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

IN THE

Supreme Court of the United States

DEB HAALAND, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR, *et al.*,
Petitioners,

v.

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

CHEROKEE NATION, *et al.*,
Petitioners,

v.

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR 87 MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF FEDERAL AND TRIBAL DEFENDANTS

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STATE OF TEXAS,

Petitioner,

v.

DEB HAALAND, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

CHAD EVERET BRACKEEN, *et al.*,

Petitioners,

v.

DEB HAALAND, SECRETARY,
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INTEREST OF AMICI CURIAE[1]

This brief is filed by 33 Senators and 54 Members of the House of Representatives (listed in the appendix to this brief), each of whom has taken an active role in legislation concerning Indian affairs during his or her tenure as a Member of Congress. Amici have a shared interest in the issues in this case because those issues implicate Congress's authority to legislate concerning Indian affairs, as well as Congress's ability to carry out the federal government's duties and obligations as trustee of the Indian Tribes and their people.

By filing this brief, amici provide the Court with additional context as to how the Indian Child Welfare Act (ICWA) furthers Congress's aims and responsibilities as the branch of government constitutionally vested with plenary power over Indian affairs. *Cf. Nestle USA, Inc.* v. *Doe*, 141 S. Ct. 1931, 1940 (2021) (citing Amicus Brief for Members of Congress to demonstrate how Congress settled upon its statutory approach after "years of studying 'how to best craft a response'").

INTRODUCTION

ICWA is a valid and constitutionally sound exercise of the "[p]lenary authority" over Indian affairs that Congress has exercised "from the beginning" of the Republic. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903). Amici respectfully submit that ICWA is consistent with the Constitution and with more than two

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person (other than amici and their counsel) made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of amicus briefs in this case.

centuries of congressional exercise of plenary authority over Indian affairs—and 190 years of this Court affirming that authority's existence. *See Worcester* v. *Georgia*, 31 U.S. 515, 559 (1832).

"Native American Tribes possess 'inherent sovereign authority over their members and territories.'" *Ysleta Del Sur Pueblo* v. *Texas*, 142 S. Ct. 1929, 1934 (2022) (quoting *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). "Congress too bears vital responsibilities in the field of tribal affairs"—responsibilities that are drawn from "our Constitution, treaties, and laws." *Id.* (citing *United States* v. *Lara*, 541 U.S. 193, 200 (2004)). "[D]rawn both explicitly and implicitly from the Constitution itself," *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974), Congress's power to address "the special problems of Indians," *id.* at 551, is "significant" and "exclusive," *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470 (1979); *see also, e.g.*, *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978) (citing as "undisputed fact" the notion that "Congress has plenary authority to legislate for the Indian tribes in all matters"); *Lone Wolf*, 187 U.S. at 565 (Congress's power "has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

The constitutional foundation—but not the only source—of Congress's plenary authority is the Indian Commerce Clause, which "provides Congress with the power to 'regulate Commerce … with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation." *Mancari*, 417 U.S. at 552 (quoting U.S. Const. art. I, § 8, cl. 3) alteration in original). "The central function of the Indian Commerce Clause … is to provide Congress with

plenary power to legislate in the field of Indian affairs," *Lara*, 541 U.S. at 200 (internal quotation marks omitted), and both Congress and the Court have consistently understood the power to extend to a broad range of Indian affairs, from economic activity to housing, health, education, and beyond. *See, e.g.*, 25 U.S.C. §§ 1601(1), 2000, 2101-2108, 4101-4243. Congress enacted ICWA pursuant to its Indian Commerce Clause "and other constitutional authority," *id.* § 1901(1), in furtherance of both Congress's "responsibility for the protection and preservation of Indian tribes and their resources," *id.* § 1901(2), and the United States' "direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe," *id.* § 1901(3).

Any decision limiting Congress's authority to pass ICWA or similar Indian affairs legislation pursuant to its plenary power would usurp Congress's proper exercise of its constitutional authority and prevent Congress from fulfilling its historic and enduring fiduciary duties as trustee to Indian Tribes. Plaintiffs' challenges to ICWA all fall short, and the Court should uphold ICWA's constitutionality in all respects.

ARGUMENT

I. CONGRESS HAD THE CONSTITUTIONAL AUTHORITY TO ENACT ICWA

In "an unbroken current of judicial decisions," *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913), this Court has repeatedly reaffirmed Congress's "plenary and exclusive power over Indian affairs," *Washington*, 439 U.S. at 470; Fed. Parties' Br. 10-11 (collecting cases). That power flows not only from the Constitution but also from "treaties and laws" reflecting federal

policy toward Indian Tribes. *Ysleta Del Sur Pueblo*, 142 S. Ct. at 1934. ICWA falls squarely within Congress's plenary authority, which "has always been recognized by the executive, and by [C]ongress, and by this [C]ourt, whenever the question has arisen." *United States* v. *Kagama*, 118 U.S. 375, 384 (1886).[2]

Although the Indian Commerce Clause is a primary source of Congress's plenary authority, that authority spans more broadly than Congress's authority under the Interstate Commerce Clause. Plaintiffs attempt to equate the scope of those two clauses, in arguing that the Indian Commerce Clause confers on Congress only the limited authority to legislate with respect to economic activity with Indian Tribes. *See* Texas Br. 47-55; Indiv. Pls'. Br. 22-24. They seek to rely upon precedents—principally *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000)—that clarified or limited the scope of Congress's Interstate Commerce Clause powers. *See* Texas Br. 50-53; Indiv. Pls.' Br. 23-24.

