Nos. 21-378 & 21-380

IN THE
Supreme Court of the United States

TEXAS, ET AL.,
Petitioners,
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 Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF CHRISTIAN ALLIANCE FOR INDIAN CHILD WELFARE AND ICWA CHILDREN AND FAMILIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

October 8, 2021

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INTEREST OF *AMICI CURIAE*[1]

Christian Alliance for Indian Child Welfare ("Alliance") is a North Dakota nonprofit corporation with members in thirty-five states, including Texas. Alliance was formed, in part, to (1) promote human rights for all United States citizens and residents; (2) educate the public about Indian rights, laws, and issues; and (3) encourage government accountability to families with Indian ancestry.

Alliance promotes the civil and constitutional rights of all Americans, especially those of Native American ancestry, through education, outreach, and legal advocacy. One area of constitutional concern for Alliance is the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 ("ICWA"). In enacting ICWA, Congress invoked power delegated by the "Indian Commerce Clause" in Article I of the Constitution, *see* 25 U.S.C. § 1901(1), which grants Congress the power to "[t]o regulate Commerce . . . with the Indian Tribes," U.S. Const. art. I § 8. ICWA is a broad and far-reaching law that has little or nothing to do with commerce, and it affects individuals that have no connection to, or have actively chosen to avoid entanglement with, tribal government.

Alliance is particularly concerned for families with members of Indian ancestry who have been denied the

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[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to fund the brief's preparation or submission. All parties in this case received notice and have consented to *amici*'s filing of this brief.

full range of rights and protections of the federal and state constitutions when subjected to tribal jurisdiction under ICWA. This case raises particularly significant issues for Alliance because its members are birth parents, birth relatives, foster parents, and adoptive parents of children with varying amounts of Indian ancestry, as well as tribal members, individuals with tribal heritage, or former ICWA children, all of whom have seen or experienced the tragic consequences of applying ICWA's race-based distinctions.

Tania Blackburn, Sage DesRochers, Cari Esparza, Nina Martin De La Cruz, Rebecca McDonald, Christopher Moore, and Sierra Whitefeather are former ICWA Children—individuals who as children were "eligible for membership in an Indian tribe" and were the "biological child of a member of an Indian tribe," 25 U.S.C. § 1903(4)—or birth parents of ICWA Children (collectively, "ICWA Children and Families"), who have been harmed as a result of ICWA. Due to ICWA's race-based classifications, ICWA Children and Families have been singled out for differential treatment, forced into tribal custody proceedings against their will or their best interests, and deprived of their legal rights, solely because they have (or their children have) Native American ancestry.

Ms. Tania Blackburn, a member of the Delaware Tribe of Indians and the Cherokee Nation of Oklahoma, is a former ICWA child. Ms. Blackburn is also an Alliance board member. Due to ICWA, she was shuttled between foster homes—at the Cherokee

Nation's guidance—most of which did not respect her traditional practices and failed to protect her safety.

Ms. Sage DesRochers, a member of the White Mountain Apache Tribe in Arizona, is a former ICWA child. Ms. DesRochers is also an Alliance board member. Under ICWA, she was taken from the custody of her now-adoptive family and turned over to her unfit alcoholic mother who abused and abandoned Ms. DesRochers.

Ms. Cari Esparza is a non-native birth mother of a daughter covered by ICWA. Due to ICWA's discriminatory placement preferences, and the resultant tribal custody proceedings, Ms. Esparza has experienced gross mistreatment, denial of her rights, and the loss of her daughter's custody in the Gila River Indian Community of Arizona.

Ms. Nina Martin De La Cruz is a member of the Spirit Lake Tribe of North Dakota and mother to a daughter covered by ICWA. Due to ICWA, the Tribe took custody of her daughter, prevented her from seeing her daughter, and improperly terminated Ms. De La Cruz's parental rights.

Ms. Rebecca McDonald is a member of the Oglala Sioux Nation in South Dakota and a former ICWA child. Due to ICWA, she was shuffled between foster homes and her struggling birth mother, who would have lost her parental rights on several different occasions had the Sioux Nation not intervened, resulting in an unstable living situation.

