No. 12-399

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,
Petitioners,
v.
BABY GIRL, *et al*.,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF *AMICUS CURIAE* SEMINOLE TRIBE OF FLORIDA, *ET AL.*, IN SUPPORT OF RESPONDENTS
[*Additional Amici Listed on Inside Cover*]

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ADDITIONAL *AMICI*:

All Indian Pueblo Council;

Catawba Indian Nation;

Confederated Tribes of the Colville Reservation;

Confederated Tribes of the
Umatilla Indian Reservation;

Coquille Indian Tribe;

Jamestown S'Klallam Tribe;

The Klamath Tribes;

Lytton Rancheria;

Maniilaq Association;

Metlakatla Indian Community;

National Council of Urban Indian Health;

National Indian Education Association;

National Indian Head Start Directors Association;

Native American Rehabilitation Association
of the Northwest, Inc.;

Nooksack Indian Tribe;

Northern Arapaho Tribe;

Pueblo of Acoma;

Southern Ute Indian Tribe;

Suquamish Tribe;

Swinomish Indian Tribal Community;

United South and Eastern Tribes, Inc.;

Ysleta del Sur Pueblo

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INTEREST OF *AMICI CURIAE*[1]

The 69 tribes from across the nation who are *amici* or members of *amici* tribal organizations filing this brief are deeply involved in the administration of the Indian Child Welfare Act and have a strong interest in the outcome of this case.

Amici Seminole Tribe of Florida, Catawba Indian Nation, Confederated Tribes of the Colville Reservation, Confederated Tribes of the Umatilla Indian Reservation, Coquille Indian Tribe, Jamestown S'Klallam Tribe, The Klamath Tribes, Lytton Rancheria, Metlakatla Indian Community, Nooksack Indian Tribe, Northern Arapaho Tribe, Pueblo of Acoma, Southern Ute Indian Tribe, Suquamish Tribe, Swinomish Indian Tribal Community, and Ysleta del Sur Pueblo are federally recognized Tribes.

Amici All Indian Pueblo Council, Maniilaq Association, and United South and Eastern Tribes, Inc. are tribal organizations representing consortiums of federally recognized Tribes. A list of the member Tribes of each *amicus* tribal organization is attached in the Appendix to this brief. *Amici* National Council of Urban Indian Health, National Indian Education Association, National Indian Head Start Directors Association, and Native American Rehabilitation Association of the Northwest, Inc., are organizations representing consortiums of tribal and related programs or individuals substantially involved in providing services to Indian children.

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[1] The parties have filed blanket consents to the filing of amicus briefs in this case. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

As federally recognized Tribes and Indian or tribal organizations, *amici* have extensive knowledge and experience with regard to the operation of the Indian Child Welfare Act (ICWA). In particular, *amici* have first-hand knowledge of ICWA's importance in protecting Indian children's citizenship ties to their Tribes. The realization and protection of these citizenship ties is critical both to tribal self-governance and to the full exercise of the rights and responsibilities available to Indian children eligible for tribal citizenship. Accordingly, *amici* have a strong interest in ensuring the proper and constitutional interpretation of ICWA as legislation protecting tribal citizenship.

Amici also have a strong interest in the constitutional standard of review that is applied by the courts to Indian affairs legislation, including ICWA. As *amici* are particularly well-positioned to explain, federal legislation with regard to Indian Tribes is constitutionally unique and involves special considerations not applicable to legislation creating racial classifications. Petitioners and the Guardian ad Litem largely disregard these special constitutional considerations in their arguments. If this Court reaches the constitutional questions raised by Petitioners and the Guardian ad Litem in this case, *amici* believe this brief will aid the court in evaluating those questions as they concern the appropriate constitutional standard of review.

SUMMARY OF ARGUMENT

In 1978, in response to widespread abuses involving the adoption of Indian children, Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963. ICWA applies to children who are enrolled members of federally recognized Indian

Tribes, or eligible for membership and born to enrolled members of those Tribes. 25 U.S.C. § 1903(4). Through such provisions as setting the minimum standards for the termination of parental rights, ICWA sought "to protect the rights of the Indian child as an Indian and the rights of the Indian community and Tribe in retaining its children in its society." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 95-1386, at 23 (1978)). ICWA's fundamental protection of tribal citizenship was a recognition by Congress that the loss of citizens and potential citizens through the widespread adoption of Indian children by non-Indians not only actually diminished the population of Tribes, but also deprived Tribes of leaders, advocates, and political and cultural participants. Such loss was found to "seriously undercut the Tribes' ability to continue as self-governing communities." *Id*. at 34.

The briefs for the Petitioners and the Guardian ad Litem ("Guardian" or "GAL") argue that the application of ICWA by the court below raises grave constitutional concerns. *See* Pet. Br. at 43; GAL Br. at 48. Their arguments, however, rest on a mischaracterization of the governing constitutional standard this Court has established for review of federal Indian legislation – a standard that is responsive to the unique constitutional challenges presented by such legislation.[2] *See Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84-85 (1977); *United States v. Antelope*, 430 U.S. 641, 645 (1977); *Rice v. Cayetano*, 528 U.S. 495, 520 (2000). It is that standard which

[2] That standard is referred to in this brief as the "Indian rational basis standard of review."

should be applied to answer the constitutional questions Petitioners and the Guardian raise.

