No. 18-11479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,
Intervenor Defendants - Appellants

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION
CASE NO. 4:17-CV-00868-O

AMICUS BRIEF OF NATIVE AMERICAN WOMEN, INDIAN TRIBES, AND ORGANIZATIONS IN SUPPORT OF APPELLANTS AND REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following list of persons and entities, in addition to those listed in the briefs of the parties and other *amici*, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate potential disqualification or recusal.

Amici Curiae

1. Rosa Soto Alvarez
2. Stephanie Benally
3. Carlene A. Chamberlain
4. Judi gaiashkibos
5. Erica Pinto
6. Kathy Talbert
7. Barona Band of Mission Indians of the Barona Reservation, California
8. Jamul Indian Village of California
9. Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California
10. Nebraska Commission on Indian Affairs
11. Southern Indian Health Council
12. Utah Foster Care
13. American Civil Liberties Union Foundation
14. ACLU Foundation of Texas

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/s/ Kendra J. Hall
Kendra J. Hall
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I. INTEREST OF *AMICI CURIAE*[1]

Amici are Native American women who are personally affected by the Indian Child Welfare Act ("ICWA"), including mothers and grandmothers with Indian children and grandchildren involved in the foster care system and Native American women who were themselves involved in the foster care system. *Amici* also include tribes as well as foster care, health care, and Indian affairs organizations that are involved in implementing ICWA. *Amici* include the following individuals and entities:

Rosa Soto Alvarez is a Councilwoman of the Pascua Yaqui Tribe and an enrolled member of the Pascua Yaqui Tribe. Ms. Alvarez went through the foster care system as a child and was placed with a Yaqui family through ICWA. The viewpoints of Ms. Alvarez in this brief are shared in her individual capacity, not in her official capacity as Councilwoman.

[1] *Amici* filed an unopposed motion to file this brief pursuant to Federal Rule of Appellate Procedure 29. All parties have consented to the brief's filing and the brief complies with Federal Rule of Appellate Procedure 29. This brief avoids repetition of facts and legal arguments contained in other briefs, and this brief focuses on points not made or adequately discussed in other briefs. Undersigned counsel hereby certifies that: (1) no counsel for a party authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity—other than *amici curiae*, their members, or their counsel—contributed money intended to fund the preparation or submission of this brief.

Stephanie Benally is a Native American Specialist/Foster-Adoptive Consultant for Utah Foster Care and an enrolled member of the Navajo Nation. Ms. Benally also has adopted two Indian children through ICWA.

Carlene A. Chamberlain is the Secretary and Enrollment Clerk for the Jamul Indian Village of California and an enrolled member of Jamul Indian Village. Ms. Chamberlain obtained custody of her Indian granddaughter through ICWA.

Erica Pinto is the Chairwoman of Jamul Indian Village and an enrolled member of Jamul Indian Village. Ms. Pinto assists with ICWA implementation as Chairwoman and she is the Aunt of the Indian child who was placed with *amicus* Ms. Chamberlain through ICWA.

Kathy Talbert is a retired ICWA Guardian Ad Litem in Minneapolis, Minnesota, and is an enrolled member of the Sisseton Wahpeton Oyate Tribe. Ms. Talbert has over twelve years of experience implementing ICWA through the Minnesota court system as an ICWA Guardian Ad Litem.

The Jamul Indian Village of California, **the Barona Band of Mission Indians of the Barona Reservation, California, and the Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California**, are federally recognized Indian tribes.

All three *amici* Indian tribes are members of *amicus* **Southern Indian Health Council ("SIHC")**. SIHC is a Native American organization consisting of seven federally recognized Indian tribes. SIHC is committed to protecting and improving the physical, mental, and spiritual health of the American Indian community. SIHC implements ICWA through its Indian Child Social Services program, providing services to Indian families such as preventing Indian child removal, working with other child welfare services toward Indian parent-child reunification, facilitating foster care, and providing general social services and case management assistance.

The Nebraska Commission on Indian Affairs ("Commission") is the state liaison between the four headquarter tribes of the Omaha, Ponca, Santee Sioux, and Winnebago Tribes of Nebraska and consists of fourteen Indian commissioners appointed by the Governor of Nebraska. The Commission's statutory mission is "to do all things which it may determine to enhance the cause of Indian rights and to develop solutions to problems common to all Nebraska Indians." In carrying out this mission, the Commission advocates, educates, and promotes through legislation the improvement and implementation of ICWA in Nebraska. The Commission also works closely with the Nebraska ICWA Coalition, consisting of tribal representatives, ICWA specialists, attorneys, and other advocates, to better the lives of Indian children and families in Nebraska's

foster care system. *Amicus* **Judi gaiashkibos** is the Executive Director of the Commission and is an enrolled member of the Ponca Tribe of Nebraska.