Mr. Christopher Moore is one-sixteenth Native American descended from the Iowa Tribe of Kansas

and Nebraska and—even though his birth parents were never part of the Tribe—is a former ICWA child. Mr. Moore's non-native biological grandmother invoked ICWA and took advantage of ICWA custody proceedings to interfere with Mr. Moore's adoption by non-native parents.

Ms. Sierra Whitefeather is a member of the Leech Lake Tribe of Minnesota, a former ICWA child, and the birth mother of an ICWA child. Ms. Whitefeather is also an Alliance board member. Due to ICWA, Ms. Whitefeather was shuffled between thirty-two different foster homes as a young child, suffering sexual, physical, and emotional abuse. When she finally found a safe, loving home that supported her native heritage, the Tribe used ICWA to prevent her adoption by non-native parents.

SUMMARY OF ARGUMENT

This case is about the harm suffered by Indian children and their families as a result of ICWA, an unconstitutional statute that violates both the Equal Protection Clause and the Indian Commerce Clause.

For nearly fifty years, ICWA has imposed race-based classifications on Indian children and their families—a clear violation of Equal Protection—and has caused horrendous individual suffering as a result. As demonstrated by the stories provided by the ICWA Children and Families, ICWA, at best, interferes with and prevents children from being placed in loving and safe homes. And at worst, ICWA is used as a weapon by estranged relatives, tribal members, and unfit birth parents to punish non-

native or dissident (but enrollable) parents or to obtain control or custody that they would otherwise be denied.

ICWA is also an unconstitutional overreach of the power granted to Congress by the Indian Commerce Clause. The Indian Commerce Clause is a narrow grant of power to the United States to regulate "commerce" with Indian Tribes. It should go without saying that Indian children are not resources, property, or items of "commerce." And child-custody matters are even less related to commerce than statutory schemes that this Court has struck down. By its plain terms, the Indian Commerce Clause does not give Congress plenary jurisdiction over ***all Indian affairs***, much less the authority to impose sweeping regulations like ICWA that are unrelated to commerce and interfere with state family-law matters.

REASONS FOR GRANTING CERTIORARI

I. THIS COURT'S REVIEW IS WARRANTED BECAUSE ICWA VIOLATES THE EQUAL PROTECTION CLAUSE.

ICWA unquestionably singles out and imposes differential treatment on Indian children and families on account of race and heritage. Thus, ICWA is a clear violation of Equal Protection. To make matters worse, this differential treatment has caused unspeakable harm to countless individuals. The ICWA Children and Families are a small portion of the individuals who have been hurt by ICWA's race-based classifications and discriminatory placement

preferences. Their stories make clear that the discrimination required by ICWA cannot be tolerated any longer.

A. ICWA Imposes Unconstitutional Race-Based Classifications.

The government may not "distribute[] burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *see Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Indeed, the "central mandate" of equal protection "is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quotation omitted). Race-based classifications are thus "presumptively invalid," *id.* at 643 (citation omitted), as they "demean[] the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *Miller*, 515 U.S. at 911.

ICWA imposes just such "odious" race-based distinctions. An "Indian child" is any minor that 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). The very application of ICWA, therefore, depends on a person's ancestry and genetics. Indeed, race-based distinctions are foundational to ICWA, because a "blood relationship

is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe." H.R. Rep. No. 95-1386 at 20 (1978). Moreover, in other circumstances tribal membership or Indian heritage is treated as a racial/ethnic distinction: the federal census,[2] college admissions,[3] or employment discrimination.[4] Even this Court has acknowledged that classifications based on "Indian blood" have a "racial component." *Rice*, 528 U.S. at 519 (citing *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974)).[5]

As a result of ICWA's race-based classifications, Indian children and families are subjected to weighted child-custody proceedings that prioritizes keeping children "in the Indian community," often at the expense of the child's best interest. H.R. Rep. No. 95-1386, at 20. Specifically, in placing an Indian child

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[2] *2020 Census Frequently Asked Questions About Race and Ethnicity,* U.S. Census Bureau (Aug. 12, 2021), https://tinyurl.com/yydr6cby (collecting information about "American Indian[s]" as a major category for race and ethnicity).

