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

# In The Supreme Court of the United States

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

*Petitioners,*

v.

CHAD EVERET BRACKEEN, et al.,

*Respondents.*

[For Continuation Of Caption, See Inside Cover]

**On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF AMICI CURIAE OF GOLDWATER INSTITUTE, TEXAS PUBLIC POLICY FOUNDATION, AND CATO INSTITUTE IN SUPPORT OF STATE OF TEXAS AND BRACKEEN, ET AL.


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MORONGO BAND OF MISSION INDIANS,

*Petitioners,*

v.

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*Respondents.*

THE STATE OF TEXAS,

*Petitioner,*

v.

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

*Respondents.*

CHAD EVERET BRACKEEN, et al.,

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v.

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

*Respondents.*

## QUESTIONS PRESENTED

State child-custody proceedings generally are governed by state law, with placement decisions based on the child's best interests. The Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901–1963, however, dictates that, in any custody proceeding "under State law" involving an "Indian child," "preference shall be given" to placing the child with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families" rather than with non-Indian adoptive parents. *Id*. § 1915(a); *see also id*. § 1915(b). The en banc Fifth Circuit fractured over the constitutionality of the placement preferences, affirming in part the lower court's decision striking them down as unconstitutional.

The questions presented are:

1. Whether ICWA's placement preferences—which disfavor non-Indian adoptive families in child placement proceedings involving an "Indian child" and thereby disadvantage those children—discriminate on the basis of race in violation of the U.S. Constitution.

2. Whether ICWA's placement preferences exceed Congress's Article I authority by invading the arena of child placement—the "virtually exclusive province of the States," *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)—and otherwise commandeering state courts and state agencies to carry out a federal child-placement program.

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## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute (GI) is a nonpartisan public policy foundation devoted to advancing the principles of limited government and individual freedom. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are implicated. GI's Equal Protection for Indian Children project is devoted to defending Native American children and families against the unconstitutional provisions of the Indian Child Welfare Act (ICWA). Through that project, GI has litigated or participated as amicus in ICWA cases nationwide, including in Arizona (*Gila River Indian Cmty. v. Dep't of Child Safety*, 395 P.3d 286 (Ariz. 2017)); California (*Renteria v. Shingle Springs Band of Miwok Indians*, No. 2:16-cv-1685-MCE-AC, 2016 WL 4597612 (E.D. Cal. Sept. 2, 2016)); Ohio (*In re C.J. Jr.*, 108 N.E.3d 677 (Ohio App. 2018)); and Washington (*In re T.A.W.*, 383 P.3d 492 (Wash. 2016)); as well as before this Court (*S.S. v. Colo. River Indian Tribes*, 138 S. Ct. 380 (2017)). GI scholars have also published groundbreaking research on the well-intentioned but profoundly flawed workings of ICWA. *See, e.g.*, Flatten, *Death on a Reservation* (Goldwater Institute, 2015)[2];

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[1] Pursuant to Rules 37.3(a) and 37.6, counsel for amicus affirms that all parties consented to the filing of this brief, that no counsel for any party authored it in whole or in part, and that no person or entity, other than amici, their members, or counsel, made a monetary contribution for its preparation or submission.

[2] http://www.flipsnack.com/9EB886CF8D6/final-epic-pamplet.html.

Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1 (2017); Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 Tex. Rev. L. & Pol. 425, 426 (2019); Sandefur, *The Federalism Problems with the Indian Child Welfare Act*, 46 Am. Ind. L. Rev. — (forthcoming, 2022)[3]; Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 25 Tex. Rev. L. & Pol. — (forthcoming, 2022).[4]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs in this and other courts. Cato's experts have published extensively on ICWA, *see, e.g.*, Olson, *The Constitutional Flaws of the Indian Child Welfare Act*, Reason.com, Apr. 22, 2013[5]; Olson, *This Isn't the Way to Protect Families' Rights*, Cato Unbound, Aug. 10, 2016,[6] and Cato

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[3] https://ssrn.com/abstract=3853970.

[4] https://ssrn.com/abstract=3823987.

[5] https://www.cato.org/commentary/constitutional-flaws-indian-child-welfare-act.

[6] https://www.cato-unbound.org/2016/08/10/walter-olson/isnt-way-protect-families-rights.

has appeared as amicus in important ICWA cases. *See, e.g.*, *R.P. v. L.A. Cnty. Dep't of Children & Family Servs.*, 137 S. Ct. 713 (2017).

