DRAFT TRIBAL AMICUS BRIEF

Note: This draft has been prepared in coordination with the Tribal Supreme Court Project *Brackeen* Workgroup. Counsel may continue to refine these arguments depending on the content of other party and amicus briefs.

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, Cross-Respondents,

v.

CHAD EVERET BRACKEEN, ET AL.,
Respondents, Cross-Petitioners.

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

BRIEF OF [X] INDIAN TRIBES AND [X] TRIBAL AND INDIAN ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF DEB HAALAND, ET. AL.

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Amici are federally recognized Indian Tribes, regional and national tribal organizations, and Indian non-profit organizations. The vital protections provided by the Indian Child Welfare Act ("ICWA") to Indian children, Indian parents and families, and Indian Tribes are of significant importance to *Amici* and their members. Individually or collectively, all *Amici* either operate tribal child welfare programs and provide direct child welfare services to their members, or advocate on child welfare issues affecting American Indian and Alaska Native people, or both. *Amici* are critically interested in ensuring that ICWA continues to protect the best interests of Indian children, families, and Tribes.

Amici federally recognized Tribes are "Indian tribes" within the meaning that term is given in ICWA. 25 U.S.C. § 1903(8). Each is a separate and distinct tribal government, possessing the sovereign authority to adjudicate the best interests of its member children. Each operates, either by itself or through a tribal consortium, tribal child welfare programs that regularly work with state child welfare agencies and participate in state court child custody proceedings. Each has a direct and immediate interest in achieving the best outcomes for its member children, and knows from experience that the procedural and substantive rights secured by Congress in ICWA help achieve those best outcomes. And each knows that a challenge to ICWA

threatens both the best interests of Indian children and the very existence of *Amici*. A complete list of *Amici* federally recognized Tribes is included in Appendix A.

Amici Association on American Indian Affairs (AAIA), National Congress of American Indians (NCAI), National Indian Child Welfare Association (NICWA), and other organizations are national and regional organizations dedicated to the rights of American Indian and Alaska Native Tribes and individuals. *Amici* organizations share a commitment to the well-being of Indian children and an understanding that ICWA is critical to achieving the best interests of children and supporting Indian families and Indian Tribes. A complete list of *amici* organizations is included in Appendix A.

SUMMARY OF THE ARGUMENT

Congress enacted ICWA in response to a nationwide crisis: the wholesale removal of Indian children from their families by state and private child welfare agencies—often without due process—at rates far higher than those of non-Indian families. In response, Congress established minimum federal standards for state child welfare proceedings involving Indian children. Congress carefully crafted ICWA to protect the legal rights of Indian children and parents, and to incorporate important jurisdictional and political interests of Tribes in decisions concerning the welfare and placement of their children. *Amici* agree with Petitioners Secretary Deb Haaland *et al.* ("Federal Petitioners") and the Cherokee Nation *et al*. ("Tribal

Petitioners") that ICWA is constitutional in its entirety and that the Fifth Circuit Court of Appeals erred to the extent it held otherwise. In contrast, the interpretations advanced by the Brackeens ("Individual Plaintiffs") and the State of Texas find no support in centuries of established federal Indian law, have never been adopted by any other court, make no practical sense, and are directly contrary to ICWA's policy and purpose. *Amici* _____ and _____ address Texas and Individual Plaintiffs' ahistorical treatment of both Congress's Indian affairs power and the anticommandeering doctrine. Undersigned *Amici* write separately to detail the factual and legal history leading to ICWA's enactment, and to show how Texas and the Individual Plaintiffs' extreme equal protection arguments pose a direct attack on the political foundations of tribal sovereignty and membership, directly threaten federal Indian statutes well beyond ICWA, and endanger federal protections for nearly half of all federally recognized Tribes and for millions of Native Americans currently living off-reservation.

Since the founding of the United States, the federal government has recognized and protected the sovereign status of Tribes. This trust responsibility has also long extended to the protection of Indian children, a responsibility initially recognized in treaties that provide federal services, education, and trust funds for their benefit. During the 19th century, shifts in federal Indian policy led to the forcible removal of Indian children from their families and communities to military-

style boarding schools in order to assimilate Indian children into non-Native culture. Later, States and private parties reinforced these assimilationalist policies when they assumed responsibility for removing Indian children from their Tribes and placing them in foster care and for adoption with non-Indian families as a means to reduce reservation populations. As painstakingly described in Congressional testimony preceding the enactment of ICWA, state child welfare systems regularly removed Indian children from their parents without due process protections for their legal rights, and repeatedly failed to place them with Indian families or to consult with tribal governments concerning their welfare. These practices led to the removal of Indian children from their families and Tribes at shocking rates—in some cases *more than 20 times* the rate of non-Indian removal—for placement almost exclusively in non-Indian homes. State agencies consistently viewed removal and placement with non-Indian families as the best possible outcome, regardless of the actual negative consequences experienced by many Indian children.

State courts allowed these abuses to occur in a virtually unfettered fashion. In most cases, state courts allowed removals of Indian children to occur without regard to the due process rights of parents or even basic evidentiary standards. Often Indian parents were unaware of their rights, and were denied access to counsel or expert witness testimony during child welfare proceedings. Congressional testimony underscored the detrimental impact of these removals on the children themselves,

including social and psychological consequences, and was replete with examples of Indian adoptees who later suffered from identity crises in adolescence and adulthood. The record also showed that the continued wholesale removal of Indian children by state and private agencies constituted a serious threat to tribal existence as ongoing, self-governing communities.