Attempting to invoke strict scrutiny review, the Petitioners and the Guardian repeatedly claim that ICWA was applied in this case solely on the basis of race or ancestry. They ask this Court to create and apply a rigid distinction between purely ancestral Indian classifications on the one hand and purely non-ancestral Indian classifications on the other hand. However, they fail to advance a clear or principled method for making the distinction they urge or to fully account for Congress's well-acknowledged powers to legislate with respect to Indians as a uniquely separate category under the Constitution. They also fail to recognize the inherent difficulties in the approach they advance, which would ignore the political significance of tribal citizenship and impose subjective cultural criteria to determine the constitutionality of legislation with respect to Indians.

Simply put, the Petitioners' and Guardian's approach is both impractical and contrary to precedent. It is also unnecessary. That is because the established constitutional standard of review for Indian classifications already ensures that Congressional action does not exceed the bounds of Congress's Indian affairs power or impinge on individual constitutional protections. The standard, firmly rooted in history, the Constitution, and strong legal precedent, only requires that legislation "be tied rationally to the fulfillment of Congress's unique obligations toward the Indians." *Weeks*, 430 U.S. at 85 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535 (1974)).

Both on its face and as applied in this case, ICWA has the specific purpose and effect of protecting tribal

citizenship, which is itself at the core of tribal self-government. The Act not only meets the proper Indian rational basis standard of review, but it falls within Congress's constitutional powers "to further Indian self-government" acknowledged by the Guardian and Petitioners themselves. Pet. Br. at 46; GAL Br. at 54.

ARGUMENT

I. The constitutionality of ICWA as applied in this case should be determined under this Court's precedents recognizing the wide breadth of Congress's constitutional Indian affairs powers, which account for equal protection limitations.

The Petitioners and the Guardian argue that the application of ICWA by the court below raises serious constitutional concerns with regard to equal protection.[3] Pet. Br. at 44; GAL Br. at 53. Their argument does not, however, provide a clear or consistent statement of or rationale for the standard of review they advance. The Petitioners and Guardian acknowledge that the standard of review must account not only for the Constitution's guarantee of equal protection, but also for its grant of congressional power over Indian affairs specifically. They suggest that these constitutional principles are in tension and must be balanced, but they do not

[3] The Petitioners and Guardian also advance arguments relating to fundamental liberty interests under the Due Process Clause of the Fifth Amendment, as well as the Tenth Amendment and federalism principles. To the extent not covered in this brief, *amici* agree with the responses of the Cherokee Nation and the Father as to these arguments. *See* Resp't Cherokee Nation Br. at 47-53; Resp't Birth Father Br. at 51-54.

provide a coherent analysis of how that balancing should be accomplished. *See* Pet. Br. at 44; GAL Br. at 54. They are instead content to simply proclaim that the application of ICWA by the court below was based solely on race or ancestry, and therefore should be subject to "strict scrutiny" and overturned. Pet. Br. at 44; GAL Br. at 54-55.

The Petitioners' and Guardian's reliance on strict scrutiny in this case is misplaced. This Court has established and repeatedly applied a constitutional standard of review that governs Congressional action over Indians and Indian affairs. Under that standard, such federal legislation is deemed constitutional if it is "tied rationally to the fulfillment of Congress's unique obligations toward the Indians." *Mancari*, 417 U.S. at 555 (1974). Where the standard is met, legislation cannot be viewed as based on impermissible racial classifications but is to be upheld under Congress's broad constitutional Indian affairs authority.

The Indian rational basis standard of review is necessarily different from standards applied to Congressional action classifying persons other than Indians. Indians occupy a "sui generis" status within the United States and receive singular treatment in the United States Constitution as the subjects of unique legislative protection and regulation. *Mancari*, 417 U.S. at 551-52 (1974); *United States v. Lara*, 541 U.S. 193, 200-01 (2004).[4] Those powers are expansive

[4] Congressional power over Indian affairs is generally described as flowing explicitly and implicitly from the Indian Commerce Clause, art. I, § 8, cl. 3, the war and treaty powers, the property clause of Article IV, and others, as well "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government" and the general nature of

and have been "consistently described as 'plenary and exclusive'" by this Court. *Lara*, 541 U.S. at 200. As a result, both federal and state courts over the years have consistently acknowledged and respected Congress's broad authority to legislate with respect to Indians. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323-24 (2011); *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980).

The treatment of Indians in our constitutional system is exceptional and well justified by history. Unlike any other segment of the population in the United States, Indians existed in North America in self-governing societies prior to the formation of the United States, and were not participants in the creation of its government. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831).[5] From the beginning,

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the relationship between Indian Tribes and the United States. *Lara*, 541 U.S. at 200-01. *See also Mancari*, 417 U.S. at 551-52; *Cohen's Handbook of Federal Indian Law* §§ 5.01-5.02 (Nell Jessup Newton ed., 2012) [hereinafter, *Cohen's Handbook*] (explaining the constitutional sources and scope of federal power over Indians). For ease of reference, we will refer to the broad authority from these several sources as Congress's constitutional, or constitutionally based, powers over Indian affairs.