[3] *See generally Gratz v. Bollinger*, 539 U.S. 244 (2003) (addressing the University of Michigan's treatment of African-Americans, Hispanics, and "Native Americans" as "underrepresented minorities").

[4] *See, e.g., Indian and Native American Employment Rights Program,* U.S. Dept. of Labor (Jul. 22, 2019), https://tinyurl.com/6uzrzk5c.

[5] The distinctions contained in ICWA are racial, and not political. As Petitioners explain, this Court has found distinctions based on Indian ancestry or tribal membership, constitute political distinctions in limited circumstances that are not present here. Tex. Br. 19-24; Brackeen Br. 17-21.

under ICWA, "preference shall be given" to "other members of the Indian child's tribe" or "other Indian families" (regardless of tribe or relationship) over ***any*** non-Indian placement. 25 U.S.C. § 1915(a); *see also id.* § 1915(b). The result is that Indian children regularly are denied loving and safe homes—and often put into dangerous or otherwise inappropriate custody situations that would not otherwise be allowed—simply because of their race. By treating Indian children differently for purposes of custody and other family-law matters solely because of their Indian ancestry, ICWA violates Equal Protection.

B. ICWA's Race-Based Classifications And Discriminatory Placement Preferences Harm Indian Children And Families.

ICWA's race-based regime has profound negative effects on those governed by it. Most significantly, ICWA's placement preferences can be, and often are, invoked as a weapon to interfere with adoption proceedings or to obtain access to a child that otherwise would not be available. These are precisely the circumstances experienced by the ICWA Children and Families.

Tania Blackburn

Due to ICWA, Ms. Blackburn was placed in far-flung foster homes that neither respected her traditional or cultural practices nor adequately protected her safety. As a member of both the Delaware Tribe of Indians and the Cherokee Nation of Oklahoma, Ms. Blackburn was subject to tribal custody proceedings under ICWA. These proceedings included two Cherokee Nation lawyers who

represented the Tribe, even though the Tribe did not provide any assistance to Ms. Blackburn or her birth mother. The tribal lawyers, instead, worked to ensure Ms. Blackburn was placed in foster homes with at least one "native" parent, but at the expense of ensuring that those homes were fit to care for children. The shortage of native foster homes that were approved by the Cherokee Nation meant that Ms. Blackburn was often placed hours away from her mother, the court, and her community, despite the availability of closer, non-native foster homes. Further, most of the foster families with which Ms. Blackburn was placed did not share (or even attempt to continue) the traditional or cultural practices to which Ms. Blackburn was accustomed. Some of these foster parents were also neglectful, failed to prevent abuse, and made disparaging comments about Ms. Blackburn's heritage. Thus, not only did ICWA fail to help Ms. Blackburn find a safe, stable home, it actively prevented it and caused Ms. Blackburn to be further removed from her mother, her community, and her heritage.

Sage DesRochers

ICWA forced Ms. DesRochers to be taken from a loving non-native family and placed into an unfit and dangerous custody situation. Ms. DesRochers entered the foster care of a non-native family when she was five months old. This family loved and cared for Ms. DesRochers as their own, and they attempted to adopt her when she was five years old. However, invoking ICWA, the White Mountain Apache Tribe and Ms. DesRochers' birth mother (an alcoholic, who had not been a part of Ms. DesRochers' life since birth) intervened to return Ms. DesRochers to her

birth mother's custody. Thus, under ICWA, Ms. DesRochers was taken from the only family she had ever known and was placed her with her unfit alcoholic mother. Throughout the process, Ms. DesRochers remembers that she was treated "like property" of the Tribe and that her best interests were not important. While in the care of her birth mother, Ms. DesRochers suffered physical abuse and was prevented from attending court hearings in her case. Ms. DesRochers' birth mother eventually decided she no longer wanted her daughter, and sent her back to the DesRochers family, in contravention of the court order she herself had sought.

