Nos. 21-376, 21-377, 21-387, 21-380

In The
Supreme Court of the United States

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

Petitioners, Cross-Respondents,

v.

CHAD EVERET BRACKEEN, *et al.*,

Respondents, Cross-Petitioners.

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

AMICUS CURIAE BRIEF OF FOSTER PARENTS AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF CHAD EVERET BRACKEEN, ET AL.

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CHEROKEE NATION, *et al.*,
Petitioners,

v.

CHAD EVERET BRACKEEN, *et al.*

THE STATE OF TEXAS,
Petitioner,

v.

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

CHAD EVERET BRACKEEN, *et al.,*
Petitioners,

v.

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

QUESTION PRESENTED

Does ICWA's separate and substandard treatment of Indian Children and the non-Indian adults they have come to love as parents who seek to adopt them—based solely on their unmatched races—unconstitutionally deny them the equal protection of the laws?

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

N.B. and S.B. (Foster Parents), inter-racial parents of an already large family, welcomed two-year-old C.J., Jr., into their Ohio home in January 2015. Sadly, C.J.'s biological parents continued to struggle with substance abuse, chronic homelessness, and periodic jail sentences. As a result, Foster Parents sought legal custody of C.J., who had closely bonded with and effectively become part of Foster Parents' family. Under Ohio law, the question should have been whether an award of legal custody to Foster Parents was in C.J.'s best interests. And everyone involved agreed that Foster Parents had provided C.J. with (in the words of his Guardian ad Litem) "exemplary care." But C.J. happens to have Native American ancestry, while Foster Parents have none. As a result, the Indian Child Welfare Act (ICWA) foisted upon Foster Parents burdens that are unknown in custody cases involving non-Indian children, while relegating C.J.'s interests below those of a distant Indian Tribe to which he had no connection.

Thus, before the Ohio juvenile court could determine whether placement with Foster Parents was in C.J.'s best interests, ICWA allowed the Arizona-based Gila River Indian Community to intervene as a full party in the Ohio custody matter. The tribe proposed to take C.J. from Foster Parents and move him to Arizona, where he had never even visited, to live with his biological father's distant relatives, whom he had never met. Under ICWA, this race-

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[1] Pursuant to this Court's Rule 37.3(a), all parties consented to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

matched placement was "preferred" to placement with his loving Foster Parents. Accordingly—because C.J. is (in part) Native American and Foster Parents are not—and despite the close bond between C.J. and Foster Parents and the "exemplary care" they had provided—Foster Parents had to prove, by clear and convincing evidence, that "good cause" existed to depart from the Gila River Indian Community's race-matched placement.

Foster Parents prevailed—but only with the pro bono assistance of Pacific Legal Foundation who represented them and Goldwater Institute who represented C.J.'s Guardian in a related matter—and not until June 2020, *five and a half years* after they first welcomed C.J. into their home. Foster Parents recognize the past injustices perpetrated against Indian families that motivated the passage of ICWA, but—as Americans and parents of multi-racial children—they believe in the equal protection of the law for each individual, regardless of race, ancestry, or any other immutable characteristic. They submit this brief to highlight the perverse unintended consequences of ICWA's race-matching policies, which significantly delay, when they do not preclude, the placement of Indian children with loving families—even when such placement would unquestionably be in the children's best interests. Foster Parents emphasize the unconstitutional obstructions that non-Indian *parents* face under ICWA when they seek legal permanency for themselves and the Indian children they love.

Founded in 1973, **Pacific Legal Foundation** is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for mainstream Americans

