No. 18-11479

IN THE 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; DANIELLE CLIFFORD,

Plaintiffs-Appellees

v.

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES 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

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

Intervenor Defendants-Appellants

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

BRIEF OF THE AMICUS STATES OF CALIFORNIA, ALASKA, ARIZONA, COLORADO, IDAHO, ILLINOIS, IOWA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEW JERSEY, NEW MEXICO, OREGON, RHODE ISLAND, UTAH, VIRGINIA, WASHINGTON, AND WISCONSIN IN SUPPORT OF THE UNITED STATES AND INTERVENOR TRIBES AND REVERSAL

XAVIER BECERRA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
CHRISTINE CHUANG
Supervising Deputy Attorney General
JAMES F. ZAHRADKA II
Deputy Attorney General
CHRISTINA M. RIEHL
Deputy Attorney General
600 West Broadway, Suite 1800
San Diego, CA
(619) 738-9740
Christina.Riehl@doj.ca.gov

Attorneys for Amicus Curiae
State of California

(Additional counsel listed on signature page)

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INTRODUCTION AND INTEREST OF AMICI STATES

The States of California, Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Virginia, Washington, and Wisconsin (Amici States) file this amicus curiae brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). Amici States urge the Court to preserve the Indian Child Welfare Act, 25 U.S.C. §§ 1901–63 (ICWA), a comprehensive statutory scheme designed to safeguard "the continued existence and integrity of Indian tribes" by protecting their greatest treasure—their children. 25 U.S.C. §§ 1901(3), 1902. ICWA is an appropriate exercise of Congressional powers and an important means of supporting Indian tribes and families, as well as strengthening state-tribal relationships.

ICWA plays a critical role in protecting the best interests of American Indian and Alaska Native children residing in Amici States, and supports the cultural integrity and survival of the tribes within their borders. The continued stability and security of Indian tribes are of vital importance to the Amici States, which are

home to eighty-five percent of the federally-recognized tribes in the United States[1] and more than half of the overall American Indian and Alaska Native population.[2]

ICWA also furthers important state-tribal relations. Amici States value their relationships with Indian tribes and have a strong interest in continuing to partner with tribal entities to protect the health and welfare of Indian children. Amici States work cooperatively with their tribal partners on child welfare matters to seek the best outcomes for Indian children. This interest is most significantly manifested by the statutory schemes of the Amici States that are predicated upon, have incorporated, or supplement the federal ICWA. Amici States California,[3]

[1] Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4235–41 (Jan. 30, 2018).

[2] U.S. Census Bureau, *American Factfinder* (2017), https://tinyurl.com/U-S-Bureau.

[3] 2018 Cal. Stat. ch. 833 (AB 3176); 2006 Cal. Stat. ch. 838 (SB 688); 1999 Cal. Stat. ch. 275 (AB 65); *see also* Cal. Code Regs. tit. 22, §§ 35353–87; Cal. R. of Ct. 5.480–.487, 5.534(i), 5.785, 7.01015; Cal. Fam. Code § 175(a)(1); Cal. Dep't Soc. Svcs. Man. Pol'y & Proc., Child. Welf. Svcs. Man., Div. 31., Ch. 31-000 to 31-530 (June 16, 2016).

Alaska,[4] Colorado,[5] Illinois,[6] Iowa,[7] Maine,[8] Massachusetts,[9] Michigan,[10] Minnesota,[11] Montana,[12] New Mexico,[13] Oregon,[14] Utah,[15] Washington,[16] and Wisconsin[17] have enacted statutes, regulations, and rules governing state court

[4] Alaska Stat. § 47.10.990; Alaska Admin. Code tit. 7, § 54.600; Alaska Child in Need of Aid R. 24.

[5] Colo. Rev. Stat. § 19-1-126.

[6] 750 Ill. Comp. Stat. § 36/104; 89 Ill. Admin. Code §§ 307.25-.45.

[7] Iowa Code Ann. §§ 232B.1-.14.

[8] Me. Rev. Stat. Ann. tit. 30, §§ 6209-A(1)(D), 6209-B(1)(D), 6209-C(1)(D), 6209-D(1)(D); Me. Rev. Stat. Ann. tit. 22, §§ 4002(9-B), 4008(2)(I), 4062(1)

[9] 110 Mass. Code Regs. § 1.07; Mass. Trial Ct. R. VI(9)(a)(3); Mass. Juv. Ct. R. 14(b), 15(b).

[10] Mich. Comp. Laws Ann. §§ 712B.1-.41.

[11] Minn. Stat. §§ 257.0651, 260.755, subds. 2a & 17a, 260.761, subd. 2(d), 260B.163, subd. 2, 260C.168, 260D.01(g); Minn. R. 9560.0040, subp. 2, .0221, subp. 3, .0223, .0535, subps 2, 4, .0542, .0545, subp. 1, .0606, subp. 1.

