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

IN THE

Supreme Court of the United States

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

Petitioners, 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 CHRISTIAN ALLIANCE FOR INDIAN CHILD WELFARE AND ICWA CHILDREN AND FAMILIES AS *AMICI CURIAE* SUPPORTING THE BRACKEEN AND STATE PETITIONERS

June 2, 2022

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CHEROKEE NATION, ET AL.,

Petitioners,

v.

CHAD EVERET BRACKEEN, ET AL.

THE STATE OF TEXAS,

Petitioner,

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

CHAD EVERET BRACKEEN, ET AL.,

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DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Equal Protection "absolutely prohibits invidious discrimination by government." *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting). The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 ("ICWA"), flies in the face of that prohibition. Based solely on their Indian blood, ICWA banishes Indian children to a separate custody regime that abandons the "best interests of the child" standard and allows Indian children to be used as the pawns or weapons of tribal authorities or dissatisfied family members. Under any other circumstance, such a classification would be "forbidden" as "it demeans the dignity and worth of a person to be judged by [their] ancestry." *Rice v. Cayetano,* 528 U.S. 495, 517 (2000). ICWA should be held unconstitutional for its discriminatory classification here.

Christian Alliance for Indian Child Welfare ("Alliance") is a North Dakota nonprofit corporation with members in thirty-five states, including Texas. Alliance was formed, in part, to (1) promote human rights for all United States citizens and residents; (2) educate the public about Indian rights and issues; and (3) encourage government accountability to families with Indian ancestry.

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[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to fund the brief's preparation or submission. All parties in this case have consented to *amici*'s filing of this brief.

Alliance promotes the constitutional rights of all Americans, especially those of Indian ancestry, through education, outreach, and legal advocacy. Alliance is particularly concerned with the discriminatory and destructive consequences of ICWA. In enacting ICWA, Congress purportedly invoked power delegated by the "Indian Commerce Clause" in Article I of the Constitution, 25 U.S.C. § 1901(1), which grants Congress the power to "[t]o regulate Commerce . . . with the Indian Tribes," U.S. Const. art. I, § 8. ICWA, however, is a broad and far-reaching law that has little or nothing to do with commerce, and it affects individuals that have no connection to, or have actively chosen to avoid entanglement with, tribal government.

Alliance is particularly concerned for families with members of Indian ancestry who have been denied a full range of rights and protections when subjected to tribal jurisdiction under ICWA. This case raises significant issues for Alliance because its members are birth parents, relatives, foster parents, and adoptive parents of children with varying amounts of Indian ancestry, as well as tribal members, individuals with tribal heritage, or former ICWA children, all of whom have seen or experienced the tragic consequences of applying ICWA's heritage-based distinctions.

Tania Blackburn, Andrew Bui, Leslie Cook, Sage DesRochers, Cari Esparza, Desirae French, Nina Martin De La Cruz, Rebecca McDonald, Christopher Moore, Elizabeth Morris, James Nguyen, Sierra Whitefeather, and Rachael Jean Wilbur are former ICWA Children—individuals who were "eligible for

membership in an Indian tribe" and were the "biological child of a member of an Indian tribe," 25 U.S.C. § 1903(4)—or birth parents or family members of ICWA Children (collectively, "ICWA Children and Families"), who have been harmed by ICWA. Due to ICWA's race-based classifications, ICWA Children and Families have been singled out for differential treatment, forced into tribal custody proceedings against their will and best interests, and deprived of their legal rights, solely because they have (or their children have) Indian ancestry.

Ms. Tania Blackburn, a member of the Delaware Tribe of Indians and the Cherokee Nation of Oklahoma, is a former ICWA child. Ms. Blackburn is also an Alliance board member. Due to ICWA, she was shuttled between foster homes—at the Cherokee Nation's guidance and without concern for her best interests—most of which did not respect her traditional practices and failed to protect her safety.

Mr. Andrew Bui, a Navy veteran, is a non-native birth father to a daughter covered by ICWA. The child's native mother struggles with drug addiction and has a history of domestic violence. Because of ICWA, Mr. Bui's procedural rights have been violated and his daughter has been repeatedly placed with her unfit native mother by the Shakopee Mdewakanton Sioux Community of Minnesota.

Mr. Leslie Cook is a non-native birth father to a son covered by ICWA. Due to ICWA, the Passamaquoddy Tribe of Maine was allowed to intervene in Mr. Cook's pending custody case, derail assault charges against his son's native mother, and

award the native mother full custody, despite her known drug abuse and violent tendencies.

Ms. Sage DesRochers, a member of the White Mountain Apache Tribe in Arizona, is a former ICWA child. Ms. DesRochers is also an Alliance board member. Under ICWA and against her best interests, Ms. DesRochers was taken from the custody of her now-adoptive family and turned over to her unfit alcoholic mother who abused and abandoned her.

Ms. Cari Esparza is a non-native birth mother to a daughter covered by ICWA. Due to ICWA's discriminatory placement preferences, and the resultant tribal custody proceedings, Ms. Esparza has experienced gross mistreatment, denial of her rights, and the loss of her daughter's custody in the Gila River Indian Community of Arizona.

Ms. Desirae French is a non-native birth mother to a son covered by ICWA. Due to ICWA's discriminatory placement preferences, the Puebla Laguna Tribe in New Mexico has interfered with the adoption of Ms. French's son by her relatives and demanded placement of Ms. French's son with his native birth father, who is a convicted sex offender suffering from severe mental health disorders.

