Nos. 21-376, 21-377

In The Supreme Court of the United States

CHEROKEE NATION; ONEIDA NATION;
QUINAULT INDIAN NATION;
MORONGO BAND OF MISSION INDIANS,
Petitioners,

v.

CHAD EVERET BRACKEEN, et al.,
Respondents.

DEB HAALAND, Secretary of the Interior, et al.,
Petitioners,

v.

CHAD EVERET BRACKEEN, et al.,
Respondents.

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

BRIEF OF 180 INDIAN TRIBES AND 35 TRIBAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF CHEROKEE NATION, ET AL.

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

Amici are federally recognized Indian Tribes, regional Tribal organizations, and national Tribal organizations. The vital protections provided by the Indian Child Welfare Act ("ICWA") to Indian children, Indian families, and Indian Tribes are of significant importance to *Amici* and their members. The challenges to ICWA in this litigation seek to diminish ICWA's protections and undermine the unique trust responsibilities the United States owes to Indian children and Indian Tribes. *Amici* are thus critically interested in ensuring that ICWA continues to protect the best interests of Indian children, families, and Tribes. Individually or collectively, all *Amici* operate tribal child welfare programs, provide direct child welfare or health services to their members, or advocate on child welfare issues affecting American Indian and Alaska Native people.

***Amici* federally recognized Indian Tribes** are "Indian tribes" within the meaning that term is given in ICWA. 25 U.S.C. § 1903(8). Each is a separate and distinct tribal government, possessing the sovereign authority to adjudicate the best interests of its member children. Each operates, either itself or through a

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[1] No counsel for any party to these cases authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received 10 days' notice of *Amici*'s intent to file this brief, and all parties have consented to its filing. S. Ct. R. 37.2(a).

tribal consortium, tribal child welfare programs that regularly work with state child welfare agencies and participate in state court child custody proceedings. Each has a direct and immediate interest in achieving the best outcomes for its member children, and knows from experience that the procedural and substantive rights secured by Congress in ICWA help achieve those best outcomes. And each knows that a challenge to ICWA threatens both the best interests of Indian children and the very existence of *Amici*. A complete list of *Amici* federally recognized Indian Tribes is included in Appendix A to this brief.

***Amici* Association on American Indian Affairs (AAIA), National Congress of American Indians (NCAI), National Indian Child Welfare Association (NICWA), and other Indian organizations** are tribal consortia and national and regional organizations dedicated to the rights of American Indian and Alaska Native Tribes and individuals. *Amici* organizations share a commitment to the well-being of Indian children and an understanding that ICWA is critical to achieving the best interests of children and preserving Indian families and Indian Tribes. A complete list of *Amici* organizations is included in Appendix A to this brief.

SUMMARY OF THE ARGUMENT

Congress enacted ICWA in response to a nationwide crisis: the wholesale removal of Indian children

from their families by state and private child welfare agencies at rates far higher than those of non-Indian families, often without due process. In response, Congress established minimum federal standards for state child welfare proceedings involving Indian children. Congress carefully crafted ICWA to promote the best interests of Indian children and to protect the rights of parents, while balancing the jurisdiction and political interests of Tribes and States. *Amici* agree with Petitioners Secretary Deb Haaland *et al.* ("Federal Petitioners," No. 21-376) and the Cherokee Nation *et al.* ("Tribal Petitioners," No. 21-377) that ICWA is constitutional and that the Court of Appeals for the Fifth Circuit erred in holding otherwise.[2] *Amici* write separately to detail the factual and legal history leading to ICWA's enactment, and to show how this landmark law remains vital today for Indian children and families across the country.

Since the founding of the United States, the Federal Government has recognized and protected the sovereign status of Indian Tribes. This trust responsibility has also long extended to the protection of Indian children, a responsibility recognized in Indian treaties that provide federal services, education, and trust funds to these children. During the 19th century, shifts in federal Indian policy led to the forcible removal of Indian children from their families to military-style boarding schools. Later, with federal encouragement, States and private parties assumed responsibility for

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[2] *Amici* oppose review in Petitions Nos. 21-378 and 21-380.

removing Indian children from their Tribes for adoption with non-Indian families as a means to reduce reservation populations and to satisfy the demand for these children on the part of non-Indian parents. As painstakingly described in Congressional testimony, state child welfare systems repeatedly failed to place Indian children with Indian families or to consult with tribal governments concerning their welfare, leading to the removal of Indian children from their families and Tribes at shocking rates—in some cases *more than 20 times* the rate of non-Indian removal—for placement in overwhelmingly non-Indian homes.