[12] Mont. Code Ann. §§ 41-3-109, -427, -432.

[13] N.M. Stat. Ann. §§ 32A-4-9(A), 32A-1-8(E), 32A-5-5.

[14] Or. Rev. Stat. Ann. §§ 109.309(13), 182.164, 419B.090(6); Or. Unif. Trial Ct. R. 3.170(9); Or. Admin. R. 413-115-0000 to -0150.

[15] Utah Code §§ 62A-2-117, 62A-4a-205.5(2), 62A-4a-206(1)(c)(iv).

[16] Wash. Rev. Code Ann. §§ 13.38 & 74.13.031(14).

[17] Wis. Stat. § 48.028.

proceedings incorporating the requirements of ICWA. California,[18] Illinois,[19] Maine,[20] New Mexico,[21] and Washington[22] have also enacted detailed procedures relating to state agency collaboration with tribes in custody proceedings relating to Indian children. Based on Amici States' experience, ICWA provides a productive framework to further the best interests of Indian children, preserve the Indian family unit, and promote productive government-to-government relationships between states and tribes. The district court's opinion invalidating ICWA significantly harms all of the above interests of Amici States, is based on fundamental errors of law, and should be reversed.

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[18] *See* Cal. Dep't Soc. Svcs., Tribal Consultation Policy (June 6, 2017), http://tinyurl.com/Cal-Dept-Social-Services; *see generally*, Gov. Jerry Brown, Exec. Order B-10-11 (Sept. 19, 2011), https://www.gov.ca.gov/2011/09/19/news17223/.

[19] Ill. Dep't of Children and Fam. Svcs, Proc., §§ 307.10, .15, .20, .25, .30, .35, .40, .45.

[20] Me. Dep't of Health and Hum. Svcs., Off. of Child and Fam. Svcs. Policy, § III (A) (Effective 2/1/2016).

[21] N.M. Stat. Ann. § 11-18-3; N.M. Admin. Code § 8.26.3.44.

[22] St. of Wash. Dep't. of Child., Youth, and Fam., *Indian Child Welfare Policies and Procedures*, https://www.dcyf.wa.gov/indian-child-welfare-policies-and-procedures; Wash. Rev. Code Ann. §§ 43.376.010-.060.

ARGUMENT

I. ICWA IS AN APPROPRIATE EXERCISE OF CONGRESS' PLENARY POWER TO LEGISLATE IN THE FIELD OF INDIAN AFFAIRS.

The district court's opinion misapprehends the trust relationship between the federal government and sovereign tribes and fails to accord the proper deference to Congress' broad authority to adopt statutes like ICWA in this context. Native American tribes and nations have a unique status in their relationships with both the federal government and the states comprising the United States. Native American tribes have been described by our Supreme Court as "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831); "wards" of the United States, *id.*; "quasi-sovereign nations," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978); "distinct, independent political communities," *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (citation omitted); and "unique aggregations possessing attributes of sovereignty over both their members and their territory," *United States v. Wheeler*, 435 U.S. 313, 323 (1978). This relationship imposes upon Congress "moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The judiciary has consistently recognized Congress' constitutional authority to define the trust relationship through various federal statutes. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) (recognizing "the organization and management of the trust is a sovereign function subject to

the plenary authority of Congress"). A key part of those obligations is a duty to respect tribal sovereignty, and Congress does so by protecting tribal resources. *See United States v. Mitchell*, 463 U.S. 206, 224–25 (1983) (stating federal government's duty to manage Indian forests and property for benefit of Indians "is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people"); *see generally* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 (1994). ICWA reflects Congress' determination that, if it is important to protect a tribe's material resources, it is vastly more important to protect a tribe's children, which Congress found to be vital to tribes' continued existence and integrity. *See* 25 U.S.C. §§ 1901(2), (3).

The Constitution vests Congress with "plenary power to legislate in the field of Indian affairs." *United States v. Lara*, 541 U.S. 193, 200 (2004). This plenary power includes the ability to regulate the relationship between states and tribes. This power derives from Congress' enumerated powers to enact treaties (U.S. Const. art. II, § 2, cl. 2) and the tri-partite Commerce Clause (U.S. Const. art. I, § 8, cl. 3), by which Congress is vested with authority to regulate commerce among the states, with foreign entities, and with Indian tribes. *See Lara*, 541 U.S. at 200 (citing the Indian Commerce Clause and the Treaty Clause as the sources of Congress' "broad general powers to legislate in respect to Indian tribes"). The

Supreme Court has recognized the federal government's power to intervene on behalf of tribes to protect their integrity, resources, and sovereignty. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) and *Morton v. Mancari*, 417 U.S. 535, 555 (1974), discussed *infra*. ICWA is comfortably within these broad powers.