who believe in the primacy of individual rights over collective interests. In addition to its involvement in Foster Parents' successful award of legal custody, PLF has extensive litigation experience in the areas of racial discrimination, racial preferences, and civil rights. It has served as lead counsel in lawsuits challenging race-based laws, including *Robinson v. Wentzell*, U.S.D.C., D. Conn. No. 18-cv-274 and *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, U.S.D.C., E.D. Va. No. 21-cv-296. And PLF has participated as *amicus curiae* in nearly every major United States Supreme Court case involving racial classifications in the past four decades, from *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), to *Students for Fair Admission, Inc. v. Univ. of N. Carolina*, U.S. No. 21-707.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under well-established state law, the best interests of the child is the "paramount" consideration in every child-custody determination. *See Birch v. Birch*, 11 Ohio St. 3d 85, 87 (1984) (noting "the court's function to see that the children's best interests are protected"); *In re K.D.*, 2017-Ohio-4161, ¶ 7 (Ohio Ct. App.) ("[T]he juvenile court's determination of whether to place a child in the legal custody of a parent or a relative is based solely on the best interest of the child.").[2] State custody decisions may not be made on the basis of race. *See Palmare v. Sidoti*, 466 U.S. 429, 432 (1984) (Because race-based classifications are inherently suspect, racial classifications are "subject to the

[2] Ohio law is consistent with the 50 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, all of which operate under "best interests" standards. *See generally* Child Welfare Information Gateway, *Determining the Best Interests of the Child* (June 2020), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

most exacting scrutiny."). And federal law expressly precludes race-matching in "adoption or foster care placements." 42 U.S.C. § 1996b. Noncompliance is "a violation of title VI of the Civil Rights Act of 1964." *Id.* § 1996b(2).

Except, that is, when an "Indian child" might be involved. 42 U.S.C. § 1996b(3) (carving out ICWA). When an Indian child is the subject of a custody matter, ICWA imposes race-matched "placement preferences," based on the law's *presumption* that it is "in the best interests of the [Indian] child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations." *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1355–56 (2014). ICWA's presumption cannot be squared with the traditional best-interests-of-the-child rule. *See Brackeen v. Haaland*, 994 F.3d 249, 319 (5th Cir. 2021) (en banc) (noting that ICWA's preferences "do in fact conflict with the otherwise applicable law of the" plaintiff-states); *In re W.D.H.*, 43 S.W.3d 30, 37 (Tex. Ct. App. 2001) (finding it "not possible to comply" with both the state's best-interest-of-the-child test and ICWA's best-interest-of-the-Indian-child standard). Indeed, as the Montana Supreme Court noted, the best-interest standard "is *improper*" in ICWA cases because "ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with [its] preferences." *In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) (emphasis added).

As a result, when a *non*-Indian child is the subject of a custody proceeding, state courts *always* make placement decisions based on the individual child's best interests, but when an "Indian child" is involved, ICWA requires that state courts sacrifice the individual child's best interests for the collective interests of tribal organizations. *See, e.g.*, 25 U.S.C. § 1901(3) (Congressional finding asserting, "there is no *resource* that is more vital to the continued

existence and integrity of Indian *tribes* than their children") (emphasis added). ICWA thus imposes substantial costs on both Indian children and their non-Indian families who want to care for them.

Below, Foster Parents describe the five-and-a-half-year ordeal they endured to obtain legal custody of C.J. and the relevant provisions of ICWA's deeply distorted, race-matching process that caused this unconscionable delay.[3]

ARGUMENT

I. The Indian Child Welfare Act Imposes Substantial Hurdles Before Non-Indian Parents Who Wish To Adopt Indian Children

A. C.J. became closely bonded with his Foster Parents and foster siblings

C.J. is a citizen of Ohio, where he was born in 2012. When he was two-and-a-half years old, Franklin County (Ohio) Children Services (County or Children Services) filed a complaint alleging that C.J. was a neglected, abused, and dependent child.[4] The County was given temporary custody, and he was immediately placed with Foster Parents in their Ohio home. *Matter of C.J.*, 108 N.E.3d at 681–82.

The County's intervention was prompted by the substance abuse, chronic homelessness, and periodic jail sentences of C.J.'s biological parents, who unfortunately

[3] Although Foster Parents finally obtained permanent custody of C.J., the parental rights of his Indian father have not been severed because of the additional hurdles placed on that process by ICWA, and the proceedings remain open, under the jurisdiction of the juvenile court in Ohio. Facts discussed here are drawn from the Ohio appellate court's published opinion, *In the Matter of C.J., Jr.*, 108 N.E.3d 677 (Ohio Ct. App. 2018).

