, testimony demonstrated that Native children removed from their homes suffered abuse and neglect in the adoptive and foster homes and state welfare systems where they were placed. *See Indian Child Welfare Program: Hearing before the Subcomm. on Indian Affs.* at 117. Witnesses recounted indiscriminate beatings and emotional abuse at the hands of their foster or adoptive parents. *See id.* at 117-18.

agents personally "judging Indian behavior or the environment in the home." *Id.* Findings from the AAIA, in a report commissioned by the American Indian Policy Review Commission, stressed that standards guiding Indian child foster care placements were "vague and . . . arbitrary." Congressional Taskforce on Federal, State Tribal Jurisdiction, FINAL REP. TO THE AM. INDIAN POL'Y REV. COMM'N, at 179 (1976), https://tinyurl.com/4j562nzt. Viewed in sum, the evidence painted a picture of welfare agencies and officials across the country who, as Senator Abourezk identified, would "rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions and, in general, their entire Indian way of life [was] smothered." *Hearing on S. 1214* at 2. Upon review of data and testimony regarding Indian child removal policies, Senator Abourezk decried the federal government's inaction as allowing state and private adoption agencies to "strike at the heart of Indian communities by literally stealing Indian children." *Id.*

The House Report on ICWA reflected Senator Abourezk's efforts to achieve the passage of comprehensive legislation that would improve the welfare circumstances of Indian children in the United States. *See* H.R. REP. NO. 95-1386, at 2 (1978), https://tinyurl.com/2p9jr63k. The House Report highlighted what the Senator had emphasized throughout the hearings, including the twenty-five to thirty-five percent removal rate of Indian children. *See id.* at 9. It found that the "disparity in placement rates for Indians and non-Indians [was] shocking." *Id.* The Report confirmed that the crisis of Indian child removal and welfare was "of massive proportions" and that "Indian families face[d] vastly greater risks of involuntary separation

than [were] typical of [American] society as a whole." *Id.* Echoing Senator Abourezk, the House Report concluded that "the wholesale separation of Indian children from their families [was] perhaps the most tragic and destructive aspect of American Indian life" at the time. *Id.* Congress passed ICWA in November 1978.

II. AS THE SITUATION IN SOUTH DAKOTA DEMONSTRATED, ICWA WAS ENACTED IN RESPONSE TO THE DISPARATE RATES OF INDIAN CHILD REMOVAL AND THE UNIQUE FAMILY STRUCTURES SHARED AMONG TRIBES.

South Dakota typified the problems ICWA sought to address. In 1980, Native Americans comprised about six percent of the state's population.[4] *See* CHANGING NUMBERS, CHANGING NEEDS: AM. INDIAN DEMOGRAPHY AND PUB. HEALTH, at 92 (Gary D. Sandefur et al. 1996), https://tinyurl.com/4f26jfk6. At the time of ICWA's enactment, Indian children suffered shockingly high rates of removal and displacement from their families and communities. Records from 1973 to 1976 compiled by the AAIA documented that in South Dakota, Indian children were placed in foster care at rates more than twenty-two times that of non-Indian children. *See* S. REP. NO. 95-597, at 49 (1977), https://tinyurl.com/bdz7nxvc. This rate was the highest of all states, followed closely by North Dakota, where state and private adoption agencies placed Indian

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[4] Today, Native Americans comprise between nine and ten percent of South Dakota's population, the third or fourth highest among the fifty states by percentage of population. *See* U.S. Census Bureau, *Quick Facts: South Dakota*, https://www.census.gov/quickfacts/SD.

children in foster care at a rate more than twenty times that of non-Indian children. *See Hearing on S. 1214* at 540.

Senator Abourezk's experience with the issues that Tribes and their members faced in South Dakota, including the Indian child welfare situation, was acknowledged by Congress, and ultimately reflected in ICWA. Senator Abourezk's remarks at the August 1977 Select Committee hearings emphasized that social welfare agencies "totally failed to understand what it was like for an Indian child to grow up in an Indian home." *Id.* at 73. ICWA's vital third placement preference provision regarding the placement of Indian children within "other Indian families" (25 U.S.C. §§ 1915(a)(3)), evinced the Senator's understanding of, and the Congressional need to recognize, the unique structures of Tribes and the circumstances in which Tribes and their members found themselves.

