Case No. 18-11479

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIEL CLIFFORD,

Plaintiffs-Appellees

vs.

DAVID BERNHARD, Acting Secretary, U.S. Department of the Interior; TARA SWEENEY; in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATED DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, in his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants

and

CHEROKEE NATION; ONEIDA NATION; QUINALT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants-Appellants

Appeal from the United States District Court for the Northern District of Texas
Case No. 4:17-CV-00868-O, Hon. Reed O'Connor, presiding

BRIEF OF *AMICI CURIAE* GOLDWATER INSTITUTE, CATO INSTITUTE, AND TEXAS PUBLIC POLICY FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES ON REHEARING *EN BANC*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

Other Authorities

IDENTITY AND INTEREST *AMICI CURIAE*[1]

The identity and interest of *amici curiae* are set forth in the accompanying motion for leave to file.

SUMMARY OF ARGUMENT

ICWA was well intended. But today, it imposes race-based (or national-origin based) mandates and prohibitions that restrict states' ability to protect Native American children against abuse, or to find them the loving, permanent, adoptive homes they often need. This harms children who are part of America's most at-risk demographic—and violates due process and our federalist system.

ICWA is complex, and discussions of it in briefs, law reviews, and popular media are often replete with inaccuracy and falsehood. That's unsurprising, because the injustices ICWA aimed to remedy generate intense emotions that can obscure careful reasoning. This brief therefore addresses, in question-and-answer format, some common misconceptions, confusions, and falsehoods surrounding ICWA.

[1] No counsel for any party authored this brief in whole or part, and no person other than *amici*, their members or counsel—and no party or party's counsel—contributed money intended to fund its preparation or submission.

ARGUMENT

I. DOES ICWA CLASSIFY BY RACE?

A. As used in ICWA, "Indian child" is a racial category because it depends on genetics.

ICWA applies to "Indian child[ren],"[2] defined as children who are (a) members of tribes or (b) both (1) eligible for membership, and (2) biological children of tribal members. Tribes determine their own eligibility criteria, but all do so based *exclusively* on biological factors—not cultural, social, or political considerations.[3]

For example, to be a member of the Navajo, a child must have 25 percent Navajo blood—but need not have a cultural, political, or social affiliation with the tribe. Navajo Nation Code, tit. 1, § 701(B).[4] To be a member of the Gila River Indian Community, a child must have 25 percent *Indian* blood, *regardless* of tribe, and also be a *biological* child of a tribal member—but no social, political, or cultural affiliation is necessary. Gila River Indian Comm. Const. art. III § 1(b).[5]

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[2] The distinction between tribal membership and "Indian child" status under ICWA must always be borne in mind. *See In re Abbigail A.*, 375 P.3d 879, 885–86 (Cal. 2016). Tribal membership is a matter of tribal law, and tribes may establish whatever eligibility criteria they want, including biological ones. "Indian child" status, by contrast, "is a conclusion of *federal and state law*," *id*. at 885 (emphasis added), which may not be predicated on immutable characteristics.

[3] Indeed, defining membership by "descen[t]" is required for federal recognition. 25 C.F.R. § 83.11(e).

[4] http://www.navajonationcouncil.org/Navajo%20Nation%20Codes/V0010.pdf

[5] http://thorpe.ou.edu/IRA/gilacons.html.

The Cherokee require no minimum blood quantum, but require proof of direct *biological* descent from a signer of the Dawes Rolls. Cherokee Const. art. IV § 1.[6] Again, cultural or political factors are not considered.

As a result, children who are fully affiliated with tribes *culturally*—who practice Native religions, speak Native languages, live on tribal lands, and follow tribal customs—but do not fit the *biological* profile, will *not* qualify as "Indian" under ICWA. Thus a child adopted by a tribal family and raised with tribal culture and customs, but lacking the required genes, does *not* qualify. *In re Francisco D.*, 230 Cal. App. 4th 73, 83–84 (2014). William Holland Thomas, a white man who served for three decades as chief of the Oconaluftee Cherokees,[7] would not qualify if he were alive today, for example.

On the other hand, a child with *no* cultural, political, or social affiliation with a tribe, who's never lived on tribal lands, and has no idea she has Native ancestry, *would* qualify, if—and solely because—she has the requisite DNA. ICWA applied, for example, to Lexi, a 6-year-old girl of Choctaw descent, based exclusively on her genes, despite having no political or cultural affiliation with the tribe. *In re Alexandria P.*, 1 Cal. App. 5th 331 (2016). It applied to D.S., a newborn with no political or cultural affiliation, based solely on biology. *In re*

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[6] https://www.cherokee.org/media/abbelmas/constitution_english.pdf.
[7] *See* E. Stanly Godbold & Mattie Russell, *Confederate Colonel and Cherokee Chief: The Life of William Holland Thomas* (1990).