Congress responded to these crises, and reasserted its trust responsibility to Indian Tribes and children, by enacting ICWA. ICWA's careful, narrowly tailored minimum federal standards have proven crucial for the protection of Indian children and the preservation of their relationship with their families and Tribes. What is more, ICWA's protections are widely supported, not only by Tribes and child welfare experts, but also in numerous States, including in Texas, where ICWA finds consistent backing at all levels of government. This Court should grant Federal Petitioners' and Tribal Petitioners' petitions to correct the decision of the Court of Appeals and uphold ICWA's constitutionality.

ARGUMENT

I. The Federal Government Assumed a Trust Responsibility for the Protection of Indian Children at this Nation's Founding, But Subsequently Neglected this Responsibility During the Late 19th and Early 20th Centuries.

Long before Congress enacted ICWA, the United States acknowledged and exercised its trust responsibility for the welfare of Indian children.[3] This history predates the United States itself—on July 12, 1775, the Continental Congress appropriated funds for Indian education at the nascent Dartmouth College. MARILYN IRVIN HOLT, INDIAN ORPHANAGES 87 (2001). This Nation's first Indian treaty, negotiated in the midst of the Revolutionary War, acknowledged a responsibility for the "security of the old men, women and *children* of the [Delaware] nation, whilst their warriors are engaged against the common enemy." Treaty

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[3] The trust responsibility was first acknowledged by this Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-56, 560-61 (1832), and is articulated in several founding-era treaties. *See, e.g.*, Treaty with the Six Nations of the Iroquois, preamble, Oct. 22, 1784, 7 Stat. 15 ("The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection . . . ."); Treaty with the Chickasaw, art. 2, Jan. 10, 1786, 7 Stat. 24 ("The Commissioners . . . of the Chickasaws, do hereby acknowledge the tribes and the towns of the Chickasaw nation, to be under the protection of the United States of America . . . ."); Treaty with the Wyandot, art. 5, Aug. 3, 1795, 7 Stat. 49 ("[T]he United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons . . . .").

with the Delawares, art. 3, Sept. 17, 1778, 7 Stat. 13 (emphasis added). And more than 110 subsequent Indian treaties provide for Indian education. Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 950 (1999). Other treaties expressly provided for Indian child welfare by establishing trust funds for Indian orphans, *e.g.* Treaty with the Shawnee, art. 8, May 10, 1854, 10 Stat. 1053; or by establishing institutions for the care of Indian orphans. *E.g.* Treaty with the Cherokee, art. 25, July 19, 1866, 14 Stat. 799. These early exercises of federal authority exemplify the Federal Government's ongoing obligation to provide for the welfare of Indian children.

Beginning in the 19th century, however, federal policy shifted decisively towards compulsory assimilation of Indians, particularly Indian children, into mainstream society. Using funds provided in treaties intended to ensure the protection of those children, the Federal Government forcibly removed them from their families to military-style boarding schools. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 76 (Nell Jessup Newton ed., 2012) ("Schooling was intended to provide Indian children with a substitute for a civilized home life. . . . The philosophy was most simply expressed by Richard Henry Pratt, the founder of Carlisle School: 'Kill the Indian and Save the Man.'"); H.R. REP. NO. 95-1386, at 9 (1978) ("1978 House Report") (noting that federal boarding school

programs "contribute[d] to the destruction of Indian family and community life").[4]