The Texas Public Policy Foundation (TPPF) is a non-profit, nonpartisan research organization founded in 1989 and dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach. In accordance with this mission, TPPF hosts policy discussions, authors research, presents legislative testimony, and drafts model ordinances to reduce the burden of government on Texans. Through its Center for Families and Children, TPPF pursues policies that will preserve families, improve foster care, and protect parents and children from unjustified, often counterproductive, government interference.

GI, Cato, and TPPF have participated as amici at every stage of this case. Given their experience and expertise with regard to ICWA, they believe this brief will aid the Court in its consideration of these petitions.

## INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITIONS

These petitions are of critical importance. As Texas's and the federal government's petitions explain, the case is essential to resolve pressing questions about Congress's authority to dictate to states how they may operate their child welfare laws. And as the

tribal and federal petitions argue, this case is crucial for ensuring the uniform application of federal Indian law. But more important than any abstract question of federalism is the impact of the questions presented on the lives and well-being of countless children of Native American ancestry who, because they are deemed "Indian" based solely on their genetic heritage, are deprived of legal protections against abuse and neglect.

ICWA strips states of the ability to protect at-risk "Indian children," limits these children's options for foster care, and effectively bars their adoption into permanent, loving homes. It also deprives Native American parents of their fundamental right to protect their own children from harm. At this moment, it is deterring otherwise willing adults from aiding at-risk "Indian children." In short, ICWA is a major obstacle to the safety and happiness of native children nationwide who are entitled to the same legal protections their non-Native peers receive. And it accomplishes this in part by erecting a race- or national-origin-based distinction of the sort that is "odious to a free people." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (citation omitted). Certiorari is imperative to ensure that these children receive justice.

To fully appreciate the exceptional importance of these petitions, this brief examines how some of the provisions of ICWA at issue here operate in practice,

and explores how those provisions inflict harm on the children ICWA is supposed to protect.

## REASONS FOR GRANTING THE PETITION

### I. ICWA bars states from taking steps necessary for protecting abused and neglected "Indian children."

This case is imperative for the safety and welfare of America's most at-risk demographic: children of Native American ancestry whom ICWA classifies as "Indian children" based solely on their biological descent.[7] The reason certiorari is urgent here is that ICWA stands as a barrier to the protection of these children and is inflicting incalculable harm on them as we speak.

[7] It is worth emphasizing that the provisions of ICWA addressed in these petitions *do not* apply in tribal courts. They apply only to proceedings in *state* courts, regarding children over whom state child welfare agencies and state courts would, but for ICWA, exercise ordinary jurisdiction.

### A. Native children are at greater risk of abuse and neglect than any other children in the United States, but ICWA prevents states from protecting them.

Native children are at greater risk of neglect,[8] violence,[9] gang activity,[10] drug abuse, alcoholism,[11] and suicide,[12] than any other group of children in America. They suffer higher rates of abuse than children of any other race (14.8 per 1,000[13]) and are overrepresented in foster care—although they make up only one percent of the national population, they account for two

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[8] *See, e.g.*, Culp-Ressler, *The Shocking Rates of Violence and Abuse Facing Native American Kids*, ThinkProgress, Nov. 18, 2014, https://thinkprogress.org/the-shocking-rates-of-violence-and-abuse-facing-native-american-kids-883449df0f63/.

[9] *See, e.g.*, *Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence: Ending Violence so Children Can Thrive* (U.S. Dep't of Justice, 2014), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/11/17/National-Security/Graphics/Report_re5.pdf.

[10] *See, e.g.*, Major, et al., *Youth Gangs in Indian Country*, OJJDP Juvenile Justice Bulletin, Mar. 2004, http://ncys.ksu.edu.sa/sites/ncys.ksu.edu.sa/files/crime%2020.pdf.

[11] *See, e.g.*, Friese, et al., *Drinking among Native American and White Youths: The Role of Perceived Neighborhood and School Environment*, 14 J. Ethnicity in Substance Abuse 287 (2015).

[12] *See, e.g.*, *Suicide Among American Indians/Alaska Natives*, Suicide Prevention Resource Center, https://sprc.org/scope/racial-ethnic-disparities/american-indian-alaska-native-populations.

[13] U.S. Dep't of Health & Hum. Servs., *Child Maltreatment 2019* at 21, https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf.

percent of children in foster care.[14] They also tend to spend far longer in foster care than children of other races,[15] meaning that they are more likely to "age out" instead of finding permanent, loving adoptive homes.