But neither *Lopez* nor *Morrison* concerned federal Indian law, any superficial comparison between the two commerce clauses is inapt, and the Court has long rejected it. It is "well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." *Cotton Petroleum Corp.* v. *New*

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[2] As Judge Dennis correctly observed, it is significant "that, in enacting ICWA, Congress explicitly contemplated whether it was constitutionally authorized to do so." *Brackeen* v. *Haaland*, 994 F.3d 249, 303 n.26 (5th Cir. 2021) (en banc) (Dennis, J., opinion); *see Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) ("The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality.").

Mexico, 490 U.S. 163, 192 (1989). "In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* Thus, cases like *Lopez* and *Morrison* are "premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Id.*[3]

It is plain that Congress's plenary power over Indian affairs includes the power to enact ICWA. After Tribes were dispossessed of much of their lands and resources, the federal government assumed a responsibility to the Tribes "and with it the authority to do all that was required to perform that obligation"—including wielding "federal power to regulate and protect the

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[3] *See also Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."); *Worcester*, 31 U.S. at 580-581 ("By the Constitution, the regulation of commerce among the Indian tribes is given to congress. This power must be considered as exclusively vested in congress, as the power to regulate commerce with foreign nations, to coin money, to establish post offices, and to declare war. It is enumerated in the same section, and belongs to the same class of powers."); *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 18 (1831) ("The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct.").

Indians and their property against interference even by a state." *Board of Cnty. Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943); *see also*, *e.g.*, *Metlakatla Indian Cmty.*, *Annette Islands Rsrv.* v. *Egan*, 369 U.S. 45, 56 (1962) (recognizing Congress's authority to "protect[] against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation"). ICWA itself states that "Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources." 25 U.S.C. § 1901(2). And Congress enacted ICWA in service of its "direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." *Id.* § 1901(3). Indeed, the Constitution gives Congress a unique responsibility with respect to stewardship of Indian families and children, based on Congress's "duty of exercising a fostering care and protection" over Indian communities. *Sandoval*, 231 U.S. at 46.

There is ample precedent for federal legislation protecting individual rights in state processes where Congress has special power over that particular group. *See, e.g.*, 50 U.S.C. §§ 3901 *et seq.* (Servicemembers Civil Relief Act). Grafting Texas's proposed limitation onto Congress's enumerated power—that is, the notion that plenary power should only survive where the subject of the legislation is "far afield from core matters of state concern," Texas Br. 36-37—would contravene the Court's instruction that state sovereignty should not be defined by "traditional" government functions, *see infra* Part II.A, and moreover would find no support in constitutional text or the constitutional design of our federal system.

II. ICWA Does Not Violate The Tenth Amendment Or The Anti-Commandeering Doctrine

A. ICWA Is An Appropriate And Respectful Exercise Of Congress's Plenary Power

The Tenth Amendment reflects "but a truism" that the States retain all powers that have not been delegated to Congress. *New York* v. *United States*, 505 U.S. 144, 156 (1992) (quoting *United States* v. *Darby*, 312 U.S. 100, 124 (1941)). ICWA, an application of Congress's plenary and exclusive power to regulate Indian affairs, is constitutional under the Tenth Amendment.

It is surely sensitive, but hardly novel, when Congress's power to regulate Indian affairs extends into state activity. *See*, *e.g.*, *Seber*, 318 U.S. at 715-718 (federal statute precluded state taxation). Plenary power would hardly be power at all if it withered on contact with any state regulation. When the area of law at issue is traditionally left to the States, the aperture of plenary power is not somehow narrowed—nor is a State's sovereignty somehow more diminished by the exercise of plenary power. As Judge Higginson explained, the Court has instructed that state sovereignty is not defined by "look[ing] to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions," as that "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Brackeen*, 994 F.3d at 442-444 (Higginson, J., concurring) (quoting *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)). The applicable test is, rather, whether the Constitution divested the States of those authorities and transferred them to the federal government, which the Indian Commerce Clause expressly did with respect to Indian affairs.

Indeed, the Court has repeatedly recognized that federal law can—consistent with the Constitution's federalist design—affect the application of state law in domestic relations proceedings. *See, e.g.*, *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001) (ERISA preempted Washington statute in state probate proceedings); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 590 (1979) (Railroad Retirement Act preempted California community property law in state divorce proceedings). These statutes validly apply substantive federal standards to state proceedings consistent with the Tenth Amendment.

The Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901 *et seq.* (the "SCRA"), is another prime example. States recognize that the SCRA's protections "are far-ranging and include forgiveness of certain interest, protection from eviction, termination of leases, and prohibition against financial retaliation by lenders and creditors." *In re Marriage of Bradley*, 137 P.3d 1030, 1033 (Kan. 2006); *see also Carmicheal* v. *Rollins*, 783 N.W.2d 763, 766 (Neb. 2010). The SCRA stays any civil proceeding—state or federal—in which the plaintiff or defendant is in active military service at the time of filing. 50 U.S.C. § 3932(a)(1). The SCRA also directs that time in military service may not be included in calculating any limitations period with respect to any state or federal claim, *id.* § 3936(a), and sets standards applicable to child custody determinations made with respect to children of servicemembers, *id.* § 3938. As with ICWA, the SCRA is intended to serve a plenary power (Congress's war power) by setting federal standards for state and federal domestic relations proceedings. *See id.* § 3902.