Later, in the 1950s, the Federal Government partnered with state and private agencies to form the Indian Adoption Project, which systematically facilitated the adoption of Indian children to primarily non-Indian families in order to reduce reservation populations, reduce spending on boarding schools, and satisfy a "large demand for Indian children on the part of Anglo parents." ELLEN SLAUGHTER, UNIV. OF DENVER RSCH. INST., INDIAN CHILD WELFARE: A REVIEW OF THE LITERATURE 61 (1976), https://tinyurl.com/fy9h7wb2. In addition, federal, private, and state child welfare officials collaborated to change state child welfare law and policy in order to facilitate these placements. As Professor Margaret Jacobs has noted:

> The [Indian Adoption Project] gathered information on state policies and practices and then worked closely with state agencies to loosen structural restraints that impeded Indian adoptions. In fact, they promised interested adoptive families that they could generate Indian children to be adopted. . . . To further its aims, the [Project] actually lobbied for changes in state laws that would ease restrictions on the adoption of Indian children and undermine tribal jurisdiction.

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[4] For this Court's convenience, the legislative history underlying the enactment of the Indian Child Welfare Act may be found on the public website of the National Indian Law Library, at https://tinyurl.com/au5d6a48.

Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 150 (2013).

During the same decade, the Bureau of Indian Affairs ("BIA") began the Urban Indian Relocation Program to encourage tribal members to leave their reservations and move to urban areas around the country. Thomas A. Britten, *Urban American Indian Centers in the late 1960s-1970s: An Examination of their Function and Purpose*, 27 INDIGENOUS POL'Y J. 1, 2 (2017). By 1970, the BIA had engineered the relocation of nearly 87,000 Indians from their reservations to urban areas around the country—more than a quarter of the 340,000 Native Americans living in urban areas at the time. U.S. DEP'T OF HEALTH, EDUC., & WELFARE, OFFICE OF SPECIAL CONCERNS, A STUDY OF SELECTED SOCIO-ECONOMIC CHARACTERISTICS OF ETHNIC MINORITIES BASED ON THE 1970 CENSUS, VOL. III: AMERICAN INDIANS 83, Table J-1 (1974). One of the primary relocation cities was Dallas, Texas, where the BIA established a relocation assistance center. Britten, *supra*, at 2. By 1969, Dallas was home to an estimated 15,000 Indians representing 84 Tribes, some from as far away as Alaska. Mary Patrick, *Indian Urbanization in Dallas: A Second Trail of Tears?*, 1 ORAL HIST. REV. 48, 49 (1973). As a result, Indian families increasingly interacted with state agencies, including child welfare agencies.[5]

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[5] Of course, these actions did not serve to divest the Federal Government of its trust responsibilities to Indian children. *See, e.g.*, *United States v. Nice*, 241 U.S. 591, 600 (1916) (noting Congress' authority over Indian affairs is a "continuing power of

II. Congressional Hearings Detailed Abuses by State Courts and State and Private Child Welfare Agencies that Resulted in the Widespread Displacement of Indian Children from their Families.

By the 1970s, when Congress began its formal investigation into the removal of Indian children from their families and placement in non-Indian homes, state child welfare systems bore overwhelming responsibility for this crisis. Congressionally commissioned reports and wide-ranging testimony taken from interested Indians and non-Indians, and from governmental and non-governmental agencies, wove together a chilling narrative: state and private child welfare agencies, with the backing of state courts, systematically removed Indian children from their families without evidence of harm, and without due process of law. *See, e.g.*, 1978 House Report at 27-28. *Amicus* AAIA documented that Indian children were removed to foster care at much higher rates than non-Indian children. *Id.* at 9. Indian placement rates by State ranged from double to more than 20 times the non-Indian rate, with between 53% and 97% of Indian children placed in non-Indian foster homes. *To Establish Standards for the Placement of Indian Children in Foster or Adoptive*

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which Congress c[an] not devest itself"); *see also McClanahan v. Tax Comm'n of Ariz.*, 411 U.S. 164, 173 n.12 (1973) (noting that provision of state services to a tribe "cannot affect their [relationship with the United States], which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization." (quoting *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1866))).

Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs, 95th Cong. 1, 539-40 (1977) ("1977 Senate Hearing"). Nationwide, "[t]he adoption rate of Indian children was eight times that of non-Indian children [and] [a]pproximately 90% of the . . . Indian placements were in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1989) (citing *Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs, S. Comm. on Interior and Insular Affairs*, 93rd Cong. 1, 75-83 (1974) ("1974 Senate Hearings") (statement of William Byler)).[6] Overall, the evidence presented to Congress was both stunning and bleak: "25-35% of . . . Indian children had been separated from their families

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[6] Among American Indian and Alaska Native children placed for adoption, as many as 97% in Minnesota—home to Child P. in the matter before this Court—were placed in non-Indian homes. 1977 Senate Hearing at 537-603. Indeed, in 1971 and 1972, nearly one-quarter of all Indian children in Minnesota under one year of age were adopted. 1978 House Report, at 9. In Arizona—home to A.L.M.—Indian children were 3.5 times more likely than non-Indian children to be removed from their homes and placed in adoptive or foster care. 1977 Senate Hearing at 544; *see id.* at 546 (noting that in one county, 45 times as many Indian children as non-Indian children were in state-administered foster care). In Nevada—home to Baby O.—Indian children were 7 times more likely than non-Indian children to be removed and placed in foster care. 1977 Senate Hearing at 574; *see also* 1974 Senate Hearings at 40-44 (detailing harassment and abuse of an Indian woman and her children by Nevada authorities under the guise of foster care placement) (statement of Margaret Townsend).

and placed in adoptive families, foster care, or institutions." *Holyfield*, 490 U.S. at 32.

A. Congress Recognized that States Frequently Disregarded Due Process, Tribal Family Practices, and Tribal Sovereignty in the Removal and Placement of Indian Children.

The House Committee on Interior and Insular Affairs noted that States had failed "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." 1978 House Report at 19; *see also Holyfield*, 490 U.S. at 45 ("Congress perceived the States and their courts as partly responsible for the child separation problem it intended to correct."). Congress ultimately found that the "States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5).

Congress found that state child welfare systems contributed to the crisis by repeatedly failing to place Indian children with Indian families. *See, e.g.*, 1974 Senate Hearings at 61 (testimony of Dr. Carl Mindell, Department of Psychiatry and Child Psychiatry, Albany Medical College) ("[W]elfare agencies tend to

think of adoption too quickly without having other options available . . . . [W]elfare agencies are not making adequate use of the Indian communities themselves. They tend to look elsewhere for adoption type of homes."); *see also* Jacobs, *supra*, at 137 ("How did it come to pass that the fostering and adoption of Indian children outside their families and communities had reached these crisis proportions by the late 1960s? State welfare authorities and [BIA] officials alleged a dramatic rise in unmarried Indian mothers with unwanted children and claimed that many Indian individuals and families lacked the resources and skills to properly care for their own children.").

One of the most frequent complaints was the tendency of social workers to apply standards that ignored the realities of Indian societies and cultures:

> [T]he dynamics of Indian extended families are largely misunderstood. . . . The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing.

1978 House Report at 10, 20; *see also Holyfield*, 490 U.S. at 35 n.4 ("One of the particular points of concern was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society.").[7] The failure to account for these cultural

[7] Not only did state social workers often misunderstand the dynamics of Indian communities, they also exaggerated the problems of those communities while overlooking those same problems

practices led "many social workers, ignorant of Indian cultural values and social norms, [to] make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." 1978 House Report at 10; *see also* 1977 Senate Hearing at 73 (statement of Sen. Abourezk) ("non-Indian agencies . . . consistently thought that it was better for the child to be out of the Indian home whenever possible"). Indeed, state agencies often removed or threatened the removal of Indian children *because* their families placed them in the care of relatives or in homes that lacked the amenities that could be found in non-Indian society. *See, e.g.*, 1977 Senate Hearing at 77-78, 166, 316; *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the Subcomm. On Indian Affairs and Public Lands of the H. Comm. on Interior and Insular* Affairs, 95th Cong. 115 (1978) ("1978 House Hearings").