[4] The abuse count was quickly dismissed.

failed to progress toward sobriety. As a result, C.J. remained with Foster Parents for an extended period. After approximately a year and a half, C.J.'s Guardian ad Litem (Guardian) filed a motion to terminate the temporary court commitment and grant permanent custody to Foster Parents. The Guardian noted the continuing struggles of C.J.'s biological parents; and he advised the court that Foster Parents had provided "exemplary care" for C.J., who had "essentially become a member of the family" and who exhibited a "close bond" with his Foster Parents and his "foster siblings." *Matter of C.J.*, 108 N.E.3d at 682–83.

B. Gila River Indian Community intervenes to assert its collective interests, which were contrary to C.J.'s best interests under Ohio family law

Three days after the Guardian's motion was filed, the Gila River Indian Community (Tribe) intervened in the case. This Arizona-based Tribe was allowed to intervene in C.J.'s Ohio custody proceeding because it claimed that C.J. was an "Indian child." *See* 25 U.S.C. § 1911(c) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, … the Indian child's tribe shall have a right to intervene at any point in the proceeding."). *Matter of C.J.*, 108 N.E.3d at 683.

An "Indian child" is an unmarried person under eighteen 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." 25 U.S.C. § 1903(4). Whether C.J. was an "Indian child" was unquestionably a question of race and ancestry—not of political

affiliation. According to the Tribe's Constitution and Bylaws,[5] "membership" is limited to "persons of Indian blood." *Id.* art. III, § 1(a). Children of members are entitled to membership only "if they are of at least one-fourth Indian blood." *Id.* § 1(b). The Tribe claimed merely that C.J. was *eligible* for membership—and only because of his and his father's *race*. These requirements are consistent with those of most Native American tribes, which limit membership by expressly requiring a certain "blood quantum"[6] through a BIA-issued "Certificate degree of Indian Blood" establishing tribal ancestry.[7]

Though tribal membership may be based on ancestry instead of race,[8] *ICWA itself* makes race-matching its central goal. According to ICWA's foster-care or pre-adoptive "placement preferences" (discussed below), state courts

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[5] CONSTITUTION AND BYLAWS OF THE GILA RIVER INDIAN COMMUNITY, ARIZONA (Mar. 17, 1960), https://naair.arizona.edu/sites/default/files/constitution_gila_river_0.pdf.

[6] Blood quantum requirements are generally expressed by some minimum fraction of "Indian blood" that must be established through genealogical ancestry, such as 1/4, 1/8, or 1/16 verifiable Indian heritage. *See generally* Ryan W. Schmidt, *American Indian Identity and Blood Quantum in the 21st Century: A Critical Review*, 2011 J. Anthropology 1, at 6-7. For some tribes, membership eligibility is satisfied through blood-quantum ancestry in that particular tribe, while others—like the Tribe involved in C.J.'s case—are satisfied by blood-quantum ancestry in any Native American tribe. *Id.*

[7] *See* U.S. Dep't of the Interior, Bureau of Indian Affs., *Genealogy*, https://www.bia.gov/bia/ois/tgs/genealogy.

[8] *See Brackeen*, 994 F.3d at 337 n.50 (discussing Cherokee Nation's membership rules). Practically speaking, however, almost all federally recognized tribes require either "lineal descent from someone named on the tribe's base roll" or "lineal descent from a tribal member who descends from someone whose name appears on the base roll." U.S. Dep't of the Interior, Bureau of Indian Affs., A Guide to Tracing American Indian & Alaska Native Ancestry, https://www.bia.gov/sites/default/files/dup/assets/foia/ois/pdf/idc-002619.pdf.

must, absent a showing of good cause to the contrary, place an Indian child with his extended family, other members of the child's (ostensible) tribe, or *any* Indian family or *any* Indian-approved or Indian-operated institution. 25 U.S.C. § 1915(b).

C. ICWA grants extraordinary power and jurisdiction to tribal courts

Foster Parents and C.J. had to endure 18 months of delays waiting for ICWA-imposed jurisdictional questions to be resolved—all the while, under the threat that C.J. would be removed from Foster Parents' home.

