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

IN THE

Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
CHAD EVERET BRACKEEN, *et al.*,
Respondents.

CHEROKEE NATION, *et al.*,
Petitioners,
v.
CHAD EVERET BRACKEEN, *et al.*,
Respondents.

STATE OF TEXAS,
Petitioner,
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

CHAD EVERET BRACKEEN, *et al.*,
Petitioners,
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

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

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN 21-376 AND 21-377, AND IN SUPPORT OF RESPONDENTS IN 21-378 AND 21-380

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INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association (ABA) is the largest voluntary association of attorneys and legal professionals in the world. Its membership includes sole practitioners and attorneys in law firms in every field of law; corporations; nonprofit organizations; and local, state, federal, and tribal governments; many judges, legislators, law professors, and law students; and non-lawyer associates in related fields.[2] The ABA's mission is "to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession."[3]

The ABA has a strong, longstanding interest in the field of children's law. The ABA operates the Center on Children and the Law, which strives to improve legal representation and legal systems that impact children and families with a special focus on the child

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[1] All Parties have filed blanket consent to briefs of *amicus curiae* in this case. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, person, or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its argument.

[3] American Bar Ass'n (ABA), *About the ABA*, https://www.americanbar.org/about_the_aba.

welfare legal system.[4] As part of this work, the Center has partnered extensively with dependency court judges, attorneys, and tribes across the country to implement the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 ("ICWA"), and its corresponding regulations. Additionally, the ABA Section of Family Law has published a respected legal guide to ICWA called *The Indian Child Welfare Act Handbook*.[5]

The ABA has also adopted Resolutions specifically in support of ICWA. ABA Resolution 115C19A (2019);[6] ABA Resolution 111A13A (2013).[7] The ABA has been a consistent advocate for ICWA in part because it effectively implements broader legal principles that the ABA recognizes as foundational in the child welfare field. *See, e.g.*, ABA Resolution 11819A (2019) (recognizing, *inter alia*, that children and parents have legally protected rights to family integrity and family unity).[8]

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[4] ABA, *Center on Children and the Law*, https://www.americanbar.org/groups/public_interest/child_law.

[5] Kelly Gaines-Stoner et al. (2018), http://www.americanbar.org/products/inv/book/338011063.

[6] https://www.americanbar.org/content/dam/aba/administrative/crsj/cle/115c-annual-2019.pdf.

[7] https://www.americanbar.org/content/dam/aba/directories/policy/annual-2013/2013_hod_annual_meeting_111A.docx.

[8] https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/118-annual-2019.pdf; *see also* ABA, *Center on Children and the Law–Policies*, https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/ (listing ABA Resolutions addressing child and youth law).

The ABA also supports ICWA because it implements the federal government's trust responsibility to Indian tribes and furthers tribal sovereignty. ABA Resolution 115C19A. Many ABA Resolutions recognize the sovereign status of Indian tribes, *e.g.* ABA Resolution 11211A (2011);[9] ABA Resolution 117A08A (2008),[10] and "the federal responsibility to Indian people," ABA Resolution 11080M (1980);[11] *see also* ABA Resolution 115A19A.[12] These and many other ABA policies are premised on the federal power to legislate or otherwise act for the benefit of Indian people specifically on the basis of their legal and political status—not on the basis of race. *E.g.*, ABA Resolution 11620M (2020);[13] ABA Resolution 103C04M (2004);[14] ABA Resolution 106A90M (1990).[15]

Each of these ABA policy Resolutions is supported by legal research and authority, vetted, debated, and carefully considered before it is voted upon by the ABA House of Delegate's 600 members representing a broad cross-section of the legal profession. The ABA

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[9] https://www.americanbar.org/content/dam/aba/directories/policy/annual-2011/2011_am_112.pdf.

[10] https://www.americanbar.org/content/dam/aba/directories/policy/annual-2008/2008_am_117a.pdf.

[11] https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/feb-80-indian-treaty-obligations.authcheckdam.pdf.

[12] https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/115a-annual-2019.pdf.

[13] https://www.americanbar.org/content/dam/aba/administrative/news/2020/02/midyear2020resolutions/116.pdf.

[14] https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2004/2004_my_103c.pdf.

[15] https://www.americanbar.org/content/dam/aba/directories/policy/midyear-1990/1990_my_106a.pdf.

is thus well positioned to provide an important, balanced perspective on legal questions implicating these policy areas.

SUMMARY OF ARGUMENT

This case presents important questions at the intersection of child welfare law, federal Indian law, and constitutional law, including equal protection. Although these questions come to the Court in the context of individual family stories, they are best viewed and answered in the context of the established legal frameworks that govern these areas of the law. ICWA not only fits comfortably within these larger legal frameworks, it is also an important component of them. As a result, invalidating ICWA would have far-reaching implications well beyond this case or the statute itself.

ICWA is part of a complex child welfare legal system in which government actors possess the power to remove children from their parents and involuntarily terminate an individual's legal relationship to his or her family. One of the questions raised in this case concerns whether this area of the law is the "exclusive province of the States[,]" Petition 21-380, and if so whether ICWA unconstitutionally "commandeers" state resources by imposing minimum federal standards for the placement of Indian children.

