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

IN THE

Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
CHAD EVERET BRACKEEN, *et al.*,
Respondents.

CHEROKEE NATION, *et al.*,
Petitioners,
v.
CHAD EVERET BRACKEEN, *et al.*,
Respondents.

STATE OF TEXAS,
Petitioner,
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

CHAD EVERET BRACKEEN, *et al.*,
Petitioners,
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND FOURTEEN AFFILIATES AS *AMICI CURIAE* IN SUPPORT OF FEDERAL AND TRIBAL DEFENDANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitutions and Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Regulatory Materials

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. The ACLU of Alaska, ACLU of Arizona, ACLU of Maine, ACLU of Montana, ACLU of Nebraska, ACLU of New Mexico, ACLU of North Dakota, ACLU of Northern California, ACLU of Oklahoma, ACLU of South Dakota, ACLU of Texas, ACLU of Utah, ACLU of Washington, and ACLU of Wyoming are state-based affiliates of the ACLU who are engaged in Indigenous Justice work. In furtherance of their mission, the ACLU and its affiliates have supported federal laws designed to preserve Indian families and respect the cultural heritage of Indian Tribes. The ACLU and its affiliates have also advocated in favor of children's rights and a child's interest in family integrity. The proper resolution of this case is, therefore, a matter of significant importance to the ACLU, its affiliates, and their members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout this Nation's history, Congress has regulated Indian affairs as a matter of tribal political sovereignty, not race. The Constitution itself recognizes "Indian tribes" as sovereigns and directs

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

Congress to "regulate Commerce" and "make Treaties" with Indian Tribes. U.S. Const. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2. And just as the Constitution recognizes "Indian" as a political—not racial—category, so has this Court. For decades, the Court has clearly and consistently held that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645 (1977). That principle governs the equal protection claims in this case. The two Indian Child Welfare Act ("ICWA") provisions challenged as violations of equal protection regulate Indian affairs by reference to a child's connection to a federally recognized Indian Tribe—a political sovereign, not a racial group.

The first challenged provision defines an "Indian child" as a child who is either "a member of an Indian tribe," or 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). Nothing in this definition turns on race. It does not matter what race a child or the child's parent may be. What matters is membership in a federally recognized Indian Tribe, or eligibility for such membership.

Plaintiffs argue that "tribal membership, ancestry, and descent are simply proxies for race." Tex. Br. 42; *see* Ind. Pet'rs Br. 29 ("ICWA's definition . . . is expressly based on lineal descent—that is, on race."). But ICWA far more precisely and narrowly defines those to whom it applies, and it does so by reference to political membership or eligibility, not race. Thus, ICWA *excludes* members of the hundreds of Indian Tribes the federal government

does not recognize because those individuals, regardless of their race, are not part of the relevant *political* entity. Similarly, ICWA excludes descendants of Tribe members who do not have a parent who is a member of a Tribe.

The second challenged provision grants a preference in placing an Indian child first to "a member of the child's extended family"—whether or not they are Indian—and then to "other members of the Indian child's tribe," and finally to "other Indian families." 25 U.S.C. § 1915(a). But this, too, turns not on race but on family ties or tribal membership. Congress expressly defined "Indian" as used in ICWA to refer to tribal *membership*, not race. 25 U.S.C. § 1903(3). Because the challenged provisions are "political rather than racial in nature," they are subject to the rational basis standard of review. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). These ICWA provisions easily survive such review.

Indeed, even if the challenged provisions were subject to strict scrutiny, they are narrowly tailored to further several compelling government interests, and as such are constitutionally sound. The challenged provisions (1) "protect the best interests of Indian children"; and (2) "promote the stability and security of Indian tribes." 25 U.S.C. § 1902. Both interests are compelling.

To advance the "best interests of Indian children," Congress passed ICWA to respond to "shocking" disparities "in placement rates for Indians and non-Indians," which have resulted in grievous harm to the safety and well-being of many Indian

children removed from their communities. H.R. Rep. 95-1386, at 9 (1978). Congress found that those disparities reflected the disturbing history of removing Indian children from their homes and tribal settings to "civilize them" in furtherance of assimilation or termination phases of American policy. S. Rep. No. 95-597, at 39 (1977).

Plaintiffs assert that the data supporting ICWA's enactment is stale and that this Court should therefore override Congress's judgment. That position ignores core separation-of-powers principles, which require this Court to accord respect to Congress, particularly where it has not provided for a statutory expiration date. But in any event, ICWA's work is far from done. Indian children today are still removed from their homes and communities far more frequently than non-Indian children, and that is precisely the harm ICWA sought to address.

