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, Cross-Respondents,

v.

CHAD EVERET BRACKEEN, *et al.*,
Respondents, Cross-Petitioners.

ADDITIONAL CAPTIONS LISTED ON INSIDE COVER

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

BRIEF FOR ACADEMY OF ADOPTION AND ASSISTED REPRODUCTION ATTORNEYS AND NATIONAL COUNCIL FOR ADOPTION AS *AMICI CURIAE* IN SUPPORT OF INDIVIDUAL AND STATE PETITIONERS

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CHAD EVERET BRACKEEN, *et al.*,

Petitioners,

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

CHEROKEE NATION, *et al.*,

Petitioners,

v.

CHAD EVERET BRACKEEN, *et al.*,

Respondents.

THE STATE OF TEXAS,

Petitioners,

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

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INTERESTS OF *AMICI CURIAE*

The Academy of Adoption and Assisted Reproduction Attorneys (the "Academy") is a not-for-profit organization of more than five hundred attorneys, judges, and law professors throughout the United States and the world. Academy fellows are experts in adoption law and are dedicated to the highest standards of professionalism, competence, and ethics.[1] The Academy supports children's human, civil, and constitutional rights to live in safe, permanent homes with loving families, the appropriate consideration of all parties' interests in adoptions, and the orderly and legal process of adoption. Academy Fellows frequently present as adoption experts to attorneys and the judiciary throughout the country, including on the Indian Child Welfare Act, 25 U.S.C. 1901–1963 ("ICWA").

Founded in 1980, the National Council for Adoption ("NCFA") is a nonprofit advocacy organization committed to the belief that every child deserves to thrive in a nurturing, permanent family. It works to meet the diverse needs of children, expectant and birth parents, adopted individuals, adoptive families, and all those touched by adoption through global advocacy, education, research, legislative action, and collaboration, all directed to best practices in adoptive placements.

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents received timely notice of *amici*'s intent to file this brief, and each party has consented to *amici*'s filing of this brief.

SUMMARY OF ARGUMENT

Congress lacks authority to enact ICWA because Article I of the U.S. Constitution does not imbue Congress with authority to preempt states' child custody and adoption laws; Congress may not commandeer state agencies to administer ICWA's federal regulatory scheme, foisting its costs and political agenda on the states; and Congress may not regulate Indian child custody and adoption proceedings based on the race of children, their parents, or their prospective foster/adoptive parents.

ICWA impermissibly subjugates Indian children's best interests to that of tribal security and infringes upon the fundamental constitutional rights of the children's parents to make parenting decisions in the best interests of their children and themselves.

ARGUMENT

Important for the Court's consideration is that ICWA does not apply to tribal courts. ICWA acknowledges that tribes have exclusive jurisdiction over child custody and adoption proceedings regarding children on reservations, 25 U.S.C. 1911(a), and none of the procedures or standards thereafter erected by ICWA apply in those cases. They only apply to state court and agency proceedings, see, *e.g.*, *id.* §§ 1911(c), 1912(a), 1915(a) (referring to proceedings in "State court" or under "State law"), involving children not on a reservation and who may not be members of a tribe. See 25 U.S.C. 1903(4) ("Indian child" defined as one who 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.").

With this background, the District Court findings are illuminating:

> This case arises because three children, in need of foster and adoptive placement, fortunately found loving adoptive parents who seek to provide for them. Because of certain provisions of [ICWA], however, these three children have been threatened with removal from, in some cases, the only family they know, to be placed in another state with strangers. Indeed, their removals are opposed by the children's guardians or biological parent(s), and in one instance a child was removed and placed in the custody of a relative who had previously been declared unfit to serve as a foster parent. As a result, Plaintiffs seek to declare [ICWA] unconstitutional.

Brackeen v. *Zinke*, 338 F. Supp. 3d 514, 519 (N.D. Tex. 2018).

I. ICWA Does Not Serve Children's Best Interests and the Court's Holding in *Adoptive Couple* is Binding Over BIA's Final Rule.

When adopting ICWA, Congress declared that "it is the policy of this Nation to *protect the best interests of Indian children* . . . ." 25 U.S.C. 1902 (emphasis added); *id.* § 1915(c) ("[T]he *preference of the Indian child* or parent shall be considered" where appropriate (emphasis added)); *id.* § 1916(a) (A petition for a return of custody shall not be granted if it "is *not in the best interests of the child*" (emphasis added)).[2]

[2] Several states recognize the best interests of the child are the *paramount* concern in ICWA proceedings. See, *e.g.*, *In re Adoption of B.G.J.*, 133 P.3d 1, 10 (Kan. 2006) ("The best interest of the child remains the paramount consideration" of ICWA); *C.L.* v. *P.C.S.*, 17 P.3d 769, 773 (Alaska 2001) ("The best interests of the

Moreover, ICWA's legislative history indicates it was intended to prevent the *unwarranted* removal of Indian children. See *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 649 (2013). But, the strict application of ICWA and the Bureau of Indian Affairs' ("BIA") Final Rule to the adoptions in this case caused, rather than prevented, the unwarranted removal of Indian children because each adoption was supported by the guardians ad litem or biological parent(s). See *Zinke*, 338 F. Supp. 3d at 325–27.

This Court acknowledged ICWA "put[s] certain vulnerable children at a great disadvantage solely because an ancestor – even a remote one – was an Indian." *Adoptive Couple*, 570 U.S. at 655. In *Adoptive Couple*, the biological Indian father tried to "play [the] ICWA trump card at the eleventh hour to override the [birth] mother's decision and the child's best interests." *Id.* at 656. The custody proceedings in this case show that ICWA's overbreadth allows tribes to do the same thing.