Cari Esparza

ICWA allowed Ms. Esparza's autistic daughter to be taken from her in favor of placement with her birth father, who belongs to the Gila River Indian Community of Arizona. As a non-native mother of an "Indian child," Ms. Esparza has experienced gross mistreatment and denial of her legal rights. After caring for her daughter alone for more than ten years, Ms. Esparza moved to the Gila River Indian Community to allow her daughter to know her birth father and her native heritage. However, when a custody dispute arose, Ms. Esparza was demeaned and threatened. She was excluded from meetings with case workers and was discriminated against in the proceedings because she is not native. The wishes of Ms. Esparza's daughter, and her relationship with her mother, were ignored in favor of granting the child's native birth father custody. Ms. Esparza had been her daughter's caretaker and advocate since infancy, but due to ICWA, her daughter was taken from her. Instead of protecting the relationship

between mother and daughter, ICWA gave preferential treatment to only part of Ms. Esparza's daughter's race and heritage over all else.

Nina Martin De La Cruz

ICWA was meant to protect Ms. De La Cruz—a member of the Spirit Lake Tribe in North Dakota and mother to an "Indian child"—but instead it was used against her. When Ms. De La Cruz became pregnant with her daughter in 2016, she was struggling with addiction, though she is now five years sober. Ms. De La Cruz began working with Social Services upon the birth of her daughter and chose not live with the Tribe. She expressed to Social Services that she did not wish to involve the Tribe— she lived one hundred miles away from the Spirit Lake reservation—and she did not enroll her daughter in the Tribe. However, under ICWA, Social Services delivered Ms. De La Cruz's daughter to the Tribe anyway. Ms. De La Cruz was not allowed to visit her daughter, and her daughter was not allowed to leave the reservation. Family members who were willing and able to take custody were not allowed to intervene, and Ms. De La Cruz's daughter was instead placed with a woman who had lost her foster license.[6] Despite her positive life changes and years of fighting to get her daughter back, Ms. De La Cruz's parental rights were terminated, and she had no way to appeal.

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[6] Tess Williams, '*I just want to be a mother to my kids': Mother says fight for child on Spirit Lake felt hopeless*, Grand Forks Herald (Jul. 14, 2019), tinyurl.com/3hcj4nk2.

Rebecca McDonald

As a member of the Oglala Sioux Nation in South Dakota, Ms. McDonald believed that ICWA would help her find a stable home, but it did just the opposite. Ms. McDonald's birth mother struggled with substance abuse and repeatedly lost custody, resulting in Ms. McDonald's placement with a foster family. However, each time the court would consider terminating her birth mother's parental rights, the Tribe intervened. The Tribe would send Ms. McDonald's birth mother to treatment—even though she consistently failed to make progress and would not show up to court—which would allow her to regain custody of Ms. McDonald for a short period of time before the cycle repeated. Thus, due to ICWA, Ms. McDonald was shuffled between her birth mother's custody and foster homes, resulting in an unstable and disrupted home life, for nearly a decade.

Christopher Moore

ICWA interfered, in violation of Mr. Moore's birth mother's wishes, with his adoption by a non-native family. Even though Mr. Moore is only one-sixteenth Native American and had no relationship with the Iowa Tribe of Kansas and Nebraska of which his birth mother was a member, ICWA still applied to him.[7] Mr. Moore's birth mother struggled with drug and alcohol dependency, and she was in and out of prison throughout Mr. Moore's childhood. Mr. Moore's biological father had no native blood and left before Mr. Moore was born. Mr. Moore was therefore placed

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[7] Lynn Vincent, *Drawing Blood*, WORLD (Apr. 22, 2006), https://tinyurl.com/sxkx79kz.

with a loving non-native foster family that sought to adopt him. Yet when adoption proceedings began, Mr. Moore's paternal grandmother—***who was not native nor a member of any tribe***—informed Social Services of Mr. Moore's heritage as a means to interfere with the adoption and obtain visitation rights that she otherwise might have been denied. As a result of ICWA's application, Mr. Moore's case was transferred to an ICWA-specific court, which ordered mandatory weekend visits to his grandmother (who lived two hours away). Custody was nearly awarded to his grandmother, but Mr. Moore's birth mother testified in support of adoption, ending the proceedings.