Ms. Nina Martin De La Cruz is a member of the Spirit Lake Tribe of North Dakota and birth mother to a daughter covered by ICWA. Due to ICWA, the Tribe took custody of her daughter, prevented her from seeing her daughter, and improperly terminated Ms. De La Cruz's parental rights.

Ms. Rebecca McDonald is a member of the Oglala Sioux Nation in South Dakota and a former ICWA child. Due to ICWA and without any regard for Ms. McDonald's best interests, she was shuffled between foster homes and her native birth mother, who would have lost her parental rights on several occasions had the Tribe not intervened.

Mr. Christopher Moore is one-sixteenth Native American descended from the Iowa Tribe of Kansas and Nebraska and—even though his birth parents were never part of the Tribe—is a former ICWA child. Mr. Moore's non-native biological grandmother invoked ICWA and took advantage of ICWA custody proceedings to interfere with Mr. Moore's adoption by non-native parents.

Ms. Elizabeth Morris is a non-native grandmother to six ICWA children. Ms. Morris is also Chair of Alliance. As a member of the Leech Lake Tribe of Minnesota, Ms. Morris's native husband—the children's biological grandfather—cared for and voluntarily took custody to protect the children from neglect and abuse suffered prior to their placement with the Morris family.

Mr. James Nguyen is a non-native birth father to a daughter covered by ICWA. Due to ICWA's discriminatory placement preferences, the Shakopee Mdewakanton Sioux Community in Minnesota has acted to prevent Mr. Nguyen's custody of his daughter and to place her with her native mother, despite her multiple domestic violence convictions and struggles with drug addiction.

Ms. Sierra Whitefeather is a member of the Leech Lake Tribe of Minnesota, a former ICWA child, and the birth mother to an ICWA child. Ms. Whitefeather is also an Alliance board member. Due to ICWA, Ms. Whitefeather was shuffled between thirty-two different foster homes, suffering sexual, physical, and emotional abuse. When she finally found a safe, loving home that supported her native heritage, the Tribe ignored Ms. Whitefeather's best interests and used ICWA to prevent her adoption by non-native parents.

Ms. Rachael Jean Wilbur is a non-native birth mother to nine ICWA children and an Army veteran. Due to ICWA's discriminatory placement preferences, and the resultant tribal custody proceedings, the Skokomish Tribe of Washington has prevented Ms. Wilbur and her children from leaving the reservation and wrongfully placed her children with their native paternal grandparents, known alcoholics who have exposed Ms. Wilbur's children to repeated sexual and physical abuse.

SUMMARY OF ARGUMENT

This case is about the harm suffered by Indian children and their families as a result of ICWA. Because of ICWA, children and their families are forced into an unconstitutional custody regime that (I) violates Equal Protection, and (II) exceeds the power granted to Congress by the Indian Commerce Clause, invading the exclusive province of the States in child-custody matters.

For nearly fifty years, ICWA has imposed race-based classifications on Indian children and their families—a clear violation of Equal Protection—and has caused horrendous individual suffering as a result. As demonstrated by the ICWA Children and Families, at best, ICWA eliminates for Indian children the "best interests of the child" standard normally prevailing in state custody proceedings. It thereby interferes with and prevents ICWA children from being placed in loving and safe homes. At worst, ICWA causes Indian children to be placed in risky or harmful custody arrangements and to be used as pawns or weapons by estranged relatives, tribal members, and unfit birth parents to punish non-native or dissident (but enrollable) parents or to obtain custody that they would otherwise be denied.

ICWA is also an unconstitutional overreach of Congress's power under the Indian Commerce Clause. The Indian Commerce Clause is a limited grant of power to the United States to regulate "commerce" with Indian Tribes. It should go without saying that Indian children are not resources, property, or items of "commerce." And child-custody matters are even less related to commerce than statutory schemes that this Court has struck down in other contexts. By its plain terms, the Indian Commerce Clause does not give Congress plenary jurisdiction over ***all Indian affairs***, much less the authority to impose sweeping regulations like ICWA that are unrelated to commerce and interfere with state family-law matters.

ARGUMENT

I. ICWA'S RACE-BASED DISTINCTIONS VIOLATE EQUAL PROTECTION.

ICWA unquestionably singles out and imposes differential treatment on Indian children and families on account of race. Accordingly, ICWA is a clear violation of Equal Protection. To make matters worse, this differential treatment has caused unspeakable harm to countless individuals. The ICWA Children and Families involved in this case represent only a small sample of the thousands of individuals who have been hurt by ICWA's race-based classifications and discriminatory placement preferences. Their stories make clear that the discrimination imposed by ICWA can no longer be tolerated.

A. ICWA Unquestionably Imposes Unconstitutional Race-Based Classifications On Indian Children.

The government may not "distribute[] burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *see Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Indeed, the "central mandate" of equal protection "is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Race-based classifications are thus

"presumptively invalid," *id.*, as they "demean[] the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U.S. at 517; *Miller*, 515 U.S. at 911.

ICWA imposes just such "odious" race-based distinctions. Under ICWA, an "Indian child" is any minor that is either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). ICWA's application, therefore, depends solely on a person's ancestry. Indeed, race-based distinctions are foundational to ICWA, because a "blood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe." H.R. Rep. No. 95-1386 at 20 (1978). Moreover, in other circumstances, tribal membership or Indian heritage is treated as a racial/ethnic distinction, including in the federal census,[2] college admissions,[3] and for purposes of employment discrimination.[4]

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[2] *2020 Census Frequently Asked Questions About Race and Ethnicity,* U.S. Census Bureau (Aug. 12, 2021), https://tinyurl.com/yydr6cby (collecting information about "American Indian[s]" as a major category for race and ethnicity).