The Court should recognize a child's fundamental right to a stable, safe, and permanent home and find that such a right exceeds the statutory rights and interests of the child's tribe. *In re Marilyn H.*, 851 P.2d 826, 833 (Cal. 1993) (A child has a fundamental right to be protected from neglect and to have a "placement that is stable, permanent, and [ ] which allows the caretaker to make a full emotional commitment to the child."); see generally, *In re Gault*, 387 U.S. 1, 13

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child remains the paramount criterion"); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 308 (Ind. 1988) ("[A] paramount interest is the protection of the best interests of the child"); *In re Interest of Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983) ("[ICWA] does not change the cardinal rule that the best interests of the child are paramount . . . .").

(1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."). Even where a child's interests would be better served otherwise, ICWA provides that courts cannot order foster care placement or terminate parental rights unless "continued custody of the child by the parent or Indian custodian is likely to result in *serious* emotional or physical damage to the child." 25 U.S.C. 1912(e)–(f) (emphasis added). And the Final Rule prohibits courts from "depart[ing] from [ICWA's placement] preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement . . . ." 25 C.F.R. 23.132(e) (2016). While the Court in *Reno* v. *Flores* held that a child's best interests is not an absolute or constitutional criterion, ICWA and the Final Rule allow, and even *require*, courts to make custody-related decisions that are not in a child's interests *at all*. 507 U.S. 292, 305 (1993).

The *Flores* Court stated that a "best interests" determination is not required so long as the alternative custody is "good enough." *Ibid.* It can hardly be argued, however, that placement under ICWA is always "good enough" merely because the harm to the child is not "serious" or the danger is not "substantial and immediate." 25 U.S.C. 1912(e), (f); *id.* § 1920. As a result, a placement could satisfy, and even be required by, ICWA while still violating a child's fundamental right to a stable, safe, and permanent home by placing him in moderate danger. ICWA's minced words and the Final Rule rob some Indian children of such basic protections provided to other children.

The Final Rule is also inconsistent with the Court's holding in *Adoptive Couple*. Under the Final Rule, ICWA's placement preferences "must be applied in *any* foster-care, pre-adoptive, or adoptive placement"

absent good cause. 25 C.F.R. 23.129(c); see generally 25 U.S.C. 1915(a). Yet, in *Adoptive Couple* the Court plainly held that the placement preferences "are *inapplicable* where no alternative party has formally sought to adopt the child." 570 U.S. at 654 (emphasis added). Despite this, state courts continue to rely on the Final Rule to incorrectly apply ICWA's placement preferences in cases where no one else has formally sought to adopt the child. See, *e.g.*, *Zinke*, 338 F. Supp. 3d at 525. The Final Rule's application to proceedings where no other party – including the Indian tribe – has sought to adopt the child cannot be reconciled with the Court's holding in *Adoptive Couple*.

II. Congress Cannot Constitutionally Regulate State Child Custody Proceedings Involving Indian Children.

Congress purportedly passed ICWA pursuant to its authority under the Indian Commerce Clause, which permits federal regulation of commerce "with the Indian tribes." U.S. Const. art. I, § 8, cl. 3; 25 U.S.C. § 1901(1). Because state custody proceedings involving Indian children, however, "involve neither 'commerce' nor 'Indian tribes,'" they lie beyond the purview of Congress's Article I authority. *Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring). Matters outside of Congress's enumerated powers are instead reserved to the States. U.S. Const. amend. X; see also, *e.g.*, *United States* v. *Morrison*, 529 U.S. 598, 618 (2000) ("intrastate violence" not involving commerce not within federal commerce power).

ICWA does not regulate commerce. Children are not chattels; they are not sold, bought, or bartered for, and adoption proceedings, therefore, do not involve commerce as traditionally understood. See *Adoptive Couple*, 570 U.S. at 659, 665 (Thomas, J., concurring).

The Indian Commerce Clause lies within the broader Commerce Clause, which gives Congress the power to regulate foreign and interstate commerce. U.S. Const. art. I, § 8, cl. 3. This power, however, does not grant Congress the authority to regulate family law matters, including child custody proceedings. *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975) (referring to "domestic relations"); see *United States* v. *Lopez*, 514 U.S. 549, 564 (1995); *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890) (child custody law "belongs to the laws of the States and not to the laws of the United States"). Significantly, there is no indication that the Founders intended "commerce" to have any broader scope with the Indian tribes than among the states. Saikrishna Prokash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149, 1160 (2003). Therefore, because state child custody and adoption proceedings cannot be regulated under the Interstate Commerce Clause, they cannot be regulated under the Indian Commerce Clause. Allowing Congress to regulate this area because Indian children are involved upsets the carefully articulated balance of federal and state power. See *NLRB*. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("That distinction between what is national and what is local in the activities of commerce [which] is vital to the maintenance of our federal system.").

Regardless, ICWA purports to regulate individual state child custody and adoption proceedings, not Indian *tribes* themselves, as would follow from its reliance on the Indian Commerce Clause. See *Adoptive Couple*, 570 U.S. at 665 (Thomas, J., concurring). ICWA concedes that tribes have exclusive jurisdiction over custody proceedings involving Indian children on a reservation. See 25 U.S.C. 1911(a). ICWA then only regulates procedure in state courts, including

intervention in state court proceedings, *id.* § 1911(c); state court proceedings to involuntarily terminate parental rights, *id.* § 1912(a); state court voluntary adoption and termination of parental rights proceedings, *id.* § 1913; invalidation of prior state court proceedings, *id*. § 1914; placement preferences for state court foster and adoptive placements, *id.* § 1915; and state court recordkeeping practices, *id.* § 1951.