The child welfare field is most definitely not the exclusive province of the states: it has long been governed by a combination of state and federal law, and federal law routinely imposes substantive and procedural requirements on state child welfare agencies and court proceedings including child placement. *E.g.*, 42 U.S.C. § 672(a)(2) (mandating federal standards for child removal and placement in foster care). Finding ICWA

unconstitutional on commandeering grounds would not only disrupt decades of precedent implementing ICWA itself, it would also call into question the structure of child welfare law as a whole.

One fundamental purpose of federal standards in this area of the law is to protect the individual rights of parents and children to preserve their family and kinship ties without undue state interference. These rights—long recognized by this Court—are often termed "family integrity" and are protected by the Fourteenth Amendment. *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Legal rights to family integrity provide key context for understanding an important additional question now before the Court: whether ICWA disadvantages Indian children and discriminates on the basis of race.

ICWA was carefully designed to *protect* Indian children and parents from discrimination and to ensure they have the same rights and legal protections to family integrity as other children and parents. To do this, ICWA builds on existing child welfare laws in a manner that accounts for the particular circumstances of Indian children. By definition, such children are either members of or eligible for membership in a sovereign Indian tribe. ICWA therefore creates a mechanism for the tribe to assume jurisdiction or become a party to state court proceedings—much like the participation of state agencies in other child welfare proceedings—to protect the child's interests, the child's rights to tribal membership, and the tribe's own interest in its political and cultural survival. Additionally, ICWA provides enhanced protections for parents of Indian children and for the child's maintenance of kinship and community relations. Child welfare laws recognize and protect these rights for all

children and parents, but ICWA does so in a manner that ensures respect for Indian cultural norms around home and family and for the child's tribal connections.

In this sense, ICWA is an important component of the larger child welfare legal structure. Questioning the goals and methods of ICWA necessarily implicates the goals and methods of the entire child welfare legal framework under state and federal law, including placement preferences designed to maintain family and community connection and minimize the short- and long-term trauma of family separation.

ICWA is also one of hundreds of statutes enacted under the federal government's constitutional Indian affairs powers. "This Court has traditionally identified the Indian Commerce Clause, U.S. Const., art. I, § 8, cl. 3, and the Treaty Clause, art. II, § 2, cl. 2, as sources of that power." *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted). The Court has also cited "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government," including military and foreign affairs powers. *Id*. at 201. The Petitions in this case raise the question whether those powers include the authority to enact ICWA.

This Court has consistently interpreted federal Indian affairs powers as exceptionally broad. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) (collecting cases discussing Congress' "plenary" Indian affairs powers). More specifically, the Court has recognized that the Indian affairs powers include authority to carry out the federal government's general duty of protection to Indian people and tribes, known today as the federal trust responsibility. *Id.* ("[T]he Indian trust relationship represents an exercise of that [plenary] authority . . .

."); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903); *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (quoting *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)). This includes the power of Congress to identify and implement specific components of the trust responsibility through legislation, like ICWA. *Jicarilla Apache Nation*, 564 U.S. at 176, 178.

Beyond that, the Petitions in this case ask the Court to decide whether ICWA draws racial classifications subject to strict scrutiny, or whether its Indian classifications are subject to the modified rational basis test adopted by this court in *Morton v. Mancari*. *Mancari* and its progeny recognize that federal action "relating to Indians as such, is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645 (1977). Instead, it is based on the unique legal and political status of Indian people in the United States.

The Court in *Mancari* identified multiple bases for that status. They include the political status of tribes themselves; the broad constitutional federal Indian affairs powers; and the federal trust responsibility. 417 U.S. at 551–52, 555. The scope of the Indian classification subject to the *Mancari* rational basis test is thus coextensive with the federal government's Indian affairs powers and extends to all beneficiaries of the trust responsibility—including Indian children as defined in ICWA.

Mancari holds that government action classifying Indian people on these bases does not violate equal protection "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians[.]" *Id.* at 555. This standard of review appropriately reflects inherent tribal sovereignty and the constitutional Indian affairs

powers vested in the federal government, while also upholding the purpose of equal protection to guard against arbitrary discrimination by government actors. *See Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84–85 (1977). To instead subject ICWA and other Indian affairs legislation to strict scrutiny as racial or "remedial" legislation—which it is not—would unreasonably curtail Congress' exercise of its Indian affairs powers and its ability to carry out the ongoing federal trust responsibility.[16]

The Petitions and briefs filed in this case present individual stories that are—like so many arising in the child welfare field—complicated, emotional, and oftentimes heartbreaking.[17] But Congress enacted ICWA under valid constitutional authority and on the basis of an extensive body of evidence and law—not only individual stories. It is not for this Court to overturn that legislative judgment.

ARGUMENT

I. Child placement proceedings are not the exclusive province of the states.

In no jurisdiction in this country are child placement proceedings the exclusive domain of the states. Instead, minimum federal standards routinely apply to protect the rights of parents and children in state proceedings. In *Santosky v. Kramer*, this Court recognized the necessity of federal protections in the child welfare arena. 455 U.S. 745, 758 (1982) (a natural parent's right

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[16] Even so, ICWA would survive strict scrutiny because it is narrowly tailored to implement the trust responsibility, a compelling federal interest.