D.S., 577 N.E.2d 572, 574-75 (Ind. 1991). It's currently being applied to C.J. Jr., a 6-year-old Ohio boy with no political or social affiliation. *In re C.J. Jr.,* No. 15JU-232 (Franklin Cnty., Ohio Juvenile Court) (pending).

"Culture isn't carried in the blood," writes Ojibwe author David Treuer, "and when you measure blood, in a sense you measure racial origins." *The Heartbeat of Wounded Knee* 382 (2019). Section 1903(4)(b) of ICWA classifies children as "Indian" based *exclusively* on blood. Therefore "Indian child" status under ICWA is a racial, not a political category. 25 U.S.C. § 1903(4)(b).

It's often said that ICWA is not race-based because not all Native children qualify as "Indian children" under ICWA. But that is fallacious. "Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Rice v. Cayetano*, 528 U.S. 495, 516-17 (2000). A law that, for example, applied only to left-handed Asians would create an unconstitutional racial classification even though it did not apply to right-handed Asians. While ICWA does not apply to all children with Native ancestry, it *does* apply *only* to children with that ancestry, and *solely because of* that ancestry. It is therefore racial, not political.

The racial nature of ICWA's categorization is made clearer by the placement mandates in Section 1915. These require that Indian children be placed first with relatives (nothing wrong with that), and if that's not possible, with members of the

same tribe, and if that's not possible, with "other *Indian* families" or in "Indian" institutions, *regardless of tribe*—rather than with adults of other races. 25 U.S.C. § 1915(a), (b). In other words, ICWA is predicated *not* on *tribal affiliation*, but on *generic "Indianness."* But generic Indianness is a racial construct, not a political classification. ICWA does *not* require that, say, Navajo children be placed with Navajo adults, but that "Indian children" be placed with "Indian adults." ICWA's *express* purpose is to keep biologically "Indian" children separate from biologically non-"Indian" adults.[8]

Some state courts tried adopting an interpretation of ICWA that *was* predicated on political, cultural, or social affiliation: the "existing Indian family doctrine" (EIFD). *See, e.g., In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982). Yet the EIFD was condemned by tribal governments and has been repudiated by most courts, on the theory that it unduly intrudes on tribal power. *See. e.g., In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009) (abandoning EIFD because it required a "factual determination" about whether a child had a political relationship with a tribe).

Consequently, the question of whether a child is an "Indian child" under ICWA does *not*, and, in those states rejecting the EIFD, *absolutely may not*,

[8] In *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989), the Court quoted from a Congressional report stating that ICWA "establish[es] 'a Federal policy that, where possible, an *Indian* child should remain in the *Indian* community.'" (Emphasis added).

include consideration of political, cultural, social, linguistic, religious, etc., factors. Rather, it must be based *solely* on biological, i.e., racial, factors.

B. Even if ICWA's classification is not racial, it is a national-origin-based classification.

The panel concluded that ICWA does not establish a racial classification because it uses biological factors as "a proxy" for the child's "not-yet-formalized tribal affiliation." *Brackeen v. Bernhardt*, 937 F.3d 406, 428 (5th Cir. Aug. 9, 2019). This is untenable. Even under this theory, ICWA establishes a national-origin classification that subject to the same strict scrutiny that applies to racial classifications. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist*., 154 F.3d 1117, 1120 (9th Cir. 1998).

In *Espinoza v. Farah Mfg. Co*., 414 U.S. 86 (1973), the Court explained that "national origin" classification is not just a classification predicated on the person's foreign *citizenship*, *id.* at 89; it also "refers to [classification based on] the country where a person was born, or, more broadly, *the country from which his or her ancestors came*." *Id.* at 88 (emphasis added). ICWA's definition of "Indian child" does precisely that.

In *Oyama v. California*, 332 U.S. 633, 645 (1948), the Court found that California's Alien Land Act constituted a form of national origin discrimination because it was triggered by the citizenship or ancestry of a child's parents: "as between the citizen children of a Chinese or English father and the citizen children

of a Japanese father, there is discrimination," the Court said—which constituted national origin discrimination even if it did not constitute racial discrimination.