Critically, state courts allowed these abuses to occur in virtually an unfettered fashion. "The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law." 1978 House Report at 10-12; *see also* Jacobs, *supra*, at 151-52. Testimony before Congress revealed "substantial abuses of proper legal procedures," and that Indian

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in the wider society. Jacobs, *supra*, at 148 ("Although alcohol use and abuse permeated all levels of American society, social workers and other state authorities imagined virtually all Indians as alcoholics who were incapable of raising their own children.").

parents were "often unaware of their rights and were not informed of them, and they were not given adequate advice or legal assistance at the time when they lost custody of their children." 123 CONG. REC. 21042, 21043 (1977) (statement of Sen. Abourezk). Tribes, too, frequently were kept in the dark about the removal of Indian children from their families. *See, e.g.*, 1977 Senate Hearing at 156 (statement of Hon. Calvin Isaac) (noting that "[r]emoval is generally accomplished without notice to or consultation with responsible tribal authorities").

B. Congress Found that Removal of Indian Children to Out-of-Home, Non-Indian Placements Was Not in the Best Interests of Indian Children, Families, and Tribes.

"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." *Holyfield*, 490 U.S. at 49-50. Testimony to Congress was replete with examples of Indian children placed in non-Indian homes who later suffered from identity crises in adolescence and adulthood. *See, e.g.*, 1974 Senate Hearings at 110, 113-14 (testimony of Dr. James H. Shore, Psychiatry Training Program and William W. Nicholls, Director, Tribal Health Program, Confederated Tribes of the Warm Springs Reservation); *id.* at 45-46 (testimony of Dr. Joseph Westermeyer, Department of Psychiatry, University of Minnesota). Such

testimony led the American Indian Policy Review Commission to conclude that "[r]emoval of Indians from Indian society has serious long- and short-term effects . . . for the individual child . . . who may suffer untold social and psychological consequences." S. REP. NO. 95-597 (1977), at 37, 43. More recent scholarship bears these findings out. A 2017 study comparing mental health outcomes of Native and White adoptees found that Native adoptees "are even more vulnerable to mental health problems within the adoptee population" and "were more likely to report alcohol addiction, alcohol recovery, drug addiction, drug recovery, self-assessed eating disorder, eating disorder diagnosis, self-injury, suicidal ideation, and suicide attempt." Ashley L. Landers, Sharon M. Danes, Kate Ingalls-Maloney, Sandy White Hawk, *American Indian and White Adoptees: Are There Mental Health Differences?*, 24 AM. INDIAN ALASKA NATIVE MENTAL HEALTH RSCH. 2, 54, 69 (2017).

Finally, the legislative record reflects "considerable emphasis on the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34. "For Indians generally and tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as ongoing, self-governing communities." 124 CONG. REC. 38103 (1978) (statement of Rep. Lagomarsino); *see also id*. at 38102 (statement of sponsor Rep. Udall) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy.").

C. ICWA Was Carefully and Narrowly Tailored to Address the Nationwide Crisis that Congress Identified and to Further the Federal Trust Responsibility.

Following years of deliberation, Congress enacted ICWA to remedy the widespread harms that state and private agencies had helped to enable. At its core, ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. ICWA's provisions were carefully crafted to address the harms identified during Congressional hearings, thereby reflecting "a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37 (quoting 1978 House Report at 23). More fundamentally, ICWA constitutes a reassertion of the federal trust responsibility—one that was disastrously abandoned in favor of state authority during the late 19th and early 20th centuries.

To further these goals, Congress established preferences for the adoptive and foster placement of Indian children. 25 U.S.C. § 1915(a) (adoptive placement), § 1915(b) (foster and preadoptive placement). The first preference is always for placement within the Indian child's "extended family." *Id.* at §§ 1915(a)(1), 1915(b)(i). The next preference is for placement with a member of the Indian child's Tribe, *id.* at § 1915(a)(2), or foster home that has the approval of the Indian child's Tribe. *Id.* at § 1915(b)(ii). Such preferences help ICWA achieve Congress' stated purposes of

"promot[ing] the stability and security of Indian tribes and families." *Id.* at § 1902.