Furthermore, Congress took special care to safeguard state interests when designing ICWA. During

the drafting process, Congress actively sought out the States' views, which were largely favorable. For example, a representative from Washington State praised the bill as "an enlightened and practical approach to legal jurisdiction and social services delivery to Indian people," Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs, 95th Cong. 342 (1977) ("1977 Hearing") (statement of Don Milligan), and expressly welcomed federal involvement as the only way to remedy the wrongful removal of Indian children from their communities, *id.* at 356.

Ultimately, ICWA respected the States' interests in matters of domestic relations by striking a careful and balanced approach—not replacing state law, but establishing "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902; *see also* H.R. Rep. No. 95-1386 ("House Report"), at 19 (1991) (explaining that ICWA was meant not to "oust the States of their traditional jurisdiction over Indian children falling within their geographic limits" but to "establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe").

B. ICWA Does Not Unconstitutionally Commandeer State Officials

The anti-commandeering doctrine emerged "relatively recently" in response to "a few isolated instances" where authority was extended "in unprecedented

ways." *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1476 (2018). This limited doctrine does not invalidate ICWA.

First, as the Fifth Circuit's en banc majority recognized, the anti-commandeering doctrine does not apply to the extent that ICWA preempts state law with federal standards. *Brackeen*, 994 F.3d at 268 (en banc). For example, ICWA grants a child's Tribe the substantive right to intervene in child-custody proceedings, *see* 25 U.S.C. § 1911(c), which is not guaranteed by state law. ICWA also requires proof "beyond a reasonable doubt" before the right to parent can be terminated, *id.* § 1912(f), whereas States may allow termination based on "clear and convincing evidence." *See, e.g.*, Tex. Fam. Code § 161.001(b)(1)-(2). These provisions demonstrate ICWA's straightforward and valid preemption of state law with substantive federal standards enforceable in state court. *See Murphy*, 138 S. Ct. at 1480 (when "Congress enacts a law that imposes restrictions or confers rights on private actors" and "a state law confers rights or imposes restrictions that conflict with the federal law," "the federal law takes precedence and the state law is preempted"); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law.").

Second, to the extent that ICWA does regulate state activity, the anti-commandeering doctrine "does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. Accordingly, the Fifth Circuit erred by finding that some provisions unconstitutionally commandeer state actors, because the text of ICWA applies to any "party" seeking the foster care placement of, or termination of parental rights to, an Indian child—regardless of whether that "party" is a

state officer or private individual (such as a custodial parent). Because the plain text of the statute applies equally to the States and to private actors, the anti-commandeering doctrine does not invalidate ICWA.

III. SECTION 1915(C) DOES NOT VIOLATE THE NON-DELEGATION DOCTRINE

The Fifth Circuit correctly held that section 1915(c) of ICWA does not violate the non-delegation doctrine.

Subsections (a) through (c) of Section 1915 enact a familiar and sensible statutory structure: a congressionally designed default rule that is supplanted by a different, congressionally sanctioned rule under congressionally defined circumstances. Not only is that method of lawmaking permissible but, as the Fifth Circuit recognized, it is core to the functioning of "countless" statutes. *Brackeen*, 994 F.3d at 350 (collecting examples). It is no less valid when the supplanting rule is created by a separate sovereign with jurisdiction over the matter at issue. *Id.* at 350-351 (citing 20 U.S.C. § 1415(b)(6)(B) (statute of limitations is two years "or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows")); 11 U.S.C. § 522(b)(2) (state law may alter the default property exemptible from a bankruptcy estate); 12 U.S.C. § 2279aa-12(b)(2) (state law may override exemption from securities registration and qualification laws); 42 U.S.C. § 14503(a), (e) (state law may override exemption of nonprofit and governmental entities from certain liabilities).

Plaintiffs acknowledge—as they must—that Congress may incorporate other sovereigns' laws into federal law. *See* Texas Br. 71 (citing *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975) and *United States* v.

Sharpnack, 355 U.S. 286, 293-294 (1958)); Indiv. Pls.' Br. 41 n.6; *see also Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 80 (1824) ("Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject."). Yet Plaintiffs misguidedly (and without citation) assert that the reason is because "courts must determine how to reconcile the interests of two sovereigns with an interest in the same physical territory" and that "Congress is simply explaining how it wishes courts to do so." Texas Br. 71. Proceeding from that defective premise, Plaintiffs argue that Tribes are not sovereigns for Section 1915(c) purposes because Tribes lack sovereignty over non-members who are not on Indian land. Plaintiffs' arguments are wrong.

Plaintiffs also ignore Congress's many reasons for adopting another sovereign's law. Congress may, for example, wish to capitalize on another sovereign's comparative expertise, or recognize the result of another sovereign's deliberative process. Moreover, the Court has long recognized that "Indian tribes are unique aggregations possessing attributes of sovereignty over *both their members and their territory*." *Mazurie*, 419 U.S. at 557 (emphasis added). As such, Indian Tribes are sovereigns for Section 1915(c) purposes because Indian Tribes have sovereign governmental authority to pass tribal law establishing an order of placement preferences, pursuant to the Tribe's authority over its own members and territory. *See id.*; *cf. United States* v. *Quiver*, 241 U.S. 602, 605-606 (1916) (recognizing "the policy reflected by the legislation of Congress and its administration for many years" that internal relations among tribal members are "to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise[]"). Whether the

result of that sovereign act is subsequently incorporated by federal law into an external process that extends beyond the Tribe's members and territory does not somehow deprive the act of its sovereign character. *See Mazurie*, 419 U.S. at 557. Plaintiffs' arguments to the contrary are unavailing.