[17] Because of the multiple Petitions granted in this case, this brief refers to the Parties using their designation as Plaintiffs or Defendants below.

to be with his or her children is "an interest far more precious than any property" and state action seeking to terminate parental rights infringes on fundamental liberty interests protected by federal law unless it meets minimum due process standards).

ICWA thus operates in an area of law that is inherently public and involves both federal and state authorities in addition to private family interests.[18] If this Court were to find ICWA unconstitutional because it applies federal standards to actions involving public and private interests in child custody, then by implication the entire child welfare legal framework would be similarly unconstitutional.

The federal government has long been involved in child welfare. Congress began providing federal support for state agency foster care payments in 1961 and through an amendment in 1962 began requiring state court judges to make determinations about a child's welfare before those payments were made available to states. 42 U.S.C. § 604(b) (1961); S. Rep. No. 87-1589, at 14 (1962).[19] Congress continues to pervasively regulate state child welfare systems through Title IV-E of the Social Security Act, 42 U.S.C. §§ 670–679c, and federal law mandates numerous

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[18] The Plaintiffs rely on *Sosna v. Iowa* to suggest that the area of "domestic relations" is the exclusive province of state law. *E.g.*, Individual Pls.' Br. 46, 54. *Sosna* was a case about private divorce proceedings, not child welfare practice, and is therefore inapposite. *Sosna v. Iowa,* 419 U.S. 393, 408 (1975) (State's durational divorce residency requirement did not violate due process).

[19] These provisions are now codified at 42 U.S.C. § 672(a).

responsibilities for both child welfare agencies and courts.[20]

Many of these responsibilities are very much in keeping with the ICWA requirements now under challenge. For example, much like ICWA's notice requirements (which require agencies to notify tribes and parents or Indian custodians of a child's removal), Title IV-E requires state child welfare agencies to notify all adult relatives within thirty days of a child's removal from parental care, and to exercise due diligence to identify and locate all the child's adult relatives. *Id.* § 671(a)(29). Similarly, since 1997 federal law has required agencies to file termination petitions after a child has been in foster care for fifteen of the most recent twenty-two months. *Id*. § 675(5)(E).

As the state of Texas acknowledges, failure to operate in a manner consistent with ICWA—as with these other federal requirements—means that a state risks losing federal funding through Title IV-E. Texas Br. 11, 39. In other words, ICWA is part of a larger child welfare legal framework in which state agencies seeking federal support must meet multiple federal standards. Significantly, all these federal standards—including ICWA—apply only after a state agency has elected to initiate a child welfare investigation. They do not "commandeer" a state agency by requiring it to take action in the first place. *See, e.g., Id.* § 672(a)(2) (providing federal reimbursement for foster care costs if standards are met *after* agency action begins).

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[20] *See* Sheila Malloy Huber et al., *The Influence of Federal Law on State Child Welfare Proceedings*, *in* Washington State Juvenile Non-Offender Benchbook (2017 ed.), https://www.wacita.org/benchbook/chapter-1-the-influence-of-federal-law-on-state-child-welfare-proceedings.

Nor is ICWA an unprecedented intrusion into state *court* authority. Federal law imposes numerous mandates on state courts in foster care, adoption, and custody matters. For example, in all non-voluntary foster care placements, Congress requires state court judges to determine that a child's "continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts" have been made to prevent removal. *Id.* § 672(a)(2)(A)(ii). In 2018, Congress passed the bipartisan Family First Prevention Services Act, which requires child welfare judges to evaluate criteria regarding whether a child in foster care can be placed in a congregate setting as opposed to a foster family home. That law also requires state child welfare agencies to provide evidence to support such placements. 42 U.S.C. § 672(k).

Other areas of child custody practice are also governed by federal law and carry implications for state courts. *See* International Child Abduction Remedies Act § 4, 22 U.S.C. § 9003; Intercountry Adoption Act of 2000 § 303, 42 U.S.C. § 14932. State child welfare agencies and courts have thus spent decades carefully implementing ICWA's provisions as a part of their regular implementation of federal and state child welfare authorities. To hold (as Plaintiffs argue) that Congress impermissibly commandeers state agencies and courts by imposing minimum federal standards on child welfare proceedings would therefore have broad potential ramifications in the field of child welfare law.

II. ICWA builds on existing child welfare law to protect the rights of Indian children and parents.

This Court has been asked to address whether ICWA discriminates against Indian children through its removal standards and placement preferences for kin and Indian families. To the contrary, ICWA plays an important role in protecting children's and parents' legal rights to family integrity and due process.

