

Nos. 21-376, 21-377

In The
Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

CHAD EVERET BRACKEEN, ET AL.,
Respondents.

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

v.

CHAD EVERET BRACKEEN, ET AL.,
Respondents.

*On Petitions for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

**BRIEF OF CASEY FAMILY PROGRAMS AND
TEN OTHER CHILD WELFARE AND
ADOPTION ORGANIZATIONS AS *AMICI
CURIAE* IN SUPPORT OF PETITIONERS**

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

TABLE OF CONTENTS

INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	5
ARGUMENT.....	6
ICWA Exemplifies Child Welfare Best Practices.....	6
A. ICWA Implements the Foundational Principle of Child Welfare that Children Are Best Served by Preserving Family and Community Connections.	8
1. Extensive research supports ICWA’s provisions promoting and maintaining family ties.	8
2. ICWA’s community placement provisions match best practices.....	13
3. ICWA’s structured decision-making framework is an essential component of best practices.....	18
B. ICWA, and Systems Like It, Achieve Better Outcomes.....	20
CONCLUSION	23

TABLE OF AUTHORITIES

Page(s)

Cases

Miss. Band of Choctaw Indians v. Holyfield,
490 U.S. 30 (1989) 5

Morton v. Mancari, 417 U.S. 535 (1974) 17

*Smith v. Org. of Foster Families for Equal. &
Reform*, 431 U.S. 816 (1977) 18

Statutes and Regulations

25 U.S.C.

§ 1903(4) 10

§ 1912(d) 10

§ 1912(e) 10

§ 1913(a) 10

§ 1915(a) *passim*

§ 1915(b) *passim*

42 U.S.C.

§ 671(a) 13, 22

§ 672(a) 22

§ 675a(c) 22

§ 14932 22

Family First Prevention Services Act, Pub. L.

No. 115-123, 132 Stat. 64 (2018) 9

International Child Abduction Remedies Act 22 U.S.C. §§ 9001-9011	23
Servicemembers Civil Relief Act. 50 U.S.C. §§ 3931–3932, 3938	23
25 C.F.R. 23.132(c)	19
Other Sources	
Annie E. Casey Foundation, <i>Every Kid Needs a Family</i> (2015)	8
Annie E. Casey Foundation, <i>Keeping Kids in Families</i> (2019).....	21, 22
Annie E. Casey Foundation, <i>Variations in the use of kinship diversion among child welfare agencies</i> (2019)	12
Annie E. Casey Foundation, <i>What Is Permanence?</i> (Feb. 5, 2012).....	15
Sixto Cancel, <i>I Will Never Forget That I Could Have Lived With People Who Loved Me</i> , N.Y. Times (Sept. 16, 2021)	14, 22
Capacity Building Center for Courts, <i>ICWA Baseline Measures Project Findings Report</i> , (2020)	21
Casey Family Programs, <i>Child and Family Services Practice Model</i> (2018)	6, 7, 13, 17

Casey Family Programs, <i>Native American/Alaska Native Children Overview</i> (2019)	21
Child Welfare Information Gateway, <i>Community-Based Resources: Keystone to the System of Care</i> (2009).....	14, 17
Child Welfare Information Gateway, <i>Determining the Best Interests of the Child</i> (2020)	11, 19
Child Welfare Information Gateway, <i>Enhancing Permanency for Youth in Out-of-Home Care</i> (2013).....	20
Child Welfare Information Gateway, <i>Foster Care Statistics 2019</i> (2021)	20
Child Welfare Information Gateway, <i>Permanency and the Child and Family Services Reviews</i>	15
Child Welfare Information Gateway, <i>Placement of Children with Relatives</i> (2018)	12, 14
Child Welfare League of America, CWLA <i>Standards of Excellence for Adoption Services</i> (2000)	11