IV. ICWA'S PLACEMENT PREFERENCES DO NOT VIOLATE EQUAL PROTECTION

A. Congress May, And Routinely Does, Legislate On The Basis Of Tribal Membership

ICWA does not apply to all children with a biological Indian parent. Rather, it applies to children who either (1) are themselves tribal members, or (2) are eligible for tribal membership and have a biological parent who is a tribal member. *See* 25 U.S.C. § 1903(4).

Thus, ICWA's applicability to a child ultimately depends upon the political designation of tribal membership—not race or biology.[4] And the reach of federal Indian law has always involved that political classification as a relevant consideration. *See, e.g.*, *Mancari*, 417 U.S. at 553 n.24 (upholding constitutionality of employment preference for Indians that applied to individuals who were members of federally recognized Indian Tribes and "one-fourth or more degree Indian

[4] In finding an equal protection violation in this case, the district court pointed specifically to ICWA's definition of "Indian child," and incorrectly concluded that it includes "those children simply eligible for membership who have a biological Indian parent." *Brackeen* v. *Zinke*, 338 F. Supp. 3d 514, 533 (N.D. Tex. 2018), *aff'd in part, rev'd in part sub nom. Brackeen* v. *Haaland*, 994 F.3d 249 (5th Cir. 2021) (en banc). That framing elided the statute's requirement that the child's parent be a tribal member. *See* 25 U.S.C. § 1903(4)(b).

blood"). The federal government's special trust relationship to Indian Tribes derives from the Tribes' status as sovereigns predating the formation of the United States, *see Wheeler*, 435 U.S. at 322-323, and an individual may share in the benefits of that relationship today only by showing his or her ties to those political communities.[5]

Because legislation based on tribal membership is "political rather than racial in nature," it is subject only to rational basis review.[6] *Mancari*, 417 U.S. at 553 n.24, 555; *see also*, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641, 645-647 (1977) (rejecting equal protection challenge to federal criminal statutes applicable to defendants because of their status as Indians). ICWA's framework of protections for "Indian children" as a political class easily satisfies the deferential rational basis standard.

Among the many statutes codified in Title 25 that "single[] out Indians" for particular treatment are those that, like ICWA, provide benefits and protections to

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[5] *See Brackeen*, 994 F.3d at 336-337 (Dennis, J., opinion); *see also* Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 Stan. L. Rev. 491, 496 (2017) ("[T]ribes (as collectives) must trace their heritage to peoples who preceded European/American settlement in order to establish a political relationship with the federal government. Tribes, in order to be recognized as such under the Constitution, therefore must, as an initial definitional matter consist of people tied together by something akin to lineage.").

[6] Strict scrutiny does not apply because ICWA does not, as the district court mistakenly held, "use[] ancestry as a proxy for race." *Zinke*, 338 F. Supp. 3d at 534. Rather, it provides protections—like most of Title 25 of the United States Code—"to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities" with a "unique" relationship to the federal government under the Constitution. *Mancari*, 417 U.S. at 554.

children of tribal members, even if the children are not *themselves* members. For example, one component of the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §§ 1601 *et seq.*, which supports Indians entering the health-care profession, includes anyone "who is a descendant, in the first or second degree" of a tribal member. *See id.* §§ 1603(13)(A), 1612, 1613. Congress similarly provides educational support to the children of tribal members in the Tribally Controlled Community College Assistance Act, 25 U.S.C. § 1801(7)(B) (providing educational support to the "biological child of a member of an Indian tribe"), and the Tribally Controlled Grant School Endowment Program, 25 U.S.C. § 2511(3) (providing educational support to the child or grandchild of a tribal member or one eligible for membership), as well as in the provision of education grants to Indian communities, 20 U.S.C. § 7491(3)(B) (defining "Indian" to include "a descendant, in the first or second degree" of a tribal member).

Even more directly, the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. §§ 3201 *et seq.*, which aims to protect Indian children from abuse, incorporates ICWA's definition of "Indian child." *Id.* § 3202(7). Like ICWA, that statute was enacted in furtherance of the United States' "direct interest, as trustee, in protecting Indian children," and in recognition of the importance of Indian children "to the continued existence and integrity of Indian tribes." *Id.* § 3201(a)(1)(F).

Congress's choice to reach the children of tribal members through ICWA and the other statutes discussed above was deliberate and rationally related to "'the fulfillment of Congress'[s] unique obligation toward the Indians.'" *Delaware Tribal Bus. Comm.* v.

Weeks, 430 U.S. 73, 85 (1977). Congress enacted ICWA not only to protect Indian children from the trauma of unwarranted dislocation, but also to protect Indian Tribes from the removal of their children, which further imperiled the Tribes' viability as political entities as well as their "cultural identity and heritage." *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 655 (2013); *see also* 25 U.S.C. § 1902 (asserting Congress's desire, through ICWA, to "promote the stability and security of" Tribes and to respect "the unique values of Indian culture"). As the Act itself states, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). And to protect tribal interests, ICWA "recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 52 (1989) (quoting *In re Adoption of Holloway*, 732 P.2d 962, 969 (Utah 1986)).

In tying the application of ICWA to the tribal membership of a child's parents, Congress recognized that not all Tribes automatically grant membership to children of tribal members. On this point, the House Report noted:

> Th[e] minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom. Obviously, Congress has power to act for [Indian children's] protection. The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law,

> particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.

