**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 NICHOLS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; and DANIELLE CLIFFORD,

*Plaintiffs-Appellees,*

*v.*

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

*Defendants-Appellants.*

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; and MORONGO BAND OF MISSION INDIANS,

*Intervenors Defendants-Appellants.*

*On Appeal from the United States District Court for the Northern District of Texas, Fort Worth Division, No. 4:17-cv-00868.*

## BRIEF OF AMICUS CURIAE THE QUAPAW NATION

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The undersigned counsel of record certifies that the following list persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those already listed in the other *amici curiae* briefs, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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## INTEREST OF THE AMICUS CURIAE[1]

The purpose of this brief is to advance the "Offences against the Law of Nations" (the "Offences Clause"), U.S. Const. art. I, § 8, cl. 10., as an additional source of federal power for the Indian Child Welfare Act (the "ICWA"). The Quapaw Nation—a federally recognized Indian tribe with approximately 5,300 members—has a strong interest in the issues being addressed in this appeal. The ICWA is crucial to the Quapaw Nation's ability to protect Quapaw families and children, and thus to the very existence of the Quapaw Nation. In addition, the Quapaw Treaty of August 24, 1818, is a prime example of relations between the United States and sovereign tribal nations taking place under the authority of Congress to regulate affairs arising within the law of nations, as recognized in the "Offences Clause" of the Constitution.

With ICWA, Congress has defined an offence against the law of nations, thereby limiting a state's ability to remove the children of a tribal nation from their families. ICWA is an appropriate exercise of Offences Clause power, with the supremacy clause of the Constitution elevating nation-to-nation obligations above state law.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus curiae states that this brief has not been authored, in whole or in part, by counsel for a party in this case, and no entity other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

## INTRODUCTION

In the Constitution the Framers conferred on Congress through multiple provisions broad powers to regulate the United States' relations and affairs with other nations, including sovereign Indian nations. The "Offences against the Law of Nations"—or, simply, the "Offences Clause—in Article I, is one of the sources of federal power that permits Congress to legislate broadly to address nationality, citizenship, child custody and welfare, and similar matters with respect to citizens of other nations. The Indian Child Welfare Act, the International Child Abduction Remedies Act, and other similar statutes fall within a well-established category of federal laws enacted pursuant to these powers.

The Appellees essentially ask this Court to disregard or revisit abundant Supreme Court decisions establishing Congress's plenary power over Indian affairs, and argue that the Indian Commerce Clause does not provide appropriate authority for ICWA. There are many good reasons to adhere to settled decisions. But if the Court is inclined to take a fresh look at precedent, it should consider those decisions and the underlying constitutional bases in their entirety. Plenary power was not built on the Commerce Clause alone. Rather, it derives from several enumerated sources—including the Offences Clause—that were synthesized into the broad plenary power recognized today.

## ARGUMENT & AUTHORITIES

### I. THE OFFENCES CLAUSE PROVIDES FEDERAL POWER AND AUTHORITY TO REGULATE RELATIONS AND AFFAIRS AMONG NATIONS

The Constitution grants Congress the power to define and punish "Offences against the Law of Nations"[2] This clause provides enumerated authority for Congress to regulate both civil and criminal matters that arise between sovereigns, including the custody and welfare of children.[3] Just as Congress has authority to enact the International Child Abduction Remedies Act,[4] it also holds power to address the custody of children of tribal nation citizens.

This is not an argument based in international law. Rather, it is recognition of a fundamental aspect of federalism: Congress's authority to pass laws governing rights and obligations relating to intercourse with other sovereign nations.

When considering the Framer's intentions, reference is often made to Emer de Vattel's seminal work *The Law of Nations* first published in 1758, which set out

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[2] U.S. Const. art. I, § 8, cl. 10.

[3] *See generally* Andrew Kent, *Congress's Under-Appreciated Power to Define & Punish Offenses Against the Law of Nations*, 85 Tex. L Rev. 843 (2007). Professor Kent's textual and historical analysis provides a primer on the relationship of the Offences Clause to federal foreign affairs power. *See also* John H. Dossett, *Tribal Nations & Congress's Power to Define Offences Against the Law of Nations*, 80 Mont. L. Rev. 41 (2019).