Tribal governments typically blame these disparities on racism by child welfare agencies, *see, e.g.*, National Indian Child Welfare Association, *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet* (Sept. 2015)[16] (blaming "widespread non-compliance" by state governments), but the more plausible explanation is that Native children disproportionately suffer from poverty, isolation, lack of access to services, and other risk factors.[17] As one expert observes, ICWA "does little to alter the conditions that Congress held responsible for the unwarranted breakup of Indian families. . . . The Act's emphasis is on removal and placement, not prevention." Barsh, *The Indian Child*

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[14] U.S. Dep't of Health & Human Servs., *The AFCARS Report* (June 23, 2020) at 2, https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf.

[15] Barth, et al., *Adoption of American Indian Children: Implications for Implementing the Indian Child Welfare and Adoption and Safe Families Acts*, 24 Children & Youth Servs. R. 139 (2002).

[16] https://www.nicwa.org/wp-content/uploads/2017/04/Setting-the-Record-Straight-ICWA-Fact-Sheet.pdf.

[17] Kastelic, Testimony before National Task Force on American Indian/Alaska Native Children Exposed to Violence in the Home 6 (National Indian Child Welfare Association, 2013), https://www.nicwa.org/wp-content/uploads/2016/11/NICWATestimonyTaskForceonAIANChildrenExposedtoViolence_Dec2013.pdf.

*Welfare Act of 1978: A Critical Analysis*, 31 Hastings L.J. 1287, 1334 (1980).

Professor Randall Kennedy is more frank: the challenges faced by Native children amount to "a large, complex social disaster that reflected and generated poverty, anomie, drug dependency, child neglect, and wanton violence," he writes, but instead of confronting these problems, Congress adopted ICWA, on the assumption that the problems "could be solved merely by the passage of a new law that would curtail the power of state officials." Kennedy, *Interracial Intimacies* 497 (2003).

Curtailing their power, however—and imposing different, *less-protective* rules for cases involving "Indian children"—has actually resulted in greater harm to these children, depriving them of security against maltreatment or opportunities for safety and happiness. Today, ICWA stands as a major obstacle to the protection of these children's futures.

### B. ICWA's restrictions and mandates prevent states from protecting these children from harm.

Contrary to the claims of Petitioners Cherokee Nation, et al., ICWA is *not* a benefit to "Indian children," but a handicap to their safety and well-being. It bars state officials from protecting these children from abuse and neglect, restricts the availability of permanent, loving adoptive homes for at-risk "Indian children," and in case after case has led to the injury and

even the deaths of children who happen to fit ICWA's race-based or national origin-based profile.[18]

### 1. The beyond a reasonable doubt standard

Consider the evidentiary standard for Termination of Parental Rights (TPR) cases. In *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court held that the due process clause requires TPR cases to be decided under the "clear and convincing evidence" standard, because a mere "preponderance of evidence" standard was insufficient to protect the rights of parents—and a "beyond a reasonable doubt" standard was insufficient to protect the rights of children. Indeed, the reasonable doubt standard "would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption." *Id.* at 769.

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[18] The Texas and Brackeen petitioners correctly observe that ICWA's definition of "Indian child" (25 U.S.C. § 1903(3)) is racial, because it applies to children who, solely as a function of their ancestry, are "eligible" for tribal membership and who have a "biological parent" who is a tribal member. Brackeen Pet. at 21; Texas Pet. at 4. But even if not racial, ICWA's definition of "Indian child" creates a ***national origin*-based distinction**. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) ("national origin" classification is one based on a person's national "ancestry"); *Oyama v. California*, 332 U.S. 633, 645 (1948) (statute created national origin classification because it was triggered by the citizenship or ancestry of a child's parents). Obviously, national origin classifications are just as suspect as racial classifications, and are subject to the same strict scrutiny. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998).

ICWA, however, imposes precisely that "reasonable doubt" standard. 25 U.S.C. § 1912(f). Indeed, it goes further, and also requires testimony by expert witnesses, *id.*, who, according to federal regulations, must be experts on tribal social and cultural standards. 25 C.F.R. § 23.122(a).

This is a greater burden than is required to send a criminal defendant to death row.

Because TPR is often necessary to protect at-risk children from abuse or to find them adoptive homes, this provision of ICWA erects an unreasonable barrier to state efforts to free permanently neglected Indian children for adoption.