[3] *See generally Gratz v. Bollinger*, 539 U.S. 244, 254 (2003) (addressing the University of Michigan's treatment of African-Americans, Hispanics, and "Native Americans" as "underrepresented minorities").

[4] *See, e.g., Indian and Native American Employment Rights Program,* U.S. Dept. of Labor, https://tinyurl.com/6uzrzk5c (last visited June 1, 2022).

Even this Court has acknowledged that classifications based on "Indian blood" have a "racial component." *Rice*, 528 U.S. at 519 (citing *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974)).[5]

As a result of ICWA's race-based classifications, Indian children and families are subjected to unbalanced child-custody proceedings that prioritize keeping children "in the Indian community," without consideration of the child's best interest. H.R. Rep. No. 95-1386, at 20. Specifically, in placing an Indian child, "preference shall be given" to "other members of the Indian child's tribe" or "other Indian families" (regardless of tribe or relationship) over ***any*** non-Indian placement. 25 U.S.C. § 1915(a); *see id.* § 1915(b). Thus, in place of the multi-factor "best interests of the child" standard applied in most state proceedings—a standard that may take the child's eligibility for tribal membership into account—ICWA imposes a mechanical rule based on race that is damaging to many children.

As a result, Indian children regularly are denied loving and safe homes—and often put into dangerous or otherwise inappropriate custody situations—simply because of their race. By treating Indian children in this harmful manner solely because of

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[5] The ancestry-based distinctions contained in ICWA are racial in nature, and not political. As Petitioners explain, this Court has found that distinctions based on Indian ancestry or tribal membership, constitute political distinctions in limited circumstances that are not present here. Tex. Br. 43-47; Brackeen Br. 20-31.

their Indian ancestry, ICWA violates Equal Protection.

B. ICWA's Race-Based Classifications And Discriminatory Placement Preferences Harm Indian Children And Families.

ICWA's race-based regime has profoundly harmful effects on those that fall within its scope. Most significantly, ICWA's placement preferences are regularly in direct conflict with the best interests of ICWA children and are often invoked as a weapon to interfere with adoption proceedings, punish or undermine the rights of non-native parents, or to obtain access to a child that otherwise would not be available. These are precisely the circumstances experienced by the ICWA Children and Families. Equal Protection does not permit any discrimination based on racial classifications, let alone the harmful discrimination imposed by ICWA.

Tania Blackburn

Due to ICWA, Ms. Blackburn was placed in far-flung foster homes—contrary to her best interests—that neither respected her traditional or cultural practices nor adequately protected her safety. As a member of both the Delaware Tribe of Indians and the Cherokee Nation of Oklahoma, Ms. Blackburn was subject to tribal custody proceedings under ICWA. These proceedings included two Cherokee Nation lawyers, even though the Tribe provided no assistance to Ms. Blackburn or her birth mother. Instead of promoting her best interest, the tribal lawyers worked to ensure that Ms. Blackburn was placed in foster homes with at least one "native"

parent, all at the expense of ensuring that those homes were fit to care for children. The shortage of native foster homes that were approved by the Cherokee Nation meant that Ms. Blackburn was often placed hours away from her mother, the court, and her community, despite the availability of closer, non-native foster homes. Further, most of the foster families with which Ms. Blackburn was placed did not share (or even attempt to continue) the traditional or cultural practices to which Ms. Blackburn was accustomed. Some of these foster parents were also neglectful, exposed her to abuse, and disparaged Ms. Blackburn's heritage.

Thus, not only did ICWA fail to help Ms. Blackburn find a safe, stable home, it actively prevented it. Indeed, ICWA caused Ms. Blackburn to be further removed from her mother, her community, and her heritage.

Andrew Bui

Mr. Bui, a Navy veteran and former Navy SEAL team member, is a non-native father who is currently embroiled in tribal custody proceedings related to his daughter's care. Because of ICWA, Mr. Bui has been subjected to a procedurally biased custody battle with his daughter's native birth mother, a member of the Shakopee Mdewakanton Sioux Community of Minnesota. The child's birth mother has a lengthy history of domestic violence and drug addiction, including ***nearly two dozen*** failed treatment programs and multiple drug overdoses, including in front of her children. In any other circumstance, Mr. Bui would have full custody of his daughter and she would be protected from her unfit birth mother. But, under

ICWA, the Tribe has repeatedly awarded the child's native birth mother custody, shielding the birth mother—as a Tribe member—from accountability for her repeated treatment failures and continuous endangerment of Mr. Bui's daughter. As a result, and because of ICWA, Mr. Bui's procedural rights have been repeatedly violated and his daughter's best interests ignored, all to ensure that the child is placed with someone in the Tribe.

Leslie Cook

Mr. Cook is a non-native father who lost custody of his young son, J.H., to the child's native birth mother, who struggles with drug abuse and has a history of violence. Due to ICWA's placement preferences, J.H.'s birth mother—a member of the Passamaquoddy Tribe in Maine and a relative of its Chief—received preferential treatment in custody proceedings, despite her unfitness as a guardian. While J.H.'s custody case was pending in non-tribal courts, J.H.'s birth mother broke down the door of Mr. Cook's home, attempted to abduct J.H., and assaulted Mr. Cook. She was then arrested and charged. Though the violence against Mr. Cook and J.H. did not take place on the reservation—and the ***aggressor*** in the assault was a Tribal member—the Tribe used the assault and ICWA to gain jurisdiction over J.H.'s custody case.