Child Welfare League of America, CWLA <i>Standards of Excellence for Kinship Care Services</i> (2000)	14
Child Welfare League of America, CWLA <i>Standards of Excellence for Services to Strengthen and Preserve Families with Children</i> (2003)	9
Tiffany Conway & Rutledge Q. Hutson, <i>Is Kinship Care Good for Kids?</i> (2007)	11
Robert E. Emery et al., <i>A Critical Assessment of Child Custody Evaluations</i> , 6 PSYCHOL. SCI. PUB. INT. 1 (2005)	18
Evan B. Donaldson Adoption Institute, <i>Safeguarding the Rights and Well-Being of Birthparents in the Adoption Process</i> (2007).....	9
H.R. Rep. No. 95-1386 (1978)	19
Teresa D. LaFromboise et al., <i>Family, Community, and School Influences on Resilience Among American Indian Adolescents in the Upper Midwest</i> , 34 J. COMMUNITY PSYCHOL. 193 (2006)	17
National Council of Juvenile and Family Court Judges, <i>Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases</i> (2000)	11

Kristine Nelson et al., <i>A Ten-Year Review of Family Preservation Research</i> (2009)	8
Amy M. Salazar et al., <i>Trauma Exposure and PTSD Among Older Adolescents in Foster Care</i> , 48 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 545 (2013)	9
U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Information Memo. on Reshaping Child Welfare in U.S. to Focus on Strengthening Families Through Primary Prevention of Child Maltreatment and Unnecessary Parent-Child Separation (Nov. 16, 2018)	11
U.S. Dep't of Health & Human Servs., Children's Bureau, Child Welfare Policy Manual.....	16
Marc A. Winokur et al., <i>Kinship care for the safety, permanency, and well-being of children removed from the home for maltreatment</i> , Cochrane Database Sys. Rev. (2014)	12

INTEREST OF *AMICI CURIAE*¹

Amici are organizations with decades of experience in research, education, advocacy, and providing services related to child welfare and adoption, all designed to support children, parents, and families. *Amici* have firsthand experience advocating for families and developing and implementing policies and best practices for child welfare decision-making. *Amici*'s perspective, based on vast experience with child welfare, is that the Indian Child Welfare Act ("ICWA") both embodies and has served as a model for child welfare policies that are best practices for all children. Because ICWA's principles are critical to *amici*'s work safeguarding the welfare of children and families, many of the *amici* have filed briefs in other cases interpreting and applying ICWA. *See, e.g., Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). A list of *amici* follows.

Casey Family Programs is the nation's largest operating foundation focused on safely reducing the need for foster care across America. Casey has provided direct family services to children and families involved in public and tribal foster care systems for more than 50 years, regularly consulting with state child welfare agencies in all 50 states, the District of Columbia, two territories, and sixteen tribal nations.

¹ Counsel of record for all parties received timely advance notice of the intent to file this brief and consented to the filing of the brief. S. CT. R. 37.2(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

The American Adoption Congress began in 1978. The group officially formed the American Adoption Congress in 1980 with the goal of championing adoptee rights, with emphasis on gaining universal access to original birth certificates for adoptees. The AAC incorporated in 1981 and has been a 501(c)(3), registered in the state of Missouri, since 1982.

The Annie E. Casey Foundation is a private philanthropy that creates a brighter future for the nation's children and youth by developing solutions to strengthen families, build paths to economic opportunity, and transform struggling communities into safer and healthier places to live, work and grow. The Foundation aims to advance racial and ethnic equity and inclusion and build paths to opportunity so that all children and youth can realize their potential.

The Child Welfare League of America ("CWLA") is a powerful coalition of hundreds of private and public agencies that since 1920 has worked to serve children and families who are vulnerable. CWLA's expertise, leadership and innovation on policies, programs, and practices help improve the lives of millions of children across the country. CWLA's impact is felt worldwide.

The Children's Defense Fund ("CDF") has worked relentlessly for nearly five decades to ensure a level playing field for all children, with special attention to the needs of poor children and children of color. CDF works collaboratively at the federal, state, and local levels to achieve policy and practice reforms to keep children safely with family, to ensure children are placed in the most family-like settings appropriate while maintaining connections to their families and

community, to seek safe, timely reunification, and only when reunification is not appropriate, to move children promptly to new permanent families through adoption or kinship guardianship.

FosterClub is the national network for young people who experience foster care. In partnership with Lived Experience Leaders, FosterClub drives change in the child welfare system and provides direct support to children and youth.

Generations United is a national advocacy organization whose mission is to improve the lives of children, youth, and older adults through intergenerational collaboration, public policies, and programs for the enduring benefit for all. It is home to the National Center on Grandfamilies, a leading voice for families headed by grandparents, other relatives and close family friends.