The same principle applies here: "not-yet-formalized tribal affiliation," in this context is based on biological descent—since eligibility for membership is determined by biological ancestry—and is therefore just national origin classification under a new name.

Membership in a true political association is fundamentally *chosen* and *voluntary*. That's why tribal membership is categorized as political. *See United States v. Crook*, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) (No. 14,891) ("the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it."). And that's why such classifications are subject to rational basis scrutiny. Race and national origin are subject to strict scrutiny because they are based on "immutable characteristic[s] determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

"Indian child" status under Section 1903(4)(b) of ICWA (genetic eligibility plus the status of the biological parent) is entirely a function of immutable factors determined by accident of birth. It cannot be characterized as political—or, as the panel put it, as future-political-based-on-ancestry. Instead, Genetic eligibility for a "not-yet-formalized" political association is synonymous with "national origin,"

and is therefore not a political classification, but another way of referring to the classification long known to the law as a national-origin classification.

C. The *Mancari* rational-basis rule does not apply.

Morton v. Mancari, 417 U.S. 535 (1974), made a point of noting that the preference that the Court was upholding was "not directed towards a 'racial' group consisting of 'Indians.'" *Id.* at 553 n.24. *Mancari* therefore did *not* hold that *all* laws that treat Indians differently are subject to rational basis. A law directed toward a racial group consisting of Indians falls outside the scope of that precedent.

United States v. Antelope, 430 U.S. 641 (1977), said the same thing: rational basis applies to laws that treat adults differently based on their decision to become or remain members of Indian tribes—a matter that is qualitatively political, not racial. Again, *Antelope* expressly reserved the question of whether laws that treat Indians as a separate class *without* reference to political or social affiliation would be constitutional. *Id*. at 646 n.7.[9]

[9] *Antelope* said a hypothetical law establishing different evidentiary standards for cases involving Indians than members of other groups would likely violate the Constitution. *Id.* at 649 n.11. ICWA does precisely that. It imposes a "beyond a reasonable doubt" standard, for example, in termination of parental rights (TPR) cases, 25 U.S.C. § 1912(f), which supersedes the "clear and convincing" standard that applies to TPR cases involving all other children. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (mandating "clear and convincing" in TPR cases because "a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.").

Rice clarified *Mancari*'s limits when it defined a race-based law as one that "singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics.'" 528 U.S. at 515 (citation omitted). ICWA does that: it is not only triggered by a child's *biological* eligibility for tribal membership, but is designed that way for the express racial purpose of keeping "Indian children" in homes that ICWA defines (generically) as "Indian."

Mancari's rational basis rule was designed to address the limited question of a statute that treated people differently based on their choice to become or remain members of a political society. But ICWA categorizes based on genetics alone—not culture, political affiliation, or treaty rights. It creates not a political, but a racial classification.

Tribes have every right to use genetic criteria as qualifications for membership. But that does not allow federal and state governments to give legal effect to genetic criteria. Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 Colum. J. Gender & L. 1, 40 (2008) ("[T]ribes may consider private racial biases and even discriminate against their citizens. However, federal and state courts are constrained by the United States Constitution and thus cannot."). If a private organization used race as a membership criterion, the government could not then use membership in *that* organization as a consideration in granting benefits or

imposing burdens. *Cf. Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (government may not "become significantly involved in private discriminations.") As the Supreme Court said in a decision that forbade states from blocking interracial adoptions, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). The same rule applies here. Tribes may establish what membership criteria they like; but "Indian child" status under ICWA is a conclusion of federal and state law, *In re Abbigail A.*, 375 P.3d at 885–86—and therefore may not be triggered by racial (or national-origin) criteria.

D. ICWA cannot be analogized to international adoption law because Indian children are American citizens.

It's often argued that tribal membership can be analogized to the *jus sanguinis* rule of citizenship—i.e., that ICWA only incorporates tribal citizenship determinations in the way international law incorporates the citizenship determinations of foreign nations. *See, e.g.*, Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 Stan. L. Rev. 1025, 1071 (2018). The problem with that argument is that all Indian children are U.S. citizens, 8 U.S.C. § 1401(b), which makes the international-law analogy untenable.[10] Federal and state governments may not treat citizens

[10] It also renders the "original understanding of the term 'Indian,'" as discussed in Prof. Ablavsky's *amicus* brief, largely irrelevant. At the time the Constitution was

differently based on the fact that their biological ancestry would qualify them for citizenship in a foreign nation. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944)).