As for "the stability and security of Indian tribes," ICWA directly serves this compelling governmental interest. Congress bears an affirmative duty to advance that interest pursuant to the "trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). To live up to its end of the deal, Congress must act to keep tribes intact—and there can be no question that keeping Indian children with their families and communities is an essential way to do so.

The challenged ICWA provisions are carefully tailored to achieve these vital objectives. And their application is tied to a child's connection to a federally recognized tribe, regardless of race. The placement

preferences prioritize keeping Indian children connected to their families, Tribes, and cultures, but allow courts to deviate from the placement preferences for "good cause." Through these provisions, ICWA recognizes the common-sense principle that an Indian household is best equipped to pass on Indian traditions and ensure the ongoing viability of Indian Tribes, which advance the government's recognition of tribal sovereignty. Plus, Texas's contention that ICWA should apply to only a handful of States ignores both bedrock principles of federalism and the reality that Tribes today span across state lines.

ICWA seeks to remedy what Congress recognized as a pervasive "Indian child welfare crisis," and does so with precision. As such, although the challenged provisions should be reviewed under rational basis, they survive any level of scrutiny the Court may impose.

ARGUMENT

I. ICWA'S CLASSIFICATIONS ARE POLITICAL, NOT RACIAL, AND THUS SUBJECT TO RATIONAL BASIS REVIEW

A federal statute that draws distinctions on the basis of an individual's connection to a federally recognized Tribe "is not directed toward a 'racial' group consisting of 'Indians,'" but is instead "political rather than racial in nature." *Mancari*, 417 U.S. at 553 n.24. This distinction reflects two centuries of precedent recognizing Tribes as sovereigns. And that distinction controls the outcome of the equal protection claims in this case. ICWA's definition of "Indian child"

and its placement preferences are political, not racial. Accordingly, rational basis applies to the challenged ICWA provisions. Here, that deferential rational-basis standard is readily satisfied: these provisions are rationally designed to protect the best interests of Indian children and to further Congress's trust responsibility to Indian tribes.

A. This Court Has Consistently Held That Federal Legislation Governing Indian Tribes Is Rooted in Political Sovereignty, Not Race

For nearly two centuries, this Court has held that "Indian Tribes [are] 'distinct political communities,'" whose authority is "'not only acknowledged, but guarant[e]ed by the United States.'" *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020) (quoting *Worcester v. Georgia*, 31 U.S. 515, 557 (1832)). Indian tribes hold a "unique legal status" under federal law and a "special relationship" with the federal government, *Mancari*, 417 U.S. at 551–52, in recognition of "the necessity of giving uniform protection" to Indian tribes, *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959).

The "unique legal status" of Indian Tribes is grounded "explicitly" in the Constitution, which grants Congress "plenary power" to "deal with the special problems of Indians." *Mancari*, 417 U.S. at 551–52. That authority includes, among other things, the power "[t]o regulate Commerce . . . with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, and "to make Treaties," with Indian Tribes, *id.* art. II, § 2, cl. 2. These are constitutional powers that relate to Indian

tribes as political entities, akin to the constitutional powers to regulate commerce between and among States and to make treaties with other sovereign nations. By using the classifications of "Indians" and "Indian Tribes," the Constitution thus "singles Indians out as a proper subject for separate legislation." *Mancari*, 417 U.S. at 552; *see* Br. of Indian Law Profs. 4–15.

As the Constitution itself reflects, considering ancestry in drawing political distinctions is hardly unusual. For example, such considerations are a "common feature" of citizenship laws that the federal government has long accepted and enforced. *Brackeen v. Haaland*, 994 F.3d 249, 338 n.51 (5th Cir. 2021) (Dennis, J.). Indeed, U.S. citizenship itself extends to children born abroad who have at least one parent who is a U.S. citizen. *See* 8 U.S.C. § 1401(c)–(d), (g); 8 C.F.R. § 322.2. That comports with the practices of many other countries, including Ireland, Greece, Armenia, Israel, Italy, and Poland, which determine "citizenship based on descent." *Brackeen*, 994 F.3d at 338 n.51.

The same principle applies to Indian Tribes, which enjoy exclusive authority to establish criteria for their own membership. Just as our own legal system looks to descent as a basis for citizenship, so, too, may Indian Tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.").

In the nearly fifty years since *Mancari*, the Court has reiterated, and never deviated from, *Mancari*'s core holding that federal laws regarding Indians draw political, not racial lines. *See, e.g.*, *Antelope*, 430 U.S. at 645; *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976). Lower courts, too, have easily and consistently applied this holding for decades and have rejected challenges like those advanced here. *See Brackeen*, 994 F.3d at 445 n.1 (Costa, J.) (collecting cases). *Mancari* was correct when decided, and has proven durable.