In passing ICWA, Congress established minimum federal standards for child welfare proceedings involvoing Indian children and families—standards that have proven crucial for the protection of Indian children and the preservation of their relationships with their families and Tribes, and have led to significant and demonstrable improvements in child welfare outcomes. As a result, states have experienced reductions in the disproportionately high levels of Indian child removals that prompted congressional action 40 years ago. ICWA's legal protections for children and parents continue to provide a vital framework for child welfare proceedings.

Texas and the Individual Plaintiffs would have this Court dismantle ICWA's protections, working profound harm on Indian children and Tribes. Particularly concerning for undersigned Tribal *Amici* are Plaintiffs' equal protection arguments. *First*, Plaintiffs claim that ICWA's classifications are race-based because they include protections for children who are eligible for tribal membership, and placement preferences that prioritize placement with the child's extended family,

Tribe, and tribally-approved foster and adoptive homes. These arguments mischaracterize core aspects of tribal membership and its centrality in furthering tribal sovereignty, and disregard the importance of kinship and extended family to children and Tribes. *Second*, Plaintiffs seek to impose new, artificial limits on Congress's well-established power to legislate for Tribes and Indians by arguing that federal Indian legislation may be upheld in the face of an equal protection challenge *only* if it supports tribal self-governance for tribal members living "on or near a reservation." This fabricated, atextual standard finds no real support in this Court's well established precedents. More fundamentally, this interpretation would gut not only ICWA and its protections for children, families, and Tribes, but also legislation applicable to the millions of Native people not living "on or near" a reservation, as well as to Tribes that *lack reservations altogether*—nearly half of all federally recognized Indian Tribes. This Court should uphold ICWA as an appropriate exercise of Congress's Indian affairs power, and reject the argument that it constitutes invidious racial discrimination.

ARGUMENT

I. ICWA Was Enacted in Response to the Widespread Removal of Indian Children from their Families and Communities by State and Private Child Welfare Agencies.

A. Congress Enacted ICWA Against the Historical Backdrop of Disproportionate Removal of Native Children Compared to Non-Native Children.

Long before Congress enacted ICWA, the United States acknowledged and exercised its trust responsibility for the welfare of Indian children.[1] This history predates the United States itself: on July 12, 1775, the Continental Congress appropriated funds for Indian education at the nascent Dartmouth College. MARILYN IRVIN HOLT, INDIAN ORPHANAGES 87 (2001). This Nation's first Indian treaty, negotiated during the Revolutionary War, acknowledged a responsibility for the "security of the old men, women and *children* of the [Delaware] nation, whilst their warriors are engaged against the common enemy." Treaty with the Delawares, art. 3, Sept. 17, 1778, 7 Stat. 13 (emphasis added). More than 110 subsequent Indian treaties provide for Indian education. Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 950 (1999). Others expressly provide for Indian child welfare by establishing trust funds for Indian orphans, *e.g.*

[1] The trust responsibility is articulated in several Founding-era treaties. *See, e.g.*, Treaty with the Six Nations, preamble, Oct. 22, 1784, 7 Stat. 15 ("The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection . . . ."); Treaty with the Chickasaw, art 2, Jan. 10, 1786, 7 Stat. 24 ("The Commissioners . . . of the Chickasaws, do hereby acknowledge the tribes and the towns of the Chickasaw nation, to be under the protection of the United States of America . . . ."); Treaty with the Wyandot, art 5, Aug. 3, 1795, 7 Stat. 49 ([T]he United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons . . . ."). The trust responsibility was first acknowledged by this Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-56, 560-61 (1832).

Treaty with the Shawnee, art. 8, May 10, 1854, 10 Stat. 1053, or by establishing institutions for the care of Indian orphans. *E.g.*, Treaty with the Cherokee, art. 25, July 19, 1866, 14 Stat. 799. These early exercises of federal authority exemplify the Federal Government's ongoing obligation to provide for the support of Indian children.

Beginning in the 19th century, federal policy shifted decisively towards compulsory assimilation of Indians, particularly Indian children, into mainstream society. Using funds provided in treaties intended to ensure the protection of Indian children, the Federal Government forcibly removed them from their families to military-style boarding schools. "This philosophy was most simply expressed by Richard Henry Pratt, the founder of Carlisle School: 'Kill the Indian and Save the Man.'" COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2019) ("COHEN'S HANDBOOK") (internal citations omitted); *see also* H.R. REP. NO. 95-1386, at 9 (1978) ("1978 House Report") (noting that federal boarding school programs "contribute[d] to the destruction of Indian family and community life.").

Later, in the 1950s, the federal government partnered with state and private agencies to form the Indian Adoption Project, which systematically facilitated the adoption of Indian children, mostly to non-Indian families, in order to reduce reservation populations and spending on boarding schools. Federal, private, and state

child welfare officials collaborated to change state child welfare law and policy to facilitate these placements. As Professor Margaret Jacobs has noted:

> The [Indian Adoption Project] gathered information on state policies and practices and then worked closely with state agencies to loosen structural restraints that impeded Indian adoptions. In fact, they promised interested adoptive families that they could generate Indian children to be adopted. . . . To further its aims, the [Project] actually lobbied for changes in state laws that would ease restrictions on the adoption of Indian children and undermine tribal jurisdiction.

Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 150 (2013).