Sierra Whitefeather

Because of ICWA, Ms. Whitefeather (a member of the Leech Lake Tribe of Minnesota) was subjected to a chaotic and abusive childhood in foster care and her adoption by a non-native family was prevented. Ms. Whitefeather was placed in the foster care system with her two sisters when she was young. Due to ICWA's mandate that preference be given to Indian placements, and the difficulty in finding such placements, Ms. Whitefeather lived in dozens of different foster homes as a child. While in foster care, Ms. Whitefeather was sexually, physically, and emotionally abused. When Ms. Whitefeather was finally placed with a non-native family who provided a safe, loving home and sought to ensure that Ms. Whitefeather retained her native culture, ICWA interfered. Pursuant to ICWA, Ms. Whitefeather's non-native foster family was prevented from adopting

her, and she was taken from her foster parents.[8] Ms. Whitefeather ran away on several occasions and survived multiple suicide attempts, all the while begging her Tribe to send her back to her foster parents. Ms. Whitefeather was finally permitted to return when she was sixteen years old.

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The ICWA Children and Families are merely a sampling of the individuals who have been harmed by ICWA.[9] Instead of helping families, ICWA and its discriminatory provisions are used to prevent Indian children from being placed with or adopted by non-native families—even if doing so is in the child's best interest—to punish non-native or dissident (but enrollable) parents or to gain access to Indian children in circumstances where that access is inappropriate and would otherwise be denied. This Court should grant review to put a stop to these gross abuses and discriminatory treatment.

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[8] Jon Tevlin, *Tevlin: Sierra shares lessons on Indian adoption,* Star Tribune (Feb. 12, 2013), https://tinyurl.com/y3fd36wu.

[9] *See, e.g.*, Naomi Schaefer Riley, *On Indian reservations, storm clouds gather over law enforcement*, American Enterprise Institute (Sept. 10, 2020), https://tinyurl.com/4bb3efxd; Mark Flatten, *Death on a Reservation*, Goldwater Institute (June 10, 2015), https://tinyurl.com/2habdpty.

II. THIS COURT'S REVIEW IS WARRANTED BECAUSE ICWA EXCEEDS CONGRESS'S AUTHORITY UNDER THE INDIAN COMMERCE CLAUSE.

ICWA is also unconstitutional under the Indian Commerce Clause. The Constitution grants to Congress specific "enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995). Thus, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). When "Congress has exceeded its constitutional bounds," the Court must "invalidate [that] congressional enactment." *Id.*

ICWA's mandates regarding Indian children and child-custody proceedings cannot, in any sense, be said to concern "commerce." And, contrary to the Fifth Circuit's ruling, the Indian Commerce Clause does not grant Congress "plenary" authority to regulate Indian affairs, Brackeen App. 28a, much less traditional state-law matters like family and child-custody issues addressed in ICWA. ICWA is therefore an unconstitutional expansion of Congress's authority under the Indian Commerce Clause and should be struck down for this additional reason.

A. The Indian Commerce Clause Does Not Give Congress Plenary Authority To Regulate All Indian Affairs.

The Indian Commerce Clause is a limited grant of authority that allows Congress "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8. Both the text of the Indian Commerce

Clause and this Court's related opinions make clear that the Indian Commerce Clause is a limited grant of power to regulate trade and other similar economic activities.[10]

First, the term "commerce," as used in the Indian Commerce Clause and at the founding, almost exclusively refers to trade or comparable economic exchange.[11] For example, prominent mid-to-late eighteenth century dictionaries define "commerce" as "trade," or similar mercantile exchange. *See* Giles Jacob, *A New Law-Dictionary* (8th ed. 1762) ("Commerce, (Commercium) Traffick, Trade or Merchandise in Buying and Selling of Goods. *See Merchant*."); Samuel Johnson, 1 *A Dictionary of the English Language* (J.F. Rivington, *et al.*, 6th ed. 1785) ("Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick."). These definitions reflect the inherently commercial or economic character of the term "commerce." *See*

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[10] Notably, interpreting the Indian Commerce Clause in this manner prevents tension with the Equal Protection Clause discussed above.