Many of these state-court proceedings concern non-Indian foster or adoptive parents and children who, while of Indian descent, do not live on a reservation and may not be members of or have any cultural connection to a tribe. See, *e.g.*, *Adoptive Couple*, 570 U.S. at 665 (Thomas, J., concurring) (majority finding ICWA inapplicable on other grounds); see also 25 U.S.C. 1915(a)–(b), 1903(4) ("Indian child" includes a child who is *eligible* for membership in a tribe, but who is *not* a member of the tribe). The Amicus Academy's Fellows regularly handle placements of such children, whose voluntary adoptions ICWA nevertheless regulates. See *id.* § 1913. Thus, ICWA does not regulate commerce with Indian *tribes* as the Constitution demands. *Adoptive Couple*, 570 U.S. at 665 (Thomas, J., concurring).

Whatever ICWA regulates, it is not "commerce" and it is not with respect to "Indian tribes" U.S. Const. art. I, § 8, cl. 3. Instead, ICWA meddles in state child custody and adoption matters properly reserved to the states. *Adoptive Couple*, 570 U.S. at 656, 665 (Thomas, J., concurring). ICWA is not a valid exercise of Congress's authority under the Indian Commerce Clause or Article I generally.

III. ICWA Commandeers the States Because It Directly Regulates States in Their Sovereign Capacities, and Not as Market Participants.

The Anticommandeering Doctrine first asks whether the challenged federal law directly regulates a state by mandating that its legislature pass law or by co-opting its other mechanisms. See *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1477 (2018). If the law does directly regulate the state, the next inquiry is whether the law evenhandedly regulates activity in which public and private actors engage. *Id.* at 1478. "No defendant denies," and the Fifth Circuit does not dispute, that ICWA requires state agency action. *Brackeen* v. *Haaland*, 994 F.3d 249, 404 (5th Cir. 2021) (en banc) (opinion of Duncan, J.). Nebraska, Wisconsin, and Washington state courts necessarily interpreted "party" in Sections 1912(a) and 1912(d) to mean state agencies, thereby imposing an affirmative duty on the agencies to notify and make active efforts.[3] While neither Section 1912(e) nor (f) assign their evidentiary burdens to a "party," state courts in New Mexico and Rhode Island have ruled that ICWA requires state agencies to hire qualified experts to satisfy the relevant burdens.[4] Finally, the BIA itself explicitly

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[3] See, *e.g.*, *In re Jassenia H.*, 864 N.W.2d 242, 245 (Neb. 2015) (Nebraska DHHS had duty to notify relevant parties); *In re G.J.A.*, 489 P.3d 631, 634 (Wash. 2021) ("Through [ICWA]… state courts and agencies are required to use 'active efforts' to prevent the breakup of the Indian family."); *In re Arianna R.G.*, 657 N.W.2d 363, 365 (Wisc. 2003) ("Pursuant to the ICWA, it is incumbent upon the agency responsible . . . to notify the appropriate tribe(s) directly of their right to intervene in proceedings involving their tribal children.").

[4] See, *e.g.*, *In re Roman A*, 218 A.3d 1016, 1031 (R.I. 2019); *State ex rel. Children, Youth & Families Dep't* v. *Douglas B.*, No. A-1-CA-38910, 2021 WL 5121018 at *3 (N.M. Ct. App. Oct. 22, 2021).

assigns placement preference burdens and the Indian child placement recordkeeping responsibilities to state agencies. 81 Fed. Reg. 38785.

Therefore, the dispositive issue is whether the even-handed regulation exception applies to ICWA. It does not. While this Court has framed the relevant inquiry as one of evenhanded regulation, the distinction really turns on whether the law regulates states in their sovereign capacities or as market participants. If the law regulates states as market participants, then the law does not run afoul of the Anticommandeering Doctrine. If the law regulates states in their sovereign capacities, then the law runs afoul of the Anticommandeering Doctrine. ICWA provides this Court with the opportunity to clarify that the even-handed regulation exception applies only where a challenged law regulates states as market participants.

Because ICWA regulates states as sovereigns, its numerous conscriptions to state agencies violate the Anticommandeering Doctrine outlined in *New York* v. *United States*, 505 U.S. 144 (1992), and its progeny. See *Murphy*, 138 S. Ct. at 1475–79 (recounting contemporary anticommandeering jurisprudence).

A. ICWA regulates states in their sovereign capacities, uniquely illustrating how the even-handed regulation exception is inapplicable.

The Anticommandeering Doctrine does not prohibit all federal laws that touch upon state activity. For example, federal laws that "evenhandedly regulate an activity in which both States and private actors engage" do not constitute commandeering. *Murphy*, 138 S. Ct. at 1478 (interpreting *South Carolina* v. *Baker*, 485 U.S. 505 (1988)). ICWA fails this standard as precedent suggests it should be applied.

While the Court has framed the question of whether federal laws regulating states run afoul of the Anticommandeering Doctrine as one of evenhanded regulation of public and private actors generally, the distinction more appropriately turns on whether the federal law regulates states in their sovereign capacities or as market participants. See, *e.g.*, *Reno* v. *Condon*, 528 U.S. 141, 143–44, 151 (2000).[5] If a challenged law *does* regulate a state in its sovereign capacity, the anticommandeering inquiry forbids the regulation. A regulation that would otherwise commandeer a state's executive or legislative mechanisms is therefore only permissible where it regulates the State's participation in a market.