This Court and other courts have recognized that ICWA deters otherwise willing adults from providing adoptive homes for in-need "Indian children." *See Adoptive Couple v. Baby Girl*, 570 U.S. 637, 653–54 (2013) (ICWA's mandates "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home"); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (Cal. App. 1996) (ICWA reduces "the number and variety of adoptive homes that are potentially available to an Indian child," and increases the risk that "an Indian child who has been placed in an adoptive or potential adoptive home" will be "taken from that home and placed with strangers.").

But the reasonable doubt standard also harms Indian children in non-adoption situations. TPR is often sought by Native parents themselves, who seek to protect their children from abusive or neglectful

ex-spouses, and who are barred from doing so by this evidentiary standard. In *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. App. 2017), *cert. denied sub nom. S.S. v. Colorado River Indian Tribes*, 138 S. Ct. 380 (2017), a tribal member father sought to terminate the rights of his drug-addicted and neglectful ex-wife. Had the children been Canadian or Mongolian, Arizona state law—which uses the "clear and convincing" standard—would have applied. *See, e.g.*, *Kent K. v. Bobby M.*, 110 P.3d 1013, 1017–18 ¶ 19 (Ariz. 2005). But because the children were "Indian children," ICWA's more burdensome requirements applied—and, thanks to the expense of obtaining expert witness testimony and the extreme difficulty of satisfying the reasonable doubt standard, the father was forbidden to take steps necessary to protect his children. *See further* Section II below.

### 2. The active efforts requirement

ICWA also forbids either state or private parties from rescuing mistreated "Indian children" from abusive households unless that state or private party first makes "active efforts" to "prevent the breakup of the Indian family." 25 U.S.C. § 1912(d).

In cases involving non-"Indian children," the laws of all states, as well as the federal Adoption and Safe Families Act, Pub. Law 105-89, § 111 Stat. 2115 (1997), require only "reasonable efforts" to prevent family breakup, and this requirement is excused in cases of "aggravated circumstances" such as sexual abuse or

drug addiction by the parent, or the commission of murder or other specified felonies, *see* 42 U.S.C. § 671(a)(15)(D).

ICWA's "active efforts" requirement, however, exceeds the "reasonable efforts" requirement,[19] and is *not* excused by the presence of aggravated circumstances. *See, e.g.*, *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 618 ¶ 20 (S.D. 2005); 81 Fed. Reg. 38814 (federal regulation stating that active efforts are not excused in such circumstances).

This means that in cases where state agencies can *prove* that the parent of an "Indian child" is abusive, they nonetheless must return that child to the abusive home, to be abused again. No such requirement would apply if the child were white, Asian, black, Hispanic, etc.

Unsurprisingly, the consequences are often tragic.[20] In *In re Shayla H.*, 846 N.W.2d 668 (Neb. App. 2014),

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[19] ICWA does not define "active efforts," but state courts say it requires something above and beyond reasonable efforts—for example, it requires "the bizarre undertaking of 'stimulat[ing]' a biological father's 'desire to be a parent.' " *Adoptive Couple*, 570 U.S. at 653.

[20] It is extraordinarily difficult to determine the exact scale of harms inflicted by ICWA because child protection agencies and tribal governments typically refuse to disclose information about such cases, even where that information would not compromise anyone's confidentiality. Foster parents are usually afraid to speak out regarding abuses they witness, out of fear that they will lose their foster care licenses, and state child protection officers fear losing their jobs. Tribal governments often punish whistleblowers, *cf.* Riley, *The New Trail of Tears* 154–55 (2016), and state juvenile court judges liberally employ gag rules to penalize

*aff'd* 855 N.W.2d 774 (Neb. 2014), state child protection officers took three minor girls from the custody of their father, due to sexual abuse and neglect. The trial court concluded that this was in their best interests. But the Court of Appeals reversed, because although the state had satisfied the *reasonable* efforts requirement, the children were "Indian children," and the state had not satisfied the *active* efforts burden. The state therefore sent the girls back to the abusive household—where they were subjected to more molestation. Later, the trial court again removed them from the family, noting that they had "experienced lifetimes of trauma," due to the "repeated lewd and lascivious behavior" of the abusive parents—trauma they would have been spared, had they been of another race. *In re Interest of Shayla H., et al*., Doc. JV13 (Lancaster County Juvenile Court, May 1, 2015) at 3, 18.

ICWA's active efforts requirement has often proven fatal to children. The Oklahoma Department of Human Services was well aware that five-year-old Declan Stewart was being physically abused by his mother's boyfriend. Department officials described his

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anyone who shares such information with the public, or even who take legal positions contrary to tribal governments.