As this Court has repeatedly recognized, rights to be free from public and private interference in the relationships between parents and children are among the most cherished rights under the law. *Troxel*, 530 U.S. at 65 (describing the "interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (noting that the Constitution "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").[21] The government therefore may not intentionally intrude on rights to family integrity without a particularized court finding of unfitness on the part of each parent. *See Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (explaining it would be a due process violation "[i]f a

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[21] *See also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Stanley*, 405 U.S. at 658. Circuit Courts have found children hold a parallel right to family integrity based in part on this Court's decisions. *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d. Cir 1977) (quoting *Smith v. Org. of Foster Fams. for Equal. & Reform* (*OFFER*), 431 U.S. 816, 844 (1977)); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) (citations omitted); *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002) (citations omitted).

State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.") (quoting *Smith v. Org. of Foster Fams. for Equal. & Reform* (*OFFER*), 431 U.S. 816, 862–63 (1977)).

These legal rights evolved as protections in child welfare cases where government authority has the tremendous power to remove a child from his or her home, place him or her in state custody, and involuntarily terminate his or her legal relationships with family. *Santosky*, 455 U.S. at 759. As such, rights to family integrity provide an important framework for understanding the responsibilities of public authority to support a family as well as the limits of public authority to break up a family.

ICWA is a core component of this framework: its provisions are designed to protect against the breakup of Indian families and ensure support. For example, ICWA requires that any party seeking removal first make active efforts to provide remedial services and rehabilitative programs, and that stringent standards be met prior to the removal. 25 U.S.C §§ 1912(d), (f). ICWA also ensures adherence to due process through its evidentiary standards and expert witness requirements. *Id*. §§ 1912(e), (f). In the context of Indian children specifically, these provisions ensure that determinations of parental fitness are based on legitimate evidence and not—as they so often have been—on ignorance of Indian culture and child-rearing practices

or a devaluing of extended Indian family networks.[22] In this way, ICWA adapts and applies universal child welfare principles to the circumstances of Indian children.

ICWA's preferences for adoptive, foster care, and preadoptive placements likewise protect Indian children's rights and interests when a state agency determines that separation or removal is necessary. *Id.* §§ 1915(a), (b). Until a termination of parental rights is permanent, reunification with parents and family is the primary objective for the majority of children who have been placed in state protective custody, whether or not ICWA applies.[23] As such, rights to family integrity continue after initial separation, including during a child's placement in foster care. *See Santosky*, 455 U.S. at 753, 760 (until the state proves parental unfitness, parents and children share a vital interest in preventing erroneous termination of their natural relationship). In the case of an Indian child, the child also has an interest in maintaining identity and connection with his or her tribe, community, and potential extended family networks.

Protecting children's ties to family and community following removal aligns with decades of research confirming that children who cannot remain with their parents thrive when raised by relatives and close family friends, known as kinship care.[24] Children in kinship care have more stable and safer childhoods

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[22] ABA Resolution 111A13A, at Report 3 (discussing documented factors underlying disproportionate removal of Indian children); H.R. Rep. No. 95-1386, at 10-11 (1978).

[23] 42 U.S.C. § 671(a)(15)(B), (D) (requiring agencies to make it possible for a child to safely return home with limited exceptions).

[24] ABA Resolution 11819A, at Report 11 (citation omitted).

than children in foster care with non-relatives, with a greater likelihood of having a permanent home. They keep their connections to siblings, family, and community and their cultural identity. Youth in kinship care homes express more positive feelings about their placements and are less likely to run away or to re-enter the foster care system after returning to birth parents.[25] Longstanding requirements in federal child welfare law therefore prioritize placements with relative caregivers over placements with non-relative caregivers. 42 U.S.C. § 671(a)(19). Similarly, ICWA's preferences were designed by Congress—based on evidence collected after more than four years of hearings, testimony, and debate—to protect and promote Indian children's connections to family, community, tribe, and culture and to foster a stronger sense of self and belonging than would result from placement with a non-kinship, non-Indian family.

The Individual Plaintiffs and certain amici mischaracterize ICWA's placement preferences as prioritizing "any Indian family" over "any non-Indian family." Individual Pls.' Br. 15, 37–40; *see also* Goldwater Br. 6. "Other" Indian families, however, are preferred over non-Indian families only when no extended family members and no other members of the child's tribe are available for placement. 25 U.S.C. §§ 1915(a), (b). In such cases, placement with another Indian family significantly increases the likelihood that the foster or adoptive family will prioritize the child's ongoing connection with his or her own tribe and appreciate

[25] *Id.* at 11–12 (citation omitted).

the rights and benefits that come with that connection, because they maintain similar connections themselves.[26]

Because Plaintiffs do not receive priority under ICWA's placement preferences, they argue that in addition to discriminating against Indian children, the preferences intrude upon their own rights as non-Indian foster and adoptive parents. Individual Pls.' Br. 41; Texas Br. 49. But ICWA does not interfere with any legal rights to which Plaintiffs would otherwise be entitled as a matter of child welfare law. Foster and adoptive families provide an invaluable role in the work of raising children, and their contributions to society are extraordinary. In contrast with parent and child rights in relationship to state and private interests, however, unrelated foster parents—and even adoptive parents before the adoption is finalized—do not have a commensurate legal interest in children they foster or seek to adopt.[27]

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[26] Plaintiffs are mistaken that this is a "racial" preference simply because other Indian families are not politically affiliated with the same tribe as the Indian child. Foster or adoptive parents are classified as Indian based on their legal and political status as such under federal law, *see* Part IV *infra*, and on their political connection to their own tribes. *See* 25 U.S.C. § 1903(3) (defining "Indian" as any member of an Indian tribe or Alaska Native member of a Regional Corporation as defined in the Alaska Native Claims Settlement Act). That classification is certainly relevant to the goal of ensuring that a foster or adoptive family appreciates and prioritizes an Indian child's tribal connections and identity.