Across Indian Country, including in the Great Plains, family relations cross reservation boundaries. In South Dakota, it is common for Lakota families enrolled in one Tribe, such as the Oglala Sioux Tribe (Oglala Lakota), to have community relationships in directly or regionally neighboring Tribes, such as the Rosebud Sioux Tribe (Rosebud Lakota). The same holds true for inter-tribal familial relations with members of Tribes geographically situated in surrounding states, such as Montana, Minnesota, North Dakota, Iowa, and Nebraska. Family relations within Indian Country often transcend tribal membership and reservation boundaries, as well as state boundaries. The third placement preference provision in ICWA addressed that reality.

In a September 1978 letter to Wyoming Congressman Teno Roncalio, chair of the House Subcommittee on Indian Affairs and Public Lands, Senator Abourezk wrote how in his "own state of South Dakota there are eight reservations occupied by different bands of Sioux. There are many close family ties between the members of the various Tribes." Letter from Sen. Abourezk, Chairman Senate Select Comm. on Indian Affs., to Rep. Teno Roncalio, at 3 (Sept. 1978) (on file with Native Am. Rts. Fund), https://tinyurl.com/mtxs4p4n. Against this backdrop, the Senator underscored the need for a provision that would consider these inter-tribal relations in Indian child welfare, adoption, and foster care placement proceedings. The provision allowed for arrangements where, for example, a Rosebud Lakota family raises an Oglala Lakota child. While the child is technically raised outside of his or her own Tribe, the Oglala Lakota child's placement with a Rosebud Lakota family enables him or her to still be raised in a home that understands the importance of tribal membership and is closely related traditionally, geographically, and linguistically with Oglala Lakota. By virtue of culturally compatible child-rearing practices, placing an Indian child with an Indian family of a different Tribe supports the child's own wellbeing and community belonging. Through ICWA's third placement preference, Congress accounted for these inter-tribal familial connections.

III. ICWA WAS GUIDED BY, AND FURTHERED, THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY TO INDIAN TRIBES AND CONGRESS'S PLENARY AUTHORITY IN INDIAN AFFAIRS.

ICWA's passage was grounded in and served the federal government's longstanding trust responsibility to Tribes. Emblematic of the 1970s shift from the federal government's policy of tribal termination towards support for tribal self-determination, ICWA was one legislative effort to honor the United States government's trust responsibility. Senator Abourezk focused his near decade of congressional service on fulfilling and reinforcing this trust responsibility. In the September 1978 letter to Congressman Roncalio, Senator Abourezk emphasized that ICWA was based in and furthered this "'special legal responsibility' to the American Indian," a responsibility without which there would be "no foundation for the statutes Congress has been enacting over the past 200 years." Letter from Sen. Abourezk to Rep. Teno Roncalio, at 4 (Sept. 1978). In the August 1977 Select Committee hearing, Senator Abourezk referenced the recent advancements the federal government had made in supporting self-determination for Tribes. *See Hearing on S. 1214* at 2. However, the federal government's inaction in addressing the removal of Indian children from their homes—a policy the Senator noted "had been called cultural genocide"—signified a failure in meeting its trust responsibility to Tribes. *Id.*

The legislative process and ultimate enactment of ICWA fell within Congress's plenary authority in Indian affairs, a power with origins in the Indian Commerce Clause and scores of treaties and statutes and recognized by two centuries of Supreme Court

precedent starting with the Marshall Trilogy. The legislative process that culminated in ICWA's enactment involved a thorough evaluation of whether the proposals outlined in ICWA fell within Congress's plenary power. *See* H.R. REP. NO 95-1386, at 13-19 (1978). The Select Committee heard testimony and received written statements from Tribes supporting the proposed bill. In an August 1977 statement addressed to Senator Abourezk from Watson Totus, chairman of the Yakima (now Yakama) Tribal Council, the Confederated Tribes and Bands of the Yakima Nation recognized Congress's legislation in the realm of Indian child welfare as properly grounded in its plenary authority in Indian affairs. Chairman Totus urged Congress to pass ICWA, asserting that Congress should affirm tribal court jurisdiction over child welfare proceedings on the basis that "the plenary power of Congress is an undisputed axiom." *Hearing on S. 1214* at 274.