By the 1970s, when Congress began its formal investigation into the removal of Indian children from their families, Congressionally-commissioned reports and wide-ranging testimony taken from interested Indians and non-Indians, and from governmental and nongovernmental agencies, wove together a chilling narrative: state and private child welfare agencies, with the backing of state courts, systematically removed Indian children from their families without evidence of harm, and without due process of law. *See, e.g.*, 1978 House Report at 27-28. *Amicus* AAIA documented that Indian children were removed to foster care at much higher rates than non-Indian children. *Id.* at 9. Indian placement rates by State ranged from double to more than 20 times the non-Indian rate, with between 57% and 97% of Indian children placed in non-Indian foster homes. *To Establish*

Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs, 95th Cong. 1, 541-602 (1977) ("1977 Senate Hearing"). Nationwide, removal of Indian children was many times higher than non-Indian children, and "[a]pproximately 90% of the . . . Indian placements were in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1989) (citing *Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs, S. Comm. on Interior and Insular Affairs*, 93rd Cong. 1, 75-83 (1974) ("1974 Senate Hearings") (statement of William Byler)).[2] Overall, the evidence presented to Congress was both stunning and bleak: "25-35% of . . . Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Holyfield*, 490 U.S. at 32.

[2] In Arizona—home to A.L.M.—Indian children were 3.5 times more likely than non-Indian children to be removed from their homes and placed in adoptive or foster care. 1977 Senate Hearing at 544; *see id.* at 546 (noting that in one county, 45 times as many Indian children as non-Indian children were in state-administered foster care). In Nevada—home to Baby O.— Indian children were 7 times more likely than non-Indian children to be removed and placed in foster care. 1977 Senate Hearing at 574; *see also* 1974 Senate Hearings at 40-44 (detailing harassment and abuse of an Indian woman and her children by Nevada authorities under the guise of foster care placement) (statement of Margaret Townsend).

This crisis was not limited to Indian families on or near reservations. During the lead-up to ICWA's passage, witnesses described the "constant two-way movement of Indian families and individuals between reservations and urban areas," 1977 Senate Hearing at 350 (letter from Don Milligan, State of Washington Department of Social and Health Services as testimony for Urban and Rural Non-Reservation Task Force), and the high rate of separation for families living off-reservation. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and a member of the National Tribal Chairmen's Association, testified concerning the "incredibly insensitive and oftentimes hostile removal" of children from their homes "under color of state and federal authority," and that "[t]he problem exists both among reservation Indians and Indians living off the reservation in urban communities . . . ." *To Establish Standards for Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for other Purposes: Hearings on S. 1214 Before the Subcomm. On Indian Affairs and Public Lands of the H. Comm. on Interior and Insular* Affairs, 95th Cong. 1, 190-91 (1978) ("1978 House Hearings"). In some states, off-reservation Indian children made up the majority of Indian children in state custody who were eventually adopted out to non-Native families. 1977 Senate Hearing at 351; *see also* 1974 Senate Hearings at 38 (testimony of Bertram Hirsch, AAIA). For example, Washington State reported

that in 1975 approximately 75% of the Indian children in state custody were located in non-reservation areas. 1977 Senate Hearing at 351.

B. Congress Recognized that States Frequently Disregarded Tribal Family Practices, Tribal Sovereignty, and Due Process in the Removal and Placement of Indian Children.

The House Committee on Interior and Insular Affairs determined that States had failed "to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future." 1978 House Report at 19; *see also Holyfield*, 490 U.S. at 45 ("Congress perceived the States and their courts as partly responsible for the child separation problem it intended to correct."). Congress ultimately found that "States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5).

In the hearings that preceded ICWA, Congress was told repeatedly of the tendency of social workers to apply standards that ignored the realities of Indian societies and cultures:

> [T]he dynamics of Indian extended families are largely misunderstood. . . . The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity,

> members of the extended family have definite responsibilities and duties in assisting in childrearing.

1978 House Report at 10, 20; *see also Holyfield*, 490 U.S. at 35 n.4 ("One of the particular points of concern was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society."). These failures were particularly pronounced in Texas and Oklahoma; data collected in the early 1980s revealed that caseworkers in those states "would routinely 'judge whether or not a person is Indian by his or her appearance, complexion, hair color, physique,' despite the fact that many tribal members have fair skin, light hair or blue eyes." Hana E. Brown, *Who Is an Indian Child? Institutional Context, Tribal Sovereignty, and Race-Making in Fragmented States*, 85 Am. Soc. Rev. 776, 784-85 (2020) (citing Jo A. Kessel & Susan P. Robbins, *The Indian Child Welfare Act: Dilemmas and Needs*, 63 Child Welfare 225, 228 (1984)). These practices led "many social workers, ignorant of Indian cultural values and social norms, [to] make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." 1978 House Report at 10; *see also* 1977 Senate Hearing at 73 (statement of Sen. Abourezk) ("[N]on-Indian agencies . . . consistently thought that it was better for the child to be out of the Indian home whenever possible"). Indeed, state agencies often removed or threatened the removal of Indian children *because* their families placed them in the care of relatives or in homes that lacked the amenities conventionally found in non-

Indian society. *See, e.g.*, 1977 Senate Hearing at 77-78, 166, 316; *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 115* (1978) ("1978 House Hearings"). State social workers also exaggerated the problems of Indian communities while overlooking those same problems in the wider society. Jacobs, *supra*, at 148 ("Although alcohol use and abuse permeated all levels of American society, social workers and other state authorities imagined virtually all Indians as alcoholics who were incapable of raising their own children.")