The National Association of Counsel for Children (“NACC”), founded in 1977, is a 501(c)(3) non-profit association dedicated to advancing the rights, well-being, and opportunities of youth in the child welfare system through access to high-quality legal representation. NACC’s work includes training, policy advocacy, and the Child Welfare Law Specialist certification program.

The North American Council on Adoptable Children (“NACAC”) works to ensure that every child in foster care has a permanent, loving family. NACAC supports adoptive, foster, and kinship families; educates parents and professionals; develops youth and parent advocates; and highlights child welfare best practices, including those codified in ICWA.

The National Alliance of Child Abuse Prevention Funds (commonly known as the Children’s Trust Fund Alliance) is the membership organization for state children's trust funds, with the primary goal of strengthening families to prevent child abuse and neglect. A major focus of the Alliance is to support the voices of parents with lived experience in all areas that touch the lives of families and to help birth parents and foster parents build strong relationships that lead to better outcomes for children. The Alliance’s members invest about \$260 million annually in community-based prevention programs and the Alliance provides guidance, training, and technical assistance to support their work.

The National Center on Adoption and Permanency (“NCAP”) is a unique nonprofit organization whose mission is to transform child welfare policy and practice from “child placement” to “family success.” NCAP’s multidisciplinary team advances this fundamental change by providing research, education, training, and other expertise that enables public and private agencies, organizational leaders, advocacy groups, and other professionals to empower, strengthen, and support all families.

Amici agree with Petitioners in Nos. 21-376 and 21-377 that the Fifth Circuit erred in invalidating several provisions of ICWA; that ICWA is essential and serves vital interests in protecting Indian children and families; and that the invalidated provisions are important parts of the Act. *See, e.g.*, Pet. in No. 21-376 at 31-32; Pet. in No. 21-377 at 17-18.²

² *Amici* oppose review in Petition Nos. 21-378 and 21-380.

Thankfully, the Fifth Circuit's judgment invalidating those provisions is not binding on the state courts that make most child welfare decisions. Nevertheless, *amici* write separately to elaborate for the Court, based on decades of firsthand experience and rigorous research, how ICWA is a context-specific application of evidence-based best practices in child welfare for all children, not only children who meet ICWA's definition of "Indian child." Over decades, ICWA has served as a model to improve child welfare decision-making for all children, and states—with Congress's encouragement—have modified their child welfare systems to look more like ICWA. *Amici* urge the Court to consider ICWA as a paradigm for employing evidence-based best practices in child welfare when deciding whether to grant review.

INTRODUCTION AND SUMMARY OF ARGUMENT

In responding to the widespread and often unwarranted removal of children from American Indian/Alaska Native families, *see Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); Pet. in No. 21-377 at 5-7, Congress enacted minimum federal standards for qualifying child welfare proceedings. For 40 years, these standards have exemplified evidence-based best practices in child welfare. The important interests served by ICWA within American Indian/Alaska Native communities, discussed by Petitioners and other *amici*, cannot be disputed. *Amici* child welfare organizations write separately, however, to discuss a broader and universally-applicable social policy issue: "the values

inherent in the act are the gold standard of child welfare for all children and families.” Casey Family Programs, *Child and Family Services Practice Model 6* (2018), <https://tinyurl.com/uakjcyf6> (“Casey Practice Model”). Casey Family Programs, for example, structures its social work practice for *all* the children and families that it serves “according to the core principles of the Indian Child Welfare Act.” *Id.*

Casey and other *amici* follow standards analogous to ICWA’s even where it does not apply because the Act’s standards are applications of universal best practices in child welfare. Decades of experience and research establish that children are best served by preserving as many connections with their birth family and community as can be done safely. Research likewise shows that better placement decisions result from applying a structured, transparent, and objective framework that guards against implicit biases, prioritizes maintaining a child’s connections, and minimizes the discretion to sever community ties. Far from derogating from the best interests of children, ICWA applies these universal principles in service of those best interests. Because ICWA standards are grounded in best practices for all children, upholding ICWA protects the ability of child welfare agencies and courts to serve the best interests of children.

ARGUMENT

ICWA Exemplifies Child Welfare Best Practices.

A guiding principle of promoting child welfare is that children are best served by preserving and

strengthening their birth family relationships. This interest in maintaining family integrity includes the mesh of ties that surround a child, from the closest ties (birth parents, siblings), to extended family, to the child's broader community. The gold standard in child welfare thus calls for practices that maintain a safe environment for the child while preserving as many of a child's connections as possible. *See* Casey Practice Model at 9.