Utah Foster Care is a nationally-recognized non-profit that finds, trains, and supports Utah families who are willing and able to provide a nurturing home for children in foster care. Utah Foster Care has Native American Specialists, such as *amicus* Ms. Benally, who work on its behalf to implement ICWA's provisions in Utah.

American Civil Liberties Union Foundation is a nationwide, nonprofit, nonpartisan organization with more than one million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. ACLU National Policy 313 expressly commits the ACLU to protecting the rights of Indian tribes to self-government and retention of their heritage. The ACLU has represented, and is representing, Indian tribes and Native American parents in ICWA cases. **The ACLU Foundation of Texas** is an affiliate of the national ACLU and shares the same commitment to protecting the rights of Indian tribes and individuals.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Indian women "played a vital role" in opposing state intervention into Indian families and the forced and highly disproportionate removal of Indian children from tribal communities. *See* MARGARET D. JACOBS, A GENERATION REMOVED:

THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 95 (2014) [hereinafter A GENERATION REMOVED]. The drive of Indian women to reclaim Indian children helped spark the national and international grassroots movement that ultimately led to the enactment of ICWA. *See id.*

As Wilma Mankiller—the first female Principal Chief of Cherokee Nation—has said, "No matter where indigenous women gather or for what purpose, they almost always talk about family and community and express concern about traditional values, culture, and lifeways slipping away." WILMA MANKILLER, EVERY DAY IS A GOOD DAY, REFLECTIONS BY CONTEMPORARY INDIGENOUS WOMEN xxviii (mem'l ed. 2011). Indeed, "[i]t is the women who are responsible for bringing about the next generation to carry the culture forward." *Id.* Children are the most vital cultural resources to tribes, as Congress recognized when enacting ICWA. *See* 25 U.S.C. § 1901(3).

Amici Native American women along with tribes and organizations as protectors of tribal families and cultures urge this Court to reverse the district court's unprecedented ruling that ICWA is unconstitutional. Contrary to the district court's holding, ICWA does not violate the equal protection component of the Fifth Amendment to the United States Constitution. Congress enacted ICWA to, *inter alia*, preserve tribal families and cultures, and it has the plenary power to enact ICWA through the Indian Commerce Clause and Treaty Clause of the

Constitution. These constitutional clauses should be interpreted using well-settled principles of domestic law as well as customary international law, both of which provide tribes have the right to self-determination, including the right to self-governance and cultural integrity. These rights prohibit assimilationist policies such as the removal of Indian children from Indian homes, which ICWA is designed to prevent. Furthermore, under rational basis review, ICWA's treatment of Indian tribes and individuals is rationally related to fulfilling Congress' unique obligation to Indians, as evidenced by the stories of *amici* Native American Women. Even under strict scrutiny review, Congress is furthering a compelling interest under ICWA. This Court should reverse the district court's unprecedented ruling that ICWA is unconstitutional, because ICWA is necessary for the protection of the rights of indigenous peoples, especially women and children, and for the continued existence of tribes as distinct governments and cultures.

III. ARGUMENT

A. Congress Properly Enacted ICWA Through its Constitutional Plenary Power, and the Constitution Should be Interpreted According to Well-Settled Principles of Domestic Law as Well as Customary International Law Protecting the Rights of Indigenous Peoples.

As the Supreme Court has held, determining whether a "preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment . . . turns on the unique legal status of Indian tribes under

federal law and upon the plenary power of Congress." *Morton v. Mancari*, 417 U.S. 535, 552 (1974). Congress' plenary power over Indian tribes and individuals is "drawn both explicitly and implicitly from the Constitution." *Id.* at 551–52. Explicit sources of power include the Indian Commerce Clause and the Treaty Clause. U.S. CONST. art. I, § 8, cl. 3, art. II, § 2; *see also United States v. Lara*, 541 U.S. 193, 200 (2004).