[11] When interpreting constitutional text, the Court gives words the meaning they had when the text was adopted. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018). This foundational canon of interpretation applies in interpreting provisions of the U.S. Constitution. *See District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008). To determine the meaning of pertinent terms, this Court has looked to contemporaneous dictionaries and legal and non-legal publications from the time of ratification. *See id.* at 581-95; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 107-08 (2001) [hereinafter Barnett, *Original Meaning*].

Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789, 817-18 (2006) [hereinafter Natelson, *Legal Meaning of "Commerce"*]; *see also Lopez*, 514 U.S. at 586-87 (Thomas, J., concurring) (relying on lay and legal dictionaries, convention records, founding era communications, and the Federalist Papers to narrowly define the term "commerce").

Definitions of the term "commerce" stand in stark contrast to other, broader terms—such as "Indian affairs"—which are not in the text but which courts have used in misapplying the Indian Commerce Clause. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (describing Congress's power "to legislate in the field of Indian affairs"). In particular, the term "affairs" has a more extensive meaning, than "commerce." *See, e.g.*, Johnson, *supra* (defining "affair" as "[b]usiness; something to be managed or transacted"); *see also* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201, 217 (2007) [hereinafter "Natelson, *Indian Commerce Clause*"] (comparing historical dictionary definitions of "commerce" and "affairs"). That includes how the term was defined at the time of the Constitution's ratification. *See* Natelson, *Indian Commerce Clause* at 217 (explaining that "affairs" was considered "a much broader category than trade or commerce").

Lay and legal texts in the eighteenth century further support a more limited understanding of the term "commerce." The term regularly "referred to mercantile activities: buying, selling, and certain

closely-related conduct, such as navigation and commercial finance." Natelson, *Legal Meaning of "Commerce"* at 805-06; *see id.* at 821-22 (reviewing Blackstone's *Commentaries*). Indeed, the use of "commerce" was remarkably consistent in both legal and lay texts at the time of the founding. *See, e.g.*, *id.* at 845 (reviewing extensive source material to come to the simple conclusion: "the word 'commerce' nearly always has an economic meaning"); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 858 (2003) (reviewing newspaper publications to conclude that it is "impossible here to convey the overwhelming consistency of the usage of 'commerce' to refer to trading activity (especially shipping and foreign trade) without listing one example after another"); Natelson, *Indian Commerce Clause* at 214-15; Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 Mich. L. Rev. First Impressions 55, 56 (2010).

Similarly, when used during the Constitutional Convention and related state conventions, the term "commerce" was almost entirely limited to trade or similar economic matters. Indeed, "if anyone in the Constitutional Convention or the state ratification conventions used the term 'commerce' to refer to something more comprehensive than 'trade' or 'exchange,' they either failed to make explicit that meaning or their comments were not recorded for posterity." Barnett, *Original Meaning* at 124; *see* Natelson, *Legal Meaning of "Commerce"* at 839-41; *Adoptive Couple v. Baby Girl*, 570 U.S. 647, 659 (2013) (Thomas, J., concurring) ("[W]hen Federalists and Anti-Federalists discussed the Commerce Clause

during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably." (citation omitted)).

Further, this Court has employed this understanding of the term "commerce" in other contexts.[12] The term "commerce" as it used in the Interstate Commerce Clause is understood generally to mean economic activity.[13] *See Taylor v. United States*, 136 S. Ct. 2074, 2079-80 (2016) ("'[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.'" (quoting *Morrison*, 529 U.S. at 613)); *Lopez*, 514 U.S. at 560. Even one of this Court's broadest recent opinions regarding the scope of the Interstate Commerce Clause, *Gonzales v. Raich*, 545 U.S. 1 (2005), which allowed Congress to regulate purely local growth of marijuana for medical use, explained that the regulations were acceptable because they governed an "economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17.