ICWA exemplifies that gold standard. Its placement preferences and related provisions work together, in harmony, to prioritize safely maintaining a child within the child's birth family first, placement with extended family next (even if they have no tribal connection), then members of the child's broader community, including the child's tribe, followed by other tribes. 25 U.S.C. § 1915(a), (b). The role of tribal placements within that framework is thus a context-specific application of the universal best practice of preserving as many of a child's connections to their community as possible. The Act's structured framework for decision-making ensures that placements adhere as much as is feasible to these priorities, which have proved over decades of research and experience to serve the best interests of all children, while always permitting courts to make case-specific departures for good cause.

Data demonstrates that ICWA's structured process, when followed, serves that critical goal for the wide range of child custody proceedings that it covers—not just infant adoptions, but also removal of older children from families and communities in which they have lived their entire lives. Encouraging results

about how many American Indian/Alaskan Native children find family member placements or avoid group homes are a testament to the effectiveness of the Act's focus on strengthening, and not unnecessarily severing, a child's birth ties. All children would benefit from such a commitment, as many states have begun to recognize, urged on by Congress in what has long been a joint state-federal effort to achieve the best possible outcomes for children at risk.

A. ICWA Implements the Foundational Principle of Child Welfare that Children Are Best Served by Preserving Family and Community Connections.

1. *Extensive research supports ICWA's provisions promoting and maintaining family ties.*

The first priority in any effective child welfare system is to limit the separation of children from parents, and to encourage reunification even after a separation has occurred. Research and experience confirm that, when possible, children's interests are best served by staying with their families. *See, e.g.,* Kristine Nelson et al., *A Ten-Year Review of Family Preservation Research* 1 (2009), <https://tinyurl.com/4953nvj9>; Annie E. Casey Foundation, *Every Kid Needs a Family* 11 (2015), <https://tinyurl.com/9d74zk7k> ("Whenever possible, children should remain at home with their parents or with a caring relative[.]"). Most children separated from their biological families—particularly when such separation is involuntary—have

experienced some trauma before separation, and even if not, the removal itself is traumatic. Amy M. Salazar et al., *Trauma Exposure and PTSD Among Older Adolescents in Foster Care*, 48 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 545, 547, 550 (2013). In *amici*'s firsthand experience, children who have been removed from their biological family suffer significantly because their sense of security and belonging are injured.

To preserve families, well-functioning child welfare systems provide robust services to prevent the separation of children from their parents in the first instance. *See, e.g.*, Family First Prevention Services Act, Pub. L. No. 115-123, § 50702, 132 Stat. 64, 232 (2018) (enabling states to use federal funds to “prevent foster care placements through ... mental health and substance abuse prevention and treatment services, [and] in-home parent skill-based programs”); Child Welfare League of America (“CWLA”), *CWLA Standards of Excellence for Services to Strengthen and Preserve Families with Children* 20 (2003) (recognizing the importance of “provid[ing] [parents] with services and support” so that “children c[an] be safely protected and treated within their own homes”). For voluntary adoptions, prioritizing parental ties means that parents must be provided “waiting periods of at least several days after childbirth before signing relinquishments, and adequate revocation periods during which [they] can change their minds.” Evan B. Donaldson Adoption Institute, *Safeguarding the Rights and Well-Being of Birthparents in the Adoption Process* 5 (2007), <https://tinyurl.com/46ayfmyk>.

ICWA embodies these best practices in several provisions, some of which were invalidated by the Fifth Circuit. ICWA limits the removal of children to cases of serious emotional or physical damage. 25 U.S.C. § 1912(e). Although the Fifth Circuit upheld that standard as validly preemptive in state courts, Pet. App. 311a,³ it invalidated the requirement that the standard be proved by expert witness testimony, as applied to state agencies, *id.* at 288a-299a. ICWA further requires that any party (whether a state agency or private party petitioner) seeking to “effect a foster care placement of, or termination of parental rights to, an Indian child under State law” must establish “that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.” 25 U.S.C. § 1912(d). The Fifth Circuit eliminated this critical family-preserving requirement as applied to state agencies. Pet. App. 286a-288a. Finally, ICWA provides for a robust waiting period and explanation process to ensure that relinquishments of parental rights are truly voluntary, 25 U.S.C. § 1913(a), which the Fifth Circuit rightly recognized was a validly preemptive federal law, Pet. App. 305a-306a.⁴

³ All citations to the Petition Appendix are to the Appendix in No. 21-376.