[27] *See OFFER*, 431 U.S. at 845 (distinguishing a natural parent's "liberty interest in family privacy," which has its source "in intrinsic human rights," with a foster parent's parallel interest in their relationship with a child, which has its "origins in a[] [contractual] arrangement in which the State has been a partner from the outset."). Holding that foster parents have legal rights commensurate to natural parents would be an unprec-

It is entirely appropriate for the law to prioritize reunification of the child with his or her birth family or community whenever possible. Contrary to Plaintiffs' assertions, nothing in ICWA suggests that children should be left in harm's way when conditions require government intervention. Nor does ICWA cause Indian children to be "more abused, and for longer" than other children before "states can rescue them[,]" as claimed by amici curiae Goldwater Institute et al. Goldwater Br. 28 (emphasis removed). These unfounded arguments misrepresent both the facts and the fundamental purpose of the child welfare legal framework: to support and facilitate family reunification.[28] Whereas removal is unfortunately necessary in extreme cases, keeping families together is a shared goal of

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edented expansion of this contractual arrangement and would interfere with existing federal and state child welfare law. The majority of circuit courts that have directly addressed the question of whether unrelated foster parents have rights to children because they are being fostered have answered in the negative or expressed hesitance to recognize such rights. *Backlund v. Barnhart*, 778 F.2d 1386, 1389–90 (9th Cir. 1985); *Wildauer v. Frederick Cnty.*, 993 F.2d 369, 373 (4th Cir. 1993) (per curiam); *Drummond v. Fulton Cnty. Dep't of Fam. & Children's Servs.*, 563 F.2d 1200, 1206 (5th Cir. 1977) (en banc); *Renfro v. Cuyahoga Cnty. Dept. of Human Servs.*, 884 F.2d 943, 944 (6th Cir. 1989); *Kyees v. Cnty. Dep't of Pub. Welfare*, 600 F.2d 693, 698–99 (7th Cir. 1979) (per curiam); *Rodriguez v. McLoughlin*, 214 F.3d 328, 337–38, 340–41 (2d. Cir. 2000).

[28] Statistically, Indian children continue to be overly represented in child welfare proceedings. The National Institutes of Health recently found that termination of parental rights proceedings are still nearly three times as likely to occur for Indian children. Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children*, *2000–2016*, 25 Child Maltreat. 32, 40 (2020).

child welfare agencies and foster families alike. It is not a failing of the system when that goal succeeds.

ICWA aligns precisely with these objectives of the child welfare legal framework more broadly. Finding ICWA unconstitutional would thus conflict with long-standing precedent in this area and would undermine Congress' and the courts' authority to protect and prioritize child and parent rights to family integrity in a multitude of circumstances.

III. Constitutional powers over Indian affairs grant Congress authority to implement the federal trust responsibility to Indian people and tribes through legislation like ICWA.

While ICWA is consistent with federal involvement in child welfare law generally, Congress enacted ICWA specifically under the constitutional Indian affairs powers. 25 U.S.C. § 1901(1). In recognition of their unique political and legal status as sovereigns predating the formation of the United States, *see, e.g.*, *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021), Indian tribes are specifically referenced in the Article I Commerce Clause along with states, the federal government, and foreign nations. U.S. Const. art. I, § 8, cl. 3; *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831). This Court has located federal Indian affairs powers in the Indian Commerce Clause as well as the Treaty Clause, art. II, § 2, cl. 2, and "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government," including military and foreign affairs powers. *Lara*, 541 U.S. at 201.

This Court has held repeatedly that these constitutional authorities vest Congress with unique powers over Indian affairs that it does not have with respect

to other groups. *Id.* at 200–01. *See also Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1934 (2022) ("Under our Constitution, treaties, and laws, Congress too bears vital responsibilities in the field of tribal affairs.") (citing *Lara*, 541 U.S. at 200); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs") (citations omitted); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (noting the "undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters," and citing cases).

The federal Indian affairs powers include the authority to carry out the long-recognized federal trust responsibility. *Jicarilla Apache Nation*, 564 U.S. at 175 (collecting cases discussing Congress' Indian affairs powers and concluding: "the Indian trust relationship represents an exercise of that authority . . . ."). As a matter of federal law, the trust responsibility to protect the interests and welfare of Indian people has generally been understood as arising from the federal government's use of its constitutional powers to claim title to tribal lands and resources, and to assert federal authority over sovereign tribes as "domestic dependent nations." *Cherokee Nation*, 30 U.S. at 17; *Mancari*, 417 U.S. at 552 (acknowledging that the United States through the exercise of its war and treaty powers "took possession of [tribal] lands, sometimes by force," and in exchange "assumed the duty of furnishing [] protection, and with it the authority to do all that was required to perform that obligation . . . .") (quoting *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. at 715); *Lone Wolf*, 187 U.S. at 567 (based on the federal government's "course of dealing" and the resulting

"dependent" status of tribes, "there arises the duty of protection, and with it the power.").