When those first- and second-order placements are not available, or not in the Indian child's best interests, ICWA also gives preference to placement with other Indian families. *Id.* at § 1915(a)(3), § 1915(b)(iii). These provisions recognize and effectively codify protections for the extended family dynamic discussed at length in testimony, which, Congress found, had certain commonalities that spanned tribal cultures. *See, e.g.*, 1978 House Hearings at 68, 69 (statement of LeRoy Wilder, AAIA) ("Indian cultures universally recognize a very large extended family."). Placement with an Indian family, even one affiliated with a Tribe different from the Indian child's Tribe, helps to protect and preserve the child's identity as an Indian. Lynn Klicker Uthe, *The Best Interests of Indian Children in Minnesota*, 17 AM. INDIAN L. REV. 237, 252-53 (1992) (describing significance of Indian cultural identity in well-being of Indian children). It also helps to protect and preserve the Indian child's legal and political identity as an Indian. Because Indian political status is ICWA's touchstone, *see* 25 U.S.C. §§ 1903(3), (4), (8) (defining, respectively, "Indian," "Indian child," and "Indian tribe"), an Indian child will share with an Indian family—even an Indian family affiliated with a different Tribe—political status as an Indian that entitles them to certain employment preferences, 20 U.S.C. § 4418; 25 U.S.C. § 5116; health care, 25 U.S.C. § 1603(12); housing assistance, 25 U.S.C. § 4103(10); and other benefits provided to Indians because of their

status as Indians. There is ample evidence in the legislative history to show that Congress, through this preference, was acting "to protect the best interests of Indian children." 25 U.S.C. § 1902.

III. ICWA Implementation at a State Level Has Improved Child Welfare Services for Indian Families and Has Fostered Tribal-State Cooperation in Child Welfare Cases.

A. ICWA Remains Vital for the Protection of Indian Children, Families, and Tribes.

ICWA's protections for Indian children and families are now widely praised among national child welfare organizations.[8] However, while ICWA's procedural safeguards have significantly improved Indian child welfare outcomes, progress is not universal. As the American Psychological Association testified nearly 20 years after ICWA's passage, "[m]any of the controversial cases surrounding the adoption of Indian children appear to have developed as a result of poor or nonexistent enforcement of ICWA provisions." *J. Hearing Before the S. Comm. on Indian Affairs and the H. Comm. on Res. on S. 569 and H.R. 1082, To Amend the Indian Child Welfare Act of 1978*, 105th Cong. 1, 228 (1997). Many States continue to have vastly disproportionate rates of Indian children in out-of-home placements compared to the general child population. *See* NAT'L COUNCIL OF JUV. & FAMILY CT. JUDGES,

[8] *Amici* Casey Family Programs *et al*. detail this point, and undersigned *Amici* urge this Court's attention to this brief.

DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE (FISCAL YEAR 2015) 5-6 (2017), https://tinyurl.com/yx2rbtj7.[9] In addition, serious due process violations in child custody proceedings involving Indian children continue today. Until recently South Dakota state courts conducted cursory removal hearings lasting just a few minutes at which Indian parents were not allowed even to view documents outlining the case against them. *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 770 (D.S.D. 2015), *rev'd on other grounds sub nom. Oglala Sioux Tribe v. Fleming*, 904 F.3d 608 (8th Cir. 2018), *cert. denied*, 140 S. Ct. 105 (2019).

In recognition of the evident need for thorough and consistent implementation of ICWA, the Department of the Interior's Final Rule for Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38777 (June 14, 2016), furthers the Act's laudable goals by synthesizing nearly forty years of case law, legislative changes, and evolution in social work practice to provide state courts with additional clarity in implementing the law.

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[9] In Minnesota, for example, Indian children are 1.7% of the population but represent 25.8% of the children in foster care. NAT'L CTR. FOR JUV. JUSTICE, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE DASHBOARD, Minnesota (hereinafter "NCJJ Dashboard"), https://tinyurl.com/k7ew637k. In Alaska, Indian children represent 21.6% of the population but represent 57.3% of the children in foster care. NCJJ Dashboard, *supra*, Alaska. These statistics have been largely unchanged for decades; when drafting ICWA, Congress was presented with statistics that showed that Alaska Native children were three times more likely than non-Native children to be in foster care. S. REP. NO. 95-597, at 46 (1977).