The power Congress exercised in enacting ICWA is analogous to the power it has exercised in other cross-jurisdictional family law legislation involving multiple sovereigns, such as the Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901-54. That law similarly imposes burdens on state family law courts, *see, e.g.*, *id.* § 14932, but is necessary to implement the treaty obligations of the United States to the other signatories of the Hague Convention. *See* Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption, Art. 4, May 29, 1993, 32 I.L.M. 1134 (requiring specific findings of the court finalizing the intercountry adoption of a child). Likewise, ICWA implements obligations the United States has undertaken to the sovereign tribes through treaties and statutes. Many of the treaties the United States has implemented with tribal nations contain language by which the United States assumes responsibility to protect tribal resources and redress "depredations" committed against the tribe. *See, e.g.*, Treaty with the Cheyenne and Arapaho, October 14, 1865, Art. I, 14 Stat. 703. Further, in such treaties Congress often specifically undertakes obligations

for the welfare of American Indian and Alaska Native children. *See, e.g.*, Treaty with the Navajo, 1868, Art. 6, 15 Stat. 667 (providing a schoolhouse and elementary teacher for every 30 Navajo children between the ages of 6 and 16). Congress has undertaken, through treaties, special obligations to American Indian tribes, including American Indian and Alaska Native children.

II. ICWA IS A CONSTITUTIONAL STATUTE.

ICWA is an effort by Congress to fulfill its responsibility to help ensure the ability of tribes to self-govern—indeed, to continue to exist—and has been successfully implemented across the country and in the Amici States over the last forty years. Far from impeding states' ability to protect the best interests of children whose welfare may be at risk from alleged abuse or neglect, ICWA has been recognized as the "gold standard" of child welfare practices. *See* Brief of Casey Family Programs, *et al.* as Amici Curiae in Support of Respondent Birth Father, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 2013 WL 1279468 at *2-3 (March 28, 2013). Congress correctly identified the need to address child welfare practices that threatened the very existence of American Indian and Alaska Native tribes by separating Indian children—current and future tribal members—from their families, tribes, and cultures. Congress' response in enacting ICWA is a permissible exercise of its obligation to tribes that does not violate the anti-commandeering doctrine of the Tenth Amendment or Equal Protection principles.

A. ICWA Does Not Violate the Tenth Amendment's Anti-Commandeering Rule.

The district court erred in ruling ICWA violates the Tenth Amendment's anti-commandeering doctrine. The anti-commandeering doctrine reflects the important principle that the Constitution "confers upon Congress the power to regulate individuals, not States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, _ U.S. _, 138 S. Ct. 1470, 1476 (2018). "'[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.'" *Id*. at 1477 (quoting *New York v. United States*, 505 U.S. 144, 181–82 (1992)).

The anti-commandeering doctrine serves vital interests by preventing Congress from issuing commands to state legislatures, or conscripting state executive officials to enforce federal policy. *Printz v. United States*, 521 U.S. 898, 925 (1997). But it does not apply here, where Congress merely requires state courts to enforce federal law and prohibits state courts from infringing on federally created rights. "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York*, 505 U.S. at 178–79; *see also Printz*, 521 U.S. at 906–08 (noting statutes enacted by the earliest Congresses demonstrate the Founders understood the Constitution to permit

"imposition of an obligation on state *judges* to enforce federal [laws]") (emphasis in original).

ICWA's provisions are consonant with the principles set forth in *Murphy*, *New York*, and *Printz*. In enacting ICWA, Congress established "minimum Federal standards" that "protect the best interests of Indian children and . . . promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. Congress' plenary authority to legislate in the field of Indian affairs empowers it to confer the rights set forth in ICWA on Indian tribes, Indian children, and their parents, as discussed *supra*. ICWA confers upon Indian children and parents the right to have tribal membership considered when children's placements are changed[23] and the right to culturally appropriate reunification services.[24] The statute confers upon Indian tribes rights to receive notice of such proceedings[25] and to have their voices heard in them,[26] as well as a preference for their members and potential members to be placed in homes where these young people can be exposed to their tribal culture and help ensure the tribes' continued existence.[27] The anti-commandeering doctrine does not bar Congress from issuing directives to state

[23] 25 U.S.C. § 1915.

[24] 25 U.S.C. § 1912(d).

[25] 25 U.S.C. § 1912(a).

[26] 25 U.S.C. § 1911.

[27] 25 U.S.C. §§ 1902, 1915.

courts to protect these kind of federal rights in the field of Indian affairs. *Cf. McCarty v. McCarty*, 453 U.S. 210, 235–36 (1981) (*superseded by statute as stated in Mansell v. Mansell*, 490 U.S. 581, 584 (1989)) (holding federal military retirement benefits statute preempted state community property law); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584, 590 (1979) (holding federal pension benefits under Railroad Retirement Act pre-empts California community property law in state dissolution proceeding).