Congress found that the faulty pretense for state agencies' largescale removal of Indian children likewise underpinned states' repeated failures to place Indian children with extended family or other Indian families. *See, e.g.*, 1974 Senate Hearings at 61 (testimony of Dr. Carl Mindell, Department of Psychiatry and Child Psychiatry, Albany Medical College) ("[W]elfare agencies tend to think of adoption too quickly without having other options available . . . [W]elfare agencies are not making adequate use of the Indian communities themselves. They tend to look elsewhere for adoption type of homes."); *see also* Jacobs, *supra*, at 137 (noting that the fostering and adoption of Indian children outside their families and communities had reached crisis proportions by the late 1960s in part because state welfare authorities and BIA officials claimed that "many Indian individuals and families lacked the resources and skills to properly care for their own children."). In short,

state social workers' misunderstanding of, or disdain for, Native communities and culture led to both unnecessary removals and widespread adoption of Indian children to non-Indian families.

Critically, state courts were complicit in these abuses and allowed them to occur in a virtually unfettered fashion. "The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law." 1978 House Report at 10-12; *see also* Jacobs, *supra,* at 151-52. Testimony before Congress revealed "substantial abuses of proper legal procedures," and that Indian parents were "often unaware of their rights and were not informed of them, and they were not given adequate advice or legal assistance at the time when they lost custody of their children." 123 CONG. REC. 21042, 21043 (1977) (statement of Sen. Abourezk). Tribes, too, frequently were kept in the dark about the removal of Indian children from their parents, families, and communities. *See, e.g.*, 1977 Senate Hearing at 156 (statement of Hon. Calvin Isaac) (noting that "[r]emoval is generally accomplished without notice to or consultation with responsible tribal authorities").[3]

[3] These abuses were not limited to involuntary removals; state and private adoption agencies also coerced parents into signing "voluntary" consents to adoption. *See, e.g.*, 1978 House Report at 10-12; *see also* Task Force Four: Federal, State, And Tribal Jurisdiction, Final Report To The American Indian Policy Review Commission 86 (Comm. Print July 1976), *available at* https://www.narf.org/nill/documents/icwa/federal/lh/76rep/76rep.pdf; 1977 Senate Hearing at 141; 1974 Senate Hearings at 463 (statement of Sen. Abourezk) ("[i]n many cases [parents] were lied to, they were given documents to sign and they were deceived about the contents of the documents.").

C. Congress Found that Removal of Indian Children to Out-of-Home, Non-Indian Placements Was Not in the Best Interests of Indian Children.

"Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture." *Holyfield*, 490 U.S. at 49-50. Testimony to Congress was replete with examples of Indian children placed in non-Indian homes who later suffered from identity crises in adolescence and adulthood. *See, e.g.*, 1974 Senate Hearings at 110, 113-14 (testimony of Dr. James H. Shore, Psychiatry Training Program and William W. Nicholls, Director, Tribal Health Program, Confederated Tribes of the Warm Springs Reservation). Such testimony led the American Indian Policy Review Commission to conclude that "[r]emoval of Indians from Indian society has serious long- and short-term effects . . . for the individual child . . . who may suffer untold social and psychological consequences." S. REP. NO. 95-597 (1977), at 37, 43; [cross-reference to Former Foster Children brief].

Importantly, the legislative record also reflects "considerable emphasis on the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34. "For Indians generally and tribes in particular, the continued

wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as ongoing, self-governing communities." 124 CONG. REC. 38103 (1978) (statement of Rep. Lagomarsino); *see also id*. at 38102 (statement of sponsor Rep. Udall) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy.").

Following years of deliberation, Congress enacted ICWA to establish "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. ICWA's provisions were carefully crafted to address the harms identified during Congressional hearings, thereby reflecting "a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37 (quoting 1978 House Report at 23). More fundamentally, ICWA reasserts the federal trust responsibility—one that was disastrously abandoned during the late 19th and early 20th centuries, first in favor of an assimilationist strategy and later for unfettered state authority.

II. ICWA IS AN APPROPRIATE EXERCISE OF CONGRESS' AUTHORITY.

As this Court has "repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad . . . ." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72 (1978); *see also Ysleta del Sur Pueblo v. Texas*, ___ U.S. ___ (2022) ("Under our

Constitution, treaties, and laws, Congress . . . bears vital responsibilities in the field of tribal affairs"); *U.S. v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate with respect to Indian tribes . . ."). In exercising this power, "Congress is invested with a wide discretion and its action, unless purely arbitrary, must be accepted and given full effect by the courts." *Perrin v. United States*, 232 U.S. 478, 486 (1914). Consistent with this authority, this Court has consistently found, against multiple challenges, that federal Indian legislation does not implicate, let alone violate, the equal protection clause. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 552-53, 553 n.24 (1974) (Bureau of Indian Affairs ("BIA") and Indian Health Service ("IHS") employment preferences did "not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference."); *United States v. Antelope*, 430 U.S. 641, 646 (1975). Rather, this Court has held that the Constitution "singles Indians out as a *proper* subject for separate legislation," and—due to the unique legal status of Tribes—grants Congress vast discretion to legislate with respect to Indian affairs. *Id.* at 551-52 (emphasis added). This principle—that Congress may appropriately exercise its broad Indian affairs power to legislate on behalf of Tribes and Indians—is the bedrock of the vast body of federal Indian law found in Title 25 of the United States Code.