These delays arose because ICWA *requires* transfer, to a tribal court, of a state-court proceedings for foster-care placement of an Indian child who, like C.J., is not domiciled or residing within the reservation of the Indian child's tribe, unless one of the child's biological parents objects. 25 U.S.C. § 1911(b); *cf. Gila River Indian Cmty. v. Dep't of Child Safety*, 242 Ariz. 277, 281 (2017). After intervening below, the Tribe moved to transfer the entire custody proceeding to its tribal court in Arizona. The Ohio juvenile court held a hearing, where C.J.'s Guardian, his biological mother's attorney, and a caseworker stated that C.J.'s best interests would be met by remaining with Foster Parents in Ohio. The attorney for C.J.'s biological mother argued that good cause existed under § 1911(b) to deny transfer. C.J.'s Guardian did the same, noting the extraordinary physical or emotional needs of the child (as established by expert testimony), the bond between C.J. and his Foster Parents (which was among the strongest the Guardian had ever witnessed), and the psychological harm that would be caused by taking C.J. from Foster Parents' home and moving him 2,000 miles away. *See Matter of C.J.*, 108 N.E.3d at 684. The court continued the

hearing but—even though C.J.'s biological mother had objected under § 1911(b)—the court later informed the parties of its intention to grant the Tribe's transfer motion. *Matter of C.J.*, 108 N.E.3d at 685.

Two days before the hearing was to resume, the Tribe filed a "Child in Need of Care Petition" with its tribal court, which entered an *ex parte* order granting emergency temporary wardship. *Id.* This *ex parte* order purportedly made C.J. a ward of the tribal court and placed him under the care, custody, and jurisdiction of the Tribe's social services. *Id.* ICWA allows this extraordinary claim of jurisdiction. Under the Act, if an Indian child is a ward of a tribal court, the Indian tribe "shall retain *exclusive* jurisdiction, *notwithstanding* the residence or domicile of the child." 25 U.S.C. § 1911(a). The tribal court ordered that C.J. be moved to the Tribe's Arizona reservation—where C.J. had never even visited—and placed in the physical custody of distant relatives—whom he had never met. The tribal court further ordered C.J.'s biological parents to appear in the tribal court for all proceedings. *Matter of C.J.*, 108 N.E.3d at 685.

When the Ohio hearing resumed, the juvenile court ruled that the Tribe had not received proper notice of the Ohio proceeding,[9] and that the improper notice had "so

[9] When a state court "knows or has reason to know" that an Indian child is involved in a custody mattery, ICWA requires notice to the child's tribe. 25 U.S.C. § 1912(a). Here, C.J.'s father initially told the County that he was of Pima heritage, but Pima is not a federally recognized tribe. (The Gila River Indian Community is made up of Pima and Maricopa peoples. *See* https://www.gilariver.org/index.php/about/culture). As a result, the County sent notice to the Bureau of Indian Affairs and the United States Department of the Interior Midwest Regional Office. Interior requested additional information, but the County did not further respond. The Tribe later became aware of the

prejudiced this case that the case is null and void." The court dismissed the case in its entirety, granted the Tribe's transfer motion, and terminated the County's temporary custody of C.J. *Id.* at 686.

With the first case "null and void," C.J.'s Guardian immediately filed a second complaint in Ohio to protect C.J.'s best interests. The Ohio juvenile court, however, found no reason to deviate from BIA guidelines that require placing an Indian child in an Indian home or with an Indian relative. *Matter of C.J.*, 108 N.E.3d at 686. Accordingly, on December 16, 2016—almost two years after C.J. was placed with Foster Parents—the court gave the tribal court's order full faith and credit and ordered that, *just two weeks later*, the Tribe would pick up C.J. in Columbus and take him to Arizona. *Id.* at 687.

