No. 17-95

In the
Supreme Court of the United States

S. S., et al.,
Petitioners,

v.

COLORADO RIVER
INDIAN TRIBES, et al.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Arizona, Division One

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Court Rule 37.2(b), Pacific Legal Foundation (PLF) respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioners S. S. and S. S. PLF timely sent letters indicating its intent to file an amicus brief to all counsel of record pursuant to Rule 37.2(a). Petitioners S. S. and Respondent Colorado River Indian Tribes (CRIT) granted consent for amicus participation, but Respondents Garrett Scholl and Respondent Stephanie H. withheld consent by failing to respond to PLF's request.

Founded in 1973, PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF has extensive litigation experience in the areas of racial discrimination, racial preferences, and civil rights. It has participated as amicus curiae in nearly every major United States Supreme Court case involving racial classifications in the past three decades, from *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), to *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

For all the foregoing reasons, the motion of Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: August, 2017.

Respectfully submitted,

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QUESTION PRESENTED

The Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901, *et seq.*, was enacted to address the problem of unjustified removal of Indian children from their parents by "nontribal public and private agencies" and their placement in "non-Indian foster and adoptive homes and institutions." *Id.* § 1901(4). That concern is absent in a private action for termination of parental rights, which is a private dispute between birth parents, involving no government entity. Nevertheless, the court below—in conflict with other state courts of last resort, and this Court's precedent—held that ICWA Sections 1912(d) (the active-efforts provision) and 1912(f) (the termination-burden provision) apply to such private disputes.

ICWA's more onerous set of evidentiary and procedural standards, including the "active efforts" and beyond-a-reasonable-doubt requirements at issue here apply only to cases involving "Indian child[ren]," *Id.* § 1903(4)—not to cases involving children who are white, black, Hispanic, Asian, or of any other ethnic or national origin.

The questions presented are:

Do ICWA's Sections 1912(d) and 1912(f) apply in a private severance action initiated by one birth parent against the other birth parent of an Indian child?

If so, does this *de jure* discrimination and separate-and-substandard treatment of Indian children violate the Due Process and Equal Protection guarantees of the Fifth and Fourteenth Amendments?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF has extensive litigation experience in the areas of racial discrimination, racial preferences, and civil rights. It has participated as amicus curiae in nearly every major United States Supreme Court case involving racial classifications in the past three decades, from *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), to *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

PLF considers this case to be of special significance in that it concerns the fundamental issue of whether public institutions may resort to racial discrimination

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Petitioners S. S. and S. S. filed blanket consent to amicus curiae briefs with this Court on July 27, 2017, and Respondent CRIT filed blanket consent to amicus curiae briefs with this Court on August 2, 2017. Respondent Garrett Scholl and Respondent Stephanie H. withheld consent by failing to respond to PLF's request.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

to deny fundamental protections of state law to Indian children solely on the basis of their race. Amicus respectfully request that this Court grant the petition of S. S. and S. S. for writ of certiorari, and reverse the decision of the Arizona Court of Appeals.

SUMMARY OF THE ARGUMENT

The Indian Child Welfare Act (ICWA) deprives American citizens of the equal protection of state custodial and protective services proceedings based solely on their race. The deprived citizens are American Indian children, vulnerable members of a class who repeatedly suffer ill effects from well-intentioned public and private efforts.[2] Because of their race, American Indian children in state court custody proceedings are not afforded the "best interests of the child" standard that is available to all non-Indian children.

Congress' intrusion into these traditionally local matters is based on an improper interpretation of the Indian Commerce Clause, through which Congress purports to assert plenary power over all Native American affairs. The original scope of the Indian Commerce Clause does not support federal intrusion into state court standards for private custodial proceedings, and there is no other constitutional authority to support such an intrusion.