Texas and Individual Plaintiffs ignore centuries of treaties and this Court's precedent in order to advance radical arguments that have never been adopted by

this or any Court, including ahistorical and strained readings of the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and Treaty Clause, U.S. CONST. art. II, § 2, cl. 2. Texas Br. at 18-29, 31-35; Ind. Pet. Br. at 4, 15-16, 19, 46-59. These arguments mischaracterize foundational precedent, misunderstand tribal self-government, ignore the fact that over 40% of federally recognized Tribes lack reservations, and—if adopted by this Court—would unwind scores of laws and programs enacted in furtherance of the federal government's unique obligations to Indian Tribes and people.

A. ICWA's Political Classifications Directly Support Tribal Sovereignty and Self-Government.

Individual Plaintiffs and Texas both argue that ICWA's classifications exceed Congress's Indian affairs power because they are not limited to current members of Indian Tribes. Ind. Pet. Br. at 14; Texas Br. at [X]. As Plaintiffs note, ICWA's definition of "Indian child" includes children that are eligible for membership in a federally recognized Tribe and that are the biological child of a tribal member, and ICWA's placement preferences prioritize placement with the child's extended family, tribe, and tribally-approved foster and adoptive homes. Individual Pet. Br. at 14-15; Texas Br. at 42, 47-49. Plaintiffs' arguments that ICWA's definition of "Indian child" and its placement preferences violate equal protection ignore fundamental concepts of tribal identity, membership, and culture, and Congress's well-established authority to legislate for the benefit of Indian people and Tribes.

1. ICWA's Protections for Indian Children Appropriately Further the Inherent Sovereign Powers of Tribes to Determine Their Membership.

This Court has long recognized that tribal membership decisions are fundamental matters of self-governance and essential to tribal sovereignty. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 72 n.32 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. . . . [T]he judiciary should not rush to create causes of action that would intrude on these delicate matters."); *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978) ("[U]nless limited by treaty or statute, a tribe has the power to determine tribe membership"); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906) (deferring to tribal membership law in determining allotment rights); *Roff v. Burney*, 168 U.S. 218 (1897) (affirming a tribe's power to confer and withdraw citizenship). Tribal membership practices and traditions are extraordinarily weighty matters for individual Tribes. As the Tribal Court of Appeals for *Amicus* Little River Band of Ottawa Indians articulated:

> Tribal membership for Indian people is more than mere citizenship in an Indian tribe. It is the essence of one's identity, belonging to community, connection to one's heritage and an affirmation of their human being place in this life and world. In short, it is not an overstatement to say that it is everything. In fact, it would be an understatement to say anything less. Tribal membership completes the circle for the member's physical, mental, emotional, and spiritual aspects of human life.

Samuelson v. Little River Band of Ottawa Indians-Enrollment Comm'n, 06-113-AP, 2007 WL 6900788, at *2 (Little River Ct. App. 2007).

Petitioners' cynically claim that the preservation of tribal membership for Indian children is nothing more than a "numbers game" for Tribes. To the contrary, *amici* Tribes know that their strength as sovereign nations is intricately connected to the health and wellness of their children. These values are woven throughout Tribal cultural practices and language; in the Lakota language, for example, the word for "child" aptly translates to "little sacred ones." NEW LAKOTA DICTIONARY ONLINE, https://nldo.lakotadictionary.org. Many tribal codes explicitly codify the Tribe's responsibility to protect their children's best interests, preserve their identity as tribal members, and nurture their knowledge of their unique traditional customs. *See, e.g.*, TULALIP TRIBES JUVENILE & FAM. CODE, ch. 4.05.020 ("The Tulalip Tribes endeavors to protect the best interest of Indian children by . . . maintaining the connection of children to their families, the Tribes, and Tribal community when appropriate); CHILDREN'S CODE OF THE TOHONO O'ODHAM NATION, § 1101(B)(2) (noting that one purpose of the Code is "To preserve the unity of the family through the provision of services to children and families that emphasize, to the extent possible and in the best interest, welfare, and safety of the child, removal prevention, early intervention, and other solutions based on the honored customs and traditions

of the Tohono O'odham"). Tribes have built extensive child welfare programs in support of these values. [Cross cite to Parent Defenders Brief].

Consistent with Congress's authority, and in recognition of the important rights that tribal membership affords, ICWA includes several interrelated provisions aimed at protecting and furthering Tribes' connections to their children as tribal members. ICWA applies to "Indian children": children that either are members of a federally recognized Tribe, or are both eligible for membership in such a Tribe, and the biological child of a member. 25 U.S.C. § 1903(4). Congress understood that unenrolled, Native children eligible for tribal membership necessarily lack the capacity to "initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural property benefits flowing therefrom," 1978 House Report at 17, and thus required that the child's Tribe, and if necessary, the Secretary of the Interior, are notified of involuntary child custody proceedings involving the child, and permits the Tribe to intervene in the proceedings. *See* 25 U.S.C. §§ 1911(c); 1912(a). These provisions ensure that the child's parents and Tribe have the opportunity to perfect tribal membership, and thus confirm ICWA's protection, for their children.[4] Finally, cognizant of adult adoptees who already had lost their "right to share in the cultural and property benefits" of

[4] These requirements are consistent with United States citizenship practices. *See, e.g.*, 8 U.S.C. §§ 1401(c)-(g), 1431(a) (children born outside the U.S. qualify for citizenship if one or both parents are U.S. citizens and other conditions are met).