Understanding these principles, in *National Council for Adoption v. Jewell* No. 1:15-CV-675, 2015 WL 12765872, at *7 (E.D. Va. Dec. 9, 2015), *judgment vacated as moot on joint motion of parties*, No. 16-1110, 2017 WL 9440666 (4th Cir. Jan. 30, 2017) *(Jewell)*, the only other decision addressing ICWA and commandeering, the court explained that even state rules of practice and procedure can be prescribed by federal law, when those prescriptions are adequately limited. *Jewell* applied to ICWA *New York*'s principle that Congress can require state courts to enforce federal laws. The court further held those courts' actions can be limited by federal standards designed to ensure vindication of the rights created in ICWA:

> Just as Congress may pass laws enforceable in state courts, Congress may direct state judges to enforce those laws. [*New York*, 505 U.S. at 178.] Where a state court is applying the rights and protections provided for by ICWA the federal government can act to prevent state "rules of practice and procedure" from "dig[ging] into substantive

> federal rights." *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 296 (1949).[28]

Congress is empowered to make these rights real by requiring state courts—which (along with tribal courts) are the forums for child custody matters—to enforce them, and by forbidding state courts from striking a balance different from that crafted by Congress regarding Indian children.

Further, ICWA applies to both state and private actors. *Murphy*, 138 S. Ct. at 1478 ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage."); *see, e.g., Reno v. Condon*, 528 U.S. 141, 151 (2000) (holding the Tenth Amendment does not bar Congress from regulating states along with other participants in commercial data marketplace); *Garcia v. San Antonio*, 569 U.S. 528, 556 (1985) (holding the Tenth Amendment does not bar Congress from applying minimum wage and overtime requirements to state as well as private actors). The district court incorrectly characterized ICWA's placement provisions as applying only when the *state* initiates an adoptive, preadoptive, or foster care

[28] *See also Quinn v. Walters*, 881 P.2d 795, 811–12 (Or. 1994) (Unis, J., dissenting) (arguing ICWA Guidelines' requirement that trial court make pretrial inquiry of child's status as "Indian child" was aligned with principle that "if the state procedural rule is regarded as unduly restricting a litigant's opportunity to assert his or her federal claim, it may be displaced by federal standards") (citing *Dice v. Akron, C. & Y.R. Co.*, 342 U.S. 359, 363 (1952); *Brown v. Western R. of Alabama*, 338 U.S. 294, 296 (1949)).

placement. *See* Slip Op. at 36 (citing 25 U.S.C. §§ 1915(a)-(c)). In fact, the placement preferences state courts must apply are equally applicable to custody changes initiated by private parties. *See* 25 U.S.C. § 1915(a) (requiring "[i]n *any* adoptive placement of an Indian child under State law," the placement preferences must be followed) (emphasis added); *see, e.g., S.S. v. Stephanie H.*, 388 P.3d 569, 574 (Ariz. Ct. App. 2017) (applying ICWA to a private abandonment and step-parent adoption proceeding, stating "Congress did not intend that ICWA would apply only to termination proceedings commenced by state-licensed or public agencies . . . "); *Matter of Adoption of T.A.W.*, 383 P.3d 492, 501–02 (Wash. 2016) (holding the provisions of ICWA apply to stepparent adoption cases); *In re N.B.*, 199 P.3d 16, 20 (Colo. App. 2007) (holding ICWA applies to stepparent adoption cases). The applicability of ICWA to activities in which both state and private actors engage severely undercuts any argument that it unconstitutionally commandeers the states.

An example illustrates this point. The district court found significant to its commandeering analysis that ICWA requires state agencies to provide notice of matters involving Indian children to several entities. *See* Slip Op. at 5 (citing 25 U.S.C. § 1912). But these notice requirements apply to "*any* involuntary proceeding in State court," 25 U.S.C. § 1912(a) (emphasis added), and are not limited to those initiated by public agencies. *See Abigail Boudewyns, et al.,*

Conference of Western Attorneys General, American Indian Law Deskbook 967 (2018 Ed.).[29] Thus, ICWA imposes notice requirements on anyone seeking adoptive or foster care placement, including private parties.

In short, all of the provisions at issue either (1) impose requirements on state courts to ensure the enforcement of federal rights, and/or (2) impose requirements on parties to child custody proceedings—requirements that apply to both private and public parties. These provisions do not unconstitutionally commandeer state governments.