[5] When the United States was established, Indian tribes were recognized as separate and their preexisting governing institutions served as a source of inspiration for the Framers. In 1988 the Senate and the House of Representatives underscored this fact in a concurrent resolution resolving that "the Congress, on the occasion of the two hundredth anniversary of the signing of the United States Constitution, acknowledges the contributions made by the Iroquois Confederacy and other Indian Nations to the formation and development of the United States;" and further resolving that the Congress "hereby reaffirms the constitutionally recognized government-to-government relationship with Indian Tribes which has been the cornerstone of this

the Founders of the United States chose to respect the political status of the Indian Tribes they encountered, and to preserve and protect it for their children and their children's children. *See* Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 164 (2008). Indeed, "[t]he historical record for the period encompassing, at the very least, 1763 through the Articles of Confederation, the Constitution, and even the ratification of the Fourteenth Amendment, provides remarkably unambiguous support for the proposition that the original understanding of the Framers was that Indian affairs must be dealt with in the context of tribal political relationships with the federal government."[6] *Id*. at 180.

The courts do, however, review Congressional action to ensure that it does not violate constitutional requirements by exceeding the reasonable bounds of Congress's Indian affairs powers. *Weeks*, 430 U.S. at 84-85. That is the function of the Indian rational basis standard of review, as articulated and applied in Supreme Court cases including *Mancari*, 417 U.S. at 555, *Weeks*, 430 U.S. at 84-85, *Moe v. Confederated*

Nation's official Indian policy; …" H.R. Con. Res. 331, 100th Cong. (1988) (enacted).

[6] Congress continues to enact legislation, consistent with the Framers' original understanding, that expressly recognizes the unique political status and governmental power of Tribes. For example, the 113th Congress recently passed legislation to recognize and affirm tribal special domestic violence criminal jurisdiction over non-Indians, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904 (2013), which the Court had previously ruled is within Congress's constitutional powers. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (it is for Congress to decide "whether Indian Tribes should finally be authorized to try non-Indians.").

Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 480 (1976), and *Antelope*, 430 U.S. at 645. Where this standard is met, nothing more need be shown for this Court to determine that an Act of Congress, as applied or on its face, passes constitutional muster. *Weeks*, 430 U.S. at 85.

While Petitioners and the Guardian acknowledge this well-settled standard of review, they argue that before the courts may apply the standard, the guarantee of equal protection requires a threshold determination that the differential treatment is not "predicated solely on 'ancestral' classification." Pet. Br. at 44; *See also* GAL Br. at 53-54. This argument reflects a fundamental misunderstanding of the justification, purpose, and function of the Indian rational basis standard. That standard does not require a threshold determination that the classification is non-ancestral in nature, because the standard itself is designed to ensure that Congressional action with respect to Indians does not exceed Congress's proper constitutional authority. So long as legislation does not exceed that authority, it cannot be deemed to violate equal protection.[7]

This Court fully explained the function of the Indian rational basis standard of review in *Delaware Tribal Bus. Comm. v. Weeks*, *supra*. In *Weeks*, a group of Delaware Indians that had been excluded

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[7] "In other words, in a sense the Constitution itself establishes the rationality of the present classification, by providing a separate federal power which reaches only the present group. … '[T]he Constitution itself provides support for legislation directed specifically at the Indian Tribes.... [T]he Constitution therefore singles Indians out as a proper subject for separate legislation.'" *United States v. Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (citing *Antelope*, 430 U.S. at 649 n.11).

from the distribution of judgment funds pursuant to an Act of Congress challenged their exclusion on equal protection grounds. 430 U.S. at 75. Appellants, Delaware Indians who were included in the distribution, argued that "Congress's pervasive authority…to control tribal property" precluded judicial review of the Act. *Id*. at 83. The Court disagreed, noting that Congress's broad power over Indian affairs "has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." *Id.* at 84.

Acknowledging Congress's unique powers over Indian affairs, the Court continued: "The question is therefore what judicial review of [the Act] is appropriate in light of the broad congressional power to prescribe the distribution of property of Indian Tribes." *Id.* at 85. In striking the balance between the clear and long-acknowledged constitutional powers over Indian affairs and the guarantee of equal protection, the Court applied the Indian rational basis standard of review. The Court upheld the statute, holding that "the legislative judgment should not be disturbed '(a)s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians.'" *Id*.