House Report, at 17. A statute that applied only to children who were *already* tribal members would inadvertently exclude swaths of Indian children in need of protection—for example, almost any newborn, whose tribal membership may not have been perfected but who is nonetheless an "Indian child." 25 U.S.C. § 1903(4). That approach also would be at odds with Congress's trust obligation to further tribal self-governance. *See Mancari*, 417 U.S. at 555. Congress ultimately adopted a reasonable and rational standard that was intended to further that trust obligation.

ICWA easily satisfies the applicable rational basis test. The district court's flawed strict scrutiny analysis, if allowed to stand, would defy sound legal reasoning regarding tribal membership; would have sweeping and unpredictable consequences throughout Title 25 of the U.S. Code; and would dramatically and unworkably curtail Congress's Indian affairs power, which provides vital federal support to Tribes and their members.

B. Congress May, And Routinely Does, Legislate For The Benefit Of Indians Both On And Off Reservations

Congress's plenary power to legislate with respect to Indian affairs is not limited to reservations or Indian lands. *See* Texas Br. 44-45. On the contrary, "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." *United States* v. *McGowan*, 302 U.S. 535, 539 (1938); *see also, e.g.*, *Morton* v. *Ruiz*, 415 U.S. 199, 236 (1974) ("The overriding

duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions."); *Perrin* v. *United States*, 232 U.S. 478, 482 (1914) (explaining that congressional power extends "whether upon or off a reservation and whether within or without the limits of a state"); *United States* v. *Holliday*, 70 U.S. 407, 415-416 (1865) (holding that federal statute applied to Indians "when they are outside of a reservation, as well as within it").

ICWA is just one of many instances in which Congress has exercised its plenary power to enact legislation for the benefit of Indians that applies with equal force both on and off reservations—including in States like Alaska, where there are more than two hundred Tribes that do not follow the reservation model. For example, the IHCIA, which Congress passed "in fulfillment of its special trust responsibilities and legal obligations to Indians," 25 U.S.C. § 1602, provides for comprehensive health services for Indians regardless of their location. Indeed, an entire subchapter of the IHCIA is devoted to "urban Indians"—*i.e.*, Indians living off-reservation in urban communities.[7] Likewise, provisions of the IHCIA aimed at facilitating education and training in the health professions apply broadly to all tribal members (as well as their first- or second-generation descendants), whether they live on or off a reservation. *See id.* §§ 1603(13)(A), 1612, 1613.

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[7] Notably, in the second half of the twentieth century, the federal government pursued a policy of encouraging and incentivizing tribal members to relocate to urban areas. *See* Tompkins, *Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions*, 81 U. Colo. L. Rev. 1119, 1128-1131 (2010). Largely as a result of these efforts, the proportion of Indians living in urban areas rose from 13 percent in 1950 to 56 percent in 1990. *Id.* at 1128.

Congress has explicitly extended the reach of a number of other laws to off-reservation Indians as well. For instance, the Head Start Act, 42 U.S.C. §§ 9801 *et seq.*, which aims, among other things, to "promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development," *id.* § 9831, authorizes the Secretary of Health and Human Services to designate Head Start agencies within communities, including communities of "Indians in any off-reservation area designated by an appropriate tribal government in consultation with the Secretary." *Id.* § 9836(h). And the Workforce Investment Act of 1998 provides that research grants may be used to conduct studies of "effective mechanisms for the delivery of rehabilitation services to Indians residing on and off reservations." 29 U.S.C. § 764(b)(13). Other statutes provide federal funds to Indian Tribes and Tribal members to be used both on and off reservation. *See, e.g.*, 25 U.S.C. § 1466 (setting up revolving fund to provide loans for Tribes and Tribal members, including for the purchase of land both on and off reservation).

Congress has found these statutory provisions necessary because the vast majority of Indians to whom Congress owes trust obligations—approximately 78%—do not live on reservations or other trust lands.[8] Indeed, many of these statutes are geared specifically toward ensuring that Indians, whether on or off a reservation, have equal access to necessary services and

[8] *See* U.S. Department of Health and Human Services Office of Minority Health, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlID=62#:~:text=The%202010%20Census%20reveals%20that,reservations%20or%20other%20trust%20lands (visited Aug. 18, 2022). As explained above, the federal government—specifically, twentieth-century federal policy—bears significant responsibility for this statistic. *See supra* note 7.

benefits.[9] Congress cannot satisfy its trust obligation if the laws it enacts for the benefit of Indians and Indian Tribes extend only to 22% of Indians.

In *Mancari*, the Court resoundingly affirmed Congress's authority to adopt a statutory employment preference for Indians in the Bureau of Indian Affairs that applies regardless of proximity to a reservation. The district court incorrectly stated that the preference at issue in *Mancari* applied only to Indians living on or near reservations. But in reality, the BIA employment preferences are not so limited: They provide that "qualified Indians" shall have "preference to appointment to vacancies in *any*" positions maintained by the BIA, not just those on or near a reservation. *Mancari*, 417 U.S. at 538 (quoting 25 U.S.C. § 5116 (emphasis added)). Moreover, the Indian Reorganization Act of 1934 ("IRA")—which codified the BIA employment preference—defines the term "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe," regardless of whether they live on or near a reservation. 25 U.S.C. § 5129.