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[12] Absent some contrary indication, repeated words or phrases in a statute are interpreted to have the same meaning. *Clark v. Martinez,* 543 U.S. 371, 378 (2005). This canon is equally applicable to constitutional interpretation. *See Weems v. United States*, 217 U.S. 349, 395 (1910).

[13] The Court has not addressed the scope of the Foreign Commerce Clause. This Court has addressed foreign commerce on a few occasions, *see Baston v. United States*, 137 S. Ct. 850, 851 (2017) (Thomas, J., dissenting from denial of cert.) (listing examples), but has never found that the Foreign Commerce Clause would apply to noncommercial conduct.

The Indian Commerce Clause thus does not grant plenary jurisdiction over all Indian affairs. As Justice Thomas has explained, "'neither the text nor the original understanding of the [Indian Commerce] Clause supports Congress' claim to such "plenary" power.' . . . Instead, . . . the Clause extends only to 'regulat[ing] trade with Indian tribes—that is, Indians who had not been incorporated into the body-politic of any State.'" *Upstate Citizens for Equal., Inc. v. United States*, 140 S. Ct. 2587 (2017) (Thomas, J., dissenting from denial of cert.) (citations omitted); *see United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring) ("No enumerated power—not Congress' power to 'regulate Commerce . . . with Indian Tribes,' not the Senate's role in approving treaties, nor anything else—gives Congress [plenary authority]."); *Adoptive Couple*, 570 U.S. at 659; *see also* Tex. Pet. 13-16. Even legal scholars supporting Respondents agree on this point: "[T]he history of the Indian Commerce Clause's drafting, ratification, and early interpretation does not support either 'exclusive' or 'plenary' federal power over Indians. In short, Justice Thomas['s concurrence in *Adoptive Couple*, 570 U.S. 637] is right: Indian law's current doctrinal foundation in the [Indian Commerce] Clause is ***historically untenable***." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1017 (2015) (emphasis added).

Second, even if the text of the Indian Commerce Clause could support Congress's claim to "plenary" authority, such an assertion conflicts with this Court's precedent. *See* Tex. Br. 12-19. Although certain of this Court's opinions have referenced, without analysis, Congress's "plenary power" over

"Indian affairs," those opinions make clear that Congress's power "is not absolute." *Del. Tribal Bus. Comm'n. v. Weeks*, 430 U.S. 73, 84 (1977). On the one occasion that the Court analyzed the reach of the Indian Commerce Clause, it ***rejected*** a claim to broad, plenary authority. The Court stated that such a ruling would result in a "very strained construction" of the clause to find that "without any reference to their relation to any kind of commerce," a criminal code was somehow "authorized by the grant of power to regulate commerce with the Indian tribe." *United States v. Kagama*, 118 U.S. 375, 378-79 (1886) (rejecting the argument that the Indian Commerce Clause granted Congress the power to create a federal criminal code for Indian land); *see* Nathan Speed, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. Rev. 467, 470-71 (2007) ("[W]hen Congress eventually began asserting plenary power over Indian tribes, the Supreme Court expressly rejected the assertion that the Indian Commerce Clause provided a basis for such a power. This evidence supports a narrow interpretation of the power to 'regulate Commerce,' and in turn, a narrow interpretation of both the Indian Commerce Clause and the Interstate Commerce Clause.").

The oft-cited opinion of *United States v. Lara*, 541 U.S. 193 (2004), is not to the contrary. Except for a concurrence by Justice Thomas, the *Lara* opinion did not analyze the proper scope of the Indian Commerce Clause. *See id.* at 224 (Thomas, J., concurring) ("I cannot agree that the Indian Commerce Clause provides Congress with plenary power to legislate in the field of Indian affairs. At one time, the

implausibility of this assertion at least troubled the Court, and I would be willing to revisit the question." (internal citations, quotation marks, and alterations omitted)). The *Lara* opinion instead involved a double-jeopardy analysis, focusing primarily on the Tribe's inherent power to prosecute and punish a nonmember defendant and the sovereign authority of Tribes. *See id.* at 199-200.