B. ICWA Does Not Violate Equal Protection Principles.

The district court also erred in holding "ICWA relies on racial classifications." Slip Op. at 26. Decades of Supreme Court precedent recognize federal laws that treat Indians differently are not based on suspect classifications but are based, instead, on political classifications and therefore are constitutional. *See, e.g.*, *Mancari*, 417 U.S. at 552-55 (upholding hiring preference for Indians, finding the "preference does not constitute 'racial discrimination'" because it does not apply "to Indians as a discrete racial group but, rather, as members of quasi-

[29] Relatedly, ICWA defines a "foster care placement" as "*any* action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand," 25 U.S.C. § 1903(1)(i) (emphasis added), and does not limit this definition to actions initiated by state authorities.

sovereign tribal entities"); *United States v. Antelope*, 430 U.S. 641, 646 (1977) (upholding tribal court criminal jurisdiction over Indian defendants' crimes against non-Indians: "[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of 'Indians'. . . ." (quoting *Mancari*, 417 U.S. at 533 n.24)); *see also Washington v. Confederated Tribes & Bands of the Yakima Nation*, 439 U.S. 463, 499–502 (1979) (upholding provision treating Indians residing in "Indian Country" differently than non-Indians with respect to both civil and criminal tribal court jurisdiction); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479–80 (1976) (affirming exemption from state taxes for Indians residing on reservation); *Fisher v. Dist. Ct. of Sixteenth Jud. Dist.*, 424 U.S. 382, 390–91 (1976) (recognizing exclusive jurisdiction in tribal court over adoption proceedings regarding tribal members even before ICWA was enacted).

In the seminal *Mancari* case, the Supreme Court upheld a Bureau of Indian Affairs (BIA) hiring preference for Indian applicants over non-Indian applicants, finding no violation of the Fifth Amendment. *Mancari*, 417 U.S. at 552–55. The *Mancari* Court determined the BIA's preference did not violate equal protection

because the classification was not racial in nature and the special treatment of Indians was "reasonable and rationally designed to further Indian self-government." *Id*.

Like the hiring statute in *Mancari*, ICWA's definition of "Indian child" is tied directly to the child's tribal citizenship: To be covered by the statute, a minor must either be "a member of an Indian tribe or . . . eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). This definition is a political, rather than racial, classification because it distinguishes American Indians and Alaska Natives based not on their race or ethnicity but, instead, on their membership or eligibility for membership (if their parent is a tribal member) in "political communities." *Antelope*, 430 U.S. at 646. In fact, ICWA's definition of "Indian child" is more specifically tied to tribal *membership* than the hiring language at issue in *Mancari* because it contains no specific blood quantum requirement. The hiring preference in *Mancari* required that "to be eligible for preference . . . an individual must be one-fourth or more degree Indian blood *and* be a member of a Federally-recognized tribe." *Mancari* at 553 n.24 (emphasis added).

Similarly, this Court upheld a federal regulation exempting a church whose membership was limited to "Native American members of federally recognized tribes who have at least 25% Native American ancestry" from the generally

applicable prohibition on peyote use. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991). The court held the regulation was not impermissible under the Equal Protection clause because it represented a "political classification . . . rationally related to the legitimate governmental objective of preserving Native American culture." *Id.* ICWA, on the other hand, contains no separate or additional blood quantum requirement and relies solely on tribes' decisions regarding membership and eligibility for membership if the child is the "biological child of a member of an Indian tribe." 42 U.S.C. § 1903(4)(b). *A fortiori,* it does not offend Equal Protection principles.

There are several factors underscoring the political nature of tribal membership. First, individuals voluntarily decide whether to assert (or renounce) their tribal membership. *See Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005) ("[Petitioner] has chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe. His Indian status is therefore political, not merely racial."). Additionally, tribes have the sole discretion to accept or reject individuals as tribal members. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (explaining federal court lacked jurisdiction regarding tribe's membership determination because "[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") (citation omitted). Finally, the group of

American Indians and Alaska Natives who are members of or eligible for membership in a federally recognized tribe is a subset of the group of people who are American Indian or Alaska Natives by ancestry or descent. *Mancari*, 417 U.S. at 553 n.24 (recognizing, where "Indian" means "members of 'federally recognized' tribes[, t]his operates to exclude many individuals who are racially classified as 'Indians.' In this sense, the preference is political rather than racial in nature.").

Once Congress' use of tribal membership to determine ICWA's applicability is viewed in the correct (non-racial) light, the reason for its decision to adopt ICWA is evident, and the statute easily survives rational basis review. In enacting ICWA, Congress acknowledged a disproportionate number of Indian children were being removed from their homes—and, ultimately, the parental rights of Indian parents were being terminated—because of state social workers' ignorance of "Indian cultural values and social norms," misevaluations of parenting skills, unequal considerations of such matters as parental alcohol abuse, and other cultural biases. H.R. Rep. No. 95-1386 (1978) at 10. It was in light of this evidence that Congress, "concerned with the rights of Indian families and Indian communities vis-à-vis state authorities," adopted ICWA. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1988). A national standard promulgated through federal legislation was needed because Congress "perceived the states and their

courts as partly responsible for the problem it intended to correct." *Id.* (citing 25 U.S.C. § 1901(5)); *see also* 124 Cong. Rec. 38,103 (1978) (ICWA sponsor Rep. Morris Udall stating "state courts and agencies and their procedures share a large part of the responsibility" for the uncertain future threatening the "integrity of Indian tribes and Indian families"). As explained above, ICWA has been a useful tool in combating cultural bias in custody proceedings and furthering the important goal of tribal sovereignty.