In stark contrast to Plaintiffs' arguments that a broad interpretation of the Indian affairs powers has no historical basis, this Court in *Lone Wolf* remarked that the power to carry out this "duty of protection . . . . has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen." *Id*.[29] Plaintiffs and their amici are likewise wrong in suggesting that Congress lacks authority to carry out the trust responsibility with respect to Indians who are not enrolled members of federally recognized tribes or who are not located on tribal lands. There is no textual basis for this argument in the constitutional provisions establishing the Indian affairs powers, nor is there any other basis in law or logic for such a limitation.

Congress' constitutional powers with respect to off-reservation and non-member Indians has long had this Court's acknowledgment. *United States v. Holliday*, 70 U.S. 407, 418 (1865) ("The right to exercise [congressional Indian affairs powers] in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on."); *Antelope*, 430

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[29] The trust responsibility has been recognized and reaffirmed in countless cases, acts of Congress, and executive orders. *E.g.*, *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 258 (2016); Indian Health Amendments of 1992 § 3, 25 U.S.C. § 1602 (amending the Indian Health Care Improvement Act); Native American Housing Assistance and Self-Determination Act § 2, 25 U.S.C. § 4101; Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

U.S. at 647 n.7 (noting that enrollment in a tribe has not been held to be an absolute requirement for federal jurisdiction). *See also* H.R. Rep. No. 95-1386, at 14–17 (1978) (discussing legal authority relied upon by Congress in extending ICWA to qualifying Indian children regardless of enrollment or location).[30]

Further, neither the Indian affairs powers nor the trust responsibility could be fully carried out if this Court were to graft on such limitations. Many federal actions in Indian affairs have involved the diminishment of tribal land bases and the intentional removal of Indian people from their tribal communities, including specifically Indian children. *See Lara*, 541 U.S. at 202 (summarizing federal Indian policies and legislation implemented prior to the current self-determination policy, including "Indian removal," "assimilation," and "termination" policies prior to the current self-determination policy era).[31] Since this Court (and every

[30] In *Holliday*, the Court affirmed that Congress had the power to regulate the sale of liquor with respect to an individual belonging to a tribe whose federal recognition as such had been "terminated." 70 U.S. at 419. The statute applied to individuals "under the charge of an Indian agent," which the Court found applicable based on his ongoing affiliation with the "terminated" tribe and his receipt of treaty annuities from the federal government. *Id*. at 418–19. The Court also considered him a tribal "member" on the basis of those facts alone. *Id*. at 418.

[31] *See also* ABA Resolution 80121A (2021), at Report 2, https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2021-annual-supplementals/801-annual-2021.pdf, (discussing the federal policy of "removal of indigenous children from their communities and subsequent placement of the children in government-sponsored boarding schools . . . .").

branch of our federal government) has recognized that these very acts give rise to the federal trust responsibility, *e.g., Cherokee Nation*, 30 U.S. at 17; *Mancari*, 417 U.S. at 552, it is both logical and necessary that the power to carry out that responsibility extends to Indian people affected by those actions. *Lone Wolf*, 187 U.S. at 567 ("[T]here arises the duty of protection, and with it the power.")

Congress has recognized this fact in the context of federal health services to Indians, for example, in its definitions of eligibility for certain services under the Indian Health Care Improvement Act (IHCIA). IHCIA eligibility includes both tribal members and other Indian people meeting certain criteria, such as descendancy "in the first or second degree" from a tribal member. 25 U.S.C. § 1603(13). Eligibility for certain IHCIA services also includes "Urban Indians" as defined in *id.* § 1603(28) who live in urban centers away from tribal lands. A 1988 Senate Report explains this scope of eligibility as follows:

> The responsibility for the provision of health care, arising from treaties and laws that recognize this responsibility as an exchange for the cession of millions of acres of Indian land[,] does not end at the borders of an Indian reservation. Rather, government relocation policies which designated certain urban areas as relocation centers for Indians, have in many instances forced Indian people who did not [wish] to leave their reservations to relocate in urban areas, and the responsibility for the provision of health care services follows them there.

S. Rep. No. 100-508, at 25 (1988). Indeed, the ABA has long urged Congress and the Executive Branch

to carry out these federal health care programs for Indians in part because they "contribute[] to the fulfillment of the United States' historic and unique federal trust responsibility owed to Indian tribes[.]" ABA Resolution 115A19A; *see also* ABA Resolution 103C04M (supporting reauthorization of IHCIA in 2004).