C.J.'s best interests—like those of Foster Parents'—were effectively ignored. Fortunately for C.J., his Guardian filed for an emergency stay with the Ohio Court of Appeals, which stayed the juvenile court's orders on the day that the Tribe was scheduled to take C.J. to Arizona. *Id.* C.J. was able to stay with Foster Parents (under the temporary custody of the County) while the Ohio juvenile and appellate courts resolved various matters.[10]

Ultimately, the appellate court reversed the juvenile court's order transferring the case to the tribal court because (1) C.J.'s biological mother had objected under 25 U.S.C. § 1911(b) and (2) the juvenile court failed to consider C.J.'s best interests under § 1911(b)'s "good cause"

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matter through C.J.'s mother's attorney. *See Matter of C.J.*, 108 N.E.3d at 682.

[10] Sadly, during this period, C.J.'s biological mother passed away. *Matter of C.J.*, 108 N.E.3d at 687.

exception. *See Matter of C.J.*, 108 N.E.3d at 695.[11] The court further ruled that the juvenile court's order granting full faith and credit to the tribal court failed to give the Ohio parties due process. *Id.* at 697.

Finally, the appellate court reversed the juvenile court's order transferring custody of C.J. to the Tribe's social services. The appellate court recognized the Tribe's "protectable interest in its Indian children, and that the protection of this tribal interest is at the core of the ICWA." *Matter of C.J.*, 108 N.E.3d at 698 (citations omitted). But the juvenile court's order was issued "without any analysis" of C.J.'s best interests and without considering whether good cause existed to depart from ICWA's placement preferences. *Id.* at 697.

While the appellate court reached the right conclusion, the delay between the Tribe's motion to transfer jurisdiction (September 2017) and the appellate court's decision (March 2018) was 18 months. By this time, C.J. had been in Foster Parents' exemplary care for over three years—a span of time that, to say nothing more, frustrates the

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[11] The Ohio appellate court described the extraordinary circumstances of the tribal court's order:

> The tribal court order was procured by [the Tribe] from its own tribal court before the Ohio court transferred jurisdiction, before [the original Ohio custody] case . . . was dismissed, and was procured without notice to all the parties, and purports to exercise personal jurisdiction over C.J.[']s parents as well as C.J.[], who is not and never has been domiciled on, resided in, or even visited the reservation.

Matter of C.J., 108 N.E.3d at 695. Two of the three judges on the panel argued that, if the objection to transfer by C.J.'s biological mother was valid, the juvenile court need not have considered good cause to depart from the jurisdictional requirement of § 1911(a). *See id.* at 699 (Brown, J., concurring in part and concurring in judgment); *id.* at 703 (Luper Schuster, J., concurring in part and concurring in judgment).

intention of Ohio law "to encourage the speedy placement of children into permanent homes." *In re J.B.*, 2013-Ohio-1703, ¶ 37 (Ohio Ct. App.).

D. ICWA imposes race-matched placement "preferences" that discriminate against non-Indian foster parents

The matter returned to the juvenile court, which still had to decide where to place C.J. For pre-adoptive placement, ICWA mandates that "preference *shall be given*" to (1) a member of the Indian child's extended family, (2) a foster home specified by the Indian child's tribe, (3) *any* Indian foster home (licensed or approved by an authorized non-Indian licensing authority), or (4) an institution for children approved or operated by *any* tribe. 25 U.S.C. § 1915(b). Thus, the latter three placements do not require placement with members or institutions of the child's own tribe.

To maintain custody of C.J., Foster Parents were required to overcome these preferences with a showing of "good cause to the contrary." *Id.* § 1915(b). While Congress had established standards of proof for other parts of ICWA,[12] it never prescribed a standard to establish "good cause" under § 1915. Under a well-established rule of statutory construction, when Congress adopts heightened standards of proof in part of a law but not others, its "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof." *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Accordingly, most courts have applied a preponderance-of-the-evidence standard. *See, e.g.*, *Dep't of Human Servs. v. Three*

[12] *See, e.g.*, 25 U.S.C. § 1912(e) (requiring "clear and convincing evidence" to order that a child be taken from his parents and placed in a foster-care placement); *id.* § 1912(f) (requiring "evidence beyond a reasonable doubt" to terminate parental rights).

Affiliated Tribes of Fort Berthold Reservation, 238 P.3d 40, 50 (Or. Ct. App. 2010).