The July 1978 House Report (No. 1386) affirmed that Congress's plenary authority in Indian affairs authorized its legislation in Indian child welfare. The findings contained in the House Report include an extensive discussion of the constitutional foundations and Supreme Court precedent undergirding congressional plenary power in Indian affairs, from the Indian Commerce Clause and the Marshall Trilogy to *U.S. v. Kagama,* 118 U.S. 375 (1886), and the Court's then-recent decision in *U.S. v. Wheeler*, 435 U.S. 313 (1978). *See* H.R. REP. NO 95-1386, at 13. The Report stressed that the Supreme Court had "time and again, upheld the sweeping power of Congress over Indian matters." *Id.* Corroborating the conclusions reached by Senator Abourezk and the Select Committee, the House Report

emphasized that "it cannot be questioned that Congress has broad, unique powers with respect to Indian Tribes and affairs" so long as the exercise of those plenary powers is not arbitrary. *Id.* at 14. The regulation of Indian child welfare and the imposition of minimum standards was thus "an appropriate exercise of Congress['s] plenary power over Indian affairs." *Id.*

The House Report concluded with a summary of the problem: "a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, with non-Indian foster or adoptive homes." *Id.* at 19. As Senator Abourezk also determined, the issue of Indian child removal was exacerbated by the failure of state welfare systems to "take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian Tribe in preserving and protecting the Indian family as the wellspring of its own future." *Id.* However, equipped with "plenary power over, and responsibility to, the Indians and Indian Tribes," Congress could address the problem of Indian child removal. *Id.* To exercise that power and responsibility, Congress established minimum federal standards and safeguards for Indian child welfare proceedings "designed to protect the rights of the child as an Indian, the Indian family and the Indian Tribe." *Id.*

The House Report confirmed what Senator Abourezk had himself discovered through presiding over the Senate Select Committee's hearings on ICWA. In a September 1978 letter to Representative and Speaker of the House Thomas ("Tip") O'Neill, Senator Abourezk emphasized that the "legal basis for the enactment of [ICWA was] well established in the House Committee Report." Letter from Sen. Abourezk,

Chairman Senate Select Comm. on Indian Affs., to Rep. Thomas O'Neill, at 3 (Sept. 1978) (on file with Native Am. Rts. Fund), https://tinyurl.com/mtxs4p4n. The Senator also emphasized that the "need for [the] legislation [was] well documented in the Hearings held before both the House and the Senate" and that the policies outlined in the law had "received strong endorsement of the Indian community *and general approval of the states*." *Id.* (emphasis added). Having thoroughly considered the constitutionality of ICWA, Congress's judgement in passing the law appropriately merits the deference customarily accorded by the Court. *See Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).

CONCLUSION

Senator Abourezk played a critical role in the passage of ICWA in 1978. As evinced by the Senator's involvement in the legislative process, ICWA was enacted in response to the chronic failures of child welfare agencies across the country to protect the wellbeing of Indian children. A century of abusive removal policies, and the arbitrary placement of Indian children in foster or adoptive care and boarding schools, amounted to a systematic attempt at cultural genocide. The hearings of the Senate Select Committee on Indian Affairs substantiated the dire need for ICWA to protect the welfare of Indian children, as well as the needs and interests of Indian families and Tribes regarding their children's wellbeing.

ICWA was grounded in the federal government's longstanding trust responsibility to Tribes and its

enactment rested firmly within Congress's plenary authority in Indian affairs. In the decades since Senator Abourezk's work on ICWA, the law has started to achieve its intended aims of improving the welfare of Indian children in custody, foster care, and adoption cases. ICWA has proven to be a crucial baseline for the protection of Indian children and empowering Tribes to look after the wellbeing of their youth. Finding ICWA unconstitutional would reverse a half century of improvements for Indian child welfare and undo an Act of Congress rooted in longstanding legal precedent. Such a repudiation would not only threaten the wellbeing of Indian children, their families, and communities, it would undermine the federal government's longstanding trust responsibility to Tribes. ICWA should be upheld.

Respectfully submitted,

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