ICWA is but one of many federal statutes properly enacted by Congress using its constitutional Indian affairs powers to carry out the federal trust responsibility.[32] In urging this Court to roll back the long recognized and necessarily broad scope of the constitutional Indian affairs powers, Plaintiffs fail to acknowledge the potential and unwarranted impacts of their argument on large swaths of federal law. *E.g.*, Title 25, United States Code ("Indians"); Title 25, Code of Federal Regulations ("Indians").

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[32] *See, e.g.,* IHCIA, 25 U.S.C. §§ 1601–1685; Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301–5423*;* Indian Education Act, 20 U.S.C. §§ 7401–7492*;* Tribally Controlled Schools Act, 25 U.S.C. § 2501–2511*;* Tribally Controlled Colleges and Universities Assistance Act, 25 U.S.C. §§ 1801–1864*;* Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101–4243*;* Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. §§ 3201–3210*;* Indian Employment, Training, and Related Services Demonstration Act, 25 U.S.C. §§ 3401–3417.

IV. The political status of Indian tribes, the constitutional Indian affairs powers, and the status of Indians as beneficiaries of the trust responsibility create a political—not racial—Indian classification subject to rational basis review.

Consistent with tribal sovereignty and the constitutional Indian affairs powers, it has long been understood that "Indian" is a legal and political classification subject to the rational basis review established by this Court in *Mancari*, 417 U.S. at 555. *E.g., Antelope*, 430 U.S. at 646. Plaintiffs' argument that *Mancari* represents only a "limited exception" to this Court's equal protection jurisprudence applicable to enrolled Indians on tribal lands is inconsistent with two hundred years of legal precedent and would have broad potential ramifications well beyond ICWA.

Mancari represents a straightforward application of this Court's equal protection analysis to federal classifications based on Indian status. "This Court has long held that 'a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (quoting *Heller v. Doe,* 509 U.S. 312, 319–320 (1993)). *Mancari* and its progeny apply this general rule, appropriately recognizing that when Congress legislates with respect to Indians because of their status as Indians it does not utilize a suspect classification. In its decision in *Antelope*, for example, the Court explained:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian

> tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

430 U.S. at 645 (footnote omitted).

The factors that underlie this Court's decision in *Mancari* also define the scope of the Indian classification it deemed legal and political in nature and thus not suspect. In addressing whether Indian classifications in federal law constitute "racial discrimination" for purposes of the equal protection analysis, the *Mancari* Court explained: "Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." 417 U.S. at 551. The Court cited both the broad federal powers over Indian affairs "drawn both explicitly and implicitly from the Constitution itself[,]" *id*. at 551–52, as well as the "origin and nature of the special relationship" undertaken to Indian people, *id.* at 552. Thus, the non-suspect Indian classification recognized as legal and political in *Mancari* is coextensive with the federal government's constitutional Indian affairs powers and extends to all beneficiaries of the federal trust responsibility. This unquestionably includes

"Indian children" as defined in ICWA, whether located on or off tribal lands.[33]

Since Indian classifications drawn on the basis of these factors are not racial or otherwise suspect in nature, a deferential standard of review is appropriate. *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citing *Heller*, 509 U.S. at 319–20). Further, this Court has recognized the need to apply standards of constitutional review that account for specific constitutional powers vested in the federal government, especially when such powers are broad or exclusive. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2418, 2420 (2018) (rational basis review over "exclusion of foreign nationals"); *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam) (rational basis review for Congressional action taken pursuant to Territory Clause of the Constitution).

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[33] ICWA defines "Indian child" to mean children who are either members of an Indian tribe or *eligible* for membership in an Indian tribe and the child of an enrolled member. 25 U.S.C. § 1903(4). Since both the parent's citizenship and the child's eligibility for citizenship in a sovereign tribe are inherently political, the Indian child classification would be political in nature even if the scope of *Mancari* were not so broad. However, the *Mancari* test appropriately preserves the ability of Congress to carry out the full extent of its constitutional Indian affairs powers by recognizing the multiple bases for the Indian classification. *See* 417 U.S. at 555 (emphasizing that the "unique legal status [of Indians] is of long standing, . . . and its sources are diverse.") (citations omitted). The constitutional Indian affairs powers and trust relationship also distinguish the Indian classification from others based on national origin that lack these legal, political, and historical dimensions. *See* Individual Pls.' Br. 35 (arguing that ICWA's "Indian child" definition should be subject to strict scrutiny as "national-origin discrimination").

In *Mancari* the Court adopted a modified rational basis test applicable to classifications based on the legal and political status of Indians as such, requiring only that those classifications "can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians." 417 U.S. at 555. This test appropriately reflects the sovereign nature of Indian tribes, and balances the federal government's broad Indian affairs powers with both the federal trust responsibility and the fundamental purpose of equal protection to guard against arbitrary discrimination by government actors. *See Del. Tribal Bus. Comm.*, 430 U.S. at 84–85. Strict scrutiny would do neither, and would unreasonably burden the federal government's exercise of its Indian affairs authority, including its authority to carry out the federal trust responsibility.[34]

As Plaintiffs and their amici point out repeatedly, virtually all Indian classifications in federal law—even those limited to enrolled citizens of federally recognized tribes—involve *some* component of Indian