ICWA also impermissibly classifies American citizens based on their race. Federally recognized

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[2] *See generally* Naomi Schaefer Riley, *The New Trail of Tears: How Washington Is Destroying American Indians* (2016) (describing the disastrous effects of numerous paternalistic policies on Native Americans, such as the "trust" relationship that bars private ownership of land and ICWA).

tribal membership is almost universally dictated by descendancy, and ICWA applies to children who are members in a federally recognized tribe or are children of a member of a federally recognized tribe. In this way, ICWA almost always operates as a suspect classification based on race. The Arizona Court of Appeals, however, described ICWA's classifications as based "not on race, but on Indians' political status and tribal sovereignty," and therefore held that ICWA need only be "rationally related to the federal government's desire to protect the integrity of Indian families and tribes." Op. ¶ 27. App. 16a.

This case raises issues of national importance. Because Congress lacks the authority to regulate privately initiated, state-court custodial proceedings, and because ICWA impermissibly denies American citizens of the equal protection of the law based on race, this Court should grant certiorari and review the constitutionality of ICWA.

ARGUMENT

I. CONGRESS' INTRUSION INTO PRIVATE, STATE COURT CUSTODIAL PROCEEDINGS RAISES SERIOUS FEDERALISM CONCERNS

The constitutional structure preserves "broad autonomy" for the states in structuring their governments and pursuing legislative objectives. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013). Federalism preserves the "integrity, dignity, and residual sovereignty" of the States through the allocation and balance of power between the States and the federal government. *Bond v. United States*, 564 U.S. 211, 221 (2011). Federalism also secures the

right of the individual to be free from laws enacted "in excess of delegated governmental power." *Id.* at 221-22.

The Constitution reserves all powers not specifically granted to the Federal Government to the states or citizens. U.S. Const. amend. X. Congress' sole asserted authority for ICWA—the Indian Commerce Clause—is insufficient to support the regulation of private state-court custodial proceedings. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565-71 (2013) (Thomas, J., concurring). Since neither the Indian Commerce Clause nor any other constitutionally enumerated power gives Congress the power to regulate the terms of private, state-court custodial proceedings, this Court should grant certiorari in order to review the constitutionality of ICWA.

A. This Court Needs to Clarify the Proper Scope of the Indian Commerce Clause

The congressional findings for the Indian Child Welfare Act claim that "Congress has plenary power over Indian affairs" derived from clause 3, section 8, article I of the U.S. Constitution and "other constitutional authority." 25 U.S.C. § 1901. The Indian Commerce Clause, however, merely states that "[t]he Congress shall have Power . . . [t]o regulate *Commerce* . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3 (emphasis added). This Court has repeatedly upheld similar assertions of power beyond commerce, stating that Congress has "'plenary and exclusive' powers to legislate in respect to Indian tribes" by virtue of the Indian Commerce Clause and the Treaty Clause. *United States v. Lara*, 541 U.S. 193, 194 (2004) (citing to *Washington v. Confederated*

Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 470-71 (1979)).

But no constitutional grant of power gives Congress "such sweeping authority." *United States v. Bryant*, 136 S. Ct. 1954 (2016), *as revised* (July 7, 2016) (Thomas, J., concurring). Founding-era sources show that the Indian Commerce Clause was properly limited to the regulation of "*trade with Indians*, though not members of a state, yet residing within its legislative jurisdiction." The Federalist No. 42, at 284-85 (James Madison) (Jacob E. Cooke ed., 1961); *see generally* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201 (2007). Nor is there any other constitutional authority that could support the broad power Congress asserts over Native Americans. *See Adoptive Couple*, 133 S. Ct. at 2566 (Thomas, J., concurring) (citing Mathew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Neb. L. Rev. 121, 137 (2006)) ("As a matter of federal constitutional law, the Indian Commerce Clause grants Congress the only explicit constitutional authority to deal with Indian tribes"); Natelson, *supra*, at 210 (evaluating, and rejecting, other potential sources of authority supporting congressional power over Indians).

During the Constitutional Convention, James Madison proposed a more sweeping power "[t]o regulate affairs with the Indians as well within as without the limits of the United States." *See* 2 *Records of the Federal Convention of 1787*, at 315-16 (M. Farrand rev. ed., 1937) (Aug. 18, 1787) (motion of James Madison, Virginia). In response, the Committee of Detail proposed that the power "[t]o

regulate commerce with foreign nations, and among the several states;" be amended to include "and with Indians, within the Limits of any state, not subject to the laws thereof." Report of the Committee of Detail (Aug. 22, 1787), *reprinted in* 2 Records, at 366-67.