The *Reno* Court held, among other things, that the Driver's Privacy Protection Act of 1994 ("DPPA") was not commandeering because it did not make South Carolina regulate its own citizens in its sovereign capacity, "enact any laws or regulations," or "require state officials to assist in the enforcement of federal statutes regulating private individuals." 528 U.S. at 150–51. Instead, the DPPA permissibly regulated South Carolina as a participant in the market for "resale of personal information contained in the records of state DMVs." *Id.* at 143–44. While the expression "market participant" is often associated

[5] While *South Carolina* v. *Baker*, 485 U.S. 505 (1985), is usually also mentioned when "evenhanded regulation" is discussed, that case had nothing to do with direct regulation of states. Instead, the Tax Equity and Fiscal Responsibility Act ("TEFRA") in *Baker* incentivized States to issue their bonds in registered form by removing the federal tax exemption for bonds issued in bearer form. See *Murphy*, 138 S. Ct. at 1478. Thus, *Baker* does not affect the market participant interpretation of the "evenhanded regulation" exception to the Anticommandeering Doctrine.

with this Court's dormant commerce clause jurisprudence, the *Reno* holding turns on the market participant distinction as well.

ICWA illustrates the inapplicability of the evenhanded regulation principle in this case. Even when private actors are parties, they're often subsidized, trained, and regulated by state agencies (e.g., state licensed child-placing agencies, foster parents). Additionally, child custody proceedings involving removals are often bifurcated—a state's child protective service removes the child and then provides rehabilitative efforts aimed at reunification of child and parent. If reunification efforts fail, a state's child protective service seeks to terminate parental rights to free the child for adoption by state-regulated foster parents. ICWA does not regulate the States in a market-participant capacity. Rather, ICWA expressly regulates states in their sovereign capacities, and thus does not fall under the "evenhanded regulation" exception to the Anticommandeering Doctrine.

B. ICWA does not regulate states in their capacities as market participants because child welfare is not a market.

ICWA's offending sections are at least the notice provision of Section 1912(a), the "active efforts" requirement of Section 1912(d), the expert witness requirement of Section 1912(e)–(f), the placement preferences found in Section 1915(a)–(b), and the recordkeeping requirements of Sections 1915(e) and 1951(a).

These provisions do not regulate states as market participants. *Murphy*, 138 S. Ct. at 1478–79 (discussing *Reno*, 528 U.S. 141; *South Carolina*, 485 U.S. 505), nor is their enforcement conditioned on the receipt of federal funds and thus an appropriate exercise of

Congress's spending power. See, *e.g.*, *NFIB* v. *Sebelius*, 567 U.S. 519, 537, 580–81 (2012) (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987)).[6] Instead, they regulate states in their sovereign capacities, "command[ing] the States' officers . . . to administer or enforce a federal regulatory program" with no ties to purchase, sale, or money. *Printz*, 521 U.S. at 935.

Congress intended ICWA to regulate states in their sovereign capacities by remedying their failings when "*exercising their recognized jurisdiction* over Indian child custody proceedings *through administrative and judicial bodies*." 25 U.S.C. 1901(5) (emphasis added). This sovereign capacity is made explicit in 81 Fed. Reg. 38789 (2016): "ICWA balances the Federal interest in protecting the integrity of Indian families and the sovereign authority of Indian Tribes with the States' sovereign interest in child-welfare matters." Unlike the DPPA – where Congress disallowed the sale of personal information by states or any other party – ICWA requires state agencies to carry out a non-market federal regulatory scheme, thereby conscripting states in their sovereign capacities. See *Printz* v. *United States*, 521 U.S. 898, 918–25 (1997).

The Fifth Circuit *en banc* opinion likened child custody proceedings to "[the] regulation of motor vehicles," stating that the latter is "an essential state function." *Brackeen*, 994 F.3d at 328 (opinion of Dennis, J.). While it is true that both child custody and vehicle regulation are traditionally left to state

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[6] While it is true that certain Social Security funds are conditioned upon states creating a child-welfare plan and certifying its compliance with ICWA under 42 U.S.C. 622(9), states must comply with the substantive provisions of ICWA notwithstanding this funding, as ICWA is expressly not conditioned on Congress's spending power.

jurisdiction, the similarities end there. ICWA is distinguishable because does not bear on a state's financial interests, and there is no market for child custody like there is for drivers' personal information.

Multiple ICWA provisions illustrate this distinction. Section 1903(1)(i) includes foster care placements under the definition of a "child custody proceeding." 25 U.S.C. 1903(1)(i). In turn, "foster care placement" is defined as "any action *removing* an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution . . . ." *Id.* (emphasis added). Removal of an Indian child necessarily involves state action. In *Adoptive Couple*, this Court found the explicit congressional purpose of ICWA's active efforts and expert witness provisions (i.e., §§ 1912(d) and 1912(f)) was providing certain "standards for the *removal* of Indian children from their families." 570 U.S. at 652 (emphasis in original). *Removal* of a child from his existing home is not an activity in which private actors engage and, in fact, the Amici are aware of no state in which a private actor may lawfully remove a child from his existing home. So-called private actors did not put 400,000 children into foster care in 2020.[7]

C. Numerous ICWA provisions commandeer state agencies.

As outlined above, the judicial burdens of Sections 1912(a), 1912(d),(e) and (f), social and logistical hardships of Sections 1915(a) and (b)'s placement preferences, the administrative obligations of Section 1951(a), and the significant financial responsibility associated with

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[7] *The AFCARS Report*, U.S. Dep't of Health and Human Services Children's Bureau (Oct. 4, 2021), *available at* https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf.

all of those endeavors are unequivocally put upon state agencies, thereby commandeering them, co-opting the States' officers – even those "assigned to more mundane tasks" – to "administer or enforce a federal regulatory program." *Murphy*, 138 S. Ct. at 1477 (quoting *Printz*, 521 U.S. at 929–30, 935 (internal quotation marks omitted)).