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[34] Even if ICWA were subject to strict scrutiny, however, the federal government has a compelling interest in carrying out its trust responsibility. *See Jicarilla Apache Nation*, 564 U.S. at 175 (describing the federal government's interest in its guardianship over Indian tribes as "a real and direct interest . . . which is vested in it as a sovereign") (citation and internal quotations omitted). ICWA is also narrowly tailored to carry out that responsibility by protecting the rights of tribes, Indian children and parents against state interference in the integrity of their family and communities while operating within existing state and federal child welfare frameworks. *See* Part II, *supra*; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–37 (1989) (discussing testimony considered by Congress in enacting ICWA and the provisions of ICWA designed to solve the problems identified in that testimony).

ancestry. That fact does not in and of itself establish that Congress may not take specific action with respect to classes of Indian persons on the basis of their unique legal and political status. *Adarand* and other cases relied upon by Plaintiffs for the proposition that Indian is "a classification based explicitly on race," *e.g.*, Individual Pls.' Br. 21–22 (citing *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995) and other cases), involve broader classifications encompassing multiple racial and other groups deemed to be socially and economically disadvantaged. They are not relevant to classifications like those in ICWA that specifically target Indian people on the basis of their unique legal and political status and as beneficiaries of the trust responsibility.

Nor do those cases establish that ICWA should be subject to strict scrutiny as "remedial" legislation.[35] The underlying rationale of *Adarand* and subsequent caselaw relied on by Plaintiffs is that the use of racial classifications even for "benign" or "remedial" purposes should be sparingly used and heavily scrutinized because, ideally, race should not be relevant for most purposes. *E.g.*, *Adarand*, 515 U.S. at 227. That logic does not apply to Indian status, which is relevant for a host of legitimate purposes beyond redress of past discrimination. Unlike race, Indian status carries inherent and ongoing legal and political significance and relates to ongoing federal powers and responsibilities. Perhaps the most obvious and fundamental significance of Indian status is the right and ability to maintain political and cultural connection with a sovereign Indian tribe—something ICWA was specifically designed to protect.

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[35] *See, e.g.*, Texas Br. 49–51; Individual Pls.' Br. 20–21.

V. Individual stories do not overcome established law or provide a basis for this Court to overturn Congress' legislative judgment.

In coordination with amici, Plaintiffs have presented compelling personal stories to support their assertions that ICWA should be overturned despite its strong basis in constitutional law. But just as Plaintiffs have brought their individual stories before the Court, there are countless other stories of Indian children who were irreparably harmed when they were removed from their tribes and families and placed into foster care or adoptive homes. In fact, there are organizations across the United States that have been founded specifically to help children heal from such experiences.[36]

Most importantly, these personal stories—many of which are not part of the case records below—provide no basis for this Court to overturn Congress' legislative judgments. When Congress enacted ICWA, it was responding to evidence in the legislative record that created a clear and documented basis for action. "Senate oversight hearings in 1974 yielded numerous examples, statistical data, and expert testimony documenting what one witness called '[t]he wholesale removal of Indian children from their homes[.]'" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (citation to legislative history omitted). As part of this testimony, Congress heard from Indian parents and individuals who had been removed from their families as children and who sought the legal protections that ICWA provides. *See, e.g.*, *Problems that American Indian Families Face in Raising their*

[36] *See* First Nations Repatriation Inst., https://www.wearecominghome.org.

Children and How These Problems are Affected by Federal Action or Inaction: Hearing Before the S. Subcomm. on Interior and Insular Affs., 93rd Cong. 165–70 (1974) (statement of Betty Jack, Chairman, Board of Directors, American Indian Child Development Program, state of Wisconsin).

Congress also considered testimony from tribal leaders "emphasi[zing] [] the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34. This Court highlighted the statements of one tribal leader in *Holyfield*:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Id. (citation omitted).

On the basis of this evidence, Congress enacted ICWA both in recognition of its trust responsibility and to ensure minimum standards for the protection of the legal interests held by Indian children, parents, and tribes. 25 U.S.C. §§ 1901, 1902. Overturning that legislative action in response to a handful of personal stories would raise substantial questions about the balance of powers between Congress and the

Judiciary.[37] *See e.g., Parham v. J. R.*, 442 U.S. 584, 602–03 (1979); *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2265 (2022) (cautioning against Court actions that "wrongly remove[] an issue from the people and the democratic process."). That is precisely what the Plaintiffs invite the Court to do in this case, and the Court should decline.

[37] This is especially true here because the Constitution vests the political branches, and not this Court, with ultimate authority over Indian affairs. *E.g., Lara*, 541 U.S. at 207; *Jicarilla Apache Nation*, 564 U.S. at 175.

CONCLUSION

The Court should uphold ICWA as a valid exercise of Congress' constitutional Indian affairs powers. To hold otherwise would upend existing federal Indian and child welfare law, threatening the validity of numerous legal frameworks as well as the ability of the Congress to implement the trust responsibility to Indian people and tribes. Further, it would overturn Congress' valid legislative judgment in enacting ICWA. This Court should decline the invitation to engage in such policymaking under the guise of constitutional review.

Respectfully submitted,

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