As a result of the Tribe's interference, Mr. Cook's procedural rights were violated, he lost his legal representation and has not been able to obtain counsel who can represent him in tribal court, and J.H. was taken from his custody. Rather than protect J.H.'s best interests, the Tribe relied on ICWA to place

J.H. with his unfit native birth mother—who then failed to comply with the tribal court's requirements regarding J.H.'s care—and to gain a strategic advantage in J.H.'s custody proceedings. Indeed, due to ICWA, when in conflict, ICWA allowed the Tribe's interests to take precedence over J.H.'s.

Sage DesRochers

ICWA forced Ms. DesRochers to be taken from a loving non-native foster family and placed into an unfit and dangerous custody situation. Ms. DesRochers entered the foster care of a non-native family when she was five months old. This family loved and cared for Ms. DesRochers as their own, and they attempted to adopt her when she was five years old. However, invoking ICWA, the White Mountain Apache Tribe of Arizona and Ms. DesRochers's birth mother (an alcoholic, who had not been a part of Ms. DesRochers's life since birth) intervened to return Ms. DesRochers to her birth mother's custody. Thus, under ICWA, Ms. DesRochers was taken from the only family she had ever known and was placed with her unfit alcoholic mother. Throughout the process, Ms. DesRochers remembers that she was treated "like property" of the Tribe and that her best interests were never a consideration. While in the care of her birth mother, Ms. DesRochers suffered physical abuse and was prevented from attending court hearings in her case. Ms. DesRochers's birth mother eventually abandoned her daughter, and sent her back to the DesRochers family, in contravention of the court order she herself had sought.

Cari Esparza

ICWA allowed Ms. Esparza's autistic daughter to be taken from her in favor of placement with her birth father, who belongs to the Gila River Indian Community of Arizona and is a convicted sex offender. As a non-native mother to an "Indian child," Ms. Esparza has experienced gross mistreatment and denial of her legal rights. After caring for her daughter alone for more than ten years, Ms. Esparza moved to the Gila River Indian Community to allow her daughter to know her birth father and her native heritage. However, when a custody dispute arose, Ms. Esparza was demeaned and threatened by tribal authorities. She was excluded from meetings with case workers and was discriminated against in the proceedings because she is not native. The wishes of Ms. Esparza's daughter, and her relationship with her mother, were ignored in favor of granting the child's native birth father custody, despite his sex-offender status and allegations of molestation concerning another member of his household. Ms. Esparza had been the sole caretaker and advocate for her daughter's health needs since infancy, but due to ICWA, her daughter was taken from her. Instead of protecting the relationship between mother and daughter, ICWA gave preferential treatment to only part of Ms. Esparza's daughter's race and heritage over all else, including her safety.

Desirae French

ICWA has been weaponized to thwart Ms. French's efforts to secure a safe, stable home for her six-year-old son, C.F. Under the guise of ICWA, and despite the fact that C.F. ***is not enrolled in the Tribe***

or eligible for membership, the Pueblo Laguna Tribe of New Mexico has taken an active role in C.F.'s custody proceedings and demanded C.F.'s placement with C.F.'s native birth father and paternal grandparents. This is despite the fact that C.F.'s birth father abandoned him before birth and has never had custody of C.F,[6] and C.F.'s birth father and paternal grandparents have never been to the Pueblo Laguna reservation and live in New York, thousands of miles from the Tribe. Further, the placement is directly contrary to C.F.'s best interests and Ms. French's wishes. Indeed, throughout C.F.'s custody proceedings, Ms. French has observed that the "best interests of the child rule is out the window." This is because C.F.'s birth father—who lives with C.F.'s paternal grandparents—is a convicted sex offender for rape in the second degree who suffers from severe mental health disorders and who has been found by a court-appointed psychologist to be unfit to be alone with C.F.[7] Since 2018, Ms. French has been willing to surrender her parental rights on the condition that C.F. remain with his foster family, with whom C.F.

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[6] Like the birth father in *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 644-46 (2013), C.F.'s birth father abandoned him before birth and has only sought to invoke ICWA after several years and on the eve of his adoption.

[7] Although a new evaluation has been completed, the so-called "expert" who conducted that evaluation has been revealed to have testified falsely regarding his credentials for years, resulting in potentially erroneous reliance on his testimony in hundreds of custody cases. Mike Gagliardi, *Man who testified as psychological expert in St. Lawrence County Family Court is not licensed psychologist*, NNY360 (May 8, 2022), https://tinyurl.com/kuf4484j.

has lived nearly his entire life and who are Ms. French's relatives and adoptive parents to C.F.'s half-sister. But due to ICWA's discriminatory placement requirements, the Tribe's demands are given preference over C.F.'s well-being and Ms. French's wishes.