That ICWA applies uniquely to state agencies is particularly salient in Section 1912(d). While it is possible that a party (who needs to show that the active efforts have been made) could mean a private adoptive couple or licensed child-placing agency, neither could be reasonably expected to actually provide the remedial services and rehabilitative programs (designed to prevent the breakup of an Indian family) that are necessary to make the requisite showing. The entity providing those services and programs is very often, if not always, a state agency or private agency acting under the color of law. This Court acknowledged as much in *Adoptive Couple*, noting that it would be a "bizarre undertaking" to expect of an adoptive couple to stimulate a biological father's desire to parent. 570 U.S. at 653.

Possibly the most controversial ICWA subsections are Section 1915(a) and (b)'s placement preferences, which require preference for certain adoptive, pre-adoptive, and foster placements, in absence of good cause to the contrary, with a member of the child's family, tribe, other tribes, or other childcare institutions blessed by the child's tribe. While both subsections are silent on who enforces the preferences, BIA explicitly assigns that burden to state agencies. Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38785 (2016). BIA requires a state agency wishing to deviate from the preferences to prove that

it conducted a "diligent search to identify placement options," giving detailed notice to parents, custodians, extended family, and the child's tribe. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10157 (2015). Likewise, state courts consistently assign the burden of satisfying the placement preferences provisions to state agencies.[8] Requiring state officers (i.e., state agencies) to execute ICWA's placement preferences is akin to the Brady Act's unlawful commands to state and local law enforcement officers to carry out its background check scheme. *Printz*, 521 U.S. at 935.

Section 1915(e) requires states to maintain records of Indian child placements "evidencing the efforts to comply with" the placement preferences. 25 U.S.C. 1915(e). Section 1951(a) requires state courts to compile and maintain records of Indian child placements to furnish to the Secretary of the Interior. *Id.* § 1951(a). These provisions do not "merely require only the provision of information to the federal government." *Printz*, 521 U.S. at 918. Rather, BIA interpreted Section 1915(e) to be Congress's "demand[] [for] documentable 'efforts to comply' with the ICWA placement preferences." 81 Fed. Reg. 38839. Additionally, Section 1951(a) requires courts to compile "such other information" deemed pertinent to ICWA's scheme to be provided to the Secretary of the Interior. 25 U.S.C. 1951(a). These provisions are hallmark examples of "direct orders to the governments of the States" that the Anticommandeering Doctrine prohibits. *Murphy,* 138 S. Ct. at 1476.

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[8] See, *e.g.*, *Native Village of Tununak* v. *State*, 334 P.3d 165, 177–78 (Alaska 2014); *Matter of S.R.*, 436 P.3d 696, 705 (Mont. 2019).

IV. Political Affiliation is a Choice; Race is Not: ICWA Unlawfully Discriminates Based on Race.

Racial discrimination is "odious and destructive," and federal laws that create racial classifications run afoul of the Fifth Amendment's Due Process Clause unless they can withstand strict scrutiny. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995) ("racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed... under strict scrutiny."); *Texas* v. *Johnson*, 491 U.S. 397, 418 (1989); *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954) (Due process under the Fifth Amendment may prohibit racially discriminatory laws). The Government bears the heavy burden of demonstrating that the suspect classification is narrowly tailored to a compelling governmental interest. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist.*, 551 U.S. 701, 720 (2007). ICWA creates impermissible racial classifications with respect to Indian children, Indian parents, and non-Indian foster and adoptive parents that cannot survive strict scrutiny.

First, ICWA applies only to "Indian child[ren]," which the statute defines as an actual or potential member of a tribe. 25 U.S.C. 1903(4). To be a member of an Indian tribe or to be eligible for membership, a child must have Indian ancestry. See Solangel Maldonado, *Race, Culture, and Adoption: Lessons From Mississippi Band of Choctaw Indians v. Holyfield*, 17 Colum. J. Gender & L. 1, 27 (2008).[9]

[9] Noting that, "ICWA's definition of an 'Indian child" as one who is 'a member of an Indian tribe' or 'is eligible for membership,' in the context of tribal rules that condition membership on the existence of tribal blood. . . shows that biology, above all else, makes a person Indian under ICWA."

Discrimination on this basis, however, is often nothing more than a form of racial discrimination that substitutes ancestry as a "proxy." *Rice* v. *Cayetano*, 528 U.S. 495, 514 (2000). As this Court has noted, "'[R]acial discrimination' is that which singles out 'identifiable classes of persons. . . solely because of their ancestry or ethnic characteristics.'" *Id*. at 515 (quoting *Saint Francis Coll.* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987)). Because Indian tribes use ancestry as the key to tribal membership, and, more importantly, because ICWA applies to membership-eligible children of Indian ancestry regardless of tribal membership, it "singles out" a class based solely on race. See *id.* at 515.

While tribal affiliation on its own has been construed as a political rather than racial classification, ICWA sweeps more broadly. *Morton* v. *Mancari*, 417 U.S. 535, 552–54 (1974). *Mancari* is the prevailing case involving challenges based on apparent racial discrimination, to policies benefitting Indians. *Id.* at 551. In *Mancari*, however, the policy at issue – a BIA employment preference in favor of Indians – was "[g]ranted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities . . . ." *Id.* at 554. Therefore, in upholding the preference, this Court's reasoning turned on tribal membership, which is an optional political quality. *Id.* at 551, 553 n.24. Potential beneficiaries of the challenged policies could only avail themselves of the preference if they were tribal members with a particular quantum of Indian blood. *Id.* at 553 n.24.