⁴ ICWA’s coverage of children who are eligible for membership in a tribe (and have a parent who is a member), as well as those who already are members, 25 U.S.C. § 1903(4), is a necessary adjunct to its safeguards for infant adoptions, which often take place before there is sufficient time to enroll a newborn as a tribal member. The Fifth Circuit rightly held that Congress’s definition of “Indian child” is constitutional. Pet. App. 164a-165a.

Many states share ICWA's emphasis on family preservation. See Child Welfare Information Gateway, *Determining the Best Interests of the Child 2* (2020), <https://tinyurl.com/jwu6x4w> ("Best Interests") (finding most frequent guiding principle in state statutes for determining a child's best interests is the "importance of family integrity and preference for avoiding removal of the child from his/her home"). The federal government, too, seeks to encourage family preservation for all children. See U.S. Dep't of Health & Human Servs. ("HHS"), Admin. for Children & Families, Information Memo. on Reshaping Child Welfare in U.S. to Focus on Strengthening Families Through Primary Prevention of Child Maltreatment and Unnecessary Parent-Child Separation (Nov. 16, 2018), <https://tinyurl.com/bcp57nz2>.

Unfortunately, it is not always possible to avoid removing children from their parents. Settled child welfare standards establish that the next best option then is placement with extended family. See National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 11 (2000), <https://tinyurl.com/jfbc5hxx> ("An appropriate relative who is willing to provide care is almost always a preferable caretaker to a non-relative."); CWLA, *CWLA Standards of Excellence for Adoption Services* § 1.10 (2000) ("The first option considered for children whose parents cannot care for them should be placement with extended family members").

Kinship care "maximizes a child's connection to his or her family." *Id.* § 8.24; see Tiffany Conway & Rutledge Q. Hutson, *Is Kinship Care Good for Kids?* 2

(2007), <https://tinyurl.com/2bp6deck> (finding research supports kinship care). Among other beneficial outcomes, children in temporary kinship care are less likely to experience multiple placements. *See* Annie E. Casey Foundation, *Variations in the use of kinship diversion among child welfare agencies* (2019), <https://tinyurl.com/bdaruud> (“[K]inship care placements ... appear more stable than placements in non-kin care.”); Marc A. Winokur et al., *Kinship care for the safety, permanency, and well-being of children removed from the home for maltreatment*, *Cochrane Database Sys. Rev.* (2014) (kinship care resulted in fewer behavioral problems, fewer mental health disorders, better well-being, and less placement disruption).

Consistent with this research, all but two states give preference to extended family placements. *See* Child Welfare Information Gateway, *Placement of Children with Relatives 2* (2018), <https://tinyurl.com/2nhj2uz9> (“Placement with Relatives”) (48 states require consideration of “giving preference to relative placements”). So does ICWA. In any proceeding leading to foster care or adoptive placement of a child (whether initiated by a state actor or private party), ICWA’s first priority placement is with a member of the child’s extended family. 25 U.S.C. § 1915(a), (b). But the Fifth Circuit—by an equally-divided vote—invalidated ICWA’s kinship placement preference to the extent it requires any action by a state agency. Pet. App. 4a-5a.

ICWA’s focus on family connections is not unique. Congress values this approach in federal efforts for all children. For example, Congress offers federal funds to

states that “consider giving preference to an adult relative over a non-related caregiver ..., provided that the relative caregiver meets all relevant State child protection standards,” and to states that exercise “due diligence” to identify, locate, and notify relatives when children enter the foster care system. 42 U.S.C. § 671(a)(19), (29). Congress encourages states to make their generally-applicable child welfare systems more like ICWA because ICWA’s placement preferences embody best practices for all children.

2. ICWA’s community placement provisions match best practices.

When extended family members are not available, ICWA next looks to a child’s web of connections beyond relatives: the child’s community. In the context of Indian children, a child’s community includes his or her tribe or related tribes. 25 U.S.C. § 1915(a), (b). Preserving such ties embodies evidence-based best practices of maintaining a child’s connection to a broader network of caring adults, and placing them within familiar settings. Such within-network or within-community placements serve several interests.