Nina Martin De La Cruz

ICWA was meant to protect Ms. De La Cruz—a member of the Spirit Lake Tribe in North Dakota and mother to an "Indian child"—but instead it was used against her. When Ms. De La Cruz became pregnant with her daughter in 2016, she was struggling with addiction, though she is now five years sober. Ms. De La Cruz began working with Social Services upon the birth of her daughter and chose not live with the Tribe. She expressed to Social Services that she did not wish to involve the Tribe— she lived one hundred miles away from the Spirit Lake reservation—and she did not enroll her daughter in the Tribe. However, under ICWA, Social Services delivered Ms. De La Cruz's daughter to the Tribe anyway. Ms. De La Cruz was not allowed to visit her daughter, and her daughter was not allowed to leave the reservation. Family members who were willing and able to take custody were not allowed to intervene, and Ms. De La Cruz's daughter was instead placed with a woman who had lost her foster license.[8] Despite her positive life changes and years of fighting to get her daughter

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[8] Tess Williams, '*I just want to be a mother to my kids': Mother says fight for child on Spirit Lake felt hopeless*, Grand Forks Herald (Jul. 14, 2019), tinyurl.com/3hcj4nk2.

back, Ms. De La Cruz's parental rights were terminated, and she had no way to appeal.

Rebecca McDonald

As a member of the Oglala Sioux Nation in South Dakota, Ms. McDonald believed that ICWA would help her find a stable home, but it did just the opposite. Ms. McDonald's birth mother struggled with substance abuse and repeatedly lost custody, resulting in Ms. McDonald's placement with a foster family. However, each time the court was about to consider terminating her birth mother's parental rights, the Tribe intervened. The Tribe would send Ms. McDonald's birth mother to treatment—even though she consistently failed to make progress and would not show up to court—which would allow her to regain custody of Ms. McDonald for a short period of time before the cycle repeated. Thus, due to ICWA and with no regard for Ms. McDonald's best interests, Ms. McDonald was shuffled between her birth mother's custody and foster homes, resulting in an unstable and disrupted home life, for nearly a decade.

Christopher Moore

ICWA interfered, in violation of Mr. Moore's birth mother's wishes, with his adoption by a non-native family. Even though Mr. Moore is only one-sixteenth Native American and had no relationship with the Iowa Tribe of Kansas and Nebraska of which his birth mother was a member, ICWA still applied to him.[9] Mr. Moore's birth mother struggled with drug and

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[9] Lynn Vincent, *Drawing Blood*, WORLD (Apr. 22, 2006), https://tinyurl.com/sxkx79kz.

alcohol dependency, and she was in and out of prison throughout Mr. Moore's childhood. Mr. Moore's biological father had no native blood and left before Mr. Moore was born. Mr. Moore was therefore placed with a loving non-native foster family that sought to adopt him. Yet when adoption proceedings began, Mr. Moore's paternal grandmother—***who was not Native American nor a member of any tribe***—informed Social Services of Mr. Moore's heritage as a means to interfere with the adoption and obtain visitation rights that she otherwise might have been denied. As a result, Mr. Moore's case was transferred to an ICWA-specific court, which ordered mandatory weekend visits to his grandmother (who lived two hours away). Custody was nearly awarded to his grandmother, but Mr. Moore's birth mother testified in support of adoption, ending the proceedings.

Elizabeth Morris

Ms. Morris and her late husband, a member of the Leech Lake Tribe of Minnesota, voluntarily took care, and were granted custody, of six Native American grandchildren. Prior to their placement with the Morris family, the children suffered neglect and physical abuse, and, in at least one case, sexual abuse, as infants and young children. The Tribe, whose placement decisions were often based on the strategic benefit to the Tribe rather than the children's best interests, approached the Morris family and approved of the placement for four of the children, despite moving them 1,200 miles from their community, in order to fulfill ICWA's discriminatory placement preferences. To prevent further harm to the children under ICWA, the Morris family cared for the children at great personal sacrifice and with no support or

oversight from the Tribe. Under ICWA, the Tribe used Ms. Morris's family to "check" a race box, while at the same time imposing a heavy emotional and physical burden on the Morris family and their biological children and exerting no concern for the ICWA children's best interests or their care.

James Nguyen

ICWA has interfered with Mr. Nguyen's daughter's custody proceedings and allowed the child's birth mother—who suffers from serious drug dependency, violence issues, and severe mental illness—access to Mr. Nguyen's daughter that would not be allowed in any other circumstance. Mr. Nguyen's daughter, and her birth mother, are members of the Shakopee Mdewakanton Sioux Community of Minnesota and are related to former leaders of the Tribe. And despite the birth mother's multiple felony domestic violence convictions, repeated treatment for drug addiction (including during her pregnancies), a maltreatment determination from a non-tribal court, and drug overdoses (including in the presence of Mr. Nguyen's daughter), she is granted at least partial custody of Mr. Nguyen's daughter by the Tribe any time she is out of prison or treatment. To ensure this result, relying on ICWA, the tribal court declared Mr. Nguyen's daughter a ward of the court, though Mr. Nguyen was never found unfit, unjustifiably limiting Mr. Nguyen's procedural and substantive rights.[10]

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[10] Mr. Nguyen has filed suit against certain tribal officials and child welfare officers regarding these legal deprivations. *Nguyen v. Foley*, Case No. 21-3735 (8th Cir. Mar. 20, 2022).

ICWA therefore allowed an unfit birth parent to use the tribal court proceedings to gain access to Mr. Nguyen's daughter, even though the birth mother's rights would have been terminated if the child had no Indian blood.