To be sure, Congress has on some occasions crafted legislation that applies only to conduct that occurs "on

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[9] One of Congress's purposes in passing the IHCIA, for example, was to eliminate the disparities that had developed between the provision of health services to Indians living on reservations and those living off reservations. *See, e.g.*, Indian Health Care Improvement Act: Hearings on H.R. 2525 and Related Bills Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 94th Cong. 29 (1975) (statement of Rep. Lloyd Meeds, Chairman of Subcomm. on Indian Affairs) (explaining that the Act addresses the exclusion of "urban Indian populations … from the services of Indian Health Service," who face "many of the health problems faced by the Indians on Federal reservations").

or near" an Indian reservation or within "Indian country," or that assigns preference to Indians who live "on or near" a reservation. *E.g.*, 42 U.S.C. § 2000e-2(i) (permitting employment preferences for Indians by "any business or enterprise on or near an Indian reservation"); 25 U.S.C. § 1521 (establishing Indian Business Development Program to provide grants to "establish and expand profit-making Indian-owned economic enterprises on or near reservations"). But these statutes are not evidence of a limitation on Congress's plenary power to legislate with regard to Indian affairs. They are merely evidence that, when Congress wishes to narrow the scope of legislation in that manner, it knows how to say so.

That Congress has occasionally passed legislation focused on conduct on or near a reservation does not mean that Congress's broad constitutional authority is constrained by reservation boundaries. To hold otherwise would be inconsistent with the original and continuing intent of Congress's plenary power—to legislate with respect to Indians, wherever they may reside—and would utterly frustrate and incapacitate Congress in its efforts to fulfill its trust obligations to the great majority of Indians who live off reservations.

C. ICWA's Preference For "Other Indian Families" and "Indian Foster Home[s]" Is Consistent With Congress's Authority To Legislate For Indians Generally

Contrary to the district court's decision, ICWA's placement preference for "other Indian families" and "Indian foster home[s]" when Indian children cannot be placed with family members or other members of their own Tribe also appropriately advances the statute's

enumerated goals.[10] First, the preferences for "other Indian families" and "Indian foster home[s]" are in line with long-standing precedent of Congress making a political distinction between Indians and non-Indians. The constitution itself and virtually all of Indian law draws just such a distinction. *See Mancari*, 417 U.S. at 552. Accordingly, these placement preferences need only be rationally related to the fulfillment of Congress's unique obligation toward Indians, *see Delaware Tribal Bus. Comm.*, 430 U.S. at 85, and there is ample evidence that keeping Indian children with Indian families, and in Indian homes, advances the stability and security of Indian Tribes and Indian children. Second, even if the preferences were cast as racial classifications and thus subject to strict scrutiny, they are narrowly tailored to Congress's compelling interest in protecting Indian children.

1. Congress acts within its power in distinguishing between Indians and non-Indians in legislation intended to benefit Indians

In virtually all of Indian law—from employment matters to criminal jurisdiction—Congress and the Court have long distinguished between Indians and non-Indians, and not between Indians who are members of one Tribe as opposed to another. The district court wrongly concluded that any categorical distinction between Indians and non-Indians is impermissible, but that ignores settled law and two hundred years of

[10] The en banc Fifth Circuit split evenly on the question of whether ICWA's preference for "other Indian families" and "Indian foster home[s]" violated the Equal Protection Clause, thus affirming the District Court's decision on that point without a precedential opinion. *Brackeen*, 994 F.3d at 268.

congressional practice. The district court's flawed conclusion and reasoning must not go uncorrected.

Employment preferences for Indians, which date back at least as far as 1834, *see Mancari*, 417 U.S. at 541, have long benefitted all Indians as a class. For example, the IRA creates a political preference for all "Indians" in filling "positions maintained … by the Indian Office, in the administration of functions or services affecting any Indian tribe." 25 U.S.C. § 5116. Its "overriding purpose" was to foster "a greater degree of self-government, both politically and economically," among Indian Tribes. *Mancari*, 417 U.S. at 542; *see also Oglala Sioux Tribe of Indians* v. *Andrus*, 603 F.2d 707, 716 (8th Cir. 1979) (describing IRA's purpose as establishing "Indian control of Indian services"). The IRA achieved that purpose without requiring any specific connection between the tribal membership of the person filling a particular position and the Tribe or Tribes served by that position.

Similarly, Title VII's "Indian preference exemption" permits employers to extend preference in employment practices to Indians based on their political status as Indians. It provides that:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual *because he is an Indian* living on or near a reservation.

42 U.S.C. § 2000e-2(i) (emphasis added). By its plain terms, the Indian preference exemption permits any employer on or near a reservation to extend an employment preference to any Indian living on or near any

reservation. It is not limited to those Indians who are members of the Tribe on whose reservation the employer is located, nor is it limited to Indians living on that reservation. Rather, like the IRA, it grants a general preference to Indians of all Tribes in "recognition of the longstanding federal policy of providing a unique legal status to Indians." *Mancari*, 417 U.S. at 548; *see also Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1122 (9th Cir. 1998) ("The purpose of the Indian Preferences exemption is to authorize an employer to grant preferences to *all* Indians (who live on or near a reservation)—to permit the favoring of Indians over *non*-Indians.").

Similar distinctions between Indians, generally, and non-Indians exist in the criminal law. While Indian Tribes generally lack the authority to impose criminal penalties on non-Indians, *see Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 204 (1978), Indian Tribes do have criminal jurisdiction over all other Indians, including non-member Indians, under the Indian Civil Rights Act (25 U.S.C. §§ 1301-1304).