II. WOULD INVALIDATING ICWA HARM TRIBAL SOVEREIGNTY AND ALL OTHER FEDERAL INDIAN LAW?

A. The challenged provisions of ICWA do not constitutionally promote tribal sovereignty.

The theory that ICWA helps preserve tribal sovereignty is predicated on three assumptions: *first*, that ICWA protects tribal court authority to adjudicate child welfare matters, thereby giving tribal governments the respect they deserve; *second*, that ICWA supports tribes' capacity to determine their own citizenship; *third*, that it prevents diminishment of tribal populations. But none of these propositions support the conclusion that ICWA promotes tribal sovereignty in a constitutionally acceptable way.

1. True, ICWA authorizes tribal courts to decide child welfare cases on reservation; that's unobjectionable and not challenged here.[11] A problem arises, though, when tribal courts try to adjudicate *off*-reservation ICWA cases where they

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written, Native Americans were not citizens; when the Fourteenth Amendment was written, they were specifically excluded from its citizenship clause. But today, and since 1924, all Native Americans are citizens of the United States—and therefore cannot be regarded as foreigners, as they essentially were in 1787.

[11] Nor did ICWA give it to tribes; on-reservation jurisdiction over members is inherent sovereignty.

lack personal jurisdiction. This happens because Section 1911(b) purports to give tribal courts authority based on a child's "Indian child" status. Consequently, tribal courts often assert personal jurisdiction based solely on a child's biological ancestry, even where that child has never been domiciled on reservation, as in *Renteria v. Shingle Springs Band of Miwok Indians,* No. 2:16-CV-1685-MCE-AC, 2016 WL 4000984 at *3 (E.D. Cal. July 26, 2016), or has never visited tribal lands, as in *In re C.J. Jr.,* 108 N.E.3d 677, 695–97 ¶¶ 90–104 (Ohio Ct. App. 2018).

For any court to assert personal jurisdiction on the basis of biological ancestry is unconstitutional, and tribal courts cannot complain if they are barred from doing so. *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) ("We demand that foreign nations afford United States citizens due process ... [and] must ask no less of Native American tribes."). Therefore, affirming the decision below will not injure tribal authority *where that authority is constitutional*. It would bar tribal courts from asserting jurisdiction where such jurisdiction is based on *genetic* factors—which is as it should be.

2. ICWA does not support a tribe's ability to determine citizenship, nor does the District Court's decision undermine that authority. Rather, the decision below is concerned with "Indian child" status under ICWA, which is a matter of federal, not tribal, law. *In re Abbigail A.*, 375 P.3d at 885–86. Affirmance would leave untouched the ability of tribes to determine their membership. It would

instead affect the way *state agencies* deal with cases involving children whom a federal statute classifies as "Indian."

3. ICWA characterizes children as tribal "resource[s]," 25 U.S.C. § 1901(3), and seeks to reinforce tribes as collective entities. *See* N. Bruce Duthu, *American Indians and the Law* 150-51 (2008). But whatever obligation Congress has to preserve tribal "resources," it may not do so in ways that deprive U.S. citizens—including minors—of equal protection or due process. Congress certainly could not, say, outlaw marriage between tribal members and non-members, or forbid tribal members from leaving the tribe—even though these prohibitions would certainly support "[a] tribe's communal interests in preserving its sovereign and cultural integrity." *Id.* at 151. For the same reason, Congress cannot deprive Indian children or their parents of their right to equal treatment, even if the goal is legitimate.

B. ICWA violates Indian parents' rights.

Another way ICWA strengthens tribal governments is by giving them authority over children "on a parity with the interest of the parents." *Holyfield*, 490 U.S. at 52 (citation omitted). For instance, ICWA lets tribal governments veto adoption decisions made by Indian parents—as in the Brackeens' case—or to block Indian parents from terminating the rights of neglectful or abusive ex-spouses, as in *In re T.A.W.*, 383 P.3d 492 (Wash. 2016), or *S.S. v. Stephanie H.*,

388 P.3d 569 (Ariz. App. 2017), *cert. denied sub nom. S.S. v. Colo. River Indian Tribes,* 138 S. Ct. 380 (2017).

But it's unconstitutional to give *any* third party authority over a child which is on a parity with, or superior to, that of the parents. *Troxel v. Granville*, 530 U.S. 57, 69 (2000). *See also* Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?,* 23 Tex. Rev. L. & Pol. 425, 452–55 (2019). Just as Washington could not force parents to allow grandparents visitation—disregarding the "special weight" that a state owes "to [a parent's] determination of her [child's] best interests," *Troxel,* 530 U.S. at 69—so Congress may not override an Indian parent's decision to put her child up for adoption, or select adoptive parents, or seek TPR of her ex.