Thus, Congress cannot be said to possess plenary authority to regulate "Indian affairs"—or to pass ICWA—in the name of the Indian Commerce Clause.

B. Family And Child-Custody Matters Covered By ICWA Are State Issues That Do Not Affect "Commerce."

The constitutional grant of power to regulate "commerce" does "not include economic activity such as 'manufacturing and agriculture,' let alone noneconomic activity such as adoption of children." *Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring) (citations omitted). And at its heart, ICWA is exactly that: a federal regulation of child-custody proceedings and adoption. *See* Brackeen App. 488a-489a (describing ICWA). ICWA was specifically enacted to address adoption or foster care placement for Indian children. *See Adoptive Couple*, 570 U.S. at 642. ICWA, and its regulation of Indian children, has no relationship to commerce or economic activity does not claim to have any relationship or connection to commerce. *See* 25 U.S.C. § 1901.

This Court has struck down similarly expansive laws that, although based on the Interstate

Commerce Clause, had little or nothing to do with commerce. For example, in *Lopez*, this Court invalidated the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551. The Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561; *cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (rejecting applicability of federal arson statute, passed pursuant to the Interstate Commerce Clause, because damage to an owner-occupied private residence was not sufficiently related to commerce and infringed on state police power). Similarly, in *Morrison*, the Supreme Court struck down 42 U.S.C. § 13981, the civil remedy portion of the Violence Against Women Act, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. at 613; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558-59 (2012) (finding that economic ***inactivity*** was not sufficiently related to commerce to justify regulation under the Interstate Commerce Clause).

Adoption proceedings have no more relationship to commerce than domestic violence or guns near schools. *See Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring) (noting also that adoption proceedings, like the ones at issue here, do not involve Indian Tribes, an additional requirement of the Indian Commerce Clause). Indeed, by its terms, ICWA "deals with 'child custody proceedings,' not 'commerce.'" *Id.* at 665 (internal citations omitted).

As Justice Thomas has noted, ICWA was enacted to address the "perceived problem was that many Indian children were 'placed in non-Indian foster and adoptive homes and institutions.' This problem, however, ***had nothing to do with commerce***." *Id.* (emphasis added) (internal citations omitted).

Not surprisingly, then, in all other contexts, adoption is governed by state law. As a result, ICWA also intrudes on a quintessential area of state concern that is entirely distinct from "commerce" that may be regulated by Congress: family law. "The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18 (citation omitted). By regulating on truly local issues of family and personal relationships, ICWA further exceeds the power granted to Congress by the Constitution and obliterates this important distinction between federal and local powers.

This Court has repeatedly acknowledged that marriage, divorce, child custody, and adoption are outside of Congress's control. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (explaining that domestic relations have "long been regarded as a virtually exclusive province of the States"). "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). Indeed, these matters are far-removed from Congress's authority to regulate, as the "Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *United States v. Windsor*, 570 U.S. 744, 766-67 (2013) (quotation omitted).

This Court has rejected interpretations of the Commerce Clause that would allow Congress to the "regulate any activity that it found was related to the economic productivity of individual citizens[, including] family law ([] marriage, divorce, and child custody)." *Lopez*, 514 U.S. at 564; *see Morrison*, 529 U.S. at 615 (rejecting reasoning that may "be applied equally as well to family law and other areas of traditional state regulation"). Congress thus may not exercise power over family and custody matters under the guise of regulating commerce with Indian Tribes. ICWA, therefore, exceeds Congress's power to regulate commerce, as it is entirely unrelated to commerce and intrudes on noncommercial subjects belonging entirely to the states.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for a writ of certiorari.

Respectfully submitted,

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October 8, 2021