The Constitution provides Congress' power to legislate over Indian tribes and individuals. In addition to the arguments advanced by the Defendants-Appellants and Intervenor Defendants-Appellants in this case regarding Congress' power, *see* Dkt. No. 145 at 21–29; Dkt. No. 147 at 7–13, *amici* assert that international law also supports Congress' plenary power to enact ICWA. As recognized in Cohen's Handbook, a source often cited by the United States Supreme Court, "[t]he field of federal Indian law has its roots in international law." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01[2], at 386 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK]. Furthermore, "[m]any Supreme Court decisions regarding Indian affairs drew directly on the law of nations to explain and justify the relationship between the national government and Indian tribes." *Id.* (citing *Worcester v. Georgia*, 31 U.S. 515, 520, 561 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 53 (1831); *Johnson v. M'Intosh*, 21 U.S. 543, 571–84 (1823)). Courts should continue to look to international law when

interpreting the Constitution and Congress' plenary power over Indian tribes, as the Supreme Court has consistently done when interpreting Congress' authority over Indian tribes and individuals. *See Lara*, 541 U.S. at 201–02.

Courts in the United States generally apply international law in two ways—"as part of customary international law applied as federal common law, and as an interpretive aid in the construction of United States constitutional or statutory law." COHEN'S HANDBOOK, *supra*, § 5.07[4][a], at 480. The Supreme Court has long held that, when possible, federal statutes should be construed in a way that does not conflict with customary international law. *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (*Charming Betsy*); COHEN'S HANDBOOK, *supra*, § 5.07[4][a], at 483 (citing *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *Charming Betsy*, 6 U.S. at 118); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains." quoting *Charming Betsy*, 6 U.S. at 118)); *Garcia v. Sessions*, 856 F.3d 27, 42 (1st Cir. 2017) (utilizing non-self-executing United Nations' 1967 Protocol Relating to the Status of Refugees when interpreting the federal Illegal Immigration Reform and Immigrant Responsibility Act of 1996 under *Charming Betsy*); *United States v. Esquenazi*, 752 F.3d 912, 924 (11th Cir. 2014) (superseded by statute on other grounds as stated in *United States v. Gross*, 661 F. App'x 1007,

1023 (11th Cir. 2016)) ("[Under *Charming Betsy*, we] are thus constrained to interpret 'instrumentality' under the [Foreign Corrupt Practices Act] so as to reach the types of officials the United States agreed to stop domestic interests from bribing when it ratified the [Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions]."); *In re City of Houston*, 731 F.3d 1326, 1333–34 (Fed. Cir. 2013) (utilizing Paris Convention of 1883 when interpreting the federal Trademark Act of 1946 under *Charming Betsy*); *United States v. Ayesh*, 702 F.3d 162, 166 (4th Cir. 2012) (finding application of federal criminal statutes comports with international law under *Charming Betsy*); *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 696 (9th Cir. 2011) (declining to interpret the federal Airline Deregulation Act of 1978 to discriminate against foreign air carriers in favor of domestic ones, as such interpretation violates U.S. treaty obligations of 1998, 1956, and 1944 and thus violates *Charming Betsy*).

Of particular applicability is the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), adopted by the United Nations General Assembly in 2007 and joined by the United States in 2011. *See* UNDRIP, General Assembly Res. No. 61/295, U.N. Doc. A/61/L.67 (2007); *Announcement of U.S. Support for [UNDRIP]*, U.S. State Dep't (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm [hereinafter *Announcement of U.S. Support for*

UNDRIP]. As the United States has recognized, UNDRIP's "concept of self-determination is consistent with the United States' existing recognition of, and relationship with, federally recognized tribes as political entities that have inherent sovereign powers of self-governance," including sovereign powers over family relations and culture. *Announcement of U.S. Support for UNDRIP*, *supra*. The United States further recognized "the many facets of Native American cultures – including their religions, languages, traditions and arts – need to be protected, as reflected in multiple provisions of [UNDRIP]." *Id.* UNDRIP contains several provisions designed to protect tribal families and cultures.

Native American attorney and international law scholar Walter Echo-Hawk has noted that "many experts believe that key rights in [UNDRIP] arise from, are connected to, and constitute settled rules of customary international human rights law, such as . . . [a] right to self-determination . . . [and a] right to culture, including the right not to be subjected to genocide and ethnocide." WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 65 (2013). Therefore, "to the extent they reflect customary international law," UNDRIP's specific provisions may be enforced by United States courts. *Id.* at 64.