Recognizing that multiple facets of Indian identity have always existed simultaneously, the Indian rational basis standard of review does not rely on a simplistic and rigid distinction between classifications involving Indian ancestry on the one hand and purely non-ancestral criteria on the other hand. Such a test would impose on courts the impossible task of parsing and scrutinizing the basis of Indian identity in each case, as the Guardian and Petition-

ers ask this Court to do. Indeed, any legislative classification directed at citizens of federally recognized Tribes is almost certain to involve *some* component of Indian ancestry, simply because citizens of Indian Tribes are Indian and have an Indian identity. *Rice*, 528 U.S. at 519-20. That is hardly a novel observation on the Petitioners' part – but that overlap is a result of historical circumstance and has never been considered a bar to Congressional action.[8] *Id*. Because Congress is constitutionally empowered to legislate with respect to Indians specifically, whether or not a classification involves individuals of common Indian ancestry is not the relevant inquiry. Instead, the question is whether or not Congress directs the use of that Indian classification toward a permissible end. *Id*.

Accordingly, the Indian rational basis standard of review recognizes that where legislation is related to Congress's unique obligations to Indians, it is necessarily "reasonably and directly related to a legitimate, *nonracially based* goal," even though the classi-

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[8] Petitioners, and several *amici* in support of the Petitioners, attempt to draw the opposite conclusion from *Rice*, citing the majority opinion's observation that "Ancestry can be a proxy for race." *See*, *e.g.*, Pet. Br. at 46; Br. of Amicus Curiae Christian Alliance for Indian Child Welfare at 15-16; Br. of Amicus Curiae National Council for Adoption at 9. But *Rice* broadly affirmed Congress's powers to "single out [Indians] for special treatment[,]" 528 U.S. at 519, and clearly distinguished such treatment from classifications with "express racial purpose and … effects." *Id*. at 517. Even if ancestry could be a proxy for race in other circumstances, *Rice* affirms that equal protection is not violated where, as here, the classification is made in furtherance of a nonracially based goal and is undertaken as an exercise of Congress's constitutional powers in matters involving Indian Tribes.

fication may also overlap with race. *Mancari*, 417 U.S. at 554 (emphasis added). *See also*, *id*. (noting that "This is the characteristic that generally is absent from proscribed forms of racial discrimination."). On the other hand, where legislation cannot be shown to be rationally related to Congress's obligations to Indians, it is subject to the same constitutional constraints as any racial classification because the historical, political, and constitutional justifications for treating Indians differently from other groups would not be available.[9]

II. Because the application of ICWA by the South Carolina courts was based on the protection of tribal citizenship, not race, it met the Indian rational basis standard and fell within the core Congressional powers acknowledged even by the Petitioners and the Guardian.

In attempting to make this case one about race, the Petitioners ignore the fact that ICWA can only be applied in the first instance on the basis of a child's membership or eligibility for membership in a federally recognized Tribe. 25 U.S.C. § 1903(4). "Membership" in a Tribe, which is more appropriately called citizenship, is at its core a matter of political status. This is a consequence of the political nature of Tribes

[9] For example, this Court has suggested that Congress could not authorize a state to adopt an Indian preference that precludes non-Indians from voting in state elections on matters of "critical state affairs," such as the election of state officials. *Rice*, 528 U.S. at 522. Because the election of state officials relates to the administration of critical state-wide affairs rather than any unique obligation toward Indians, it likely would not pass constitutional muster under the Indian rational basis standard of review.

themselves and the governmental functions they perform, which distinguishes them from ethnic groups or associations which do not perform such functions. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

The inherent right of a Tribe to determine its own citizenship is at the core of what it means to be a self-governing Indian Tribe under familiar principles of federal Indian law. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978). "Although physically within the territory of the United States … [Tribes] nonetheless remain a separate people, with the power of regulating their internal and social relations" including membership. *Wheeler*, 435 U.S. at 322; *id*. at 322 n.18. This Court in *Santa Clara Pueblo* agreed with a district court decision noting that "membership rules were 'no more or less than a mechanism of social . . . self-definition,' and as such were basic to the Tribe's survival as a cultural and economic entity." *Santa Clara Pueblo*, 436 U.S. at 53-54. The Court also noted that "[t]o abrogate tribal decisions, particularly in the delicate area of membership… is to destroy cultural identity[.]" *Id*.

If Tribes are to continue to function as self-governing entities, their ability to enroll and meaningfully incorporate new citizens into their nation must be protected. *See Foley v. Connelie*, 435 U.S. 291, 295-96 (1978) ("The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others.") (citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)). A Tribe's interest in enrolling eligible citizens (and the child's own interest in enrollment) is therefore critical and exists regardless of any ties the

custodial parent may or may not have with the Tribe. Congress has a strong constitutional basis for acting to preserve these tribal and individual rights under its broad Indian affairs powers. *Santa Clara Pueblo*, 436 U.S. at 62-63 (1978) (Congress's powers over Indian affairs include the powers to preserve as well as to limit or modify the powers of tribal self-government).