Moreover, even if, contrary to decades of Supreme Court precedent, the district court was correct that ICWA's reliance on membership in an Indian tribe constituted a racial classification, ICWA would still survive strict scrutiny by being "narrowly tailored to further a compelling governmental interest." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). The federal government has trust obligations with regard to Indian tribes, which emanate both from the Constitution (*see, e.g.*, *Antelope*, 430 U.S. at 645–49 ("classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians")) and the treaties signed with Indian tribes to acquire their lands (*see, e.g.*, Treaty with the Navajo, 1868, Art. 6, 15 Stat. 667). These trust obligations give rise to a compelling federal interest in protecting the integrity of Indian families and the sovereignty of tribal communities from ignorant and problematic child

welfare practices that threatened the future of Indian tribes. Indeed, as discussed above, the legislative history of ICWA makes the compelling interest clear; it was because of this historical trust relationship—and in recognition that a nationwide remedy was necessary to redress biased state child welfare practices—that Congress enacted ICWA. *Holyfield*, 490 U.S. at 44–45.

ICWA is narrowly tailored to cover neither too many nor too few people to further this compelling interest. The district court interpreted the statute's preference for placement with "other Indian families" as treating "all Indian tribes as an undifferentiated mass." Slip Op. at p. 28 (citing *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas J., concurring)). In fact, by including placement with "other Indian families" as a possibility within the list of possible priority placements, Congress appropriately accommodated the best interests of an Indian child who may be best served by such a placement.[30] In enacting ICWA, Congress was not merely protecting the ability of sovereign tribes to continue to exist and thrive but was doing so in response to the existential threat posed by unwarranted

[30] Specifically allowing placement with "other Indian families" was another way to combat Congress' concern that white middle class standards were being applied by state and private foster care or adoptive placement agencies to foreclose placements with Indian families to the detriment of Indian children. *See* H.R. Rep. No. 95-1386 (1978) at 9-11 & 24 (discussing the importance of using standards prevailing in the Indian community when establishing placement preferences to help avoid the problem of Indian children who "have to cope with the problems of adjusting to a social and cultural environment much different than their own").

removal of Indian children from their parents and cultures. H.R. Rep. No 95-1386 (1978) at 10 (explaining ICWA was necessary because "many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life."). Therefore, Congress not only needed to consider the needs of tribes but also had to consider an appropriate scheme for establishing the best interests of Indian children, as the child's best interest is the touchstone of child welfare law.[31] *See, e.g.,* 42 U.S.C. § 621(a) (stating the purpose of federal-state cost sharing child welfare program is to ensure "all children are raised in safe, loving families by . . . protecting and promoting the welfare of children"). Congress rationally concluded placing an Indian child with an Indian family, even from a different tribe, could better help the child maintain ties with Indian culture than placement with a non-Indian family. *See Quinn*, 881 P.2d at 810. Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or

[31] Courts have noted that "[u]nder the ICWA, what is best for the 'Indian child' is to maintain ties with the Indian tribe, Indian culture, and Indian family." *Quinn v. Walters*, 881 P.2d 795, 810 (Or. 1994) (citing *Holyfield*, 490 U.S. at 50 n. 24).

institutions which will reflect the unique values of Indian culture." H.R. Rep. No. 95-1386 (1978) at 8.

As this Court has held, ICWA's goal of "preserving Native American culture" is a "legitimate governmental objective." *Peyote Way*, 922 F.2d at 1216. A robust body of research shows "identification with a particular cultural background and a secure sense of cultural identity is associated with higher self-esteem [and] better educational attainment . . . and is protective against mental health problems, substance use, and other issues."[32] Conversely, forcing children to be part of a cultural group different from the one into which they were born is associated with increased risk of suicide, substance use, and depression among American Indians and Alaska Natives. *Id.* This is especially so where being separated from a cultural group also results in alienation from the benefits of citizenship in a tribe. ICWA encourages "child welfare agencies [to] partner with Native agencies and community-based providers to incorporate cultural values, traditions, spirituality, and kinship practices in services," helping Indian children's "successful transition into adulthood."[33] *In re Baby Boy D.*, 742 P.2d 1059, 1075 (Okla. 1985) (Kauger,

[32] Nat. Indian Child Welfare Ass'n, *Attachment and Bonding in Indian Child Welfare: Summary of Research* (2016) https://tinyurl.com/NICWA-Final-Brief.