First, placement within the child’s community or network serves the interest of stability. Out-of-home placements are very disruptive, and community placement helps the child to “maintain a continuity of schools, providers and participation in their community.” Casey Practice Model at 10. In short, “[k]eeping children within their own community and relying on the community for services and support

have been part of good child welfare practice for decades.” Child Welfare Information Gateway, *Community-Based Resources: Keystone to the System of Care 2* (2009), <https://tinyurl.com/vbed9aau> (“Community-Based Care”).

Second, placement within the child’s larger community supports the maintenance or creation of a network of relationships with caring adults. On occasion, a primary caregiver may be identified who, though unrelated, has significant ties with the child. A model child welfare system will assess a child’s “family friends ... and neighbors,” along with members of a child’s tribe or clan where applicable, “to determine their willingness and ability to provide care and protection” before making a more removed placement. CWLA, *CWLA Standards of Excellence for Kinship Care Services* § 2.8 (2000). More than half of states, in fact, provide a preference for “fictive kin”—unrelated adults who are known to the family, have a relationship with the child, and are willing and able to provide a home. See Placement with Relatives at 2; Sixto Cancel, *I Will Never Forget That I Could Have Lived With People Who Loved Me*, N.Y. Times (Sept. 16, 2021), <https://tinyurl.com/625dctpm> (describing personal experiences with multiple foster care placements and urging child welfare systems to “expand[] the legal definition of kinship to encompass more of the loving adults who are in youths’ lives already” in order to “stop needlessly extracting youths from their communities”).

Even when a “fictive kin” primary caregiver is not identified, placement within a child’s broader community or network can help ensure a core group of

adults whom a child can rely upon for different forms of support, mentoring, and guidance; sometimes called “relational permanency.” This concept is distinct from “legal permanency,” which means a child’s placement with a parenting adult whose relationship is recognized by law, e.g., birth parents, guardianship, or adoption. See Annie E. Casey Foundation, *What Is Permanence?* (Feb. 5, 2012), <https://tinyurl.com/7ur36jmr>. For all children—especially those who are aging out of the foster care system without a legal family—relational permanency is essential. Fostering relational permanency means promoting and recognizing “the many types of important long-term relationships that help a child or young person feel loved and connected,” including relationships with siblings, family friends, and other caring adults such as neighbors, teachers, members of their church, etc. *Id.*

Preservation of “continuity of family relationships and connections” is thus one of two permanency outcomes against which the federal government evaluates the success of state child welfare programs for all children (the other being placement stability). See Child Welfare Information Gateway, *Permanency and the Child and Family Services Reviews*, <https://tinyurl.com/6xjdcpa>. To evaluate whether states have achieved this outcome, the Children’s Bureau (a division of HHS responsible for such evaluations) assesses the degree to which child welfare systems help children maintain ties with a network beyond their families. See *id.* (specifying evaluation criteria including “whether, during the period under review, concerted efforts were made to

maintain the child's connections to his or her neighborhood, community, faith, extended family, Tribe, school, and friends"). The Children's Bureau also recognizes that a placement serving a child's cultural needs is important for all children. HHS, Children's Bureau, Child Welfare Policy Manual § 4.3, Question 3, <https://tinyurl.com/v544949v>.

ICWA's tribal placement preferences serve these same interests in stability, relational permanency, and community and cultural connections. For most proceedings covered by the statute—which, as discussed below, often involve older children removed from communities where they have developed ties—the community from which a child is removed includes the child's tribe or a related tribe. Specifying placement within the tribe is thus best understood as context-specific shorthand for placement preferences that help maintain stability in the broad network of relationships that a child needs to thrive. 25 U.S.C. § 1915(a), (b). Where that placement does not make sense in terms of a child's developed relationships, alternative placements are possible based on good cause, but ICWA helps ensure that relational permanency objectives are achieved by requiring consideration of tribal placements first. *See id.*

By an equally-divided vote, however, the Fifth Circuit invalidated ICWA's third-order placement preferences, for adoptive placements with "other Indian families," *id.* § 1915(a)(3), and foster care placements in a licensed "Indian foster home," *id.* § 1915(b)(iii), as well as even the preference for placement within a child's own tribe as applied to state agencies. *See* Pet. App. 4a. *Amici* agree with

Petitioners that this non-precedential ruling is wrong for several reasons, including Plaintiffs' lack of standing and because the placement preferences are based on a political classification and have a rational basis under *Morton v. Mancari*, 417 U.S. 535 (1974). See Pet. No. 21-377 at 30-37.