Amici were not alone in supporting these efforts to properly implement the law. In fact, Texas's Department of Family and Protective Services ("DFPS") submitted comments stating that "DFPS fully supports the Indian Child Welfare Act." Letter from John J. Specia, Jr., Commissioner, to Elizabeth Appel, U.S. Dep't of Interior, Re: Notice of Proposed Rulemaking ("NPRM") Regulations for State Courts and Agencies in Indian Child Custody Proceedings 25 CFR Part 23 (May 19, 2015), https://tinyurl.com/3mhja9er.

What is more, many of the same state court judges and court personnel that Petitioner Texas claims suffer under ICWA's yoke have embraced Interior's efforts. Noting that "[d]iffering interpretations [of ICWA] have resulted in inconsistent, and sometimes conflicting, practices by various State courts and agencies and different minimum standards are being applied across the United States, contrary to Congress' intent," the National Council of Juvenile and Family Court Judges ("NCJFCJ") filed comments in favor of Interior's proposed regulations. Mem. from Nat'l Council of Juv. & Fam. Ct. Judges to Elizabeth Appel, U.S. Dep't of Interior, *Proposed Indian Child Welfare Act Regulations* (May 14, 2015), https://tinyurl.com/9ufyd7y9. These comments came on the heels of an earlier NCJFCJ resolution supporting full implementation of the Indian Child Welfare Act, noting that such implementation "should be a priority for all state courts" and that "NCJFCJ encourages states to adopt ICWA in its entirety in state law." *Resolution in Support of Full Implementation of the Indian Child Welfare Act*, Nat'l

Council of Juv. & Fam. Ct. Judges (July 13, 2013), https://tinyurl.com/57p5r9b5. ICWA's protections for Indian children, families, and Tribes remain as vital as they were forty years ago.

B. Texas Has Enacted ICWA as Official Policy.

While Texas has taken issue with ICWA in these and other proceedings, other actions by its Legislative, Executive, and Judicial branches tell a different story. For its part, in response to reports "suggest[ing] that many judges in Texas who deal with child protective services cases are unaware of the federal Indian Child Welfare Act," the Texas Legislature in 2015 amended the Texas Family Code to mandate inquiry into the tribal status of children and families involved in child welfare cases. H. REP. 84(R)-16852, Reg. Sess., at 1 (Tex. 2015); Act of April 30, 2015, 84th Leg., Reg. Sess., ch. 697 §§ 1-3, 2015 Tex. Sess. Law. Serv. 1 (West); Tex. Fam. Code §§ 262.201(f), 263.202(f-1), and 263.306(a-1)(3).[10] According to its sponsor, the legislation was intended to ensure "proper efforts to identify the heritage of Native American children" so that Texas "help[s] such children remain connected with their families and tribes while going through a child protection suit and assist[s] the judicial and court community *in*

[10] The relevant tribal status provisions were moved to their current location in the Code in 2017. *See* Act of May 1, 2017, 85th Leg., Reg. Sess., ch. 910 § 262.201, 2017 Tex. Sess. Law. Serv. 1 (West); Act of April 19, 2017, 85th Leg., Reg. Sess., ch. 324 § 7.009, 2017 Tex. Sess. Law. Serv. 1 (West).

upholding the important promise made in the Indian Child Welfare Act of 1978." H. REP. 84(R)-16852, Reg. Sess., at 1 (Tex. 2015) (emphasis added).[11] The legislation was signed into law by Governor Abbott after passing both the Texas House and Senate with near-unanimous support.[12] And, as noted above, Texas DFPS submitted official comments to the Federal Government strongly supporting ICWA.

Outside of the present litigation, Texas continues to express support for ICWA and its implementation. The Texas Supreme Court Permanent Judicial Commission for Children, Youth and Families, a state body that "exists to improve the judicial handling of child protection cases systemically through improvements in technology, attorney and judicial training, and court improvement pilot projects," has stated that it "supports partnering with system stakeholders to promote ongoing knowledge and understanding of the ICWA and its importance." TEXAS DEP'T OF FAM. & PROT.