tribal membership, 124 Cong. Rec. 38103 (statement of Rep. Udall), ICWA also provided a mechanism for the disclosure of information necessary for "enrollment or for determining any rights or benefits associated with that membership" for such individuals. 25 U.S.C. § 1951(b). ICWA thus appropriately, and rationally, protects Native children eligible for membership, and not merely those who have had the good fortune to have enrollment paperwork finalized on their behalf prior to the commencement of a child custody proceeding. These provisions are thus both consistent with this Court's deference to Congress to determine who is an Indian subject to the "guardianship and protection of the United States," so long as such determinations are not made "arbitrarily," *United States v. Sandoval*, 231 U.S. 28, 46 (1913), and firmly "rooted in the unique status of Indians as 'a separate people' with their own political institutions . . . [and are] not to be viewed as legislation of a "'racial' group consisting of Indians." *Antelope*, 430 U.S. at 646, quoting *Morton v. Mancari*, 417 U.S. 544, 553 n.24 (1974).

Plaintiffs do not stop at ICWA's eligibility requirements. Rather, they call into question the very nature of tribal membership, arguing that because membership in many Tribes is grounded in lineal descent, federal laws like ICWA that apply to tribal members constitute *per se* racial discrimination. Ind. Pl. Br at 31-32; Texas Br. at 42 ("In this context, tribal membership, ancestry, and descent are simply proxies for race."). In so arguing, Plaintiffs reduce nearly every tribal membership

decision to an insidious act of racial discrimination. In attacking ICWA on this basis, they necessarily ask this Court to take an extraordinary step and "intrude on . . . delicate matters" that have "long been recognized as central to [Tribes'] existence as . . . independent political communit[ies]." *Santa Clara Pueblo*, 436 U.S. at 72 n.32. This Court should decline the invitation.

2. ICWA's Placement Preferences are Likewise Connected to Political Status and Tribal Self-Government, and are Well Within Congress's Power to Protect and Further the Best Interests of Indian Children, Families, and Tribes.

To further its goals in "promot[ing] the stability and security of Indian Tribes and families," 25 U.S.C. § 1902, Congress established preferences for the adoptive and foster placement of Indian children. The first preference is always for placement within the Indian child's "extended family," regardless of whether those family members are also Tribal members. *Id.* § 1915(a)(1), (b)(i). The next preference is for placement with a member of the Indian child's Tribe, *id.* § 1915(a)(2), or a foster home that has the approval of the Indian child's Tribe. *Id.* § 1915(b)(ii). When those first- and second-order placements are not available, or not in the Indian child's best interests, ICWA also gives preference to placement with other Indian families. *Id.* § 1915(a)(3), (b)(iii).

Far from treating "Indian tribes *and* children as fungible," Ind. Pet. Br. at 39, placement with an Indian family helps to protect and preserve the Indian child's *political* and *legal* identity with a Tribe. Because Indian political status is ICWA's

touchstone, *see* 25 U.S.C. § 1903(3), (4), (8) (defining, respectively, "Indian," "Indian child," and "Indian tribe"), an Indian child will share with an Indian family—even an Indian family affiliated with a different Tribe—political status as an Indian that entitles them to certain employment preferences, 20 U.S.C. § 4418; 25 U.S.C. § 5116; health care, 25 U.S.C. § 1603(12); housing assistance, 25 U.S.C. § 4103(10); and other benefits provided to Indians because of their political status as Indians. This recognition that tribal members, by virtue of their political status also share a legal identity under federal law, is not uncommon or suspicious. For example, Congress has elsewhere confirmed the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians"—even the members of other Tribes. 25 U.S.C. § 1301(2); *see Lara*, 541 U.S. at 196 (upholding Congress's recognition of this inherent authority). In addition to preserving a child's political and legal identify, placement with an Indian family helps to protect and preserve the child's *personal* identity as an Indian. Lynn Klicker Uthe, *The Best Interests of Indian Children in Minnesota*, 17 AM. INDIAN L. REV. 237, 252-53 (1992) (describing the significance of Indian cultural identity in the well-being of Indian children.

ICWA's placement preferences effectively codify protections for the extended family dynamic discussed at length in testimony, which, Congress found, had certain commonalities that spanned tribal cultures. *See, e.g.*, 1978 House

Hearings at 69 (statement of LeRoy Wilder, AAIA) ("Indian cultures universally recognize a very large extended family."). As the brief of *amici* Casey Family Programs discusses at length, ICWA's placement preferences lead to demonstrably better outcomes for Indian children. [Cross cite to Casey Family Programs Brief]. Congress, through ICWA's placement preferences, was acting well within its powers to protect the political and legal status of eligible Indian children, and in so doing "protect[ing] the best interests of Indian children" while also promoting tribal self-government. 25 U.S.C. § 1902.

B. Congress's Authority to Legislate on Behalf of Tribes, Tribal Members, and Their Children Extends to Both On and Off-Reservation Lands.

Individual Plaintiffs attempt to rewrite this Court's Indian affairs jurisprudence to include two equally artificial limitations: first, by suggesting that a political classification may be upheld only if it supports self-governance, and then arguing that only "laws that operate only on or near a reservation . . . can be viewed as promoting tribal self-government." Ind. Pet. Br. at 26. But this Court's holdings have never been so cramped, and if adopted, Plaintiffs' limitations on the *Mancari* political classification doctrine not only would eviscerate ICWA's protections for Indian children, families, and Tribes, but also would sever Congress's ability to legislate for the benefit of the hundreds of thousands of Indians and Alaska Natives

who are members of the over 230 federally recognized Tribes that lack reservations, as well as the millions of tribal citizens who do not live near their Tribe's reservation.