Child welfare *amici* specifically emphasize, however, that the interests served by ICWA's placement preferences go far beyond "keeping children linked to their tribe," Pet. App. 269a. Rather, ICWA's priorities, like preferences for community placements applicable to all children, serve the interest of maintaining or strengthening a child's community ties and produce better outcomes. Maintaining "[c]onnection to family, community and culture creates relational permanency that ensures there are adults who are reliable and committed to the youth throughout their life." Casey Practice Model at 7. The "concept of community within a system of care includes issues of locality" and a "social bond characterized by a sense of mutuality, care, connection, and identity[.]" Community-Based Care at 2 (internal quotation marks omitted). Other tribes, beyond a child's particular tribe, often share that social bond indicative of community. And studies have shown that fostering children's connection to a broader cultural community improves their resilience. See, e.g., Teresa D. LaFromboise et al., *Family, Community, and School Influences on Resilience Among American Indian Adolescents in the Upper Midwest*, 34 J. COMMUNITY PSYCHOL. 193, 203–04 (2006). Ultimately, ICWA's placement preferences—

including its third-order preferences—help create better outcomes for children.

3. ICWA’s structured decision-making framework is an essential component of best practices.

Successful implementation of these data-informed best practices requires a structured framework that guides placement determinations yet permits contextual, child-specific decision-making in every case. Child welfare decision-making is complex, and disputes frequently are emotionally charged. Different parties may each seek to serve the best interests of the child but nonetheless vehemently disagree about the best course of action.

Providing a structured system that imposes rebuttable presumptions and objective factors can improve decision-making, and thereby improve outcomes. Otherwise, without some structure, decisions based on the child’s “best interest” often are not supported by evidence-based practices. Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations*, 6 PSYCHOL. SCI. PUB. INT. 1, 7–8 (2005) (describing the “absence of scientific support” for many assessments designed to identify the best interests of children). Judges “may find it difficult, in utilizing vague standards like ‘the best interests of the child,’ to avoid decisions resting on subjective values.” *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 835 n.36 (1977). Many states agree that objective criteria are important, and therefore specify

mandatory factors for best-interests-of-the-child determinations. *See* Best Interests at 2.

Congress did the same with ICWA. ICWA embodies the objective, yet individualized, decision-making framework preferred by child welfare practitioners because it mandates structured placement preferences while permitting customized consideration of each child's needs. Congress rejected an open-ended "best interest" standard that would leave courts with unbridled discretion, concluding that the best interests of children were better served by a framework of presumptive placements. *See generally* 25 U.S.C. § 1915(a), (b). And it did so after specifically contemplating the limitations of a structureless best interest standard. H.R. Rep. No. 95-1386, at 19 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7542 (purpose of ICWA is to serve the best interests of children, but without structure the best interest standard "is vague, at best"). Yet Congress simultaneously provided for all-important individualized decision-making by permitting departure from placement preferences upon a showing of good cause, 25 U.S.C. § 1915(a), (b), which may be established based on various relevant considerations, including parental preferences, 25 C.F.R. 23.132(c)(1).

At bottom, ICWA provides structured standards for state courts to apply that promote child welfare best practices. Efforts guided by complete information and structured decision-making best serve the interest of preserving a child's ties to his or her family and community.

B. ICWA, and Systems Like It, Achieve Better Outcomes.

1. ICWA's successful outcomes—across the spectrum of proceedings that it covers—reflect the congruence between ICWA's principles and child welfare best practices. Child welfare best practices must be flexible enough to address a range of situations, from newborns and very young children to (more commonly) older children who have lived for years with their families, and communities (including, for children who are eligible for tribal membership, their tribes). ICWA's structured system of placement preferences combined with a safety valve to depart from those preferences whenever there is "good cause" to do so effectively handles the gamut of child welfare proceedings.