But in 2016—almost thirty years after Congress enacted ICWA and after disclaiming authority to impose a standard[13]—the BIA issued a regulation to require *clear and convincing evidence* to establish good cause under § 1915. *See Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38778-01, 38874 (Dec. 12, 2016); 25 C.F.R. § 23.132(b).

Therefore, because C.J. is (in part) Indian and because Foster Parents have no "Indian blood," ICWA imposed a burden on Foster Parents to show—by clear and convincing evidence—"good cause" to depart from the Act's race-matching placement "preferences."

E. Foster Parents—finally—prevail

Ultimately, Foster Parents did establish "good cause" to depart from ICWA's placement preferences—in May 2020—more than two years after the Ohio appellate court returned the matter to the juvenile court, and *five and a half years* after C.J. was first placed with Foster Parents.

Foster Parents likely could not have afforded to overcome ICWA's "preferences" with private counsel—and should never have been put in that position. If C.J. and Foster Parents were of different races, Foster Parents' request for legal custody would have been analyzed under the "best interests" test that is used for every other child in Ohio's juvenile court system.

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[13] For most of ICWA's existence, the BIA believed that it lacked authority to exercise "supervisory control over state or tribal courts" and that such action would be "extraordinary" and "so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect." *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584 (Nov. 26, 1979). Congress never issued such an express declaration.

As noted above, Foster Parents acknowledge that ICWA was passed in response to "federal policy [that] consciously sought to separate Indian children from their parents." Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 7 (2020). *See also Brackeen*, 994 F.3d at 284–85 (discussing state abuses that led to ICWA). And Foster Parents agree with the intentions of ICWA, which was to reject the idea that stereotypes—specifically, the idea that a "white" upbringing was preferred for Indian children—should be used in custody proceedings. But ICWA's race-matching preferences have resulted in a similar problem—individual Indian children are sacrificed for collective interests, under a race-based presumption that Indian children uniquely need an Indian upbringing.

But for ICWA, C.J. would almost certainly have been placed under the permanent "exemplary" care of Foster Parents four years earlier than he was—indeed, he likely would have been adopted, which is the preferred outcome for dependent children whose birth parents have failed efforts at progress. Instead, C.J. faced years under the constant threat of being taken from Foster Parents, with whom he was closely bonded, and moved 2,000 miles away from the only state he had ever called home and away from his Foster Parents and foster siblings.

Not only was this process deeply unfair and emotionally stressful to C.J. and Foster Parents, but as discussed next, it is flatly unconstitutional.

II. The placement preferences unconstitutionally discriminate against non-Indian foster and adoptive placements

ICWA clearly discriminates against individual Indian children by depriving each one of the "best interests of the

child" standard that applies to every other child needing protection within the exact same state juvenile courts. But—as C.J. and Foster Parents' ordeal makes clear—ICWA *also* discriminates against non-Indian families seeking custody of Indian children. If Foster Parents had Native American ancestry, they would have been "preferred placements" for C.J. Instead, only because of their races, Foster Parents had to submit clear and convincing evidence of good cause to depart from ICWA's race-matching "preferences." ICWA thus deprioritizes non-Indian placement options based on the law's presumption that placing an Indian child with Indian families is *always* in an Indian child's best interests. In this way, ICWA discriminates against loving, bonded foster parents, solely because they lack Native American ancestry. Because this discrimination hinges on the prospective placements' race, the ICWA placement preferences are unconstitutional under the Equal Protection guarantees of the U.S. Constitution.

To be sure, this Court has recognized the federal government's "broad authority to legislate with respect to enrolled Indians as a class." *Duro v. Reina*, 495 U.S. 676, 692 (1990); *see also Morton v. Mancari*, 417 U.S. 535, 538, 554 (1974) (upholding BIA hiring preferences for positions dealing with "the administration of functions or services affecting any Indian tribe" because it made "the BIA more responsive to the needs of its constituent group" and applied to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."). But these cases involved circumstances quite distinct from child-custody proceedings, in which courts make important determinations involving non-tribal members whose lives and activities are completely independent of BIA oversight.