[4] 22 U.S.C. §§ 9001–9011.

the "natural laws" governing the rights and obligations involving intercourse between sovereigns, including navigation, trade, war, diplomacy, and citizenship.[5] Vattel's text is said to be "unrivaled among such treatises in its influence on the American Founders."[6] At the outset, Vattel set forth a broad definition of "nation" that encompassed the indigenous tribal nations in North America. "Nations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength."[7]

During the time of drafting and ratification of the Constitution, the United States was engaging with tribal nations on a sovereign basis, fighting wars, and negotiating treaties all along the western frontier.[8] With their British and Spanish allies, tribal nations posed a serious threat to the fledgling United States

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[5] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct & Affairs of Nations and Sovereigns, with Three Early Essays on the Origin & Nature of Natural Law & on Luxury* (Richard Whatmore *et al*. eds., 1797) [hereinafter *Vattel 1797*] (available at https://perma.cc/2UHQ-CMPA).

[6] Peter & Nicholas Onuf, *Federal Union, Modern World, the Law of Nations in an Age of Revolutions* 1776–1814 11 (1993).

[7] *Vattel 1797*, at § 1.

[8] *See generally* Reginald Horsman, *Expansion & American Indian Policy 1783–1812*, 4–39 (1967) [hereinafter *Expansion*]; Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999, 1009–38 (2014).

government.[9] One of the primary purposes of the constitutional convention and the Offences Clause was to transfer authority over both Indian affairs and foreign affairs from the states to the federal government.[10]

As the Framers gathered in Philadelphia in the summer of 1787, "Congress was deluged with bad news regarding Indian affairs."[11] War Secretary Henry Knox concluded that the government was "utterly unable to maintain an Indian war with any dignity or prospect of success."[12] The only hope for peace on the frontier was a nationwide "policy of justice toward the Indians and protection of their rights and property against unscrupulous traders, avaricious settlers, and ubiquitous speculators."[13]

The purpose of the Offences Clause was for the United States to avoid military and diplomatic reprisals by shifting control over international relationships from the states to the new federal government. To this end, Virginia Governor Edmund Randolph opened the Constitutional Convention with a speech describing

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9 *Expansion* at 69, 78.

10 1 *The Records of the Federal Convention of 1787*, at 594 (Max Farrand ed., 1911).

11 *Expansion* at 39.

12 33 *Journals of the Continental Congress: 1774–1789* 388–89 (Roscoe R. Hill ed., 1936).

13 1 Francis Paul Prucha, *The Great Father: The United States Government & the American Indians* 46 (1984).

a primary defect in the Articles of Confederation as Congress "could not cause *infractions of treaties or of the law of nations*, to be punished: that particular states might by their conduct provoke war without controul."[14] John Jay applied these concerns explicitly to Indian wars in the Federalist No. 3, writing.

> "So far, therefore, as either designed or accidental *violations of treaties and the laws of nations* afford JUST causes of war, they are less to be apprehended under one general government than under several lesser ones . . . . Not a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish *offenses*, have given occasion to the slaughter of many innocent inhabitants."[15]

The full text of the Offences Clause provides that it is "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[16] The Framers intended the term "offence" in its broad sense, to include not only criminal offences, but any transgression or injury that could lead to conflict between nations. In this nation-to-nation context, sanctions for "offences" more frequently involve restitution and reparation of damages rather than criminal penalties.

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[14] 1 *Records*, at 19 (describing Madison's notes of Randolph's speech) (emphasis added).

[15] The Federalist No. 3, 44 (John Jay) (Clinton Rossiter ed., 1961) (emphasis added).

[16] U.S. Const. art. I, § 8, cl. 10.