ICWA, however, is not limited by either of these distinctions; it applies to children who are merely "eligible" for tribal membership and are the biological child of a tribal member, even if they possess an extremely small quantity of Indian blood. See 25

U.S.C. 1903(4) (defining "Indian child"); *Adoptive Couple*, 570 U.S. at 641 (child that is 1.2% Cherokee considered an Indian child). Its application therefore turns not on political affiliation with a particular tribe, but on generic "Indian" ancestry – and therefore race – alone.

Similarly, while *Mancari* might permit ancestral classification with respect to the internal affairs of a particular tribe, it does *not* permit such classification for matters of a state. *Rice*, 528 U.S. at 520–22 (decided under the Fifteenth Amendment). In *Rice*, Hawaii limited participation in statewide elections for the State's "Office of Hawaiian Affairs" to ancestral or "native" Hawaiians. *Id.* at 498–99. After characterizing this limitation as functionally a racial classification, this Court invalidated the relevant statute in part because it pertained not to the "internal affair[s] of a quasi sovereign" tribe, but to an "arm of the State." *Id.* at 520–21. As in *Rice*, ICWA creates racial, not political distinctions; it applies directly to state courts and agencies and expressly *not* to the internal affairs of tribes. See 25 U.S.C. 1911(a) (tribes have exclusive jurisdiction over proceedings regarding Indian children on reservations, which are not governed by ICWA). This distinction is magnified where an Indian child is not a member of and has no connection with a tribe and does not live on a reservation. See *id*. §§ 1903(4), 1911(a). Congress "may not authorize a State to" enforce such a racial classification. *Rice*, 528 U.S. at 519, 522. ICWA is distinguishable from *Mancari* and its progeny because it prescribes racial – not political – classifications for participants in state court proceedings.

Indeed, ICWA subjects Indian children involved in state court custody or adoption proceedings to entirely

separate and more restrictive standards and procedures than non-Indian children solely on the basis on race. For instance, ICWA's "active efforts" provisions "qualified expert witness" requirements, and "beyond a reasonable doubt" standard of proof for termination of parental rights proceedings apply to Indian children, but not non-Indian children in otherwise identical state court proceedings. See 25 U.S.C. 1912(d)–(f). Such separate standards based on race are unconstitutional. See *Gratz* v. *Bollinger*, 539 U.S. 244, 270–71 (2003) (even in the context of a remedial scheme, subjecting groups to different standards based on race and without individualized determination is unconstitutional); *Cooper* v. *Aaron*, 358 U.S. 1, 17 (U.S. 1958); see also *Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring) (describing as "absurd" the possibility that Congress might "dictate specific rules of criminal procedure for state-court prosecutions against Indian defendants").

ICWA's Section 1915 placement preference provisions also racially discriminate against non-Indian foster and adoptive parents. For example, an Indian child can be removed from a non-Indian- home – as Child P. was from the Cliffords' – where the child has lived for years and developed secure attachments, solely because the foster or adoptive parents have no Indian ancestry. See, *e.g.*, *Adoptive Couple*, 570 U.S. at 644–45.

Even assuming the government has compelling interests in preventing Indian children from being removed from their families and in preserving Indian culture, ICWA is not narrowly tailored to protect such interests. See 25 U.S.C. 1901(2)–(4), 1902; *Parents Involved*, 551 U.S. at 720. Its underinclusive provisions have no application to children residing on Indian land. 25 U.S.C. 1911(a) (exclusive jurisdiction

of tribes over custody proceedings involving children domiciled on the reservation), § 1912(a), (d)–(f), § 1915(a) (referencing proceedings in "State court" or under "State law"). Yet, it is also overinclusive in applying to any biological child of a tribal member outside of Indian land eligible for tribal membership, regardless of her actual connection to a tribe. See, *e.g.*, *Adoptive Couple*, 570 U.S. at 641 (2013) ("This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.").

ICWA's placement preferences are particularly offensive because they prioritize any "Indian famil[y]" and even any "institution" any tribe might approve, regardless of its connection to the child's tribe. 25 U.S.C. 1915(a)(3), (b)(iv). As a result, an Indian family "from anywhere in the country enjoys an absolute preference over other citizens." *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 508 (1989). Such a preference transcends the interests and political bounds of any tribe and blatantly prescribes a racial classification in favor of a preferred family having any Indian heritage at all. As such, this classification is not narrowly tailored to the interests of preserving the cultural integrity of any individual tribe or keeping Indian children with their own families and societies. See *ibid.* ("obvious[ly] . . . such a program is not narrowly tailored to remedy the effects of prior discrimination.").

Finally, courts will not find a racial classification to be "narrowly tailored until less sweeping alternatives—particularly race-neutral ones—have been considered and tried." *Walker* v. *Mesquite*, 169 F.3d 973, 983 (5th Cir. 1999) (quoting *Williams* v. *Babbit*, 115 F.3d 657, 666 (9th Cir. 1997)). A racial classification is not narrowly tailored where a defendant "failed to present any evidence that it

considered [race-neutral] alternatives . . .” *Parents Involved*, 551 U.S. at 735. ICWA’s legislative record does not show that Congress considered, but rejected, race-neutral alternatives to address the concerns that led to ICWA’s enactment. Instead, Congress applied ICWA to nearly every off-reservation child with Indian blood and codified the belief that placement with an Indian family invariably is in those children’s best interests. ICWA violates the equal protection rights of Indian children, Indian parents, and non-Indian adoptive and foster parents.

V. ICWA Unconstitutionally Violates a Parent’s Fundamental Rights to Confidentiality and to Make Decisions Regarding Their Child.