For example, in *In re C.J. Jr.*, 2019-Ohio-1863, the guardian ad litem objected to the child being sent from Ohio to Arizona to live with strangers he had never met, as the tribe demanded under ICWA. Because the guardian ad litem argued that ICWA was unconstitutional, the juvenile court judge *removed him from the case*—a brazen violation of the First Amendment. *See In re C.J. Jr.*, 15JU-232 (Ct. Common Pl. Franklin Co., June 25, 2018) at 2 (removing G.A.L. because he "does not support ICWA.").

condition as "shocking," and in 2006, removed him from his mother's custody after he arrived at the emergency room with signs of having been beaten. Had Declan been Chinese or Jewish, the state could have placed him in safe custody. But because he was biologically eligible for membership in the Cherokee tribe, ICWA applied—and its "active efforts" requirement required the Department to return Declan to his mother's custody. A year later, her boyfriend raped him and beat him to death. *See* Clay & Ellis, *U.S. Law Pushed Boy Home Before He Died*, The Oklahoman, Oct. 4, 2007.[21]

Officials in Great Falls, Montana, knew five-year-old Antonio Renova was being brutalized by his biological parents. They placed him in foster care with a couple who cared for him for more than four years, and hoped to adopt him. But because he was biologically eligible for membership in the Crow tribe, he was deemed an "Indian child," and the tribal court judge said "I'll be damned if I'll . . . let a white couple adopt a Crow child." Murray, *Foster Family Who Raised Slain 5-year-old Explains How System Repeatedly Failed Him*, Great Falls Tribune, Nov. 22, 2019.[22] The state therefore returned him to his abusive parents in February 2019. Had Antonio been Italian or Peruvian, the state could have spared his life. Instead, because he

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[21] https://www.oklahoman.com/article/3140271/us-law-pushed-boy-home-before-he-diedbrspan-classhl2tribal-statute-advocates-reunifying-split-familiesspan?

[22] https://www.greatfallstribune.com/story/news/2019/11/22/foster-family-who-raised-slain-child-explains-how-system-failed-him/4275866002/.

was subject to ICWA's mandates, he was beaten to death seven months later by adults the state knew were hurting him.

Arizona Department of Child Services officers had been investigating one-year-old Josiah Gishie's mother for half a decade due to her mistreatment of her other children, but its efforts to help her put her life on track were unsuccessful. They placed Josiah in foster care, and if he had been Swiss or Nigerian, they might have been able to save him. But—as the Department itself said in a subsequent press release—his mother was "affiliated with an Arizona Tribe, [meaning] her cases fell under [ICWA]. ICWA cases contain jurisdictional and legal issues that influence how the Department investigates and provides services. . . . There is a higher burden of proof for the government to intervene in an ICWA case." Arizona Department of Child Safety, *Statement on the Death of One-Year-Old Josiah Gishie*, Oct. 12, 2018.[23] Consequently, the Department returned Josiah to her custody. A month later, she left him alone in the apartment and went to work. He was dead when she returned. Koehle, *DCS Claims 'Jurisdictional, Legal Issues' in Phoenix Toddler's Death Case*, ABC15.com, Oct. 15, 2018.[24]

ICWA stands as a barrier to protecting at-risk children who are deemed "Indian" based solely on their

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[23] https://dcs.az.gov/sites/default/files/StatementFatality/Fatality%20Statement%20Josiah%20Gishie.pdf.

[24] https://www.abc15.com/news/region-phoenix-metro/central-phoenix/dcs-there-were-jurisdictional-legal-issues-in-boys-case.

biological ancestry. This is a matter of urgent concern for countless children and the parents who seek to protect their best interests.

### 3. The best interests of the Indian child

The Tribal Petitioners claim that ICWA represents "the 'gold standard' for child-welfare practices." Tribes' Pet. at 2. This is a false statement, and it is important to explain why.

The slogan "gold standard" first appeared in an amicus brief filed in *Adoptive Couple v. Baby Girl* by the Casey Family Programs, et al. (2013 WL 1279468). That brief made the unremarkable assertion that the "gold standard" for child welfare practice is "that active efforts be made to support and develop the bonds between a child and her *fit* birth parents." *Id.* at *4 (emphasis added). But nobody disputes that the bonds between children and *fit* parents should be supported. Rather, the question is, what to do about *unfit* parents, or about situations such as this case, in which Native parents agree to the adoption of their children by fit *adoptive* parents. Mere recitation of this slogan does not make it so—and in fact ICWA represents the opposite of the "gold standard" in important respects.