Scholars have found that the indigenous right to self-determination is settled customary international law and that the right to self-determination is comprised

of, among other rights, the right to self-governance and the right to cultural integrity. *Id.* at 65, 82–84 (citing JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 69–70 (2004 ed.); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM RTRS. J. 57, 109 (1999)). The right to self-governance includes having "political institutions that reflect [indigenous peoples'] specific cultural patterns and that permit [indigenous peoples] to be generally associated with all decisions affecting them on a continuous basis." *Id.* at 65 (quoting JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 112 (1996 ed.)). The right to cultural integrity includes "the survival and flourishing of indigenous cultures through mechanisms devised in accordance with the preferences of the indigenous peoples concerned." *Id.* (quoting JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 104 (1996 ed.)).

Reflecting customary international law, UNDRIP specifically provides for the right of indigenous peoples to self-determination in Article 3. UNDRIP further provides in Article 7 that "[i]ndigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, *including forcibly removing children of the group to another group*." (emphasis added). Similar to Article 7, Article 8 of UNDRIP provides that "[i]ndigenous peoples . . . have the right not to be

subjected to forced assimilation or destruction of their culture" and that "States shall provide effective mechanisms for prevention of . . . [a]ny form of forced assimilation or integration."

The right to self-determination, and the underlying rights to self-governance and cultural integrity, are evidence of customary international law, and should be used by courts when interpreting the Constitution and federal laws pertaining to Indian tribes and individuals. In particular, Congress' plenary power to legislate for Indian tribes and individuals through ICWA should and does include an ability to ensure the self-determination of tribes, including the survival and flourishing of tribal governments and cultures, as evidenced in Article 3 of UNDRIP. Without tribal involvement in the placement of Indian children under ICWA, *see* 25 U.S.C. § 1915, tribes are subject to the destruction of their cultures and forced assimilation, in violation of customary international law evidenced in Articles 7 and 8 of UNDRIP. Congress itself noted that ICWA was intended to, among other things, prevent assimilation and protect tribal cultures. Congress reported that "[o]ne of the most pervasive components of the various assimilation or termination phases of American policy has been the notion that the way to destroy Indian tribal integrity and culture, usually justified as 'civilizing Indians,' is to remove Indian children from their homes and tribal settings." TASK FORCE FOUR: FEDERAL,

STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 78–79 (Comm. Print July 1976).

The power of Congress to legislate over Indian tribes and individuals is directly tied to the tribes' legal status as distinct governments with their own cultures and as the Supreme Court put it, "this unique legal status is of long standing." *Mancari*, 417 U.S. at 555. The Constitution's provisions provide Congress with the power to enact ICWA as the Defendants-Appellants and Intervenor Defendants-Appellants have argued before the district court. Additional support for Congress' plenary power is found in customary international law as evidenced by UNDRIP, which provides guidance in interpreting the Constitution and demonstrates that Congress has the power to enact ICWA. ICWA is an effective mechanism for the protection of tribal self-determination and the prevention of tribal cultural destruction and assimilation. This Court should uphold Congress' plenary power to enact ICWA under the Constitution.

B. Congress' Special Treatment of Tribes Under ICWA is Rationally Related to the Fulfillment of Congress' Unique Obligation to Indian Tribes and Individuals, as Evidenced by the Stories of *Amici* Native American Women.

In 1968, the "mothers' delegation"—a group of five Indian women from the Devils Lake Sioux Tribe in North Dakota—held a press conference and lobbied in New York City and Washington DC to bring awareness to the epidemic of the forced removal of Indian children. *See* A GENERATION REMOVED, *supra*, at 97.

"The Devils Lake mothers' delegation presaged the prominent role that Indian women would play in the decade-long movement to preserve Indian families" and convinced federal officials to take action. *Id.*

Following the mothers' delegation and leading up to the passage of ICWA, the House Subcommittee on Indian Affairs conducted hearings in the mid-1970s in which several Indian women testified. *See, e.g.*, *Hearings Before the Subcomm. on Indian Affairs of the Comm. on Interior & Insular Affairs on Problems that Am. Indian Families Face in Raising Their Children & How These Problems Are Affected by Fed. Action or Inaction*, 93rd Cong. 51–54, 64–71, 95 (1974) (statements of Mrs. Alex Fournier and Mrs. Cheryl DeCoteau) [hereinafter *1974 ICWA Hearings*]. These hearings revealed the shocking fact that between one-quarter and one-third of all Indian children in the country were removed from their families by state child welfare agencies and state judicial officers and placed in foster or adoptive homes or residential institutions.[2] These percentages were far higher than those for white children. In one state, Indian children were eight times more likely than white children to be adopted through state court proceedings; in