C. Even analogizing ICWA to the international adoption context, ICWA exceeds constitutional limits.

It's sometimes claimed that ICWA should be analogized to international adoption, so that just as, say, Canada could block Americans from adopting Canadian children, tribal governments can forbid adoption of Indian children. This analogy fails. First, ICWA is not a treaty, but a statute. Second, Indian children are American citizens, not foreigners. Third, foreign governments block adoptions in *their own* courts, not in American courts, whereas ICWA uses *federal* power to override *state* courts on behalf of *tribal* governments. Fourth, Congress lacks authority, even under its treaty-making powers, to force American citizens into a

legal system that lacks constitutionally guaranteed due process protections. *Reid v. Covert,* 354 U.S. 1 (1957).

Reid involved crimes committed by wives of servicemen stationed overseas; they were tried by military tribunals. The Court found this unconstitutional because as American citizen civilians, they were entitled to trial in ordinary courts, with the "express safeguards" provided in those courts. *Id.* at 22. The government claimed authority under the treaty power to subject them to military proceedings, *id.* at 14-16, but the Court said "[i]t would be manifestly contrary" to "our entire constitutional history and tradition" to allow Congress to adopt a treaty whereby American citizens were subjected to a legal process that stripped them of Bill of Rights protections. *Id.* at 17.

ICWA does just that. It subjects American citizens—Indian children and the adults who love them—to the jurisdiction of tribal courts that lack the due process protections available in state or federal courts (and often with no pretense of personal jurisdiction beyond genetics). Section 1911's jurisdiction-transfer mandate means that these children and adults are forced into tribal courts where the Bill of Rights does not apply, *see Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring), and where appeal rights are so restricted as to be largely illusory. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Therefore, like the treaty provisions in *Reid*, the provisions of ICWA that force "Indian children"

and adults—all U.S. citizens—into tribal courts are "illegitimate and unconstitutional." 354 U.S. at 39–40.

Congress cannot make treaties that exceed its authority, *id.* at 18; *Bond v. United States*, 572 U.S. 844, 867 (2014) (Scalia, J., concurring), and the Constitution forbids Congress from discriminating on the basis of race or national origin. Congress could not make a treaty with, say, Japan, which subjected lawsuits involving Americans of Japanese ancestry to special evidentiary standards, or a treaty with Israel forcing Americans of Jewish descent to adjudicate disputes before a *beth din* instead of a legal court. So, too, American citizens not domiciled on reservations are entitled to be treated the same as all other Americans, even if they are biologically eligible for tribal membership—and even if their loved ones are.

D. No other federal Indian law uses ICWA's race-based "eligibility" criterion.

The fear expressed in, e.g., the Members of Congress *amicus* brief (at 16), that finding ICWA unconstitutionally race-based would shake the foundations of all Indian law are irrational hysteria. ICWA is absolutely unique in being triggered solely by biological eligibility for tribal membership. The Indian Gaming Regulatory Act does not do this—it applies to actual members and to tribal land. 25 U.S.C. §§ 5129, 2703(4), (5). The Indian Self-Determination and Education Assistance Act applies to actual members. 25 U.S.C. § 5304(d). The Native

American Graves Protection and Repatriation Act applies to things that have a cultural affiliation with an existing tribe. 25 U.S.C. § 3002. *Only* ICWA applies *not* to tribal members, but to "*potential* Indian children, including those who will never be members of their ancestral tribe." *Brackeen v. Zinke,* 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018). *See also* Duthu, *supra,* at 154-55 (ICWA "maintain[s] [a child's] … *potential* cultural and social links with … [a] tribe." (emphasis added)).

The only other law that comes close to ICWA's biological trigger is the Indian Major Crimes Act, 18 U.S.C. § 1153, which does not actually include such a provision, but has been interpreted as *possibly* applicable to persons who are only *potential* members of tribes. *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015). That interpretation, however, has been criticized for "transform[ing]" that act "into a creature previously unheard of in federal law: a criminal statute whose application turns on whether a defendant is of a particular race." *Id.* at 1116 (Kozinski, J., concurring). And even under *that* rule, eligibility for tribal membership is not dispositive, as it is in ICWA. *United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005).

Only ICWA makes biology the sole triggering factor. And because ICWA's biological trigger is unique in Indian law, affirming the District Court would have no effect on other Indian statutes.