ICWA’s pervasive assumption is that it promotes the stability and security of Indian families. The reality is that it robs the parents of Indian children of autonomy and confidentiality in making parenting decisions by permitting tribal intervention in voluntary state court adoption proceedings and establishing placement preferences notwithstanding those parents’ wishes. 25 U.S.C. 1902, 1911(c), 1912(a), 1915(a). In doing so, ICWA threatens the parents’ fundamental constitutional rights to confidentiality and to make decisions regarding their children’s best interests, thereby violating substantive due process.

“[S]ubstantive due process protects unenumerated fundamental rights and liberties under the Due Process Clause[s]” of the Fifth and Fourteenth Amendments. *Gallagher* v. *Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012); *Flores*, 507 U.S. at 301. It “forbids the government to infringe certain fundamental liberty interests *at all,* no matter what process is provided, unless the infringement” satisfies the appropriate

level of scrutiny. *Flores*, 507 U.S. at 302 (emphasis in original).

In his concurrence in *Troxel* v. *Granville*, Justice Thomas wrote that strict scrutiny applied to infringements of fundamental family rights. 530 U.S. 57, 80 (2000) (Thomas, J., concurring). Lower courts later held that "[u]nder . . . the Due Process . . . Clause[], interference with a fundamental right warrants the application of strict scrutiny." *Bostic* v. *Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014). As such, to survive review, an infringement on a fundamental right must be "narrowly tailored to serve a compelling state interest." *Flores*, 507 U.S. at 302. Ultimately, to show a substantive due process violation, a party must: (1) establish the existence of a fundamental right or liberty, and (2) provide a "'careful description' of the asserted fundamental liberty interest." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997). The Court should recognize that the fundamental parental rights in the management of children includes the right to direct voluntary placement of children for adoption.

ICWA's placement preferences violate the right of an Indian child's "natural parents [to] the care . . . and management of their child" by overriding their choice of voluntary adoption placement. *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982). This is true even where the child is a ward of the court. These "liberty interest[s] of natural parents . . . do[] not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." *Id.* at 753.

Nonetheless, extant ICWA litigation demonstrates the absence of deference to parents of Indian children. In the instant cases, both of ALM's biological parents supported the Brackeens' adoption. *Zinke*, 338 F.

Supp. 3d at 525. Plaintiff Altagracia Hernandez made a private adoption plan in which she voluntarily consented to the Librettis' adoption of Baby O. *Id*. at 526. Similarly, in *Adoptive Couple*, birth mother Christina Maldonado privately selected the Capobiancos to adopt Baby Girl. 570 U.S. at 644. ICWA made a cataclysm of the single weightiest decision a parent can make – selecting an adoptive placement for her own child.

Substantive due process "protects the fundamental rights of parents to make parenting decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66. These rights are among the "oldest of fundamental liberty interests recognized by this Court." *Id.* at 65. They have included the right to "control the education" of children, *Meyer* v. *Nebraska*, 262 U.S. 390, 401 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–35 (1925); the right of familial cohabitation, *Moore* v. *City of East Cleveland*, 431 U.S. 494, 488–500 (1997); and the right of parents to control child visitation, even as against another of the child's blood relatives. *Troxel*, 530 U.S. at 67–68. Amici urge here a further articulation of this jurisprudence. If parents have the fundamental rights to "direct the education of children," to "direct the[ir] upbringing," and to "prepare [them] for additional obligations," then the right of parents to voluntarily direct adoptive placement of their own children – a most personal, sacred, and heart-wrenching decision – deserves no less protection from this Court. *Pierce*, 268 U.S. at 534–35.

The strict scrutiny analysis turns on whether ICWA's placement preferences serve a compelling government interest and whether the infringement they occasion is narrowly tailored to that interest. *Flores*, 507 U.S. at 302. Congress's stated interests in

passing ICWA were to correct the unwarranted removal of Indian children from their families, "protect the best interests of Indian children," and "promote the stability and security of Indian tribes and families." 25 U.S.C. 1901(4), 1902. Even assuming these interests to be compelling, folding Indian children into ICWA's preferred placements is not narrowly tailored to achieve them.

Thwarting parents in selecting a specific, voluntary adoptive placement of their child with a home-studied family does nothing to remedy the unwarranted removal of Indian children from their homes.[10] *Id*. § 1901(4). A parent's voluntary placement is not "unwarranted," and an affirmative, voluntary placement is not a "removal" in the sense Congress intended. *Ibid.* (specifying removal "by *nontribal public and private agencies*") (emphasis added); S. Rep. No. 95-597 at 1 (1977). Therefore, placement preferences inconsistent with voluntary parental choices are wholly unrelated to the government's interests and de facto create a second-class category of parent. Plaintiff Hernandez would have encountered no impediment to a specified relinquishment had she been the mother of a non-Indian child.

Importantly, while Indian parents who are members of tribes may be subject to tribal court rules, particularly where their Indian child is domiciled on a reservation, 25 U.S.C. 1911(a), an unsuspecting non-Indian parent is certainly not and is entitled to full constitutional protections of their liberty interest in

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[10] Here, a "home-studied" family is one which has successfully undergone the investigations and assessments required under State law to adopt a child. *See, e.g.*, Mo. Rev. Stat. § 453.070 (2021).

making parental decisions for their child. *Meyer*, 262 U.S. at 400.