[2] *See Hearings Before the Subcomm. on Indian Affairs & Public Lands of the H. Comm. on Interior & Insular Affairs on S. 1214*, 95th Cong., 2d Sess. (1978); *Hearing Before the S. Select Comm. on Indian Affairs on S. 1214*, 95th Cong., 1st Sess. (1977); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 155–59 (2010).

another, Indian children were thirteen times more likely than non-Indians to be placed in foster care. *See id.* at 15 (statement of Mr. William Byler, Exec. Director, Ass'n on Am. Indian Affairs).

In addition to these findings, "[s]tudies also indicated that state social workers and state judges often lacked a basic knowledge of Indian culture regarding child-rearing, were prejudiced in their attitudes, and removed Indian children from their homes primarily because the family was Indian and poor." STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 291 (2012); *see also* H.R. REP. NO. 95-1386, at 10 (1978). Specifically, Congress found that "an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies;" that state officials "often failed to recognize the . . . cultural and social standards prevailing in Indian communities and families;" that a "high percentage of such children are placed in non-Indian foster and adoptive homes and institutions;" and that these removals threatened "the continued existence and integrity of Indian tribes." 25 U.S.C. §§ 1901(3), (4), (5); *see Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (noting ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes

through adoption or foster care placement, usually in non-Indian homes."); BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 160 (2010) ("Testimony before Congress also indicated that state child welfare officials were insensitive to traditional Indian approaches to child rearing . . . [and applied] majoritarian middle-class values [in assessing whether to remove an Indian child from his or her home].").

The 1978 House Report characterized these removals as "perhaps the most tragic and destructive aspect of American Indian life today," resulting in a crisis "of massive proportions." H.R. REP. NO. 95-1386, at 9 (1978). As the 1974 congressional hearing demonstrated, "[t]hese separations contributed to a number of problems, including the erosion of a generation of Indians from Tribal communities, loss of Indian traditions and culture, and long-term emotional effects of Indian children caused by the loss of their Indian identity." *See* Indian Child Welfare Act Proceedings, Final Rule, 81 Fed. Reg. 38,864, 38,780 (June 14, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf (citing *1974 ICWA Hearings*, *supra*, at 1–2, 45–51 (statements of Sen. James Abourezk, Chairman, Subcomm. on Indian Affairs and Dr. Joseph Westermeyer, Dep't of Psychiatry, Univ. of Minn.)).

Congress passed ICWA to address these state-created problems. As ICWA provides, its purpose is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families . . . ." 25 U.S.C. § 1902. ICWA, then, has the twin goals of safeguarding Indian children and families while also protecting the survival of Indian tribes. *See Holyfield*, 490 U.S. at 52 (noting that Indian tribes have an interest in the custody of tribal children "which is distinct from but on parity with the interest of the parents" and which "finds no parallel in other ethnic cultures found in the United States"; "many non-Indians find [such a relationship] difficult to understand" and "non-Indian courts are slow to recognize [such a relationship]" (quoting *In re adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986)).

The statutory language and legislative history of ICWA make it clear that Congress enacted ICWA to, *inter alia*, preserve tribal families and cultures. In enacting ICWA, Congress took a holistic approach to the best interests of Indian children, establishing presumptive preferences that Indian children would be best placed with family members, 25 U.S.C. § 1915(a)–(b), or in homes that "reflect the unique values of Indian culture." H.R. REP. NO. 95-1386, at 8 (1978). Congress further found that ICWA's enactment was necessary because "many social workers, ignorant of Indian cultural values and social norms, make decisions that

are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." *Id.* at 10.

Amicus Kathy Talbert, an enrolled member of the Sisseton Wahpeton Oyate Tribe who is a retired ICWA Guardian Ad Litem in Minnesota with over twelve years of experience, believes that cultural barriers often arose in her work. As an ICWA Guardian Ad Litem, Ms. Talbert worked with numerous social workers and Native American families. In her experience, encountering two to three children in one bedroom or having families stay over is normal in Indian households, but that situation is generally less common in non-Indian households. She indicates that oftentimes in the state foster care system, social workers do not tend to trust individuals in the parents' house, even if they are extended family members.