1. Plaintiffs' arguments threaten scores of laws passed for the benefit of millions of tribal members living off-reservation.

As early as 1866, this Court noted that Congress's ability to legislate "in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or the member of the tribe with whom it is carried on." *U.S. v. Holliday*, 70 U.S. 507, 418 (1866); *see also U.S. v. Nice*, 241 U.S. 591 597 (1914) (Congress's authority "to regulate or prohibit traffic in intoxicating liquor with tribal Indians within a State, whether upon or off an Indian reservation is well settled."). Indeed, even the employment preference at issue in *Mancari*—which the Individual Plaintiffs and Texas use as the foundation for their limiting theory—was not limited to Indians "on or near reservations," but rather extended to qualified Indian applicants regardless of where they lived or the locations of their BIA or IHS offices. 25 U.S.C. § 5116 (previously codified at 25 U.S.C. § 472); 417 U.S. at 537-39.[5]

[5] To be sure, this Court has recognized a "significant geographical component to tribal sovereignty . . . [that] remains an important factor to weigh in determining whether *state authority* has exceeded the permissible limits" in its application *on a Tribe's reservation*. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (emphasis added). Similarly, this Court has considered certain restraints on the exercise of tribal authority concerning on-reservation activities of non-Indians. *See Plains Commerce Bank v. Long Family Land & Cattle Company*, 554 U.S. 316, 327 (2008). But these cases say nothing about the extent of *Congress's authority* to legislate for the protection of Tribes, their sovereignty, and their members, let alone whether such authority should

As *amici* Members of Congress rightly note, Congress has, consistent with its Indian affairs power, enacted scores of laws singling out Indian individuals and federally recognized Tribes for a variety of programs. [Cross cite to Members of Congress Brief]. Many of these laws carry out specific promises embodied in treaties and obligations assumed by the United States that are tied to the vast cessions of land and resources by Tribal Nations and the federal government's corresponding trust responsibility. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §22.01[3] (Nell Jessup Newton ed., 2019) ("Obligation to Provide Services"). Other laws passed by Congress for the benefit of Tribes and Indian individuals have no explicit tie to tribal self-governance, have no geographical limitation, and sometimes are directed specifically for off-reservation Indians. Moreover, like ICWA, many of these laws also are aimed at addressing past policy failures. For example, during the 1950s and 1960s, federal and state programs sought to assimilate tribal members into non-Indian society by encouraging them to leave their reservations and move to urban areas across the country. Thomas A. Britten, *Urban American Indian Centers in the late 1960s-1970s: An Examination of their Function and Purpose*, 27 Indigenous Pol'y J. 1, 2 (2017). As a result of the program, by 1970 nearly 87,000 Indians had moved to cities—more than a quarter of the 340,000 Native Americans

be limited to a Tribe's reservation. As noted above, this Court has consistently held that authority is not so limited.

living in urban areas at the time. U.S. DEP'T OF HEALTH, EDUC., & WELFARE, OFFICE OF SPECIAL CONCERNS, A STUDY OF SELECTED SOCIO-ECONOMIC CHARACTERISTICS OF ETHNIC MINORITIES BASED ON THE 1970 CENSUS, Vol. III: American Indians 83, Table J-1 (1974).[6] Later that decade Congress enacted the Indian Health Care Improvement Act of 1975 which sought, among other things, to ensure that urban Indians were provided access to federal health care programs as those living on-reservation. *See Indian Health Care Improvement Act: Hearing 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).

Given that Congress and this Court have long recognized Congress's ability to legislate for Indian people regardless of location, it is hard to overstate the effect on well-settled federal Indian law if this Court were to now limit Congress's power to "members of Indian tribes on or near Indian lands." In addition to invalidating the laws described above, such an unprecedented reading would effectively terminate Congress's relationship to and obligations towards millions of Indians currently living off-reservation. *See* U.S. Census Bureau, 2010 Census Brief: The American

[6] One of the primary relocation cities was Dallas, Texas, where the Bureau of Indian Affairs established a relocation assistance center. Britten, *supra*, at 2. By 1969, Dallas was home to an estimated 15,000 Indians representing 84 Tribes, some from as far away as Alaska. Mary Patrick, *Indian Urbanization in Dallas: A Second Trail of Tears?*, 1 Oral Hist. Rev. 48, 49 (1973). As a result, Indian families increasingly interacted with Texas agencies, including child welfare agencies.

Indian and Alaska Native Population: 2010, at 12-13 (Jan. 2012), available at http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf (reporting that 78 percent of the 5.2 million American Indians and Alaska Natives reside in urban areas).

2. Plaintiffs' arguments threaten to rewrite the relationship between Congress and hundreds of federally recognized Tribes.