With these amendments, the grant of power to Congress over Indian affairs became limited in direction and scope. The object of the power was changed from individual "Indians" to "Indian Tribes." *See* Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 Am. Indian Law Rev. 57, 72-73 (1991). Though the power could reach tribes within the limits of states but not subject to state jurisdiction, it could not reach individual Indians. *See id.* Early decisions of this Court extended the power of Congress to individual Indians, but only where "commerce, or traffic, or intercourse" was carried on by an individual member of a tribe. *See United States v. Holliday*, 70 U.S. 407, 418 (1865).

Viewed together with the additional grants of power contained within the Commerce Clause, it is evident that the Indian Commerce Clause is not a grant of plenary power over all Indian affairs. Article I, section 8, clause 3 gives Congress related grants of power over three separate relationships: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Clause has not been—and could not be—construed to grant Congress plenary power over foreign nations or the states; and there is no reason to infer the Committee on Detail would have used the same Clause to extend such power over Indian tribes alone. *See* Natelson, *supra*, at 215.

Varying the meaning of "Commerce" for the three objects of the Clause violates the contemporaneous legal rule of construction that "the same word normally ha[s] the same meaning when applied to different phrases in an instrument." *Id.*

Though the idea that Congress had exceptionally broad authority to regulate with respect to Indian tribes has been accepted in this Court for over 100 years, attributing such authority to the Indian Commerce Clause is, at best, a post-hoc rationale. In *United States v. Kagama*, the Court admitted that "it would be a very strained construction" of the Indian Commerce Clause to find that laws passed "without any reference to their relation to any kind of commerce" could be "authorized by the grant of power to regulate commerce with the Indian tribes." 118 U.S. 375, 378-79 (1886). Under a proper understanding of the Indian Commerce Clause, Congress' appropriate reach must be limited to some type of commerce with the Indian tribes.

B. Many State Courts Improperly Apply ICWA to Private, State-Court Custodial Proceedings That Are Beyond the Reach of Congress

The states "diverge greatly" in their interpretations of whether ICWA applies to private proceedings involving intrafamily disputes. *See, e.g.*, Billy Joe Jones, et al., *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* 28 (American Bar Association 2d ed., 2008). This Court should grant certiorari to clarify among the state courts that Congress' authority under the Indian Commerce Clause cannot reach private custodial proceedings.

The power granted by the Indian Commerce Clause is not plenary. ICWA is therefore constitutional only if the proceedings in which it applies can be viewed as "[c]ommerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The application of ICWA here does not "regulate Indian tribes as tribes." *See Adoptive Couple*, 133 S. Ct. at 2570 (Thomas, J., concurring). Yet here, the court below applied ICWA to a proceeding for termination of parental rights (TPR) initiated by an Indian father against a non-Indian ex-partner. Op. ¶ 22. App. 12a-13a. This is purely a private dispute between a former couple. Op. ¶ 5. App. 3a.

Application of ICWA in this case does not implicate commerce with an Indian tribe, nor does it regulate commerce between individuals. Even the broad, though similarly suspect,[3] interpretation of the Commerce Clause has been limited by this Court. *See United States v. Lopez,* 514 U.S. 549 (1995) (holding unconstitutional the Gun-Free School Zones Act of 1990 as regulating conduct beyond the scope of "Commerce . . . among the several States"); *and United States v. Morrison*, 529 U.S. 598 (2000) (holding unconstitutional the Violence Against Women Act on similar grounds). Under the Commerce Clause, Congress may only regulate: (1) the use of the channels of commerce; (2) the instrumentalities of commerce or persons in interstate commerce; and (3) activities that have a substantial effect on commerce. *Lopez*, 514 U.S. at 558-59. Where Congress

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[3] Prominent scholars have argued that Article I, section 8, clause 3 should be more properly limited to trade between the states. *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001).

has regulated other parental rights, it has relied on express connections to interstate commerce. *See, e.g.*, *United States v. Cummings*, 281 F.3d 1046, 1049 (9th Cir. 2002), *cert. denied*, 537 U.S. 895 (upholding the International Parental Kidnapping Crime Act because all persons prosecuted would have necessarily first engaged in "[t]he transportation of passengers in interstate commerce"). No such connection to commerce exists here.