[33] Holly E. Phillips, *Nurturing the Spirit of ICWA: Reinforcing Positive Outcomes for Indigenous Children in Out-of-home Placement*, Humboldt St. U. (May 2016), https://tinyurl.com/y7gz2gmg.

J., concurring in part, dissenting in part) (recognizing the "significant social and psychological problems among Indian children placed in non-Indian homes").[34]

Additionally, the district court improperly found that ICWA is "broader than necessary because it establishes standards that are unrelated to specific tribal interests and applies those standards to *potential* Indian children." Slip Op. at p. 28. ICWA's definition of "Indian child"—which includes an unmarried person under the age of eighteen who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," 42 U.S.C. § 1903(4)(b)—is consistent with tribal membership requirements and the practical limitations on children's ability to apply for membership. Membership in an Indian tribe is not necessarily automatic, often requiring putative members to take affirmative action to become members.[35] Thus, Congress specifically extended ICWA protections to children who are eligible for membership (but not yet members) to ensure their

[34] Further, to the extent the district court found ICWA's placement preference for placement with "other Indian families" over placement with non-Indian families unconstitutional, it should have excised only the unconstitutional portion of the placement preference, rather than invalidating the entire statute. *See e.g., Booker v. U.S.*, 543 U.S. 220, 258 (2005) (holding that courts "must refrain from invalidating more of the statute than is necessary").

[35] *See, e.g.*, Modoc Tribe, *Tribal Enrollment*, https://tinyurl.com/ya3vc7nb (requiring applicants to submit "documented proof of ancestry"); *see generally* Tanana Chiefs Conf., *Tribal Enrollment*, https://tinyurl.com/yatbj4m2 (describing enrollment process for Alaska tribes, including providing documentation of lineal descent from member of tribe).

inability to take those steps did not prejudice them. H.R. Rep. (1978) 95-1386 (1978) at 17 (recognizing a minor child "does not have the capacity to initiate the formal, mechanistic procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom"). Applying ICWA to children who are *eligible* for membership and the biological child of a member recognizes that an Indian child's rights should be protected even if the child is limited in his or her ability (due to his or her age) to register as a tribal member.[36] This provision does nothing to change the fundamentally political nature of an American Indian or Alaska Native child's membership, which is the focus of ICWA and key to the constitutional analysis.

III. ICWA IS A CRITICAL TOOL THAT FOSTERS STATE-TRIBAL COLLABORATION IN ORDER TO IMPROVE THE HEALTH AND WELFARE OF INDIAN CHILDREN.

ICWA creates an important framework that has allowed robust state-tribal collaboration on the shared interest in improving the health and welfare of Indian children. Amici States have employed ICWA as a means of strengthening and deepening their important, government-to-government relationships with tribes in this critical area. ICWA authorizes states and tribes to "enter into agreements with

[36] *See* H.R. Rep. No. 95-1386 (1978) at 17 (citing, *inter alia*, *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899)) (explaining that including children who are eligible for tribal membership as well as actual members is important because "Indian children . . . because of their minority, cannot make a reasoned decision about their tribal and Indian identity").

each other respecting care and custody of Indian children and jurisdiction over child custody proceedings." 25 U.S.C. § 1919(a). Some Amici States have utilized this provision to enact far-reaching compacts or collaborations to ensure ICWA's goals are realized in their child welfare proceedings. Alaska,[37] Minnesota,[38] Mississippi,[39] New Mexico,[40] Utah,[41] and Washington[42] all have such agreements in place with tribes, and California's court system has a unit devoted to enhancing cooperation in ICWA cases.[43] These agreements have led to important successes. In Utah, for example, the Ute Tribe has placed 75 percent of its children with relatives. By comparison, only 38 percent of other children in foster

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[37] *See Alaska Tribal Child Welfare Compact* (Dec. 15, 2017), http://dhss.alaska.gov/ocs/Documents/Publications/pdf/TribalCompact.pdf.

[38] Minn. Courts, *Tribal/State Agreement* (Feb. 22, 2007), https://tinyurl.com/MN-TribalStateAgreement.

[39] *See Memorandum of Understanding Between Mississippi Department of Human Services, Division of Family and Children's Services and the Mississippi Band of Choctaw Indians* (Oct. 25, 2012), https://tinyurl.com/Miss-Band-MOU.

[40] St. of N.M., Indian Affairs Dep't, *State-Tribal Collaboration Act Summary Report for State Agencies' Activities with New Mexico Indian Tribes, Nations and Pueblos* (FY 2018), https://tinyurl.com/State-Tribal-Collaboration.

[41] St. of Utah Div. of Child and Family Serv's, *CFSP Final Report for Federal Fiscal Years 2010-2014 and CAPTA Update* (June 30, 2014), https://tinyurl.com/CFSP-Final-Report.

[42] St. of Wash. Dep't of Child., Youth, and Fam., *Tribal/State Memorandums of Understanding*, https://www.dcyf.wa.gov/tribal-relations/icw/mou.