In addition to having no foundation in law or history, Plaintiffs' arguments also ignore the fact that many federally recognized Tribes either lack reservations today or were, until comparatively recently, landless. For much of the Nation's history, federal policy toward Tribes was dedicated to forced assimilation, wholesale removal from historical homelands, and even extinction. *See generally* COHEN'S HANDBOOK §1.04 (2019 ed.) ("Allotment and Assimilation"). Tribes and Native peoples persevered during this period, despite in many cases being rendered entirely landless. California's Tribes, for example, were largely dispossessed of their lands as part of a history of "violence, exploitation . . . and the attempted destruction of tribal communities." Cal. Exec. Order N-15-19 (June 18, 2019). While the federal government later acquired small plots of land for some of these Tribes,[7] and though

[7] "Reservation Data, California, 1951," reproduced in *Hearings: A review of California Indian Affairs,* House Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs, 85th Cong., 1st Sess., 24 May 1963, Serial No. 10, at 186 *et seq*.

others were restored through litigation or legislation,[8] these actions often did not come with the immediate restoration of a land base. Regardless, these deprivations in California and elsewhere did not negate Congress's Indian affairs authority as to these Tribes. Congress's authority over Indian affairs is a "continuing power of which Congress c[an] not devest itself." *United States v. Nice*, 241 U.S. 591, 600 (1916); *see also*, *United States v. John*, 437 U.S. 634, 653 (1978) ("Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them."). Congress later confirmed through the Federally Recognized Indian Tribe List Act of 1994 that its authority extends to all federally recognized Tribes, and it prohibited the Executive Branch from extending or withdrawing access to special federal benefits, *see* Pub. L. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. § 5123), irrespective of an individual Tribe's history or whether it has reservation lands.

Plaintiffs compound their ahistorical misrepresentation by ignoring the hundreds of Tribes, such as those in Alaska, that today do not have reservation lands. Alaska is home to 229 federally recognized Tribes—40% of the Nation's 574

[8] *See, e.g., Duncan v. Andrus*, 517 F.Supp. 1 (N.D. Cal. 1977); *Table Bluff Band of Indians v. Andrus*, 532 F.Supp. 255 (N.D. Cal. 1981); *Smith v. United States*, 515 F.Supp. 56 (N.D. Cal 1978); Tillie Hardwick v. United States, No. C-79-1710 SW (N.D. Cal.); Auburn Indian Restoration Act, Act of 31 October 1994, 108 Stat. 4533, 25 U.S.C. §§ 13001-13001-7; Paskenta Band Restoration Act, Act of 2 November 1994, 108 Stat. 4793, 25 U.S.C. §§ 1300m-1300m-7.

Tribes—yet only one has a reservation. Enacted seven years before ICWA, the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), revoked the reservation status of all Alaska Native villages except the Metlakatla Indian Community. *See* 43 U.S.C. § 1601 *et seq*. As a result, land held by 228 of Alaska's 229 Tribes is not within a "reservation," as that term is defined in ICWA and numerous other statutes. Be that as it may, thousands of Alaska Natives live in their tribal communities, speak their native language, and practice their traditional ways of life on lands that is not a reservation but is nonetheless the land that their people have lived on since time immemorial. [Cite 2020 Census]. For many Alaska Native villages, the tribal government is the only government in the community. A ROADMAP FOR MAKING NATIVE AMERICA SAFER, INDIAN LAW & ORDER COMMISSION, ch. 2 (Nov. 2013). While this Court has held that non-reservation land held by Alaska's Tribes does not constitute "Indian country" within the meaning of 18 U.S.C. § 1151, *Alaska v. Native Vill. Of Venetie Tribal Gov't*, 522 U.S. 520, 532-34 (1998), it never suggested that ANCSA deprived Alaska Tribes of their sovereign authorities as Tribes, or Congress's powers to deal with them as such. To the contrary, in the wake of—and in reliance on—this Court's decision in *Venetie*, the Alaska Supreme Court repeatedly confirmed that Alaska Tribes retain all sovereign authority not specifically divested by Congress and concluded that Tribes' abilities to conduct internal self-governance functions—including tribal decisions about the best

interests of tribal children—do not depend on the existence of Indian country. *John v. Baker*, 982 P.2d 739, 751, 755-58 (Alaska 1999); *accord State v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011); *see also Kaltag Tribal Council v. Jackson*, 344 Fed. Appx. 324 (9th Cir. 2009), *cert. denied* 131 S. Ct. 66 (2010). Therefore, even if Indian legislation could only survive an equal protection challenge if it were directly related to promoting self-governance—a position Tribal *Amici* do not concede—the multitude of "landless" Tribes make plain that self-governance does not occur only "on or near" reservations.[9]

Texas's and the Individual Plaintiffs' newly-minted geographical limitation would effectively render most Indian legislation a nullity for hundreds of federally recognized Tribes in Alaska and elsewhere and their hundreds of thousands of tribal members, as well as the millions of tribal citizens who do not live near their Tribe's reservation. Such an extreme interpretation has never been adopted by this or any other court, makes no practical sense, and finds no support in centuries of established federal Indian law.

CONCLUSION

[9] Multiple *amici* federally recognized Tribes outside of Alaska, including in Montana and Virginia, also lack reservation lands; Plaintiffs' proposed restrictions threaten the federal trust relationship with these Tribes as well.

ICWA remains one of the most important pieces of federal Indian legislation ever enacted. It has provided immense and lasting benefit to *amici* Tribes and tribal organizations and their collective goals in furthering tribal sovereignty and the best interests of Indian children. The Court should uphold ICWA as an appropriate exercise of Congress's Indian affairs power.

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APPENDIX A

AMICUS CURIAE FEDERALLY RECOGNIZED TRIBES ON THIS BRIEF:

[List of Tribes by State pending final sign-on]

AMICUS CURIAE NATIONAL TRIBAL AND INDIAN ORGANIZATIONS ON THIS BRIEF:

[List pending final sign-on]

AMICUS CURIAE OTHER NATIONAL AND REGIONAL TRIBAL AND INDIAN ORGANIZATIONS ON THIS BRIEF:

[List pending final sign-on]