Further, *Mancari's* use of tribal membership has been called into question by later opinions. In *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 205 (1995), for example, this Court applied strict scrutiny and invalidated a federal program that provided highway-construction contracts to minority-owned business enterprises—including those run by a Native American. *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (finding the plan could not satisfy strict scrutiny because the government had no compelling interest without evidence of prior discrimination, and finding no narrow tailoring where attempts at race-neutral solutions had been explored). As the Court pointed out, even if Congress acts with the best of intentions, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S. at 229–30. The Court did not distinguish between the preferences for Hispanic Americans or African Americans and the preference for Native Americans, even though the dissenters pointed to *Mancari* as a case which permitted such supposedly benign governmental classifications. *Id.* at 244 n.3 (Stevens, J., dissenting). Notably, *Adarand* overturned an earlier decision which had upheld minority ownership preferences for a variety of groups, including Native Americans. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), *overruled by Adarand*, 515 U.S. at 200.

Perhaps most significantly, this Court invalidated a provision in the Hawaiian Constitution providing that only descendants of Hawaiian Island inhabitants, as of 1778, could vote for trustees in the Office of Hawaiian Affairs, a state agency that administers programs for the benefit of native Hawaiians. *Rice v. Cayetano*, 528 U.S. 495, 514 (2000). In certain contexts, "[a]ncestry can be a proxy for

race," the Court explained, and because the Hawaiian Constitution "single[d] out identifiable classes of persons … solely because of their ancestry or ethnic characteristics," it was constitutionally infirm. *Id.* at 514–15. The same analysis applies to ICWA.

While ICWA does not on its face mandate ancestry requirements, tribal membership in federally recognized tribes is always a function of ancestry and/or race. Accordingly, whatever may have been the expediency for allowing Native American job preferences at the BIA, that rationale should not be applied more broadly to cancel loving relationships like that of C.J. with Foster Parents.

Further, ICWA's placement preferences fail even under the standard set forth in *Mancari*. This Court has upheld classifications targeting members of Indian tribes *only* when they were clearly based on social, cultural, or political relationships. *See United States v. Antelope*, 430 U.S. 641, 646 (1977); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 480–81 (1976); *Mancari*, 417 U.S. at 554. ICWA placement preferences, however, have no such connections. Rather, the placement preferences treat *any* Indian placement, provided they are a member of *any* Indian tribe, as preferable to a non-Indian placement. Indeed, for foster care placements, ICWA prefers Indian-approved or -operated *orphanages* over non-Indian foster *families*.

* * *

ICWA's placement preferences are triggered by a child's race, which alone is a clear constitutional violation. But once ICWA's placement preferences apply to a state custody proceeding, any non-Indian individuals or families seeking foster or adoptive placements will find themselves at a grave disadvantage throughout the remainder of the process—solely due to their race. Because ICWA

disregards all social and cultural connections of the individuals involved, its placement preferences can only be understood as relying on the ancestry and/or race of proposed foster and adoptive parents. And because ICWA categorically excludes non-Indians from its placement preferences, non-Indians are necessarily deprived of race-neutral proceedings when they seek custody of Indian children. Accordingly, this Court should hold that the placement preferences are unconstitutional under the Equal Protection guarantees of the United States Constitution.

III. ICWA Demotes the Interest of Individual Children and the Adults They Have Bonded With

As discussed above, if there is one universal principle in child-protection laws across the country, it is that the child's individual and fundamental rights take precedence over any state or collective. *See* Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 TEX. REV. L. & POLITICS 55, 89 (2022) (compiling cases referring to the best interest of the child as the "'bedrock,' the 'lodestar,' the 'guiding principle,' the 'guiding light,' the 'primary consideration,' the 'foremost concern,' and—naturally—the 'gold standard'").

Before ICWA, state courts often made the racist presumption that the best interests of an Indian child were served by placement with a white family. But rather than focusing on each child's best interests, ICWA requires state courts to operate under a different—but equally unacceptable—presumption that placement with an Indian family (or institution) in always in an Indian child's best interests.