Both on its face and as applied in this case, ICWA operates to discourage the placement of Indian children in environments where their potential for tribal citizenship and participation in tribal life is not likely to be realized. ICWA is triggered on the basis of tribal citizenship or eligibility for tribal citizenship, and has the specific purpose and effect of protecting that citizenship. It is therefore evident that ICWA facially and as applied meets the Indian rational basis standard of review because it is tied to Congress's unique obligations toward Indian Tribes. ICWA also clearly falls within Congress's constitutional authority "to further Indian self-government" specifically acknowledged by the Guardian and Petitioners themselves. Pet. Br. at 46; GAL Br. at 54.[10]

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[10] For the same reasons, the application of ICWA in this case does not, as the Petitioners claim, conflict with federalism principles. Pet. Br. at 49. The federal justification is remarkably strong and firmly rooted in a power specifically reserved to Congress. *Lara*, 541 U.S. at 200 ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian Tribes, powers that we have consistently described as 'plenary and exclusive.'"). Just as Congress can claim broad constitutional powers over Indian affairs, the states can claim none, as they "have been divested of virtually all authority over Indian commerce and Indian Tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996). Thus, federalism principles and

Petitioners assert that where a Tribe "recognizes as members all persons who are biologically descended from historic tribal members," then "the ancestry underpinning membership is 'a proxy for race.'"[11] Pet. Br. at 45-46. They acknowledge that "[t]his Court has upheld preferential treatment for Indians where the differentiation is a consequence of Indians' unique sovereign status." Pet. Br. at 44. Yet their argument would necessarily reduce that "unique sovereign status" to a nullity by treating tribal citizenship as nothing more than identification as part of a racial group, with no independent political meaning. That conclusion would fly in the face of two hundred years of legal precedent to the contrary and cannot be seriously entertained.

In short, tribal citizenship has always been recognized as a political matter. ICWA was triggered in this case by Father's tribal citizenship and Baby Girl's eligibility for citizenship in the Cherokee Nation. It was therefore not applied on the basis of race but on Father's and Baby Girl's political status and falls comfortably within the core of tribal self-government interests that Congress may constitutionally protect.

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the Tenth Amendment do not operate to restrict Congressional action taken under its Indian affairs powers. *Id*.

[11] As has been noted, Petitioners improperly rely on *Rice v. Cayetano* for this claim. *See* note 8, *supra*, and accompanying text.

III. The restrictive threshold tests advanced by the Petitioners and Guardian to avoid the proper standard of review are not supported by law.

Petitioners and the Guardian apparently recognize that their constitutional claims involve a departure from the long established Indian rational basis standard applied in *Weeks*, *supra.* In order to lay the foundation for their constitutional claims, then, they seek to limit the scope of the standard by proposing new threshold tests for its applicability. Under the Guardian's formulation, Congress's actions under its constitutional Indian affairs powers would be subject to strict scrutiny unless the legislation enacted "relates to Indian land, tribal status, self-government, or culture." GAL Br. at 54. Petitioners advance a similar approach when they argue that the result in this case was "unmoored to any legitimate federal interest in protecting existing tribal ties, culture, or self-government" and is therefore subject to strict scrutiny. Pet. Br. at 3, 45-46.

These threshold tests are contrary to this Court's precedents and have no basis in logic or law. As was made clear in *United States v. Antelope*, the application of the Indian rational basis standard of review is not predicated on a court's independent determination that the classification relates to tribal self-government, culture, land, or any other threshold criteria. In *Antelope*, the Court concluded:

> [*Mancari* and *Fisher*] involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating

> Indian interests. But the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal 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'[.]"

Antelope, 430 U.S. at 646-647.

Whether or not a classification furthers self-government or protects tribal culture may be relevant to whether or not it meets the Indian rational basis standard, but it is not an independent prerequisite to the application of that standard or the only means of satisfying it. *Compare Mancari*, 417 U.S. at 554 (finding that a BIA employment preference met the test because it was "reasonably designed to further the cause of Indian self-government and make the BIA more responsive") *with Weeks*, 430 U.S. at 85 (finding that a distribution of judgment funds to certain Indians but not others satisfied the standard of review, not because it furthered self-government, but because "[a]s tribal property, the appropriated funds were subject to the exercise by Congress of its traditional broad authority over management of lands and property held by recognized Tribes[.]").

Similarly, whether or not legislation deals directly with tribal land may sometimes be relevant to whether it is rationally related to Congress's unique obligations toward Indians, but it is not a required

element of any test for constitutional authority.[12] Congress's power over Indian affairs does not spring from its power over Indian lands, but from its constitutional powers over Indians and Indian Tribes and the fundamentally political nature of the relationship between the United States and Indian Tribes. *United States v. Holliday*, 70 U.S. 407, 418 (1865) (Congress has constitutional authority to regulate intercourse between Indians and non-Indians outside of Indian Country as "The right to exercise [such power] in reference to any Indian Tribe, or any person who is a member of such Tribe, is absolute, without reference to the locality of the traffic, or the locality of the Tribe, or of the member of the Tribe with whom it is carried on.").

In *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194-95 (1876), the Court noted that "this court has held that the power to regulate commerce with the Indian Tribes was, in its nature, general, and not confined to any locality; that its existence necessarily implied the right to exercise it, whenever there was a subject to act upon[,]" and that such authority is "[b]ased … exclusively on the Federal authority over the subject-matter[.]"). *See also Antoine v. Washington*, 420 U.S. 194, 204 (1975) (legislation ratifying a treaty that reserved special off-reservation hunting and fishing rights for tribal members was a proper exercise by Congress of its broad power under the Constitution to "[single] out Indians as a proper subject for separate legislation.") (citing *Mancari*).