Sierra Whitefeather

Because of ICWA, Ms. Whitefeather—a member of the Leech Lake Tribe of Minnesota—was subjected to a chaotic and abusive childhood in foster care. ICWA prevented her adoption by a non-native family. Instead, Ms. Whitefeather was placed in the foster care system with her two sisters. Due to ICWA's discriminatory placement preferences, and the difficulty in finding such placements, Ms. Whitefeather lived in dozens of different foster homes as a child. While in foster care, Ms. Whitefeather was sexually, physically, and emotionally abused. When Ms. Whitefeather was finally placed with a non-native family who provided a safe, loving home and sought to ensure that Ms. Whitefeather retained her native culture, ICWA interfered. Pursuant to ICWA and without any regard for Ms. Whitefeather's best interests, Ms. Whitefeather's non-native foster family was prevented from adopting her, and she was taken from her foster parents.[11] Ms. Whitefeather ran away on several occasions and survived multiple suicide attempts, all the while begging her Tribe to send her back to her foster parents. Ms. Whitefeather was

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[11] Jon Tevlin, *Tevlin: Sierra shares lessons on Indian adoption,* Star Tribune (Feb. 12, 2013), https://tinyurl.com/y3fd36wu.

finally permitted to return when she was sixteen years old.

Rachael Jean Wilbur

ICWA proceedings have trapped Ms. Wilbur, an Army veteran, and her nine children in an abusive and dangerous situation on the Skokomish Indian Reservation in Washington. Over the past twenty-five years, each time Ms. Wilbur has sought to leave her husband or seek safer arrangements for her children, her native husband and his parents—known alcoholics with a history of violence and sexual abuse allegations, against whom Ms. Wilbur has obtained several protective orders—utilize ICWA and tribal custody proceedings to gain custody of her children. Under ICWA's mechanical and discriminatory placement preferences—which act without any regard for the children's safety or best interests—Ms. Wilbur's children have been repeatedly placed with her husband's parents. And, on multiple occasions, Ms. Wilbur's three oldest children suffered repeated and serious physical and sexual abuse at the hands of other relatives while they were in their custody. The Tribe has repeatedly delayed return of Ms. Wilbur's children due to her filing state and federal complaints regarding the Tribe's conduct and procedural violations. Tribal authorities have further indicated, if Ms. Wilbur were to regain custody of her children or were to become pregnant again, that they would take steps to remove any children from her care. ICWA thus allows the Tribe and tribal members to deprive Ms. Wilbur of her procedural rights and to control Ms. Wilbur and her children with the threat of the children being placed in even more precarious living conditions.

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The ICWA Children and Families are merely a sampling of the individuals who have been harmed by ICWA.[12] Instead of helping families, ICWA and its discriminatory provisions effectively eliminate any requirement to consider a child's best interests, are used to prevent Indian children from being placed with or adopted by non-native families, are wielded to punish non-native or dissident (but enrollable) parents, or to gain access to Indian children in circumstances where that access is inappropriate and would otherwise be denied. This Court should find ICWA unconstitutional to stop these gross abuses and discriminatory treatment.

II. ICWA EXCEEDS CONGRESS'S AUTHORITY UNDER THE INDIAN COMMERCE CLAUSE.

ICWA also unconstitutionally exceeds Congress's power under the Indian Commerce Clause.

The Constitution grants to Congress specific "enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995). Thus, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). And when "Congress has exceeded its constitutional bounds," the Court must "invalidate [that] congressional

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[12] *See, e.g.*, Naomi Schaefer Riley, *On Indian reservations, storm clouds gather over law enforcement*, Am. Enter. Inst. (Sept. 10, 2020), https://tinyurl.com/4bb3efxd; Mark Flatten, *Death on a Reservation*, Goldwater Inst. (June 10, 2015), https://tinyurl.com/2habdpty.

enactment." *Id.*; *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) (noting the Court's "duty to recognize meaningful limits on the commerce power of Congress").

Despite its purported grounding in the Indian Commerce Clause, ICWA's mandates regarding Indian children and child-custody proceedings in no way relate to or concern "commerce." *First*, contrary to the Fifth Circuit's summary conclusion, the Indian Commerce Clause does not grant Congress "plenary" authority to regulate the whole of Indian affairs. Tex. Pet. App. 28a. And, *second*, the Indian Commerce Clause does not grant Congress power to regulate traditional state-law matters like family and child-custody issues addressed by ICWA. ICWA is therefore an unconstitutional expansion of Congress's authority and should be struck down for this additional reason.

A. Congress Lacks Plenary Authority To Regulate All Indian Affairs.

The Indian Commerce Clause is a limited grant of authority that allows Congress "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8. Both the text of the Indian Commerce Clause and this Court's jurisprudence clarify that Congress's authority under the Indian Commerce Clause, even as augmented by the Necessary and

Proper Clause, is limited to regulating *economic* activities.[13]

First, the term "Commerce," as used in the Indian Commerce Clause and at the founding, almost exclusively refers to trade and associated economic activities.[14] For example, prominent eighteenth century dictionaries defined "Commerce" as "trade" and related mercantile activities. Giles Jacob, *A New Law-Dictionary* (8th ed. 1762) ("Commerce, (Commercium) Traffick, Trade or Merchandise in Buying and Selling of Goods. *See Merchant*."); Samuel Johnson, 1 A Dictionary of the English Language (J.F. Rivington *et al.*, 6th ed. 1785) ("Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick."). These definitions reflect the inherently commercial or economic character of the Constitution's term "Commerce." Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789, 817-18 (2006) [hereinafter Natelson, *Legal Meaning of "Commerce"*]; *Lopez*, 514 U.S. at

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[13] This understanding of the scope of the Indian Commerce Clause, notably, prevents tension with Equal Protection.