B. The Challenged ICWA Provisions Involve Political, Not Racial, Classifications

Mancari and its progeny squarely govern Plaintiffs' equal protection challenges to ICWA's definition of "Indian child" and its placement preferences. These provisions draw political, not racial, classifications and are accordingly subject to rational basis review.

"Indian Child." Under 25 U.S.C. § 1903(4), the term "Indian child" means "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). Whether a child meets this definition turns on the child's connection to a federally recognized "Indian tribe"—a distinct political community—not the child's race. Contrary to Plaintiffs' arguments, ICWA's terms are not predicated on descent alone; indeed, they *exclude* many children who are the descendants of members of Tribes but are neither members of, nor eligible for

membership in, a federally recognized Tribe. The definition also excludes children who might be considered "Indian" but are members of non-federally-recognized Tribes. *See id.* § 1903(3), (4). In other words, Indian children "[a]re not subjected to [ICWA] because they are of the Indian race but because" they or their parents "are enrolled [tribal] members," *Antelope*, 430 U.S. at 646, or are eligible for such membership, 25 U.S.C. § 1903(4).

As federal regulations explain, "[t]he determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is *solely* within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law." 25 C.F.R. § 23.108(b) (emphasis added); *see also* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153 (Feb. 25, 2015) ("[o]nly the Indian tribe(s) . . . may make the determination whether the child" is an "Indian child"). Courts, too, defer to Tribes' determination of their membership.[2]

Placement Preferences. With respect to adoptive placement, ICWA provides that "a preference shall be given, in the absence of good cause to the

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[2] *See, e.g.*, *Aguayo v. Jewell*, 827 F.3d 1213, 1217 (9th Cir. 2016) (holding that BIA did not act arbitrarily or capriciously in determining that it had "no authority to intervene in a tribal membership dispute"); *Cahto Tribe of the Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1230 (9th Cir. 2013) (holding federal agency would have jurisdiction to review membership decisions only if Tribal law authorized it).

contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). Similarly, with respect to placement in any foster care or preadoptive placement, "a preference shall be given, in the absence of good cause to the contrary, to a placement with—(i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." *Id.* § 1915(b).

As with "Indian child," Congress defined the term "Indian," used throughout the placement preferences, in terms of *Tribal membership*—not race. *See* 25 U.S.C. § 1903(3) ("'Indian' means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43.").

Indeed, because the statute provides first preference to members of a child's "extended family," 25 U.S.C. § 1915(a)(1), any family member, including a non-Indian family member, comes *first* in line regardless of their race or Tribal membership. 25 U.S.C. § 1915(a)(1). And under Sections 1915(a)(2) and (3), preference applies to all members of federally recognized Tribes, including those who are of other

races, such as the Cherokee Freedmen.[3] *Id.* § 1915(a)(2), (3). By the same token, Indians who are not members of a federally recognized Indian Tribe receive no placement preference as would-be guardians or adoptive parents—unless they are members of the child's extended family, in which case the basis for placement is familial, not racial. *Id.*; *see infra* § II.B. Accordingly, ICWA's placement preferences rest on consideration of a child's "extended family" and links to federally recognized Tribes—not race.

C. Plaintiffs' Attempts to Limit *Mancari* Lack Merit

Recognizing that their equal protection claims fail under *Mancari* and its progeny, Plaintiffs seek to engraft various "limitations" on those cases' reasoning. None is defensible.

For example, contrary to Plaintiffs' contentions, *Mancari* is not limited to classifications strictly promoting "Indian self-government" or "involving internal tribal affairs." Ind. Pet'rs Br. 14, 26; Tex. Br. 45. While *Mancari* and *Fisher* involved preferences "directly promoting Indian interests in self-

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[3] *See generally Cherokee Nation v. Nash*, 267 F. Supp. 3d 86 (D.D.C. 2017) (explaining that Cherokee Freedmen descended from African slaves and holding the Freedmen have a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees), *enforced sub nom. In re Effect of Cherokee Nation v. Nash*, No. SC-17-07, 2017 WL 10057514 (Cherokee Nation Sup. Ct. Sept. 1, 2017), *judgment entered*, 2021 WL 2011566 (Cherokee Nation Sup. Ct. Feb. 22, 2021).

government," the Court has made clear that those features are not necessary for *Mancari*'s application. Rather, "the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications." *Antelope*, 430 U.S. at 646. Thus, even when confronting regulations unrelated to "tribal self-regulation"—such as matters of criminal jurisdiction—the Court recognized that "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Id.*

Nor is *Mancari* limited to legislation applicable to Indian lands. Ind. Pet'rs Br. 14, 25–26; Tex. Br. 44–45. Indeed, *Mancari* itself upheld a hiring preference within the BIA that was not geographically bound to Indian lands. 417 U.S. 535. Fundamentally, this Court has long held that "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (citation omitted).