In 1991, in response to the Supreme Court's holding in *Duro* v. *Reina*, 495 U.S. 676 (1990), Congress amended the Indian Civil Rights Act to make clear that the Tribes' "powers of self-government" include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians*." 25 U.S.C. § 1301(2) (emphasis added); *see also Lara*, 541 U.S. at 196 (upholding amendment's constitutionality). This explicit recognition came after nearly two centuries of law distinguishing generally between Indians and non-Indians for purposes of criminal jurisdiction. In 1817, Congress extended federal criminal jurisdiction to crimes committed in Indian country, but excluded "any offence committed by one Indian against

another." Act of Mar. 3, 1817, ch. 92, 3 Stat. 383. This same exception was included in the Indian Trade and Intercourse Act of 1834, § 25, 4 Stat. 733, and the General Crimes Act, now codified at 18 U.S.C. § 1152 (1976 ed.). As recognized in the legislative history of the 1991 amendment, "Congress has never differentiated between member Indians and non-member Indians" in defining the scope of tribal criminal jurisdiction. S. Rep. No. 102-153, at 3 (1991).

In each of these areas of the law, Congress had good reason to treat all Indians collectively as a single political class. Many Indians live on the reservations of Tribes of which they are not members. On some reservations, up to thirty percent of residents are non-member Indians. *See* H.R. Rep. No. 102-61, at 4 (1991). Congress has long recognized that classifying member and non-member Indians in the same category "is premised upon the reality and practice of reservation life: that non-tribal member Indians own homes and property on reservations, are part of the labor force on the reservation, and frequently are married to tribal members." S. Rep. No. 102-153 at 7. In many instances, this commingling of different Tribes and their members is the result of specific federal policy, because "over the course of many years, Federal policy forced the relocation of many tribes onto one reservation." *Id.*

Given these realities, if tribal provisions like those in the IRA or Title VII had to be Tribe-specific, as the district court's holding would require, a great many Indians would be excluded from federal services and protections entirely, and denied their rights as beneficiaries of the federal-tribal trust responsibility. As such, treating Indians generally as a class is not just rationally related—it is often crucial—to Congress's ability to fulfill its trust obligation to Indians.

2. The preferences for "other Indian families" and "Indian foster home[s]" are narrowly tailored to serve ICWA's purpose of protecting the best interests of Indian children and Tribes

Judge Duncan's opinion for the en banc court "assume[d] *arguendo* that 'Indian family' is a tribal, not a racial category" but nonetheless concluded that "the preference fails to rationally further Congress's goal of keeping Indian children linked to their own tribe." *Brackeen*, 994 F.3d at 400 (Duncan, J., opinion). This conclusion misrepresents Congress's goals in passing ICWA, ignores legitimate justifications for the preferences, and applies an overly onerous version of the rational basis standard. But even under a heightened standard of review, the preference for "other Indian families" and "Indian foster home[s]" is narrowly tailored to serve ICWA's interest of protecting the interests of Indian children and Tribes.

ICWA was drafted to accomplish two goals in furtherance of Congress's unique obligation toward Indians: "to protect the best interests of Indian children," and "to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902; *accord* House Report, at 8. Both interests are served by the placement preferences for "other Indian families" and "Indian foster home[s]."

Placing Indian children with "other Indian families" and in "Indian foster home[s]" when they cannot be placed with their own families or Tribes serves the interests of those children. In the years leading up to ICWA, nearly a third of all Indian children were forcibly removed from their homes and placed in non-Indian families on the false assumption that "most Indian chil-

dren would really be better off growing up non-Indian." 1977 Hearing 1 (statement of Sen. Abourezk); *see also Mississippi Band of Choctaw Indians*, 490 U.S. at 32-33. The consequences for the removed children were devastating. As one psychiatrist testified before Congress, removed children were deprived of their Indian identities but often were never fully accepted in or assimilated into their new, non-Indian communities. *See Mississippi Band of Choctaw Indians*, 490 U.S. at 33 n.1 ("[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess." (quoting Indian Child Welfare Program, Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93rd Cong. 46 (1974) (statement of Dr. Joseph Westermeyer)). As a result, many children suffered from "ethnic confusion" and a "pervasive sense of abandonment." 1977 Hearing 114 (statement of Drs. Carl Mindell and Alan Gurwitt). The preference for other Indian families helps to minimize the disruption and dislocation experienced by removed Indian children by placing them with families that share similar cultural identities. *See* Uthe, *The Best Interests of Indian Children in Minnesota*, 17 Am. Indian L. Rev. 237, 246, 252 (1992) (describing significance of Indian cultural identity in well-being of Indian children and noting that placement of Indian children in Indian homes increased following ICWA). In fact, because "many contemporary tribes descended from larger historical bands and continue to share close relationships and linguistic, cultural, and religious traditions, … placing a child with another Indian family could conceivably further the interest in maintaining the child's ties with his or her tribe or culture." *Brackeen*, 994 F.3d at 345 (Dennis, J., opinion).

Placement preferences for "other Indian families" and "Indian foster home[s]" also serve the interests of Indian Tribes. As Judge Dennis explained, "[i]t is rational to think that ensuring that an Indian child is raised in a household that respects Indian values and traditions makes it more likely that the child will eventually join an Indian tribe—thus 'promot[ing] the stability and security of Indian tribes.'" *Brackeen*, 994 F.3d at 345.