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[12] For a more thorough discussion of why land ownership is not a determinative factor when evaluating Congress' constitutional power over Indians, *see* Br. of Amicus Curiae Tanana Chiefs *et al*.

The absence of any threshold requirement to the application of the Indian rational basis standard of review in over 200 years of Supreme Court precedent is perhaps why the Guardian cites only a single Ninth Circuit case, *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), for the notion that such a "key" test exists. Specifically, the Guardian reads *Williams* as requiring that challenged legislation involving special treatment for Indians "[relate] to Indian land, tribal status, self-government or culture." GAL Br. at 54. But the *Williams* passage quoted by the Guardian served only to list, by way of example, legislation that "passes *Mancari*'s rational relation test because 'such regulation is rooted in the unique status of Indians as a separate people with their own political institutions.'" *Id*. at 664. In fact, neither the *Williams* court nor any other court has held that legislation *must* fit into one of the four categories listed by the Guardian or that these categories alone provide "[t]he key to whether legislation involving Indians triggers the relaxed review of *Mancari*, or the exacting scrutiny traditionally demanded of classifications based on race[.]" GAL Br. at 54.

Notably, the *Williams* court cited *Antelope* for the scope of the Indian rational basis standard of review. *Williams*, 115 F.3d at 665. As discussed, the Court in *Antelope* specifically held that legislation need not be tied to matters of self-government to meet the standard. *Id.* at 646-647. It further found that the Major Crimes Act as applied in that case very easily passed constitutional muster because the Indian defendants to whom it was applied were *tribal members*. *Antelope*, 430 U.S. at 646. The chain of logic advanced by the Guardian, then – that the *Williams* court's examples of legislation proper under *Mancari* and *Antelope* somehow created a rigid threshold test

that ICWA cannot satisfy – finds no support in any legal precedent.[13]

IV. The threshold tests proposed by the Guardian and the Petitioners are fatally subjective and would force courts into a policymaking role properly reserved for Congress.

As noted, the Guardian's argument would require all federal legislation providing special treatment for Indians to "relate to Indian land, tribal status, self-government or culture" in order to avoid strict scrutiny. GAL Br. at 54. It is difficult to decipher exactly what the terms "self-government" and "culture" are meant to encompass under this test. All that can be gleaned from the Guardian's brief is that this threshold test would not be satisfied by any of the interests implicated here, including: the Tribe's self-government interest in enrolling and maintaining its citizens as future participants in the political and cultural life of the Tribe; the child's interests in the rights and opportunities that flow from tribal citizenship and civic participation; the child's interest in understanding her cultural and political heritage; and the federal government's interest in protecting

[13] To the extent that *Williams* may have suggested a narrower reading of *Antelope* through the use of a "unique tribal interests" test, relying on factors such as "Indian culture" and whether or not the legislation furthers a "native way of life" as determined by the court, it has been criticized for departing from the governing precedents and relying on inappropriate, subjective criteria. *E.g.* Carole Goldberg, *Descent into Race*, 49 UCLA L. Rev. 1373, 1376-1380 (2002). Whatever standard is employed by the courts, Indian Tribes should not be subject to the divestment of critical legal protections conferred on them by the Constitution simply because tribal cultures, like all cultures, grow and evolve in reaction to new circumstances. *Id*. at 1380.

citizenship and family relationships in tribal nations and communities.

The Petitioners' threshold test for the Indian rational basis standard of review also ignores these interests and is even less defined than the Guardian's test. Petitioners simply assert that the result in this case was "based on race, unmoored to any legitimate federal interest in protecting existing tribal ties, culture, or self-government." Pet. Br. at 3. That assertion is repeatedly made throughout Petitioner's brief without any explanation as to why it might be so.[14]

If adopted, this threshold test in practice would require courts to make sensitive and far reaching policy decisions of the kind specifically reserved for Congress. They would invite the erosion of basic legal protections for Indians and Indian Tribes extended under the Constitution by imposing vague and subjective cultural criteria to be applied by the courts. Application of the Guardian's undefined "Indian land, tribal status, self-government or culture" test would require courts to determine (on an unknown basis) what comprises a native "way of life" and what constitutes the meaningful exercise of culture and self-governance within the unique context of that way of life. These determinations have been left to Congress and the Tribes over the course of our Nation's history not only due to the expansive power over Indian affairs specifically reserved to Congress under the Constitution, but also because of the properly limited role of the courts in our democratic system. Congress, in turn, has most often

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[14] By our count, the Petitioners repeat this claim or some variation of it over 15 times in their brief, while the Guardian does so over 25 times.

appropriately chosen to leave such cultural and other sensitive determinations to Tribes by deferring to their right to determine their own citizens.