As is typical in child welfare proceedings, the majority of children affected by ICWA are older children who have been removed from families they have lived with for years. See Child Welfare Information Gateway, *Foster Care Statistics 2019* 8 (2021), <https://tinyurl.com/2nzej62f> (median age of entry into foster care is 6.3 years old); Child Welfare Information Gateway, *Enhancing Permanency for Youth in Out-of-Home Care* 2 (2013), <https://tinyurl.com/y6cmvcrh> (42% of the children in foster care are aged 11 years or older). Data from California and Washington (two states with relatively large numbers of American Indian/Alaska Native children entering care) indicate that between 75-79% of American Indian/Alaska Native children entering foster care in 2016 were age 1 or older (similar to the rates for other children), and 48-53% were school age

(ages 5-17). Casey Family Programs, *Native American/Alaska Native Children Overview* (2019), <https://tinyurl.com/pbaxvepx>. In those circumstances, ICWA's strong preference for preserving the child's network of emotional, familial, and cultural connections is particularly critical.

ICWA appears to be serving that interest well. It is difficult to provide a complete picture of outcomes in ICWA cases because existing federal data sets capture only whether a state identified a child as being American Indian or Alaska Native. But available data are encouraging. According to federal data, American Indian/Alaska Native children have the highest rate of kinship care compared to populations not governed by ICWA. *Id.* They also have the lowest rate of congregate care, *i.e.*, placement in institutional settings, and have one of the lowest rates of children aging out of care without an adoptive family. *Id.*; *see also* Annie E. Casey Foundation, *Keeping Kids in Families 2* (2019), <https://tinyurl.com/4fsxxs2s> ("Keeping Kids in Families") (reporting 90% of American Indian children placed in family settings, the highest percentage of any group). A recent study indicated that specialty courts focused on ICWA compliance achieve better results for children, increasing reunification rates from 48% to 53% and cutting the rate that children "age out" of care in half. Capacity Building Center for Courts, *ICWA Baseline Measures Project Findings Report 17* (2020), <https://tinyurl.com/spa68nm>. Early tribal involvement cut time for children to return home in half. *Id.* at 19. In sum, the available data suggests that even though ICWA implementation varies significantly across the country, ICWA's active-

efforts requirement and placement preferences are working, and helping to keep the children covered by ICWA better connected to family and community.

2. What's more, when states have adopted systems more like ICWA—such as structured decision-making with strong placement preferences—they, too, have achieved better outcomes. For example, simply by requiring a higher-level of approval for a non-family (e.g., group home) placement, Connecticut “more than doubled the rate of kin placements and slashed its group placement rate from 26 percent to 10 percent” over a ten-year period. *See* Keeping Kids in Families at 4. New Mexico increased initial kinship placements from 3 percent to over 50 percent in two years in part by adopting an expansive definition of kin and a process to identify and prioritize existing, supportive relationships. *See* Cancel, *I Will Never Forget*, *supra*.

Many states have been encouraged by Congress to adopt such rules, as the states and the federal government have long shared responsibility for child welfare. *See* 42 U.S.C. § 672(a)(2)(A)(ii); *id.* § 671(a)(15) (in states accepting child welfare grants, courts must make findings that “reasonable efforts” have been made to “preserve and reunify families” for a child to be placed into foster care); *id.* § 675a(c)(2) (requiring certain findings if children are placed in non-family settings). And in contexts other than ICWA, where there is likewise a unique federal interest and authority, Congress routinely mandates particular standards for state courts to apply in child welfare or custody proceedings. *See, e.g.*, 42 U.S.C. § 14932 (Intercountry Adoption Act, requiring

“reasonable efforts” to identify prospective parents in the United States); 22 U.S.C. §§ 9001-9011 (International Child Abduction Remedies Act, requiring state courts to promptly order a return of children who were wrongfully removed or retained in violation of international convention); 50 U.S.C. §§ 3931–3932, 3938 (Servicemembers Civil Relief Act, setting rules for default judgments, stays, and the consideration of deployments in child custody proceedings involving military personnel).

As Congress and the states have made efforts toward implementing child welfare best practices by preserving families and children’s relationships with kin and extended community networks, ICWA has been the lodestar. It embodies the best practices that all child welfare systems strive to achieve, and it fosters the best interests of children.

CONCLUSION

The Fifth Circuit erred in invalidating parts of ICWA.

Respectfully submitted.

Hyland Hunt
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC

October 8, 2021