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[11] In fact, Texas child welfare workers have at times failed to afford Indian children ICWA's protections by presuming that children were not Indian children if they didn't look Indian. Hana E. Brown, *Who Is an Indian Child? Institutional Context, Tribal Sovereignty, and Race-Making in Fragmented States*, 85 AM. SOC. REV. 776, 784-85 (2020) (citing Jo A. Kessel & Susan P. Robbins, *The Indian Child Welfare Act: Dilemmas and Needs*, 63 CHILD WELFARE 225, 228 (1984)).

[12] H. JOURNAL, 84th Leg., Reg. Sess., 2164-65 (Tex. 2015), https://tinyurl.com/2swzbj34 (stating that the legislation (House Bill 825) passed the Texas House of Representatives by a vote of 125 to 15); S. JOURNAL, 84th Leg., Reg. Sess., 2321 (Tex. 2015), https://tinyurl.com/nm2ba5re (stating HB 825 passed the Texas Senate by a vote of 29 to 2).

SERVS. (TEXAS DFPS), 2015-2019 TITLE IV-B CHILD & FAMILY SERVS. PLAN FINAL REPORT, 10, 124. Texas also has entered into tribal-state agreements to better implement ICWA and other child welfare issues affecting each sovereign,[13] and just this past January hosted the Texas Indian Child Welfare Act Summit alongside all three of Texas's federally recognized Indian Tribes. *See* 2021 TEXAS INDIAN CHILD WELFARE ACT SUMMIT, https://tinyurl.com/ce2tpznr (Jan. 8, 2021). Texas DFPS noted in its comments on the Final Rule that it:

> has worked collaboratively with the three federally recognized tribes in Texas and many other tribes throughout the country, as well as community stakeholders throughout Texas to develop best practices that will inure to the benefit of tribal children and families. This agency maintains an ongoing dialogue with Texas tribes to address both case specific and systemic issues. While there is always room for improvement, our commitment to both the letter and spirit of the ICWA is clear.

Letter from Commissioner John J. Specia, Jr., *supra*. Texas DFPS's agreements with Ysleta Del Sur Pueblo

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[13] *See, e.g.*, Mem. of Understanding between Ysleta Del Sur Pueblo/Tigua Tribe & the Tex. Dep't of Fam. & Prot. Servs., Child Prot. Servs. Div. (July 27, 2009), https://tinyurl.com/yx9bc2jt; Mem. of Understanding between Alabama-Coushatta Tribe of Tex. & the Tex. Dep't of Fam. & Prot. Servs., Child Prot. Servs. Div., Regions 4 and 5 (April 21, 2010), https://tinyurl.com/yya9coag. Upon information and belief, the Ysleta Del Sur Pueblo/Tigua Tribe agreement has since expired, but the Tribe and DFPS continue to operate under the expired agreement. Texas is one of 39 States to have entered such agreements. Brown, *supra* note 11, at 791.

Tribe and Alabama-Coushatta Tribe of Texas are "based on the fundamental principles of government-to-government relationships," recognize "each respective sovereign's interests," and provide protocols for investigation of child welfare matters on- and off-reservation, as well as notice to the Tribes under ICWA. *Supra* note 13 at 2 (Ysleta Del Sur Pueblo/Tigua Tribe) and 1 (Alabama-Coushatta Tribe). In particular, the Alabama-Coushatta Tribe's MOU provides that DFPS shall "[w]ork cooperatively with the Tribe's [child welfare department] to the greatest extent possible to ensure that appropriate services, consistent with the Tribe's culture and traditions, are provided in any case involving an Alabama-Coushatta Tribe of Texas child while maintaining the child's best interest at all times." *Id.* at 2.

Texas's efforts at a legislative and agency level to implement the Indian Child Welfare Act should be lauded. Fundamentally, ICWA creates a framework for collaboration among States, Tribes, and the Federal Government—one that furthers, not hinders, their respective sovereignty, as well as the best interests of Indian children, families, and Tribes. Stripping away ICWA's protections would endanger the progress in child and family outcomes identified by child welfare experts, juvenile court judges, and state child welfare agencies. This Court need not, and should not, enable such a result.

CONCLUSION

For the foregoing reasons, *Amici* join the Federal Petitioners and the Tribal Petitioners in respectfully urging that this Court grant the petitions so that ICWA's constitutionality may be affirmed.

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