III. HOW CAN STATES CLAIM INTERFERENCE WHEN CONGRESS HAS AN OBLIGATION TO INDIAN TRIBES?

A. ICWA goes beyond preemption and exercises a federal police power.

Where the federal government has exclusive authority, states cannot complain of being preempted. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018) (discussing the line between permissible preemption and impermissible commandeering.) But Congress may not override state police powers where there's no genuine connection to a federal authority. Thus in *United States v. Morrison*, 529 U.S. 598, 618 (2000), Congress could not impose a federal law against sexual assault, which "has always been the province of the States."

ICWA, like the statute struck down in *Morrison*, regulates a state law matter. It is not confined to federal lands, or to tribal citizens, but applies to children who are ordinary citizens of states like everyone else—except that federal law classifies them as "Indian" based exclusively on biological factors. These "Indian children" don't live on reservations, but in suburbs and cities like their peers of other races. State laws already exist to protect them from abuse or neglect. Therefore, unless Congress has authority that it lacked in *Morrison*, it may not supersede state police powers.

B. Child welfare is not "commerce."

Family law is a quintessentially state matter. Federal courts will not adjudicate such cases, even where they have jurisdiction. *Ankenbrandt v. Richards*, 504 U.S. 689, 703-07 (1992). The Constitution's authors considered family law categorically outside federal authority. They found it so hard to imagine Congress, "by some forced constructions" of the Constitution, trying to govern such things that only the "imprudent zeal" of the Constitution's opponents could envision that possibility. *The Federalist* No. 33 at 206 (J. Cooke ed., 1961) (Alexander Hamilton).

There is no basis for believing that the Indian Commerce Clause allows Congress to impose a federal family law for off-reservation cases involving children who are "eligible" for tribal membership. *See* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause,* 85 Denv. U. L. Rev. 201, 265 (2007) (Clause "did not grant to Congress a police power over the Indians."). Child welfare is not commerce, *cf. Morrison*, 529 U.S. at 610, and cases that involve no connection to federally-governed tribal land are matters of state jurisdiction. Just as Congress cannot override non-discriminatory state family law to mandate a discriminatory federal family law, *United States v. Windsor*, 570 U.S. 744, 769-70 (2013), it cannot do so with regard to children who live off reservation and aren't necessarily tribal citizens.

IV. WHAT ABOUT RESIDENTIAL SCHOOLS AND OTHER ABUSES?

A. The injustices of the past are not cured by inflicting injustices today.

Native Americans have suffered awful wrongs, including by federal and state governments trying to force assimilation against their will. But inflicting injustices against *today's* children does not fix those wrongs—it only perpetuates the cycle. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). Two racial wrongs do not make a right. Martin Luther King Jr., *Give us the Ballot—We Will Transform the South* (1957) *reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* 200 (James Washington, ed. 1986) ("We must act in such a way as to make possible a coming-together … on the basis of a real harmony of interest and understanding. We must seek an integration based on mutual respect.").

Depriving Native children—who are at greater risk of abuse and neglect,[12] violence,[13] gang activity,[14] drug abuse,[15] alcoholism,[16] and suicide,[17] than any other group of American children—of the legal protections necessary to secure them a safe and healthy future, solves nothing. In fact, the injustices toward Native Americans have been rooted in the denial of the legal equality to which they are entitled—a denial that ICWA perpetuates by subjecting "Indian children" to separate, less-protective rules—rules that prioritize other factors over their individual needs and "place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 653–54 (2013); *see also* Elizabeth Stuart, *Native American Foster Children*

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[12] *See, e.g.,* Tara Culp-Ressler, *The Shocking Rates Of Violence And Abuse Facing Native American Kids*, ThinkProgress, Nov. 18, 2014, https://goo.gl/CjM3rn.
[13] *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://goo.gl/Lwqfso.
[14] *See, e.g,* Aline K. Major, et al., *Youth Gangs in Indian Country*, OJJDP Juv. Justice Bulletin, Mar. 2004, https://goo.gl/fpH19d.
[15] Linda R. Stanley, et al., *Rates of Substance Use of American Indian Students in 8th, 10th, and 12th Grades Living on or Near Reservations: Update, 2009-2012*, 129 Pub. Health Rep. 156 (2014), goo.gl/yryzK9.
[16] *See, e.g,* Bettina 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), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4550484/.
[17] *See, e.g.,* Suicide Among Racial/Ethnic Populations in the U.S.: American Indians/Alaska Natives, Suicide Prevention Resource Center (2013), https://www.sprc.org/sites/default/files/migrate/library/AI_AN%20Sheet%20Aug%2028%202013%20Final.pdf.