The true gold standard for child welfare law is the universally recognized "best interests" standard. The child's best interest has been the law's primary concern in child protection cases since long before Justice Cardozo first used the phrase "best interests of the child" in *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. App.

1925). *See* 2 Story, *Commentaries on Equity Jurisprudence as Administered in England and America* 675–77 (13th ed. 1886) (tracing the origins of the best interests standard). States generally characterize the best interest of the child as the "touchstone"[25] or the "linchpin"[26] of child welfare law, or the "overriding"[27] or "foremost" consideration in child welfare cases.[28]

The best interests standard is an all-things-considered analysis of each individual child's *specific* needs in his or her *particular* circumstances. It does not rely on legal presumptions. Indeed, *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972), rejected reliance on presumptions in best interests analysis when it said that doing so "risks running roughshod over the important interests of both parent and child" if that presumption "forecloses the determinative issues of competence and care." Reliance on presumptions therefore violates the due process rights of parents and children. *Accord, In re Kelsey S.*, 1 Cal.4th 816, 848 (1992).

Yet ICWA overrides the best interests test and substitutes a different test for "Indian children." California courts have said it establishes a separate but equal test: while in cases involving children of other racial or national origins, the child's best interests are

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[25] *In re Marriage of Wellman*, 164 Cal. Rptr. 148, 151 (Cal. App. 1980).

[26] *In re Robert L.*, 24 Cal. Rptr. 2d 654, 660 (Cal. App. 1993).

[27] *In re L.M.*, 572 S.W.3d 823, 837 (Tex. App. 2019).

[28] *King v. Lyons*, 457 S.W.3d 122, 131 (Tex. App. 2014).

"the state's top priority," *In re Marriage of Williams*, 58 Cal. Rptr. 3d 877, 890 (Cal. App. 2007) (citation omitted), for cases involving Indian children, the child's best interests are only "one of the constellation of factors" relevant to the court's determination. *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 634 (Cal. App. 2016), *cert. denied*, 137 S. Ct. 713 (2017). Texas courts have gone further, holding that there is an "Anglo" best interests standard, and a separate but equal "Indian" best interests standard. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 168 (Tex. App. 1995).

Other authorities have asserted that ICWA creates not a separate-but-equal rule regarding best interests, but that it establishes *per se* presumptions regarding "Indian children." For instance, Colorado courts have declared that ICWA "reflects the presumption that the protection of an Indian child's relationship with the tribe serves the child's best interests," *People in Interest of Z.C.*, 487 P.3d 1044, 1047 ¶ 44 (Colo. App. 2019), and Montana courts have held that "while the best interests of the child is an appropriate and significant factor in custody cases under state law, it is *improper*" in ICWA cases because "ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with [ICWA's] preferences," even if the child's *individual* best interests lie elsewhere. *In re C.H.*, 997 P.2d 776, 782 ¶ 22 (Mont. 2000) (emphasis added).[29]

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[29] The Bureau of Indian Affairs (BIA) has agreed, asserting that "an independent consideration of the best interest of the

But application of such a presumption obliterates the inherently individualized nature of the best interests analysis. Each "Indian child," no less than his or her peers of other ethnicities, deserves to have his or her *specific* best interests adjudicated, free of any presumption that "forecloses the determinative issues." *Stanley*, 405 U.S. at 657.[30]

Most importantly, states have a legal and moral obligation to support and protect the best interests of all minors within their jurisdiction, without respect to their biological ancestry. By overriding their authority to do so and imposing a federally-mandated presumption that classifies children based on their racial or national origin—and purports to declare *per se* what is best for all "Indian children," regardless of their particular circumstances—ICWA deprives states of the ability to exercise their *parens patriae* responsibilities. That is worse than merely depriving them of "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S.

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Indian child" is improper when applying ICWA "because [ICWA's statutory adoption and foster care] preferences reflect the best interests of an Indian child in light of the purposes of the Act." 80 Fed. Reg. 10146-02, 10158 § F.4(c)(3) (Feb. 25, 2015).

[30] The BIA recently embraced the more modest position that ICWA *does* allow consideration of a child's particular best interests in "limited" and "exception[al]" circumstances. 81 Fed. Reg. 38847. While this innovation is welcome, state courts have concluded otherwise, and this Court should still grant certiorari to make clear that that the statute does indeed allow consideration of each child's specific best interests.