These present-day issues that *amicus* Ms. Talbert faced regarding cultural misunderstandings were prevalent when ICWA was passed. Congress recognized then that "[a]n Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family," but that "[m]any social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." *Id.* ICWA is still very much needed today because, *inter alia*, as *amicus* Ms.

Talbert notes, this ensures cultural misunderstandings do not result in findings of neglect that would lead to the removal of Indian children.

Congress encapsulated ICWA's legislative history within the statutory text, by acknowledging that "States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(4). Congress also recognized its unique position with regard to Indian tribes, i.e., Congress is "responsib[le] for the protection and preservation of Indian tribes and their resources." *Id.* § 1901(1).

Traditionally, Native women played an important role in passing on cultural knowledge within many tribal families. Audrey Shenandoah, an Onondaga Nation Clan Mother, described women as playing a central role in her culture—"[t]he Clan Mothers, the grandmothers, the aunts, and the elders were the ones who had the honor and responsibility of nurturing young minds of the children." MANKILLER, *supra*, at 105. The children learned everything from their grandmothers, including "how to take care of one another[,] . . . survival skills, how to gather medicine, and how to determine what was good and bad." *Id.*

However, federal policies toward Native Americans vastly changed the role of women in many traditional societies. From the early 1800s until the mid-1920s—over a century—federal policies toward Indian tribes focused on removing tribes from their ancestral homelands, placing Indians on reservations and

"civilizing" them, and taking collective tribal land and allotting it to Indian individuals in order to assimilate them into American culture as middle-class farmers. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 15–25 (6th ed. 2015). During the 1930s until the 1950s, federal policies shifted toward protecting tribal governments and lands, but then shifted back to assimilation policies involving the termination of tribes and relocation of Indians from reservations to metropolitan areas until the late 1960s. *Id.* at 25–30. Beginning in the late 1960s, the federal government took the approach still in place today—self-determination, which enables tribes to control their own destinies through self-governance. *Id.* at 30–34.

These policies had fundamental effects on the roles of Native women in many tribal societies and families. *See* Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 8 (1997). Traditionally, women "had responsibility for cultivating the land in most American tribes," contrary to their non-Native counterparts. *Id.* In many tribal cultures, women decided what food to grow, how to prepare it, and what clothing and blankets to make. *Id.* at 17. Women not only held significant property rights, but also wielded great political power. *Id*. at 17–18. The power of women in tribal societies, often "sat very uneasily with judges of the nineteenth and early twentieth centuries." *Id.* at 18. For instance, the mother-child relationship "was often treated

with suspicion or resistance by the courts"; "[i]f the mother had not renounced tribal ways, her status would often stigmatize the child and was viewed as an impediment to the child's interest in assimilation." *Id.* Many Indian women suffered unrelenting persuasion and intimidation from social workers and other authorities to relinquish their children, including being "coaxed or bullied" into signing misleading forms to give their children up for adoption or terminate parental rights. A GENERATION REMOVED, *supra*, at 79–80; *see also 1974 ICWA Hearings*, *supra*, at 64–71 (statement of Mrs. Cheryl DeCoteau).

ICWA seeks to remedy these now-rejected assimilationist policies, by, *inter alia*, requiring state courts to place Indian children with Indian families whenever possible, *see* 25 U.S.C. §§ 1915(a) and (b), a requirement clearly designed to preserve tribal families and cultures, rather than destroy them. The Supreme Court has referred to these placement preferences as the "most important substantive requirement" of ICWA. *Holyfield*, 490 U.S. at 36–37. For adoptive placement, ICWA requires that preference be given to members of the child's extended family, to members of the child's tribe, or to other Indian families. 25 U.S.C. § 1915(a). The foster care or preadoptive placement provisions of ICWA contain similar preferences to the child's extended family, to Indian foster homes, or to institutions approved by tribes or operated by Indian organizations. *Id.* § 1915(b). Courts may override these provisions by finding good cause exists to deviate from

ICWA's preferences. *Id.* § 1915(a), (b). These placement provisions serve to implement ICWA's legislative history and statutory findings that Indian children should be placed with family or in homes that reflect their tribal cultural values. Such placement is critical to ensuring the best interests of Indian children and promoting the stability and security of tribal families.