Suffer Under a Law Originally Meant to Help Them, Phoenix New Times, Sept. 7, 2016[18] (describing how ICWA deters foster and adoptive parents from helping "Indian children.")

B. Allegations that Indian children are psychologically harmed by being adopted by non-Indians are unsupported.

It's often said that Indian children suffer unique distress when adopted by non-Indian adults. *See, e.g.*, Catherine Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future*, 27 Creighton L. Rev. 661, 668 (1994). But these claims are unreliable, based on flawed psychological surveys, such as Carol Locust, *Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children*, 44 Ontario Ass'n. Child. Soc'y. J. 11 (2000). Locust's study was unscientific and "implemented so poorly that we cannot draw conclusions from it." Bonnie Cleaveland, *Split Feather: An Untested Construct* (2015).[19] It involved only 20 adults; its methodology was not disclosed; there was no control group; it made no attempt to consider other potential causes of trauma.

Similar flaws taint other surveys of this sort, such as the "Apple Syndrome" analyses of Joseph Westermeyer, which Professor Kennedy has called "utterly subjective" and "junk social science." Randall Kennedy, *Interracial Intimacies*

[18] https://goo.gl/hvo45Z.
[19] https://goo.gl/ibsr8j.

499, 502–3 (2003). Most notably, such surveys fail to determine whether the trauma at issue was the result of the mistreatment or neglect that *led to* those children being adopted, instead of being the consequence of adoption itself. More rigorous research has failed to establish any link between adoption by non-Indians and any distinctive form of distress. *See* Christine D. 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, 547–49 (1996) (detailing research); David Fanshel, *Far from The Reservation* 323 (1972) (Indian children adopted by non-Indians do "remarkably well"); Rita J. Simon & Sarah Hernandez, *Native American Transracial Adoptees Tell Their Stories* 13-14 (2008) (interviews with subjects in which 16 of 20 Indians adopted into non-Indian families reported positive experiences).

C. This case and similar cases have nothing to do with "removing" Indians from Indian families.

ICWA was intended to prevent "the removal" of Indian children from their families "by nontribal … agencies." 25 U.S.C. § 1901(4). Yet this case has nothing to do with the removal of children from their families. The Brackeens sought adoption of a child whose birth parents *agreed* to, and testified in *support* of, that adoption. And in *In re S.S., supra*, *In re T.A.W., supra*, *Renteria, supra,* and other cases, no children were being removed, and no agencies were involved—yet courts applied ICWA anyway.

Obviously unjustified removal of children from families is a grave concern. Cases such as *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 763 (D.S.D. 2015), *vacated*, 904 F.3d 603 (8th Cir. 2018), show that serious wrongdoing continues. But such wrongs already violate non-ICWA laws, such as the Due Process Clause, *see id.* at 769–72, so affirming the District Court would have no effect on courts' ability to redress those wrongs.

V. IS ICWA THE "GOLD STANDARD"?

A. The "gold standard" soundbite originated in a single *amicus* brief that used the term to refer to one aspect of ICWA.

The soundbite most favored by defenders of the ICWA status quo is that it's "the gold standard" for child welfare. That is just false.

First, that phrase originated in an *amicus* brief filed in *Adoptive Couple v. Baby Girl* (2013 WL 1279468 at *1), and it referred, not to ICWA as a whole, but to the "active efforts" requirement in Section 1912(d)—and the principle that states should, when possible, "support and develop the bonds between a child and her fit birth parents." *Id*. at *4. Of course, nobody disputes that placement with *fit* parents is ideal. The problem is that ICWA's "active efforts" provision is not limited to *fit* parents—it also restricts states from protecting Indian children from *unfit* parents.

B. ICWA's "active efforts" provision is no gold standard.

The difference between ICWA's "active efforts" requirement and the state-law "reasonable efforts" requirement is crucial. *See generally* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1, 36–42 (2017). State law requires child welfare workers to make "reasonable efforts" to restore families after state intervention; this includes, e.g., making rehabilitation opportunities available. *See, e.g., In re A.L.H.*, 468 S.W.3d 738, 744–45 (Tex. App. 2015). But reasonable efforts are excused where "aggravated circumstances," such as systematic abuse or molestation exist—because states shouldn't return children to homes where they'll be abused again. *Id.*

ICWA's "active efforts" requirement overrides that. It requires *more* from the state than "reasonable efforts" does, *People ex rel. A.R.*, 310 P.3d 1007, 1014–15 ¶ 28 (Colo. App. 2012), and is *not* excused in cases of aggravated circumstances. *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 618 ¶ 20 (S.D. 2005).