[14] The Court gives words the meaning they had when the text was adopted. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018). This foundational canon of interpretation applies in interpreting provisions of the U.S. Constitution. *See District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008). And to interpret pertinent constitutional terms, this Court looks to contemporaneous dictionaries and publications from the time of ratification. *Id.* at 581-95; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 107-08 (2001) [hereinafter Barnett, *Original Meaning*].

586-87 (Thomas, J., concurring) (relying on Founding Era materials to find that "commerce" "consisted of selling, buying, and bartering, as well as transporting for these purposes").

The inherently commercial and economic nature of the term "Commerce" becomes even clearer when the term is contrasted with other, broader terms—particularly "Indian affairs"—used widely during the Founding Era but that are not contained in the text of the Constitution. The term "Affairs" was more extensive than "Commerce," and addresses "business; something to be managed or transacted." *See, e.g.*, Johnson, *supra*; Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201, 217 (2007) [hereinafter "Natelson, *Indian Commerce Clause*"] (comparing historical dictionary definitions of "Commerce" and "Affairs"). And at the time of the Constitution's ratification, there is no question that the term "affairs" was considered "a much broader category than trade or commerce." Natelson, *Indian Commerce Clause* at 217.

Lay and legal texts in the eighteenth century further support a restrained interpretation of the term "Commerce." The term regularly "referred to mercantile activities: buying, selling, and certain closely-related conduct, such as navigation and commercial finance." Natelson, *Legal Meaning of "Commerce"* at 805-06; *see id.* at 821-22 (reviewing Blackstone's *Commentaries*). Indeed, several comprehensive reviews of texts from the time of the founding have found that use of "Commerce" was remarkably consistent in referring to trade or

economic transactions. *See, e.g.*, *id.* at 845 (reviewing extensive source material to come to the simple conclusion: "the word 'commerce' nearly always has an economic meaning"); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 858 (2003) (reviewing newspaper publications to conclude that it is "impossible here to convey the overwhelming consistency of the usage of 'commerce' to refer to trading activity (especially shipping and foreign trade) without listing one example after another"); Natelson, *Indian Commerce Clause* at 214-15; Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 Mich. L. Rev. First Impressions 55, 56 (2010).

Similarly, when used during the Constitutional Convention and related state conventions, the term "Commerce" was almost entirely limited to trade or similar economic matters. Indeed, "if anyone in the Constitutional Convention or the state ratification conventions used the term 'commerce' to refer to something more comprehensive than 'trade' or 'exchange,' they either failed to make explicit that meaning or their comments were not recorded for posterity." Barnett, *Original Meaning* at 124; *see* Natelson, *Legal Meaning of "Commerce"* at 839-41; *Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring) (noting that the founders "often used trade (in its selling/bartering sense) and commerce interchangeably."). Thus, all textual evidence points to a limited interpretation of the term "Commerce."

The meaning of the word "Commerce" helps explain why, even in modern times, this Court has

limited application of the Commerce Clause to economic activity.[15] *Taylor v. United States*, 579 U.S. 301, 306 (2016) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." (quoting *Morrison*, 529 U.S. at 613)); *Lopez*, 514 U.S. at 560. Even when paired with the Necessary and Proper Clause, the scope of Congress's Commerce Power applies only to economic activity. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (allowing Congress to regulate purely local growth of marijuana for medical use because the regulation governed an "economic 'class of activities' that have a substantial effect on interstate commerce").

Therefore, as Justice Thomas has explained, "neither the text nor the original understanding of the Indian Commerce Clause supports Congress' claim to such "plenary" power. . . . Instead, . . . the Clause extends only to 'regulating trade with Indian tribes—that is, Indians who had not been incorporated into the body-politic of any State." *Upstate Citizens for Equal., Inc. v. United States*, 140 S. Ct. 2587, 2587 (2017) (Thomas, J., dissenting from denial of cert.); *see United States v. Bryant*, 579 U.S. 140, 160 (2016) (Thomas, J., concurring) ("No enumerated power—not Congress' power to 'regulate Commerce . . . with Indian Tribes,' not the Senate's role in approving

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[15] This Court has addressed the Foreign Commerce Clause only on a few occasions, *Baston v. United States*, 137 S. Ct. 850, 851 (2017) (Thomas, J., dissenting from denial of cert.) (listing examples), but has never explored its scope nor found that it would apply to noneconomic conduct.

treaties, nor anything else—gives Congress [plenary authority]."); *Adoptive Couple*, 570 U.S. at 659. Even legal scholars supporting the Tribal and Federal Respondents agree on this point. "[T]he history of the Indian Commerce Clause's drafting, ratification, and early interpretation does not support either 'exclusive' or 'plenary' federal power over Indians. In short, Justice Thomas['s concurrence in *Adoptive Couple*] is right: Indian law's current doctrinal foundation in the [Indian Commerce] Clause is ***historically untenable***." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1017 (2015) (emphasis added).[16]

Second, even if the text of the Indian Commerce Clause could support Congress's claim to "plenary" authority, such an assertion conflicts with this Court's precedent. Tex. Br. 29-37. Although certain of this Court's opinions have referenced, without analysis, Congress's "plenary power" over "Indian affairs," those opinions make clear that Congress's power "is not absolute." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977).