This civil purpose of the term "offence" is supported by Vattel's treatment. He stressed that offences are committed by one nation against another and emphasized the importance of civil remedies: "But if there is question of obtaining reparation of the damage done, together with adequate satisfaction for the offence, we must apply to the sovereign of the delinquents; we must not pursue them into his dominions, or have recourse to arms, unless he has refused to do us justice."[17] Blackstone also included within the law of nations "civil transactions and questions of property between the subjects of different states."[18]

The Offences Clause does not import international law without congressional action. During the constitutional convention, the terms "define" and "punish" were subject to substantive debate by the Committee of Detail. When James Wilson argued that the United States could not "pretend to define" the law of nations, Gouverneur Morris replied: "The word define is proper when applied to offenses in this case; the law of nations being often too vague and deficient to be a rule."[19] The was accepted by a vote, and the clause adopted as it now stands.[20]

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[17] *Vattel 1797*, at § 43.

[18] 4 William Blackstone, *Commentaries on the Laws of England* 67 (U.K., Clarendon Press 1769).

[19] 2 *The Records of the Federal Convention of 1787* 614-15 (Max Farrand ed. 1937).

[20] *Id.* at 615.

The discussion indicates that the "Law of Nations" refers to a body of general principles, and it is within the sole authority of Congress to provide specific laws that will be enforced within the United States.

This construction also does not limit Congress to providing only for criminal punishment, but it is open-ended to permit Congress to define offences that have only a civil remedy. Many clauses in the constitution are constructed the same way, as inclusive lists of related powers or rights. For example, the Second Amendment protects the right of the people "to keep and bear Arms" which is the right to both keep arms and bear arms. In the same way, the powers to "define and punish" offences are two separate powers related to the law of nations.

The most powerful affirmation of the civil purpose of the Offences Clause comes from Congress itself. The first Congress enacted the Alien Tort Claims Act (the "ATCA") in 1789, granting federal courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[21] In 2004, the Supreme Court affirmed the civil purpose of the ATCA, which should be "read as having been enacted on the understanding that the common law would provide a cause of action for the modest

[21] Judiciary Act of 1789, Pub. L. No. 1-20, § 9(b), 1 Stat. 73, 76–77; *see* 28 U.S.C. § 1350. The ATCA has been subject to increased attention in the federal courts in recent years as foreign citizens seek remedies for human rights violations. *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014).

number of international law violations with a potential for personal liability at the time."[22] In two more recent statutes, Congress has cited the Offenses Clause in support of the power to regulate civil liability: the authority to determine when foreign sovereigns can be sued in United States courts,[23] and the power to create civil liability for certain international human rights violations.[24]

There is agreement among Congress and the Supreme Court that the scope of the Offences Clauses includes both civil and criminal matters involving citizens of other nations. More importantly, it is within the sole authority of Congress to provide specific laws that will be enforced within the United States. Congress has done so with ICWA, defining the removal of tribal nations' children from their families as an offence against the law of nations.

## II. QUAPAW TREATY OF 1818 IS A TREATY OF PROTECTION UNDER THE AUTHORITY OF THE LAW OF NATIONS

Ratified Indian treaties are evidence of the Framer's recognition of tribal nationhood, and intent to treat them as within the scope of the Offences Clause. As Vattel noted, "[p]ublic treaties can only be made by the superior powers, by

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[22] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

[23] *See* H.R. Rep. No. 94-1487, at 12 (1976), *reprinted* in 1976 U.S.C.C.A.N. 6604, 6610–11 (listing the Offenses Clause as basis of congressional authority to enact the Foreign Sovereign Immunities Act); S. Rep. No. 94-1310, at 12 (1976) (same).

[24] *See* S. Rep. No. 102-249, at 5–6 (1991) (listing Offenses Clause as basis of Congress's power to enact the Torture Victim Protection Act).

sovereigns who contract in the name of the state." Moreover, the historical record is replete with evidence that tribal nations have been treated as nations throughout the early historical period of the United States, and indeed up to the present day.