[43] Jud. Council of Cal., *S.T.E.P.S. to Justice—Child Welfare* (Mar. 2015), http://www.courts.ca.gov/documents/STEPS_Justice_childwelfare.pdf.

care in Utah are placed with relatives.[44] This is consistent with broader studies showing that in states where a high percentage of placements of Indian children are made in accordance with ICWA's placement preferences, there is a correspondingly high level of state-tribal cooperation in working with Indian families and children.[45]

Amici States' experience has shown adherence to ICWA's standards—in particular, its requirement that active efforts be made to preserve the family—reduces unwarranted removals of children from their Indian homes, removals that have been found to have profound negative short- and long-term effects on children.[46] ICWA's mandate that parties make "active efforts" to "provide remedial services and rehabilitative programs designed to prevent the breakup of

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[44] Utah Div. of Child and Fam. Serv., *Child and Family Services Plan for Federal Fiscal Years 2015-2019* 22, https://tinyurl.com/Child-and-Family-Services-Plan.

[45] Gordon E. Limb, et al., *An empirical examination of the Indian Child Welfare Act and its impact on cultural and familial preservation for American Indian children*, 28 Child Abuse & Neglect 1279, 1279–89 (2004).

[46] *See*, *e.g.*, Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. Penn. J. of L. and Soc. Change 207, 211–13 (2016) (citing studies showing foster home placement and multiple successive non-familial caregivers negatively impact children's ability to form healthy attachments, capacity for social and emotional functioning, adaptive coping, self-regulation, decision making, ability to develop secure attachments, and maintenance of healthy relationships); *see also* part II.B., *supra* (explaining ICWA's important role in facilitating an Indian child's ability to retain cultural ties).

the Indian family," 25 U.S.C. § 1912(d), is working. While studies show disparities still exist in child removals, those disparities are significantly lower than the rates before ICWA.[47] For example, in Utah, in 1976, an Indian child was 1,500 times more likely to be in foster care than a non-Indian child; that disparity dropped to 4 times by 2012.[48] In short, ICWA provides a valuable tool for Amici States to both further Indian children's best interests and protect tribal sovereignty through partnerships with Indian tribes.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting plaintiffs' motions for summary judgment.

[47] *See* Joshua Padilla & Alicia Summers, *Disproportionality Rates for Children of Color in Foster Care,* Nat'l Council of Juv. and Fam. Ct. Judges (May 2011).

[48] Brooke Adams, *American Indian Children too Often in Foster Care*, Salt Lake Trib. (Mar. 24, 2012), http://archive.sltrib.com/article.php?id_53755655&itype=CMSID).

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Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
CHRISTINE CHUANG
Supervising Deputy Attorney General
CHRISTINA M. RIEHL

/s/ CHRISTINA M. RIEHL
CHRISTINA M. RIEHL
JAMES F. ZAHRADKA II
Deputy Attorneys General
Attorneys for Amicus Curiae *State of California*

KEVIN G. CLARKSON
Attorney General
State of Alaska
1031 W. Fourth Ave., Suite 200
Anchorage, AK 99501

MARK BRNOVICH
Attorney General
State of Arizona
2005 N. Central Avenue
Phoenix, AZ 85004

PHILIP J. WEISER
Attorney General
State of Colorado
1300 Broadway
Denver, CO 80203

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

KWAME RAOUL
Attorney General
State of Illinois
100 W. Randolph St., 12th Floor
Chicago, IL 60601

THOMAS J. MILLER
Attorney General
State of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333-0006

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

JIM HOOD
Attorney General
State of Mississippi
Post Office Box 220
Jackson, MS 39205

TIMOTHY C. FOX
Attorney General
State of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

GURBIR S. GREWAL
Attorney General
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo St.
Santa Fe, NM 87501

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

SEAN D. REYES
Attorney General
State of Utah
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320

MARK R. HERRING
Attorney General
State of Virginia
202 North 9th Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General
State of Washington
PO Box 40100
Olympia, WA 98504-0100

JOSHUA L. KAUL
Attorney General
State of Wisconsin
17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4, because it contains 6,218 words, according to the count of Microsoft Word. I further certify that this brief complies with typeface requirements of Rule 27(d)(1)(E) because it has been prepared in 14-point Times New Roman font.

Dated: January 14, 2019

/s/ CHRISTINA M. RIEHL
Christina M. Riehl

CERTIFICATE OF SERVICE

I certify that on January 14, 2019, the foregoing **Brief of the Amicus States of California, Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Virginia, Washington, and Wisconsin in Support of the United States and Intervenor Tribes and Reversal** was served electronically via the Court's CM/ECF system upon all counsel of record.

Dated: January 14, 2019

/S/ CHRISTINA M. RIEHL
Christina M. Riehl