Plaintiffs attempt to justify their cramped view of *Mancari* by misreading this Court's decisions in *Rice v. Cayetano*, 528 U.S. 495 (2000) and *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). *Rice* was neither an Indian law nor an equal protection case; it involved a challenge under the Fifteenth Amendment to a Hawai'i election law that singled out individuals for voting eligibility "solely because of their ancestry or ethnic characteristics." 528 U.S. at 515 (citation omitted). The classification found to be racial in *Rice* was based *purely* on ancestry: the state statute explicitly defined "Hawaiian" only through descent,

with no tie to political tribal membership. *Id.* Here, by contrast, the classification of "Indian child" turns on the child's or parent's membership, or a child's eligibility for membership, in a federally recognized Tribe. *Supra* § I.B. In addition, since *Rice* involved a state election, it had no opportunity to consider the federal government's authority over Indian affairs, nor its trust responsibilities with respect to Indian Tribes.

Plaintiffs' reliance on *Adoptive Couple* is equally unavailing. In dicta, this Court suggested certain interpretations of ICWA could "raise equal protection concerns." 570 U.S. at 656. But this Court's reasoning limited *Adoptive Couple* to its unique circumstances of "abandonment"—without suggesting that ICWA's classifications are facially suspect—and this case does not present any of the questions noted in *Adoptive Couple*'s dicta.

Ultimately, if Plaintiffs' reading were accepted, it could have sweeping consequences for other Indian-related laws. By way of example, the Major Crimes Act and General Crimes Act allow federal prosecution for crimes by or against "Indians"—which, in Plaintiffs' view, makes the statutes so constitutionally suspect that they trigger strict scrutiny.[4]

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[4] Beyond the criminal context, numerous other laws regulate Indian affairs by reference to an individual's Indian status or identity. *See, e.g.*, 25 U.S.C. §§ 1603(13)(A), 1612, 1613 (Indian Health Care Improvement Act (IHCIA), identifying anyone "who

* * *

For the foregoing reasons, the challenged ICWA provisions need only satisfy rational basis review. But in any event, they also satisfy strict scrutiny for the reasons explained in the next section. *See infra* § II. Because the ICWA provisions survive strict scrutiny as demonstrated below, and are rationally related to fulfilling Congress's trust responsibility, they also easily satisfy rational basis review. *See generally Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 541 (3d Cir. 2011) (explaining that "[i]f the [challenged governmental action] survived strict scrutiny, it would necessarily survive intermediate scrutiny or rational basis review.").

II. EVEN UNDER STRICT SCRUTINY, ICWA'S PROVISIONS ARE CONSTITUTIONALLY SOUND

Even if the Court were to apply strict scrutiny, ICWA would survive. Strict scrutiny is satisfied where the government has a "strong basis in evidence" for its compelling interests, and if the legislative action "substantially addresses" that interest. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.) (citations omitted).

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is a descendant, in the first or second degree" of a Tribal member as a means of supporting Indians entering the healthcare profession); *id.* § 1801(7)(B) (providing educational support to the "biological child of a member of an Indian tribe"); *see also* 20 U.S.C. § 7491(3)(B) (defining "Indian" to include "a descendant, in the first or second degree" of a Tribal member for purposes of providing education grants to Indian communities).

"Context matters" when applying strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). Plaintiffs simply assume that the modern doctrine of strict scrutiny—developed in the context of racial discrimination unrelated to Indian affairs—applies to ICWA. But strict scrutiny in that sense, which is applied where classifications are especially suspect, makes little sense where the federal government has a specific, constitutionally-based obligation to Indian tribal members. The very existence of that obligation means that laws treating Indian tribal members differently are not inherently suspect, but rather grounded in the Constitution itself. Strict scrutiny has never before been applied to the government's regulation of Indian affairs, and it is far from clear that its modern form would apply in this context. But even assuming it were to so apply, ICWA is narrowly tailored to further compelling government interests.