592, 601 (1982). This is an intrusion onto a quintessential state responsibility in a way that prevents states from protecting their most vulnerable citizens.[31]

## II. ICWA is depriving Native parents of the ability to protect their children.

As mentioned in Section I.B.1 above, ICWA infringes on the right of Native parents to act in the best interests of their children—a right seven justices of this Court characterized as "fundamental" in *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also id.* at 80 (Thomas, J., concurring); *id*. at 87 (Stevens, J., dissenting); *id.* at 78–79 (Souter, J., concurring).

For one thing, ICWA's reasonable doubt + expert witness requirement effectively bars Native parents from terminating the rights of abusive or neglectful exspouses. Thus, in *In re J.P.C.*, CV-17-0298-PR (Ariz. Feb. 13, 2018), a Tohono O'odham mother who lived in Tucson, but not on the Tohono O'odham reservation, sought to terminate the rights of her abusive, repeat-criminal ex-husband, so her new husband could legally adopt her son. Had the child been German or Pakistani, Arizona state law would again have applied—which employs the clear and convincing standard. A.R.S. § 8–537. And if the child had lived on

[31] It bears emphasizing—because it is often forgotten in ICWA cases—that "Indian children" are not foreigners. They are citizens of the United States and of the state where they reside. 8 U.S.C. § 1401(b); U.S. Const. amend. XIV. Thus there is no analogy between ICWA and any international treaty respecting the adoption of foreign nationals.

reservation, the tribe's law would have applied—which in this respect was identical to Arizona law, using the same clear and convincing standard. Tohono O'odham Code tit. 3, ch. 1, art. 5, § 1517(F).[32] But because the family lived *off*-reservation, and the child was an "Indian child" under ICWA, the federal "beyond a reasonable doubt" standard applied instead—meaning the mother was barred from protecting her child's best interests. *See further* Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 Tex. Rev. L. & Pol. 425, 447–48 (2019).

Amazingly, ICWA even blocks Native parents from protecting their children in cases where the abusive spouse is *not Native*. In *In re T.A.W.*, 383 P.3d 492 (Wash. 2016), a tribal member mother sought to terminate the rights of her violent ex-husband *who was non-Native*—so that her new husband, who *was* Native, could adopt her son legally—but the Washington Supreme Court refused, on the grounds that ICWA obliged her to first "prove that active efforts were undertaken to remedy [the non-Native father's] parental deficiencies." *Id*. at 494 ¶ 1. In short, ICWA not only failed to prevent the breakup of the Indian family but barred the *formation* of this Indian family.

Similarly, when Native parents consent to the adoption of their child—as in the Brackeens' case—that decision is one of the fundamental rights of parents as described in *Troxel*. The *Troxel* Court, in fact,

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[32] https://www.tolc-nsn.org/docs/Title3Ch1.pdf.

found the Washington visitation statute unconstitutional because states may not elevate the interests of third parties over the parents' "fundamental right to make decisions concerning the care, custody, and control" of their children. 530 U.S. at 72. Yet as this Court acknowledged in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)—ICWA gives tribal governments " 'an interest in the child which is *distinct from but on a parity with* the interest of the parents.' " *Id.* at 52–53 (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969–70 (Utah 1986) (emphasis added)).

*Troxel* made clear that the government may not, consistent with the fundamental rights analysis, give any third party an interest in a child on a parity with the interest of the parents. But because ICWA does this, tribal governments are allowed to effectively veto the decisions of Native parents to "make decisions concerning the care, custody, and control" of their children. 530 U.S. at 72. That, in fact, is what happened here: there is no dispute that A.L.M.'s parents, for example, voluntarily terminated parental rights and consented to adoption by the Brackeens—yet ICWA empowered tribal governments to veto the choices of A.L.M.'s parents in precisely the manner found unconstitutional in *Troxel*.

## III. ICWA deprives at-risk "Indian children" of the opportunity to find safe, permanent, loving homes.

ICWA's foster care and adoption placement mandates (25 U.S.C. § 1915) and the power of tribes to

invalidate state court decisions in certain circumstances (*id.* § 1914), create a powerful disincentive against adults opening their homes and hearts to "Indian children." Knowing they will almost certainly be barred from adopting a child and may not be able to take steps necessary to protect their safety, otherwise willing adults are likely to decline the opportunity to care for at-risk "Indian children." *See* Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, Phoenix New Times, Sep. 7, 2016.[33]

Section 1915(b) requires that "Indian children" be placed with "Indian" foster families. But there is a drastic shortage of Indian foster families. *See* Krol, *Inside the Native American Foster Care Crisis Tearing Families Apart*, Vice.com, Feb. 7. 2018.[34] In California's San Francisco Bay Area, for example, home to 7.7 million people, there are approximately 14 licensed "Indian" foster homes. Begay & Wilczynski, *Barriers to Recruiting Native American Foster Homes in Urban Areas* 2 (unpublished Masters thesis, CSU San Bernardino, 2018).[35] In Los Angeles County, home to 10 million people, there is only *one*. Heimpel, *L.A.'s One*

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[33] https://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832.