Because neither the Indian Commerce Clause nor any other enumerated power can be interpreted as a plenary grant of authority over all Indian affairs, and because private, state-court custodial proceedings are not "Commerce . . . with [an] Indian Tribe[]," this Court should grant certiorari and review the constitutionality of ICWA.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN ICWA AND THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT

Regardless of Congress' authority to regulate with respect to Indian tribes, that power "is not absolute." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion). All legislation passed by Congress—even legislation enacted under the Indian Commerce Clause—is rightly scrutinized to determine whether it violates the equal protection component of the Fifth Amendment. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535 (1974); *and Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977).

Where legislation—such as ICWA—classifies people based on a "suspect" classification involving an

immutable characteristic, such as race, ethnicity, or ancestry, it must be subjected to strict scrutiny by the courts. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (all racial classifications imposed by federal, state, or local government are analyzed under strict scrutiny). This searching review takes place even where the classification appears "benign," or is intended to help the minority class. *Id.* Because ICWA regulates Indian children based solely on their genetic association and descendancy, it must survive strict scrutiny.

A. State Courts Fail to Analyze ICWA Under Strict Scrutiny, Even Though It Classifies Indian Children Based on Race Through Blood Lineage

ICWA governs in all legal proceedings that involve the custodial status of an "Indian child." 25 U.S.C. § 1911. Indian child is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

While this Court has upheld classifications targeting members of Indian tribes where the connections were based on social, cultural, or political relationships, *see United States v. Antelope*, 430 U.S. 641, 646 (1977); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 480-81 (1976); *and Morton v. Mancari*, 417 U.S. 535, 554 (1974) ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ."), ICWA ignores any such connection,

instead using blood lineage[4] as the means to establish application of placement preferences.[5] Despite this use of racial classifications, numerous state courts—including the Arizona Court of Appeals here—analyze ICWA under a rational basis standard. *See* Op. ¶ 27, App. 16a ("[T]he additional requirements ICWA imposes . . . are rationally related to the federal government's desire to protect the integrity of Indian families and tribes.").

For most Indian tribes, membership is further limited by an express use of "blood quantum"[6] established by the issuance of a "Certificate of Indian Blood" from the Bureau of Indian Affairs establishing

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[4] Although enrollment criteria are set by each tribe's governing documents, practically speaking, almost all federally recognized tribes require either "lineal descent from someone named on the tribe's base roll" or "lineal descent from a tribal member who descends from someone whose name appears on the base roll." U.S. Dep't of the Interior, Bureau of Indian Aff., *A Guide to Tracing American Indian & Alaska Native Ancestry*, https://www.bia.gov/cs/groups/public/documents/text/idc-002619.pdf

[5] Although the placement preferences are not at issue in this case, the fact that placement preferences *require* an Indian child be sent to "*an* Indian" foster facility approved by "*an* Indian tribe" without consideration of the child's tribal membership or heritage further establishes that ICWA is based not on concerns for tribal connections, culture, or heritage, but race alone. *See generally* Timothy Sandefur, *Escaping ICWA Penalty Box*, 37 Child. Legal Rts. 1, 51 (2017).

[6] Blood quantum requirements are generally expressed by some minimum fraction of "Indian blood" that must be established through genealogical ancestry, such as 1/4, 1/8, or 1/16 verifiable Indian heritage. *See generally* Ryan W. Schmidt, *American Indian Identity and Blood Quantum in the 21st Century: A Critical Review*, 2011 J. Anthropology 1, at 6-7. For some tribes, membership eligibility is satisfied through blood quantum ancestry in that particular tribe, while others are satisfied by blood quantum ancestry in any tribe. *Id.*

lineal tribal connections. U.S. Dep't of the Interior, Bureau of Indian Aff., *Genealogy*, https://www.bia.gov/FOIA/Genealogy/. For nearly a third of federally recognized tribes, there is no minimum blood quantum, meaning that any ancestral Indian connection to the tribe, no matter how distant, suffices. In short: for many Indian children, one drop of blood triggers all of ICWA's extraordinary burdens.[7]

For many Indian children, tribal ancestry means that race-based classification overrides non-discriminatory state court standards, and state courts are therefore prevented from acting even where—as here—they find sufficient evidence of abandonment and determine that severance of parental rights is in the best interests of the child. Op. ¶ 7. App. 4a.