That means Indian children must be *more* abused, for *longer*, than children of other races, before states can protect them, and must be returned time and again to abusive homes. The results are cases in which social workers know children are being abused, but cannot take action—whereas they would be able to act if the children were not biologically classified as "Indian."

● In November 2019, 5-year-old abuse victim Antonio Renova was removed, in compliance with ICWA, from the non-tribal foster family where he had found peace and safety, and placed in the custody of an abusive Crow couple by a tribal court despite plentiful evidence that this placement was unsafe. They murdered him. *See* David Murray, *Foster Family who Raised Slain 5-Year-Old Explains How System Repeatedly Failed Him,* Great Falls Tribune, Nov. 22, 2019.[20]

● In July 2018, after 1-year-old Josiah Gishie was murdered by his mother, Arizona child protection workers admitted that they'd known Josiah was being abused, but had been unable to act because of ICWA. *See, e.g.,* Ariz. Dep't of Child Safety, *Statement on the Death of One-year-old Josiah Gishie*, Oct. 12, 2018.[21]

● In 2007, Cherokee child Declan Stewart was beaten to death by his mother's boyfriend, even though Oklahoma social workers knew he was being abused; they had been forced to return him to the couple's custody by ICWA's "active efforts" provision. *See* Mark Flatten, *Death on a Reservation* 25-26 (Goldwater Institute, 2015).[22]

[20] https://www.greatfallstribune.com/story/news/2019/11/22/foster-family-who-raised-slain-child-explains-how-system-failed-him/4275866002/.
[21] https://goo.gl/8Ayjw2.
[22] https://goo.gl/TU9WVQ.

● Between 2008 and 2015, three Nebraska girls were repeatedly abused by their father, *id.* at 20, and when officials tried to rescue them, the state Supreme Court overruled that because officials had not made "active efforts" to reunite them with their abuser. *In re Shayla H.*, 855 N.W.2d 774 (Neb. 2014).

These are just a few of the countless cases in which officials have been *aware* Indian children were being harmed—and were barred from protecting them by ICWA's "active efforts" requirement.

That is *not* a "gold standard."

C. It's not a "gold standard" to override a child's best interests—but ICWA does so.

All U.S. states and territories apply the "best interest of the child" standard to cases involving children's custody, placement, and welfare. But ICWA overrides that standard. *See, e.g., Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. App. 1995) (describing the best interests standard as an "Anglo" standard that should not be applied to Indians); *In re Alexandria P.*, 1 Cal. App. 5th at 351 (best interests is the overriding consideration for children of *non*-Indian descent, but only "one of the constellation of factors relevant" in an Indian child's case).

Instead, ICWA purports to declare what is *per se* in the best interests of *all* Indian children. The Montana Supreme Court, for instance, says ICWA "expresses the presumption that it is in an Indian child's best interests to be placed in

conformance with the preferences." *In re C.H.*, 997 P.2d 776, 782 ¶ 22 (Mont. 2000). In 2015, the BIA agreed: state courts should not apply a case-specific best-interests analysis in ICWA cases because ICWA's race-based "presumptions" are *per se* in the best interests of *all* "Indian children." Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10158 F.4(c)(3) (Feb. 25, 2015).

But Congress has no authority to decree what is "presumptively" in the best interests of *all* children who fit a specified racial (or national) profile.

Properly applied, the best-interests determination is individualized. *In re Doe 2*, 19 S.W.3d 278, 283 (Tex. 2000). While "'[p]rocedure by presumption'" may be "'cheaper and easier than individualized determination[s],'" employing them instead of a case-by-case inquiry "'risks running roughshod over the important interests of both parent and child,'" and "'therefore cannot stand.'" *In re B.G.S.*, 556 So. 2d 545, 553 (La. 1990) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972)). Courts may not simply rely on presumptions, but must make findings about *each* child's *specific* circumstances.

ICWA overrides that principle—which harms Indian children.

For Congress to decree what is in the best interests of all children of a genetically defined class is unconstitutional and unconscionable. It hurts children by subordinating their specific needs to the *ipse dixit,* one-size-fits-all

pronouncements of Congress—or of tribal governments. That's no "gold standard." It's a violation of fundamental human rights.

CONCLUSION

The decision should be *reversed*.

RESPECTFULLY SUBMITTED this 10th day of January, 2020 by:

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