These placement provisions of ICWA ensured that *amicus* Rosa Soto Alvarez was able to be placed in a tribal home when she was a child. Ms. Alvarez is a Councilwoman for, and an enrolled member of, the Pascua Yaqui Tribe. When she was around six years old, she was placed in non-Indian foster homes. While in foster care, Ms. Alvarez experienced abuse and neglect, including being locked in a closet for several hours for misbehavior and being spat upon by a foster sibling. Once the Pascua Yaqui Tribe was notified through ICWA of her foster care placement, the tribe intervened and Ms. Alvarez's case was transferred from state court to tribal court. The tribe placed Ms. Alvarez and her biological sister with a Yaqui foster family and they were raised on the tribe's reservation. The family had already taken in two of Ms. Alvarez's biological siblings, and readily agreed to take in Ms. Alvarez and her sister as well. All four siblings were raised by the Yaqui family that Ms. Alvarez describes as very loving and caring. The Yaqui family was traditional and heavily involved in the Yaqui community, practicing the tribe's ceremonies and teaching them to Ms. Alvarez and her siblings. Now Ms.

Alvarez passes on traditional knowledge and ceremonies to her children and grandchildren, who are all Yaqui. In 2012, Ms. Alvarez ran for a seat on Tribal Council and won with the second highest number of votes. She now advocates nationally, including to members of Congress, for the protection of ICWA, education, and her tribe's sovereignty and land. Ms. Alvarez's experience illustrates why ICWA is such an important law that ensures the well-being of Indian children and the survival of tribes and their cultures.

These placement provisions also ensured *amicus* Carlene Chamberlain was able to obtain custody of her granddaughter, an Indian child. Ms. Chamberlain is the Secretary and Enrollment Clerk for Jamul Indian Village and is an enrolled member of the Jamul Indian Village. Ms. Chamberlain received notice of her five-year-old granddaughter's foster care placement through ICWA's required notification to the tribe of the child's placement in foster care. Ms. Chamberlain recalls visiting her granddaughter while she was in foster care, and seeing her granddaughter appear severely malnourished and scared. Through ICWA's extended family member placement preference, 25 U.S.C. § 1915(b), Ms. Chamberlain was able to take her granddaughter out of foster care and obtain custody of her. Now her granddaughter is in middle school and is on the honor roll. Ms. Chamberlain is grateful to be able to care for her granddaughter and pass on the stories of their family's strong Indian women ancestors. Her granddaughter

is learning the language, history, ceremonies, and practices of her tribe. Ms. Chamberlain's granddaughter is also able to learn important cultural lessons from her aunt, *amicus* Erica Pinto, who is the Chairwoman of their tribe, the Jamul Indian Village.

ICWA's placement provisions have also helped *amicus* Stephanie Benally, an enrolled member of the Navajo Nation and a Native American Specialist with Utah Foster Care, to adopt two Indian children who are also members of the Navajo Nation. She and her husband became licensed as an adoptive home through Navajo Nation. In their home, they teach their children Navajo language, culture, and traditions. In Ms. Benally's work experience, she notes oftentimes it is difficult for non-Indian foster parents to provide the same cultural knowledge and experiences that Indian foster and adoptive homes provide. Culture to Ms. Benally includes language, food, humor, traditions, and an everyday lifestyle. For instance, Ms. Benally teaches her children about taboos in her Navajo culture, which may also be taboo in other Indian cultures, but not necessarily in non-Indian cultures, such as looking at owls or snakes. Such animals may frequently appear in the cartoons that non-Indian children generally watch or the clothes that non-Indian children generally wear. Ms. Benally also notes the date and location of certain tribal ceremonies may not be published or widely disseminated because of the sudden nature of the ceremony, such as the celebration of an infant's first laugh.

Through her experience as a Native American Specialist at Utah Foster Care, and as an adoptive parent, Ms. Benally has seen the ability of ICWA to protect Indian children as well as tribal cultures and traditions.

In sum, the legislative history and text of ICWA make it clear that Congress enacted the law to, *inter alia*, preserve tribal families and cultures. Traditionally, Native women played critical roles in passing on the cultural values of many tribal communities, but their roles have often been eroded by assimilationist policies. Many times Native women are nonetheless still the keepers of tribal cultures, and their stories illustrate that ICWA is very much needed today to, among other things, preserve cultural bonds in tribal families by ensuring Indian children are placed in appropriate homes. These reasons for enacting ICWA rationally relate to Congress' unique obligation to Indian tribes and individuals, *see Mancari*, 417 U.S. at 555, and ICWA therefore does not violate the equal protection component of the Fifth Amendment's Due Process Clause.