ICWA thus subordinates the rights of individual Indian children to the collective interests of tribes. ICWA's congressional findings refer to children not as people in

need of special protection, but as a tribal "resource." 25 U.S.C. § 1901(3). ICWA's proponents embrace the collectivist notion that tribal rights are more important than the safety and happiness of individual Indian children, and they rely on racist stereotypes for justification. For instance, one scholar suggests that an Indian child should be subjected to tribal jurisdiction just like "a baby elephant [ought to] be raised by elephants." Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act*, 28 ARIZ. ST. L.J. 589, 624 (1996). ICWA, of course, applies to human children with individual needs and rights. And because the placement preferences are designed to override the state-law best-interests analysis, it *necessarily* means that—when ICWA applies—a child's individual needs and desires are relegated to a lesser status and the child is deprived of an inquiry into his best interests.

Further, the presumption that a "tribal community's need to perpetuate its culture" is more important than the individual needs of its members is suspect. *See* Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1, 2 (1990). It rests on the assumption that "contemporary American Indians identify strongly with their tribal communities and their Indian identity." *Id.* at 12.[14] Such an identity certainly may be the case for *some* American Indians—based not on their race, but on their actual connections to tribal communities. And, when these connections and resulting identity exist, they may properly help inform a best-inter-

[14] The notion that Indian children—by virtue of their race alone—have a unique need for tribal connection has been criticized as "junk science." Bonnie Cleaveland, *Split Feather: An Untested Construction Indian Child Welfare Act* (Mar. 2015), https://perma.cc/CX6H-P5BA.

ests analysis. But these circumstances do not automatically exist for all "Indian children," as shown in the case of C.J., a child born and raised in Ohio (2,000 miles from his father's tribe) to parents, who unfortunately struggled with substance abuse. *See also Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013) (involving a girl who had no connection to the Cherokee Nation for the first two years of her life). Indeed, ICWA's *defenders* emphasize that the law favors group identity over an individual child's needs. *See* Debra Dumontier-Pierre, *The Indian Child Welfare Act of 1978: A Montana Analysis*, 56 MONT. L. REV. 505, 523 (1995) (defending ICWA because "the Indian community focuses on the collective rights of the community as a large cultural group and not on individual rights").

This disregard for the well-being of the individual child can lead to pernicious outcomes. For example, under ICWA, a child is presumed to be better off in an Indian-approved institution (such as an orphanage) than with a loving and caring but state-approved non-Indian *family*. 25 U.S.C. § 1915(b)(iv). Similarly, as in C.J.'s case, ICWA requires state courts (absent good cause to the contrary) to place Indian children with members of their tribe—even if they are complete strangers—rather than leaving children in safe, loving homes where they've lived for years. And ICWA's additional legal hurdles before parental rights may be severed make it more difficult to finally separate Indian children from abusive biological parents than it would be to remove non-Indian children from their abusive parents. ICWA may thus "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption." *Adoptive Couple,* 570 U.S. at 653–54 (footnote omitted).

The individual well-being and happiness of American citizens are therefore undermined to appease the wishes of a distant tribal sovereign with which the child may have no connection whatsoever. This is precisely backwards. The Constitution conclusively declares that equality under the law must prevail. *See The Federalist No. 45*, at 309 (Madison) (J. Cooke ed. 1961) ("[A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter."). *See also* Sandefur, *supra*, 37 CHILD. LEGAL RTS. J. at 78 ("On this principle, the legal institutions of the United States must hold firm, as with a chain of steel. To the extent that sovereignty—whether of a state or of a tribe—may conflict with protections for the rights of individual children, that sovereignty must yield.") (footnotes omitted).

CONCLUSION

Foster Parents are thankful that the Ohio juvenile court ultimately found that it was in C.J.'s best interests to remain in their care. They submit, however, that the process imposed by ICWA—imposed only because C.J. is (in part) Indian and Foster Parents are not—caused unnecessary delay and emotional turmoil for both C.J. and Foster Parents. They endured a five-and-a-half-year ordeal constantly under the threat that C.J.—whom they welcomed into their home and who became a member of the family—could be taken from their home. Foster Parents ask the Court to hold that ICWA's race-matching placement preferences denied them and C.J. the equal protection of the laws.

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Respectfully submitted,

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