The placement preferences are also not narrowly tailored to protect and preserve Indian tribes and their resources. The placement preferences include extended family who are *not* members of any tribe and any Indian family from *any tribe* living on or off a reservation in any state. See 25 U.S.C. 1915(a); see also, *e.g.*, *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1328, 1331 (2014) (ICWA preferences and tribe directed placement with non-Indian extended family). Placements with either type of family may result in children being placed in in families with no connection to the child's potential tribe. They are, therefore, unrelated to ICWA's purpose of protecting the integrity of Indian tribes. 25 U.S.C. 1901(3). In these cases, placement preferences do not apply narrowly to stabilize a particular tribe and instead may destroy Indian families where an Indian or non-Indian birth parent is pitted against her immediate family, the immediate family of the birth father, or a tribe. See *id.* § 1915(a).

Subjecting both Indian and non-Indian parents to infringement of their fundamental constitutional liberties in the name of "promot[ing] the stability . . . of Indian tribes" assumes that their children will one day choose to affiliate with the parent's tribe and participate in its governance. 25 U.S.C. 1902. This assumption is undeniably speculative as it will not ripen for years into the future. It is, at best, tangentially related to "the continued existence and integrity of Indian tribes" and certainly not narrowly tailored. *Id*. § 1901(3).

Concerns over the effects of ICWA's placement preferences are magnified when tribes receive notice

of voluntary relinquishments of Indian children. Such notice infringes upon birth parents' rights of confidentiality of profoundly personal family information. *Whalen* v. *Roe*, 429 U.S. 589, 598–600 (1977) ("Privacy" involves two interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions"). A parent's consent to adoption does not constitute consent to disclosure of that decision. While ICWA does not require such invasion of confidentiality in voluntary proceedings under Section 1913, it happened to Plaintiff Hernandez. *Zinke*, 338 F. Supp. 3d at 526. Further, some State analogs to ICWA appear to mandate tribal notification in voluntary adoptions. See, *e.g.*, Mich. Comp. Laws § 712B.9 (referring to "child custody proceeding[s]" generally). Such dissemination of information may deeply embarrass parents and distance them from their families and religious communities and elicit tribal rejection and shunning. These disclosures work to undermine the government's interest in tribal stability.

Notice to tribes also may trigger intervention by the tribe in a voluntary proceeding and implementation of ICWA's placement preferences. 25 U.S.C. 1911(c), 1915(a). By wresting control away from parents, these provisions may discourage adoption of Indian children and even thwart the decision to gestate at all. Adoption agencies and attorneys necessarily advise birth and adoptive parents of ICWA's impact on adoption.[11] In states where tribal notification can trigger other ICWA provisions, some adoptive parents surely turn away from private adoption of Indian

[11] Child Welfare Information Gateway, https://www.childwelfare.gov/topics/adoption/laws/ (last visited May 18, 2022).

children. As this Court highlighted in *Adoptive Couple*, "it would surely dissuade some . . . [prospective adoptive parents] from seeking to adopt Indian children." 570 U.S. at 653. And it does.

Mothers also surely turn to abortion when told by agencies and their counsel that tribes will be allowed to supersede their fundamental rights, especially given the remaining choices may be between placement with the Indian family of a violent father or co-parenting with a violent father himself, such as in *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982) or in *In re KMN*, 870 N.W.2d 75 (Mich. 2015).[12] Domestic violence becomes decisional for pregnant women where escape options such as specified adoption are threatened by ICWA. The Supreme Court of Iowa elucidated this ICWA induced dilemma:

> Shannon was faced with an unintended pregnancy. A woman in her position has three choices: to keep the child, put the child up for adoption, or terminate the pregnancy. Such a decision is undoubtedly gut wrenching and will forever impact her as well as the unborn child. The State has no right to influence her decision by preventing her from choosing a family she feels is best suited to raise her child.

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[12] One in four women experience domestic abuse, including pregnant women. NCADV Statistics, https://ncadv.org/STATISTICS (last visited June 1, 2022). Domestic homicide is the leading cause of death for pregnant and postpartum women. Nidhi Subbaraman, *Homicide is a top cause of maternal death in the U.S.*, NATURE (Nov. 12, 2021), https://www.nature.com/articles/d41586-021-03392-8. Together abuse and homicide constitute inescapable twin terrors for pregnant and postpartum women.

In re N.N.E., 752 N.W.2d 1, 9 (Iowa 2008).

ICWA's placement preferences effect an unconstitutional and unconscionable infringement upon the fundamental rights of the parents of Indian children. In so doing, they rob parents of control over their children and finesse women who then avoid adoption into an impossible dilemma to protect their safety or their lives: co-parent with a violent person or terminate a pregnancy.

CONCLUSION

Congress crafted ICWA to address the states' unwarranted removal of children from Indian homes and "protect the best interests of Indian children." 25 U.S.C. 1901(4), 1902. Yet, on December 31, 2011, this same law took twenty-seven-month-old Baby Girl from the only home she had ever known and eliminated contact with her parents because she was an "Indian child." *Adoptive Couple*, 570 U.S. at 645–46, 645 n.3. She was saved from an anguishing disruption only because this Court found ICWA inapplicable on the facts of the case. *Id.* at 641–42. To date, Child P. has not been so fortunate. *Brackeen*, 994 F.3d at 289 (opinion of Dennis, J.).

ICWA has been vitiated by erecting two sets of child custody laws for state court proceedings, not tribal court proceedings – one for children of Indian ancestry and one for all others. ICWA facially exceeds Congress's Article I authority, and many of its provisions commandeer State agencies to operationalize its racially discriminatory scheme. This undermines the children's best interests in the instant cases and impermissibly infringes upon the constitutional rights of their Indian and non-Indian parents. *Santosky*, 455 U.S. at 746.

ICWA should be declared unconstitutional so that it may no longer disadvantage the very Indian children – and parents – it was intended to benefit.

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