[34] https://www.vice.com/en/article/a34g8j/inside-the-native-american-foster-care-crisis-tearing-families-apart.

[35] https://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1776&context=etd.

*and Only Native American Foster Mom*, The Imprint, June 14, 2016.[36]

This means "Indian children" are frequently placed with non-"Indian" foster families, and because this is not ICWA compliant, they can be, and frequently are, removed from those families and placed with another, and then another, until they "age out" of the system. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 543, 569 (1996). Although Native children are only one percent of the population, they account for three percent of children who age out of foster care. Pharris, et al., *American Indian and Alaska Native Youth Aging out of Foster Care: A Life Course Analysis*, Presentation to Society for Social Work and Research, Jan. 16, 2020.[37] But aging out of foster care without forming a permanent adoptive family bond is highly correlated with risks that diminish a child's quality of life. Margolin, *Every Adolescent Deserves A Parent*, 40 Cap. U. L. Rev. 417, 418–22 (2012).

Worse, the fact that "Indian children" can be abruptly and arbitrarily removed from their care discourages adults who would be willing and able to do so from aiding these children. A 2016 story in the *Phoenix New Times* described this circumstance well. Stuart, *supra*.

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[36] https://imprintnews.org/news-2/l-a-s-one-native-american-foster-mom/18823.

[37] https://sswr.confex.com/sswr/2020/webprogram/Paper40463.html.

It profiled a foster mother, "Jennifer," who took an 18-month-old "Indian child" into her home when his parents were unable to care for him. Had he been Persian or Maori, she would have been able to provide him a long-term home—but because his case was governed by ICWA, placement with Jennifer was deemed non-compliant. Thus, after a year and a half, when she suggested adoption, the tribe and the state immediately removed him from her care. For at least four more years, he languished in foster homes, with Jennifer forbidden to contact him. "It's as if he died," she told a reporter, "but worse." Asked if she would again consider providing foster care for a Native child, her answer was clear: " 'No,' she said. 'Nope. Nope. Nope.' "

The damage done to the children is obviously greater. "The importance of early infant attachment cannot be overstated. It is at the heart of healthy child development and lays the foundation for relating intimately with others, including spouses and children." Colin, *Infant Attachment: What We Know Now* at ii (U.S. Dep't of Health & Human Servs., 1991).[38] ICWA systematically deprives "Indian children" of this stability.

Consider *In re Alexandria P.*, *supra*. It involved a six-year-old girl called Lexi, who lived with a California foster family for four of those years. Although she had no political, social, cultural, linguistic, religious, or other

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[38] https://aspe.hhs.gov/sites/default/files/private/pdf/73816/inatrpt.pdf.

relationship with the Choctaw tribe, her great-great-great-great-great-great grandfather had been a full-blood member of the tribe, and because the tribe has no minimum blood quantum requirement, that rendered her eligible for membership—and consequently made her an "Indian child." Therefore, tribal officials demanded that she be removed from the foster parents she called "Mommy" and "Daddy," and sent to live in Oklahoma with her step-second cousin. State courts obliged. The trauma inflicted on Lexi was certainly incalculable. Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1, 1–2, 52–56 (2017).

No wonder, then, that ICWA "put[s] certain vulnerable children at a great disadvantage." *Adoptive Couple*, 570 U.S. at 655. Adoption of Native children has decreased as a consequence of ICWA, *see* MacEachron, et al., *The Effectiveness of the Indian Child Welfare Act of 1978*, 70 Soc. Serv. R. 451 (1996)—but *not* because of a decrease in need. It's because of the legal barriers ICWA erects.

There are adults willing and ready to care for these children—but federal law forbids them from doing so because their skin is the wrong color.

## CONCLUSION

These are probably the most important petitions this Court will receive this term. On them depends the

safety and welfare of countless American children of Native ancestry who—due to ICWA—are stripped of the legal protections their non-Indian peers receive. The petitions should be *granted*.

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