The Quapaw Treaty of 1818 provides in Article 1: "The undersigned chiefs and warriors, for themselves and their said tribe or nation, do hereby acknowledge themselves to be under the protection of the United States, and of no other state, power, or sovereignty, whatsoever."[25] The United States acquired its claims to the territory in 1803 by the Louisiana Purchase, and the treaty was negotiated soon after the War of 1812 as settlers pushed west. Pursuant to the Treaty, the Quapaw ceded all claims from the Red River to beyond the Arkansas and east of the Mississippi.

The Quapaw treaty demonstrates relations between the United States and tribal nations taking place under the authority of the law of nations. It is a prototypical construction of a treaty of protection identified by Vattel. Where a sovereign nation, "in order to provide for its safety, places itself under the protection of a more powerful one . . . without however divesting itself of the right of government and sovereignty" it is considered a sovereign state that "that keeps

[25] 2 *Indian Affairs: Laws and Treaties* 160 (Charles J. Kappler, ed., 1904) [hereinafter 2 *Indian Affairs*].

up an intercourse with others under the authority of the law of nations."[26] Moreover, the treaty itself identifies the Quapaw as a "nation."

It is reasonable that the Framers intended the term "Nation" in the Offences Clause to include tribal nations because they used it in this sense in contemporaneous expressions, and in ratified treaties. John Rutledge of South Carolina, who chaired the Committee of Detail during the constitutional convention, wrote "Indian Affairs" next to "the Law of Nations" in his copy of the draft constitution.[27] In July of 1789, two months after George Washington's inauguration, Secretary of War Knox wrote to the President with his plan for Indian affairs: "The independent nations and tribes of Indians ought to be considered as foreign nations, not as the subjects of any particular state . . . ."[28] Two months later, President Washington wrote to the Senate in reference to "the treaties with certain Indian nations."[29] Washington counseled that foreign treaties and Indian treaties should be ratified by the Senate in the same manner, "so that

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[26] *Vattel 1797* §6.

[27] 1 *Records*, *supra* note 9, at 143.

[28] 3 *The Papers of George Washington, Presidential Series, 15 June 1789–5 September 1789* 34–41 (Dorothy Twohig *et al*. eds., 1989).

[29] 4 *The Papers of George Washington: Presidential Series September 1789—January 1790* 51–53 (W.W. Abbot et al. eds., 1993) [hereinafter 4 *Washington Papers*].

our national proceedings in this respect may become uniform, and be directed by fixed and stable principles."[30]

The very first treaty ratified by the Senate in 1789 was the Treaty of Fort Harmar with the "Wyandot, Delaware, Ottowa, Chippewa, Pattewatima, and Sac Nations."[31] The second was the Treaty of New York in 1790, which proclaimed "perpetual peace and friendship between all the citizens of the United States of America, and all the individuals, towns and tribes of the Upper, Middle and Lower Creeks and Semanolies composing the Creek Nation of Indians."[32] A digital search of the text of all Indian treaties reveals the term "nation" or "nations" used 517 times to describe the various tribal nations, the last one with the "Navajo Nation" in 1868.[33]

In 1832, the Supreme Court applied this understanding of the law of nations as the basis for recognizing inherent tribal sovereignty. In *Worcester v. Georgia*,[34] Chief Justice Marshall cited Vattel in reasoning that the power of tribal

[30] *Id.* at 51–53.

[31] 2 *Indian Affairs* at 18–23.

[32] *Id.* at 25.

[33] U.S. Gov't Publishing Office, https://www.gpo.gov (click "Explore and Research," then click "govinfo," then click "A to Z," then scroll down to "Kappler's Treaties;" then click "Volume 2" then search "nation," "nations," and "Navajo Nation") (last visited Jan. 24, 2019).

[34] 31 U.S. 515, 559 (1832).

governments to make treaties was premised on the power of self-government. "The very term 'nation,' so generally applied to them, means 'a people distinct from others.'"[35] His opinion explained:

> "The very fact of repeated treaties with them recognizes it; and the settled doctrine of the *law of nations* is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe, 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state.'"[36]

In his seminal legal opinion *The Powers of Indian Tribes*, Felix Cohen relied on the same passages from Vattel and *Worcester* as the authority for his argument that tribal nations exercise inherent sovereignty; they "exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty."[37] The law of nations and the Offences Clause lie at the heart of the federal Indian law principle that tribal nations possess inherent sovereignty, limited only by treaty and trust relationships with the United States.