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[16] Professor Ablavsky filed an amicus brief in support of Respondents at the Fifth Circuit, but that brief was defective for several reasons. One was its peremptory and incomplete review of scholarship exploring the meaning of the term "Commerce." Another was the spurious quality of its arguments. Robert G. Natelson, *A Preliminary Response to Prof. Ablavsky's "Indian Commerce Clause" Attack*, Indep. Inst. (Apr. 7, 2022), https://tinyurl.com/mtx3jy2u (noting Ablavsky's clear misrepresentation both of cited sources and of opposing arguments, including of statements by Justice Thomas).

On the single occasion that the Court analyzed the reach of the Indian Commerce Clause, it ***rejected*** a claim to broad, plenary authority. Indeed, the Court stated that such a ruling would result in a "very strained construction" of the clause to find that "without any reference to their relation to any kind of commerce," a criminal code was somehow "authorized by the grant of power to regulate commerce with the Indian tribes." *United States v. Kagama*, 118 U.S. 375, 378-79 (1886); *see* Nathan Speed, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. Rev. 467, 470-71 (2007) ("[W]hen Congress eventually began asserting plenary power over Indian tribes, the Supreme Court expressly rejected the assertion that the Indian Commerce Clause provided a basis for such a power.").

The oft-cited opinion of *United States v. Lara*, 541 U.S. 193 (2004), is not to the contrary. Except for a concurrence by Justice Thomas, the *Lara* opinion did not analyze the Indian Commerce Clause. *Id.* at 224 (Thomas, J., concurring) ("I cannot agree that the Indian Commerce Clause provides Congress with plenary power to legislate in the field of Indian affairs."). The *Lara* opinion instead addressed a double-jeopardy question, focusing primarily on the Tribe's power to prosecute and punish a nonmember defendant and the sovereign authority of Tribes. *Id.* at 199-200. It did not provide any interpretation or substantive discussion regarding the Indian Commerce Clause.

Thus, Congress cannot be said to possess plenary authority to regulate "Indian affairs"—or to pass ICWA—in the name of the Indian Commerce Clause.

B. Family And Child-Custody Matters Covered By ICWA Are State Issues That Do Not Affect "Commerce."

The constitutional grant of power to regulate "Commerce" does not include "noneconomic activity such as adoption of children." *Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring). At its heart, that is precisely what ICWA is: a federal regulation of child-custody proceedings and adoption. Tex. Pet. App. 471a-472a (describing ICWA); *see Adoptive Couple*, 570 U.S. at 642 (same). Yet ICWA, and its regulation of Indian children, has no relationship to commerce or economic activity and does not claim to have any relationship or connection to commerce. 25 U.S.C. § 1901.

This Court has struck down similarly expansive laws that, although based on the Interstate Commerce Clause,[17] had little or nothing to do with commerce. For example, in *Lopez*, this Court invalidated the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551. The Act was "a criminal statute that by its terms has nothing to do

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[17] Absent some contrary indication, repeated words or phrases in a statute are interpreted to have the same meaning. *Clark v. Martinez,* 543 U.S. 371, 378 (2005).

with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561; *cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (overturning federal arson statute, passed pursuant to the Interstate Commerce Clause, because damage to an owner-occupied private residence was not sufficiently related to commerce and infringed on state police power). Similarly, in *Morrison*, the Supreme Court struck down 42 U.S.C. § 13981, the civil remedy portion of the Violence Against Women Act, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. at 613; *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558-59 (2012) (finding that economic ***inactivity*** was not sufficiently related to commerce to justify regulation under the Interstate Commerce Clause).

Adoption proceedings have no more relationship to commerce than domestic violence or guns near schools. *Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring). Indeed, by its terms, ICWA "deals with 'child custody proceedings,' not 'commerce.'" *Id.* at 665. As Justice Thomas has noted, ICWA was enacted to address the "perceived problem . . . that many Indian children were 'placed in non-Indian foster and adoptive homes and institutions.' This problem, however, ***had nothing to do with commerce***." *Id.* (emphasis added).

Not surprisingly, then, in all other contexts, adoption is governed by state law. Accordingly, ICWA also intrudes on a quintessential area of state concern that is entirely distinct from "commerce" that may be regulated by Congress: family law. "The Constitution

requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. By imposing on truly local issues of family and personal relationships, ICWA further exceeds the power granted to Congress by the Constitution and obliterates this important distinction between federal and local powers.

This Court has repeatedly acknowledged that marriage, divorce, child custody, and adoption are outside of Congress's control. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (explaining that domestic relations have "long been regarded as a virtually exclusive province of the States"). "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). Indeed, these matters are far-removed from Congress's authority to regulate, as the "Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *United States v. Windsor*, 570 U.S. 744, 766-67 (2013).

This Court has rejected interpretations of the Commerce Clause that would allow Congress to the "regulate any activity that it found was related to the economic productivity of individual citizens[, including] family law ([] marriage, divorce, and child custody)." *Lopez*, 514 U.S. at 564; *see Morrison*, 529 U.S. at 615 (rejecting reasoning that may "be applied equally as well to family law and other areas of traditional state regulation"). Congress thus may not seek to exercise power over family and custody matters under the guise of regulating commerce with

Indian Tribes. ICWA, therefore, exceeds Congress's power to regulate commerce, as it is entirely unrelated to commerce and intrudes on noncommercial subjects belonging entirely to the States.

CONCLUSION

For the foregoing reasons, this Court should rule in favor of the Brackeen and State Petitioners.

Respectfully submitted,

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