While a few courts have attempted to implement the kind of cultural litmus tests suggested by Petitioners and the Guardian,[15] most have sensibly rejected them as simply inappropriate. As noted by one California court of appeal:

> The determination whether an Indian child and/or his or her parents have any "significant" ties to Indian culture is, by its very nature, a highly subjective one that state courts are ill-equipped to make […] [Under that approach] the trial court was left to decide, without any guidance or expertise, if the parents' Indian activities and beliefs were "significant" enough to warrant application of ICWA. No evidence was presented describing Indian cultural practices generally, or explaining how the family's "Indianness" might be expected to manifest itself day to day.

In re Alicia S., 65 Cal. App. 4th 79, 90-91 (Cal. 1998). *See also, e.g.*, *In re N.B.*, 199 P.3d 16, 22 (Colo. Ct. App. 2007) ("Applying [this type of analysis] would

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[15] For example, *In re Bridget R.*, 41 Cal. App. 4th 1483, 1514-15 (1996), a state court attempting to determine "Indianness" in an effort to ensure that ICWA was not applied on the basis of race alone resorted to such criteria as whether an Indian child's parents "privately identified themselves as Indians and privately observed tribal customs… took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, … or maintained social contacts with other members of the Tribe" among other things. *See also*, *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Cal. Ct. App. 2001) (relying on *Bridget R.* and employing a similar analysis).

result in each state court using its own value system to decide whether a child is "Indian enough" for ICWA to apply, which would limit the Tribes' efforts to regain members who were lost because of earlier governmental action."); *In re Baby Boy C.*, 27 A.D.3d 34, 49 (NY 2005) (state courts are "ill-equipped" to "make the inherently subjective factual determination as to the 'Indianness' of a particular Indian child or parent" and such an exercise would be contrary to federal policy). These warnings and observations apply not only in the ICWA context or in state (as opposed to federal) court settings, but generally to any subjective, culturally specific test.[16] They likewise apply to the Guardian's test, which as formulated in the Guardian's brief would apply as a threshold matter to all federal Indian affairs legislation that becomes the subject of constitutional challenge.

V. The "Existing Indian Family" doctrine advanced by the Petitioners and the Guardian suffers from the same fatal flaws as their threshold tests for constitutionality.

The Petitioners and the Guardian also argue that ICWA specifically must be limited, as applied, by still another test in order to pass muster under their threshold tests for constitutionality: the "existing Indian family" doctrine. This "doctrine" is not found in any of the provisions of ICWA and suffers from the same defects as the other threshold tests discussed above.

The existing Indian family doctrine is a judicially created test used by a small number of state courts to

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[16] *See* note 13, *supra*.

limit the application of ICWA. By Petitioners' count, courts in seven states apply the doctrine, while the courts in fourteen states have specifically rejected it. Pet. at 11-12. The doctrine essentially provides that ICWA may not be applied in cases where "adoptive placement of the child would *not* cause the 'breakup of [an] Indian family.'" Pet. Br. at 40 (emphasis added). Under this test, a child's citizenship (or eligibility for citizenship) in a Tribe does not in itself create a sufficient connection between the child and the Tribe on which to constitutionally base the application of ICWA's protective provisions. Instead, the burden is on the party relying on ICWA to demonstrate to the satisfaction of the court that there are additional tribal ties to support the threshold determination that an existing Indian family would be adversely affected.

ICWA itself does not identify any specific tribal ties that must be proven to trigger application of the statute beyond eligibility for citizenship, so courts have developed differing formulations of the existing Indian family doctrine.[17] Under the Petitioners' formulation, "When an adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian mother with sole custodial rights [under state law], ICWA's purpose to prevent the unwarranted removal of Indian children and the continuation of their

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[17] *Compare In re Bridget R.*, 41 Cal. App. 4th 1483, 1514-15 (1996) (the existing Indian family doctrine requires that the child's biological parent or parents "maintain a significant social, cultural, or political relationship with their Tribe") *with In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009) ("The judicially created EIF doctrine is an exception to ICWA that precludes its application in cases where the court determines that there is no existing Native American family, meaning the child is not, and never was, part of a Native American family or Tribe.")

existing Indian ties is not implicated" and ICWA cannot be applied. Pet. Br. at 40 (citing *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988)). The Petitioners state variations on this theme throughout their brief, and they further claim that "The existing Indian family doctrine, by focusing on connections to tribal culture and sovereignty, prevents ICWA from devolving into a race-based preference for Native Americans" that could not meet constitutional requirements. Pet. at 26.

In a similar vein, the Guardian cites with approval *Adoption of T.R.M.*, *supra*, for the proposition that the "purpose of ICWA is to protect Indian children from improper removal from their existing Indian family units…" GAL Br. at 47. The Guardian, therefore, would require something "beyond biology" for ICWA to apply as a constitutional matter, though it is not clear what. GAL Br. at 48.