Because ICWA applies to children based not on their actual tribal membership or cultural connections, but rather on their racial descendancy from historically identified members of a race, it must be analyzed under strict scrutiny.

B. ICWA Cannot Survive Strict Scrutiny

Laws that impose racial classifications are constitutional "only if they are narrowly tailored to further compelling governmental interests." *Grutter*

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[7] Under current Bureau of Indian Affairs guidelines, the standard may be even lower than the "one drop" standard, since ICWA must be applied any time there is "reason to know" a child is an Indian child. 25 C.F.R. § 23.111(e). "Reason to know" may be satisfied when "[a]ny participant in the proceeding . . . informs the court that the child is an Indian child," or if "[t]he child . . . gives the court reason to know he or she is an Indian child." *Id.* § 23.107(c). The standards will then apply until tribal eligibility can be disproven.

v. Bollinger, 539 U.S. 306, 326 (2003). Even where racial classifications appear to be motivated by benign purposes—or even where they are intended to be remedial—searching inquiry is necessary to ensure a "smoke out" of illegitimate uses of race based on "notions of racial inferiority or simple racial politics." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

While the government has a compelling interest in attempts to remedy past discrimination,[8] *see United States v. Paradise*, 480 U.S. 149, 167 (1987), any law that uses racial classification must be narrowly tailored to that interest. *See Gratz v. Bollinger*, 539 U.S. 244, 269 (2003). The facts of this case establish the unconstitutional overbreadth of ICWA. The children here sought severance of parental custodianship from their non-Indian mother—a mother the trial court found by clear and convincing evidence had abandoned the children. Op. ¶ 7, App. 4a-5a. But ICWA's race-based procedural hurdles were invoked to prevent an Indian father from severing ties with an unfit, non-Indian mother, preventing the formal adoption of the Indian children into a unified, loving family.

This Court has previously recognized that the possibility that ICWA may place "certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian . . . would raise equal protection concerns." *See Adoptive*

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[8] ICWA was passed as a response to the shameful application of states' child protection laws and policies in the mid-twentieth century. *See* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885, 952-56 (2016).

Couple, 133 S. Ct. at 2552. This case demonstrates that this Court's concern is well founded. What's more, the unequal treatment required by ICWA threatens to effectively erase the traditional "best interests of the child" rule for one race of children. *See* Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. Det. Mercy L. Rev. 451, 453 (1989). Thus, children of the "wrong" race will be more likely to be placed in an outcome that is not in their best interests. *See id.*

"[A]ll racial classifications reviewable under the Equal Protection Clause" must be subjected to strict scrutiny. *Gratz*, 539 U.S. at 270. Because ICWA applies to children based solely on their race, it employs a suspect classification and must be analyzed under strict scrutiny. Many state courts—including the Arizona Court of Appeals here—have improperly reviewed ICWA using the rational basis standard. Despite the compelling interest of remedying past discrimination by state agencies and private institutions, ICWA is overbroad and not narrowly tailored to that purpose. Accordingly, this Court should grant certiorari to review ICWA.

CONCLUSION

ICWA was passed in response to shameful actions by state courts and private institutions undertaken out of paternalistic notions of what was "best" for Indian children. Those mistaken notions led to years of Indian children receiving different treatment in state court custodial proceedings, creating a de facto

presumption that Indian children would be better off removed from their Indian families and raised away from their Indian tribe. Unfortunately, ICWA suffers from its own paternalistic notions, now leaving Indian children in state court custodial proceedings facing a de jure removal of their state court protections—based solely on their race.

Because a race-based Congressional intrusion into private, state-court proceedings raises several serious issues of national importance, this Court should grant certiorari to review the constitutionality of ICWA.

DATED: August, 2017.

Respectfully submitted,

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