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[35] *Worcester*, 31 U.S. at 559.

[36] *Id.* at 560–61 (emphasis added).

[37] 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917–1974 448 (1979).

This understanding of indigenous peoples as "nations" within the scope of the "law of nations" is not confined to the past. As recently as 2001, in considering the constitutionality of military tribunals for terrorists, the Department of Justice relied on the precedent that Tribal Nations are "domestic dependent nations"[38] subject to the laws of war and adjudication of hostilities by military tribunals.[39] As recently as last term, the Supreme Court found that the State of Washington's fuel tax is pre-empted by a treaty reservation of rights to the "Yakama Nation."[40] The indigenous peoples of the United States continue to be "nations," and the principles of the law of nations apply to their intergovernmental relations.

Finally, the Quapaw Nation's 1818 Treaty is not only an example of tribal relations taking place under the authority of the law of nations, it is a proper object of Offences Clause authority. The purpose of the Offences Clause is to implement not only customary international law, but also to implement treaties as a

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[38] *Id*. (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)).

[39] *Legality of the Use of Military Commissions to Try Terrorists*, 25 Op. O.L.C. 238, 265-66 ((Nov. 6, 2001).

[40] *Washington State Dep't. of Licensing v. Cougar Den, Inc*. (16-1498) 586 U. S. ___, 139 S. Ct. 1000 (2019).

fundamental component of the law of nations.[41] The United States undertook a duty of protection towards the Quapaw Nation by treaty, and has similar obligations to all tribal nations.[42] With the ICWA, Congress has defined an offence against the law of nations, limiting a state's ability to remove the children of a Tribal Nation from their families. ICWA is a proper exercise of Offences Clause power, with the supremacy clause of the Constitution elevating nation-to-nation obligations above state law.

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[41] *Boos v. Barry*, 485 U.S. 312, 323 (1988); *see also United States v. Arjona*, 120 U.S. 479, 483 (1887) (noting that "Congress is expressly authorized 'to define and punish . . . offenses against the law of nations'" because the national government is "made responsible to foreign nations for all violations by the United States of their international obligations"). *See generally* Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 Yale L.J. (2015).

[42] In addition to specific treaty obligations, the federal trust obligation to all tribal nations is based in the federal acquisition of tribal lands under the principles of the Northwest Ordinance. *See* Ordinance of 1787: The Northwest Territorial Gov't, *reprinted in* U.S.C. at lix (2012). "The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them." *See generally* John H. Dossett, *Indian Country & the Territory Clause: Washington's Promise at the Framing*, 68 A.M. U. L. REV. 205, 207–10 (2018).

## III. ICWA PRESENTS A VALID EXERCISE OF FEDERAL AUTHORITY TO REGULATE CHILD CUSTODY DISPUTES AMONG CITIZENS OF OTHER NATIONS

Appellants have argued that family law and child custody proceedings are exclusively the province of state law.[43] This is incorrect for at least two reasons. First, the Supreme Court long ago laid down the rule that tribal domestic relations are not subject to state law.[44] Second, federal law regulates both the citizenship of foreign-born children, and child custody disputes with citizens of other nations.

Vattel recognized the citizenship and custody of children as a subject of the law of nations, noting:

> "As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it."[45]

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[43] *Brackeen v. Bernhardt*, No. 18-11479, State Appellee's Opening Brief, at 28-29, (Feb. 6, 2019).

[44] *See, e.g.*, *Carney v. Chapman*, 247 U.S. 102 (1918); *United States v. Quiver*, 241 U.S. 602, 603-604 (1916) ("At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws.").