Contrary to the district court's conclusions, these preferences do not impermissibly ignore the differences between Tribes or treat them as "an undifferentiated mass." *Zinke*, 338 F. Supp. 3d at 535. Rather, the Act provides that "[t]he standards to be applied in meeting [its] preference requirements … shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915(d). ICWA does not treat Indian communities as interchangeable equivalents; ICWA respects Indian Tribes as culturally distinct communities, while recognizing that there will be more commonalities between the "social and cultural standards" of Indian Tribes than between tribal and non-tribal communities. *See id.* § 1915(a)-(b) (creating adoptive and foster care placement preferences for family members first, followed by other members of the Indian child's tribe and then other Indian families). Placement with an Indian family, selected in accordance with the social and cultural standards of the child's Tribe, minimizes the dislocation, marginalization, and loss of identity experienced by the removed Indian child. It is therefore crucial to ICWA's purpose of protecting the best interests of Indian children and to the fulfillment of Congress's "distinctive obligation of

trust" in dealing with Indian Tribes. *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942).

Indeed, even if strict scrutiny applied—and it does not—ICWA's preferences for "other Indian families" and "Indian foster home[s]" are narrowly tailored to further a legitimate interest. As already explained, granting priority to "other Indian families" and "Indian foster home[s]" furthers Congress's goals of protecting the interests of both Indian tribes and children by giving Indian children the opportunity to be raised in homes that protect Indian traditions and by ensuring that Tribes will be protected from the existential threat of future generations' removal. ICWA is narrowly tailored, impacting only the small portion of a state court's docket involving Indian children, where placement with the child's extended family or Tribe is not possible, and where there is not "good cause to the contrary," 25 U.S. § 1915(a), to place the child elsewhere. Further narrowing to discriminate between Tribes would be impractical and would raise fresh concerns that courts would be impermissibly classifying on the basis of religion or culture, rather than tribal affiliation.

CONCLUSION

The Court should reverse the judgment of the Fifth Circuit insofar as the Fifth Circuit found ICWA to be unconstitutional, and affirm the judgment of the Fifth Circuit insofar as it upheld ICWA's constitutionality.

Respectfully submitted.

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APPENDIX

APPENDIX A

AMICI CURIAE MEMBERS OF CONGRESS

1. Senator Brian Schatz
2. Senator Lisa Murkowski
3. Senator Tammy Baldwin
4. Senator Michael F. Bennet
5. Senator Richard Blumenthal
6. Senator Cory A. Booker
7. Senator Maria Cantwell
8. Senator Susan M. Collins
9. Senator Catherine Cortez Masto
10. Senator Tammy Duckworth
11. Senator Dianne Feinstein
12. Senator Margaret Wood Hassan
13. Senator Martin Heinrich
14. Senator John Hickenlooper
15. Senator Mazie K. Hirono
16. Senator Tim Kaine
17. Senator Angus S. King, Jr.
18. Senator Amy Klobuchar
19. Senator Ben Ray Luján
20. Senator Edward J. Markey
21. Senator Jeffrey A. Merkley
22. Senator Jerry Moran

23. Senator Patty Murray
24. Senator Alex Padilla
25. Senator Gary C. Peters
26. Senator Jacky Rosen
27. Senator Bernard Sanders
28. Senator Kyrsten Sinema
29. Senator Tina Smith
30. Senator Dan Sullivan
31. Senator Jon Tester
32. Senator Elizabeth Warren
33. Senator Ron Wyden
34. Representative Sharice L. Davids
35. Representative Tom Cole
36. Representative Pete Aguilar
37. Representative Don Bacon
38. Representative Nanette Diaz Barragán
39. Representative Karen Bass
40. Representative Donald S. Beyer Jr.
41. Representative Earl Blumenauer
42. Representative Salud Carbajal
43. Representative Tony Cárdenas
44. Representative Ed Case
45. Representative Judy Chu
46. Representative J. Luis Correa
47. Representative Angie Craig

48. Representative Peter A. DeFazio
49. Representative Anna G. Eshoo
50. Representative Ruben Gallego
51. Representative Jesús G. "Chuy" García
52. Representative Jimmy Gomez
53. Representative Raúl M. Grijalva
54. Representative Eleanor Holmes Norton
55. Representative Jared Huffman
56. Representative Pramila Jayapal
57. Representative Kaiali'i Kahele
58. Representative Daniel T. Kildee
59. Representative Derek Kilmer
60. Representative Doug LaMalfa
61. Representative James R. Langevin
62. Representative Brenda L. Lawrence
63. Representative Teresa Leger Fernández
64. Representative Mike Levin
65. Representative Ted W. Lieu
66. Representative Alan S. Lowenthal
67. Representative Betty McCollum
68. Representative Gwen S. Moore
69. Representative Tom O'Halleran
70. Representative Jimmy Panetta
71. Representative Chellie Pingree
72. Representative Mark Pocan

73. Representative Katie Porter
74. Representative Raul Ruiz
75. Representative Gregorio Kilili Camacho Sablan
76. Representative Michael F. Q. San Nicolas
77. Representative Adam B. Schiff
78. Representative Kurt Schrader
79. Representative Kim Schrier
80. Representative Adam Smith
81. Representative Darren Soto
82. Representative Melanie Stansbury
83. Representative Greg Stanton
84. Representative Mark Takano
85. Representative Mike Thompson
86. Representative Rashida Tlaib
87. Representative Norma J. Torres