C. Even under Strict Scrutiny Review, ICWA Furthers a Compelling Government Interest.

If this Court were to find that ICWA relies on racial classifications, which it should not, ICWA would need to pass strict scrutiny. Under strict scrutiny review, the federal government would need to establish that the "racial" classification it has made is "narrowly tailored to further a compelling government interest." *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Because other briefs in this appeal

discuss narrow tailoring, this brief will only address the unique perspective *amici* have regarding the compelling interest of Congress in passing ICWA.

During the enactment of ICWA, Congress expressed great concern for the health and well-being of Indian children who were removed from their families and for the cultural continuation of tribes. The stories of *amici* Native American women above illustrate how ICWA has been implemented to address those concerns, and *amici* assert that Congress' compelling interest is represented by its clear intent to support tribal sovereignty and self-determination as well as to protect Indian children, families, and culture. Courts have recognized the federal government's compelling interest in fulfilling its unique trust responsibilities to tribes by promoting tribal self-determination and protecting Indian culture. *See McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 473 (5th Cir. 2014); *United States v. Wilgus*, 638 F.3d 1274, 1285–86 (10th Cir. 2011) (cited approvingly by *McAllen Grace Brethren Church*, 764 F.3d at 473). ICWA is a key component of Congress being able to fulfill its trust responsibility to support tribal sovereignty and self-determination.

Since the late 1960s, Congress has enacted numerous statutes to promote tribal self-determination, including ICWA. Such statutes include the Indian Self-Determination and Education Assistance Act of 1975, which allows tribes to plan and administer various federal Indian programs, including medical, law

enforcement, education, and social services programs. *See* Pub. L. No. 93-638 (codified as 25 U.S.C. § 450f *et seq.*, and in scattered sections of 5, 25, 42, and 50 U.S.C.). Another such statute includes the Indian Health Care Improvement Act of 1976, which provides for greater tribal control of reservation healthcare and expanded services. *See* 25 U.S.C. §§ 1613–82. Additionally, the Indian Arts and Crafts Act of 1990 ("IACA") permits Indians to recover damages against those who violate the IACA by misrepresenting Indian arts and crafts when marketing or selling such goods. *See* 25 U.S.C. §§ 305d, 305e; *see also* 18 U.S.C. § 1159 (providing for criminal penalties as well). And the Native American Graves Protection Act of 1990 ("NAGPRA") allows tribes to assert cultural self-determination as NAGPRA provides legal standards and procedures for the repatriation and protection of Native American human remains and funerary objects, sacred objects, and objects of cultural patrimony to tribes and provides the legal standards and procedures for ownership of such objects. *See* 25 U.S.C. §§ 3001–13.

The stories of *amici* Native American women as well as ICWA's statutory language and legislative history described in Section III.B. above demonstrate that ICWA furthers a compelling government interest as it is a key component in the federal government fulfilling its trust responsibility to tribes. ICWA is the single most important law enacted by Congress to promote self-determination by

protecting the rights of Indians to be free from genocide and ethnocide, including the forcible removal of Indian children from Indian homes to non-Indian homes and by protecting Indian culture. ICWA's provisions reflect Congress' concern for the well-being of Indian children and families as well as for the cultural continuation of tribes in general. Of the numerous statutes Congress has enacted for the protection of tribes and their cultures, ICWA is the most important statute aimed at protecting Indian children, families, and culture. Therefore, if this Court determines that ICWA is subject to strict scrutiny, ICWA furthers a compelling government interest and ICWA therefore does not violate the equal protection component of the Fifth Amendment's Due Process Clause.

IV. CONCLUSION

For the reasons stated above, *amici* support the Appellants and respectfully urge this Court to reverse the district court's decision below.

Respectfully submitted,

DATED: December 12, 2019

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that pursuant to Federal Rules of Appellate Procedure 29 and 32 the attached brief is proportionally spaced, has a typeface (Times New Roman) of 14 points, and contains 6,480 words (excluding, as permitted by Fed. R. App. P. 32(f), the cover page, supplemental statement of interested persons, table of contents, table of authorities, certificate of compliance, and certificate of service), as counted by the Microsoft Word processing system used to produce this brief.

Dated: December 12, 2019

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CERTIFICATE OF SERVICE

I hereby certify that, on December 12, 2019, I filed the foregoing Brief of *Amici Curiae* using the Court's ECF system. Service on all counsel of record for all parties was accomplished electronically using the Court's CM/ECF system. I further certify that, on that date, the CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

Dated: December 12, 2019

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