[45] *Vattel 1797* § 212. ("By the law of nature alone, children follow the condition of their fathers, and enter into all their rights; the place of birth produces no change in this particular, and cannot of itself furnish any reason for taking from a child what nature has given him."); *see also id*. § 215.

The purpose of ICWA fits closely with Vattel's natural law theory. In its findings, the ICWA states "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[46] The Framers would have understood the confiscation of native children from their families by state governments as an offence against the law of nations, and that ICWA, or any law regulating the citizenship and custody of children between sovereign nations, was within the scope of federal authority under the Offences Clause.

Indeed, these laws are common in the United States Code and throughout the world, and the use of parentage to determine citizenship is a well-recognized principle of the law of nations. Although every nation has its own laws regarding citizenship, there are two main categories. In the first one, "jus sanguinis," or the principle of blood, descent and heritage play a pivotal role in defining who can become a citizen.[47] The second, "jus soli," defines citizens as those born within the country, regardless of the citizenship of the parents.[48] Federal law in the U.S.

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[46] 25 U.S.C. § 1901(3).

[47] *Black's Law Dictionary* (10th ed. 2014).

[48] *See* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship & the Legal Construction of Family, Race & Nation*, 123 YALE L.J. 2134, 2152–53 (2014).

incorporates both principles, and the use of ancestral classifications in ICWA should be given similar deference.[49]

Understanding ICWA as an expression of congressional power through the Offences Clause disposes of the State of Texas's claim (which was adopted by the district court) that "deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race and therefore 'must be analyzed by a reviewing court under strict scrutiny.'"[50] Instead, ICWA's use of ancestry is comparable to federal laws regulating the citizenship and custody of children in the international context. If ICWA's use of ancestry is unlawful, so is much of the Immigration and Naturalization Act relating to the children of U.S. citizens born abroad.[51] Foreign-born children are analogous to tribal citizens born outside of tribal jurisdiction in that they frequently do not become citizens automatically upon birth but must demonstrate ancestry or parentage.

The federal immigration and nationality laws reflect Congress's power under Article I, Section 8, clause 4 (also referred to as the Nationality Clause), which

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[49] 8 U.S.C. §§ 1401 & 1409.

[50] *Brackeen*, 2018 WL 4927908, at *26 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

[51] 8 U.S.C. § 1401 (2018).

reads: Congress shall have Power "To establish a uniform Rule of Naturalization." But the same cannot be said of the Hague Convention on the Civil Aspects of International Child Abduction[52] and its federal implementing statute, the International Child Abduction Remedies Act (ICARA).[53] The Hague Convention is a multilateral treaty that provides a set of principles for the return of children abducted from one country to another.[54] ICARA is the federal law that implements the Hague Convention in the United States, and requires both state and federal courts to hear petitions for return of a child to their habitual country of residence. Because the Hague Convention and ICARA are unrelated to naturalization laws, they are a clearer example of congressional authority to define the law of nations regarding the custody of children, and to impose that law in state courts.

The 1980 Hague Convention's stated goals are straightforward—"to secure the prompt return of children wrongfully removed or retained in any Contracting State, and to ensure that the rights of custody and access under the laws of one Contracting State are effectively respected in the other Contracting States."[55] The

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[52] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11, 670, 1343 U.N.T.S. 89 [hereinafter *Hague Convention*].

[53] 22 U.S.C. §§ 9001–9011.

[54] *Id.* § 9001(4).

[55] *Hague Convention*, art. 1.

Convention returns jurisdiction to the country of habitual residence where the merits of the custody dispute can be resolved. In this manner, ICARA—like ICWA—removes traditional state authority over child custody in certain cases, and subjects state courts to federal law. The Hague Convention is both a treaty and the "law of nations," a body of principles established by international agreement. With ICARA, Congress defined these principles by providing specific laws that will be enforced within the United States. In this way, both ICWA and ICARA are examples of Congress using its Offences Clause power to define the law of nations applicable to state court child custody proceedings.

## CONCLUSION

The Court should affirm the constitutionality of the Indian Child Welfare Act.

Respectfully submitted,

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