However formulated, the existing Indian family doctrine wrongly conflates tribal membership with race and discounts the independent political meaning of tribal citizenship as well as Congress's explicit constitutional powers to legislate with regard to Indians. It would open the door to vague judicial analyses seeking "some other tribal connection," left undefined, to ensure that the application of ICWA is not based on race. GAL Br. at 48. *See In re Bridget R.*, 41 Cal. App. 4th 1483, 1509 (1996). This is also inconsistent with Congress's authority to determine who shall be considered Indian for purposes of federal law, *United States v. Sandoval*, 231 U.S. 28, 47 (1913), authority that cannot be diminished even where a state court has decided that the Indians "have become fully assimilated into the political and

social life of the State[.]" *United States v. John*, 437 U.S. 634, 652 (1978).

Petitioners attempt to distinguish their version of the existing Indian family doctrine from the version employed in cases like *Bridget R.* by focusing on which parent has custody. Pet. Br. at 40-41. But they admit that when tribal citizenship is considered an insufficient basis for application of ICWA, custody is only relevant because "there is at least the possibility that the child could be exposed to Indian culture or tribal politics through her Indian parent." Pet. Br. at 45. Ultimately, then, the Petitioners' test – like the cultural litmus test employed in *Bridget R.* – follows from the faulty assumption that tribal membership is merely a proxy for race. For that reason, the Petitioners' argument necessarily demands some cultural or political showing of "Indianness" beyond eligibility for citizenship, such as a child's potential home life. That requirement is inconsistent with the role of the courts, with Congress's authority to determine who is an Indian for purposes of federal law, and with the Tribes' right to determine their own citizenship.

In that sense, the Petitioners' position cannot be meaningfully distinguished from the more explicitly cultural version of the "existing Indian family" doctrine in its premise, reasoning, and ultimate requirements. Indeed, "[t]he requirement that Indian people enact their Indianness to the satisfaction of outsiders—with the burden on the Indians themselves—is one of the consequences" of ignoring the political meaning of tribal citizenship and erroneously concluding that it is based on race. Goldberg, *supra* note 13, at 1388.

By protecting tribal citizenship ties through ICWA, Congress permissibly chose to allow Tribes them-

selves to determine the level of cultural and political participation required for tribal citizenship. Perhaps even more crucially, Congress acted to ensure Tribes the opportunity to reincorporate individuals eligible for tribal citizenship who may have been prevented from participating in tribal life for any number of reasons, including the downstream effects of assimilationist federal and state policies. *E.g., In re N.B.*, *supra*, 199 P.3d at 22. This fundamental goal would be undermined by inappropriate judicial interference if the Petitioners' and the Guardians tests were to be adopted.

CONCLUSION

For the reasons stated, *amici* respectfully request that the decision of the Supreme Court of South Carolina be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

LIST OF MEMBER TRIBES OF *AMICI* TRIBAL ORGANIZATIONS

All Indian Pueblo Council

Ohkay Owingeh, New Mexico

Pueblo of Acoma, New Mexico

Pueblo of Cochiti, New Mexico

Pueblo of Isleta, New Mexico

Pueblo of Jemez, New Mexico

Pueblo of Laguna, New Mexico

Pueblo of Nambe, New Mexico

Pueblo of Picuris, New Mexico

Pueblo of Pojoaque, New Mexico

Pueblo of San Felipe, New Mexico

Pueblo of San Ildefonso, New Mexico

Pueblo of Sandia, New Mexico

Pueblo of Santa Ana, New Mexico

Pueblo of Santa Clara, New Mexico

Pueblo of Santo Domingo, New Mexico

Pueblo of Taos, New Mexico

Pueblo of Tesuque, New Mexico

Pueblo of Zia, New Mexico

Pueblo of Zuni, New Mexico

Ysleta del Sur Pueblo, Texas

Maniilaq Association

Native Village of Ambler
Native Village of Buckland
Native Village of Kiana
Native Village of Kivalina
Native Village of Kobuk
Native Village of Kotzebue
Native Village of Noatak
Noorvik Native Community
Native Village of Point Hope
Native Village of Selawik
Native Village of Shungnak

United South and Eastern Tribes, Inc.

Alabama-Coushatta Tribe of Texas
Aroostook Band of Micmacs, Maine
Catawba Indian Nation, South Carolina
Cayuga Nation, New York
Chitimacha Tribe of Louisiana
Coushatta Tribe of Louisiana
Eastern Band of Cherokee Indians, North Carolina
Houlton Band of Maliseet Indians, Maine
Jena Band of Choctaw Indians, Louisiana
Mashantucket Pequot Tribal Nation, Connecticut
Mashpee Wampanoag Tribe, Massachusetts
Miccosukee Tribe of Indians of Florida

Mississippi Band of Choctaw Indians

Narragansett Indian Tribe, Rhode Island

Oneida Indian Nation, New York

Passamaquoddy Tribe—Indian Township, Maine

Passamaquoddy Tribe—Pleasant Point, Maine

Penobscot Indian Nation, Maine

Poarch Band of Creek Indians, Alabama

Saint Regis Mohawk Tribe, New York

Seminole Tribe of Florida

Seneca Nation of Indians, New York

Shinnecock Indian Nation, New York

The Mohegan Tribe, Connecticut

Tunica-Biloxi Tribe of Louisiana

Wampanoag Tribe of Gay Head (Aquinnah), Massachusetts