A. ICWA Furthers Compelling Government Interests

By its terms, ICWA furthers at least two compelling government interests: (1) "protect[ing] the best interests of Indian children"; and (2) "promot[ing] the stability and security of Indian tribes." 25 U.S.C. § 1902. These interests are rooted in the "special relationship between the United States and the Indian tribes and their members," 25 U.S.C. § 1901, as well as "the fulfillment of Congress' unique obligation" to address "special problems" affecting Indian Tribes, *Mancari*, 417 U.S. at 551–52, 555. Congress recognized that the removal of Indian children had historically been a tool to both harm Indian children

and to eradicate Indian Tribes altogether, and passed ICWA in response. These interests are unquestionably compelling.

1. ICWA Furthers the Government's Compelling Interest in Protecting the Best Interests of Indian Children

When it enacted ICWA, Congress recognized our nation's grim history of mistreating Indian children and sought to address "shocking" disparities "in placement rates for Indians and non-Indians." H.R. Rep. 95-1386, at 9 (1978). At the time, "an estimated 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive homes, foster care, or institutions." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38839 (June 14, 2016) (codified at 25 C.F.R. § 23). And "[a]round 90 percent of those children were being raised by non-Indians"— "[m]any would never see their biological families again." Christie Renick, *The Nation's First Family Separation Policy*, Imprint (Oct. 9, 2018). Indeed, "[i]n 16 states surveyed in 1969, approximately 85 percent of all Indian children [] were living in non-Indian homes." H.R. Rep. No. 95-1386, at 9 (1978). By contrast, "[i]n 1980, the incidence rate of children [nationwide] in foster care was 4.4 [per 1,000 children]"—or 0.44 percent. Karl Ensign, U.S. Dep't of Health & Hum. Servs., *Foster Care Summary: 1991* (Dec. 31, 1990). Thus, Indian children were approximately *fifty to eighty times* more likely to be removed from their families (and Tribes) than other children.

Congress found that "the separation of large numbers of Indian children from their families and tribes" resulted from a long discriminatory history of "abusive child welfare practices," *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989), which disregarded "essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," 25 U.S.C. § 1901(5). Indeed, Congress considered that "[one] of the most pervasive components of the various assimilation or termination phases of American policy has been the notion that the way to destroy tribal integrity and culture, usually justified as 'civilizing Indians,' is to remove Indian children from their homes and tribal settings."[5]

Congress determined that depriving an Indian child of tribal relations inflicts unique harm on the child—including the loss of his or her personal tribal identity, relationships, cultural heritage, and language, and enacted ICWA to mitigate these harms. *See* 25 U.S.C. § 1902 (policy statement). Indeed, research addressed below has demonstrated that children removed from their tribal community exhibit elevated levels of substance abuse, mental health struggles, self-injury, and even suicide.

Plaintiffs claim that, whatever circumstances might have justified ICWA's enactment, they cannot support its continued enforcement today. *See* Tex. Br. 52–53, 55–56, 59; Ind. Pet'rs Br. 42 (citing *Shelby*

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[5] S. Rep. No. 95-597 at 43–44 (Excerpt of Task Force Four: Federal, State, and Tribal Jurisdiction, Final Report to the American Indian Policy Review Comm'n (1976)).

Cnty. v. Holder, 570 U.S. 529 (2013)). But Plaintiffs are wrong on the facts and the law.

While ICWA has proven effective, *see* Br. of Casey Family Programs ("Casey Br.") 16–18, the statute's work is far from finished, and Congress retains a compelling interest in keeping Indian families together for the best interest of the children. Contemporary studies consistently find that "[N]ative American children [] are still disproportionately more likely to be removed from their homes and communities than other children," and are still "unnecessarily removed from their families and placed in non-Indian settings; where the rights of Indian children, their parents, or their Tribes were not protected." Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38779. Some contemporary estimates indicate that Indian parents "are up to four times more likely to have their children taken and placed into foster care than their non-Native counterparts." *Disproportionate Representation of Native Americans in Foster Care Across United States*, Citizen Potawatomi Nation Blog (Apr. 6, 2021), https://tinyurl.com/2s9eb27m; *see also* Annie E. Casey Foundation, *Child Welfare and Foster Care Statistics* (May 16, 2022) (finding that Indian children were still "overrepresented among those entering foster care," at nearly double the nationwide rate), https://tinyurl.com/2td3ytbw.

In Oklahoma, Indian children "represented more than 35 percent of those in foster care, yet Native Americans ma[d]e up only around 9 percent of Oklahoma's population" as of 2017. *Disproportionate Representation of Native Americans*, *supra*. In Alaska,

68% of the total number of children in out-of-home care are Alaska Native/American Indian[6]—far more than their roughly 16% of the population.[7] In Nebraska, the percentage of children in foster care who are Native American is four times greater than their percentage of the State population.[8] And in South Dakota, "52 percent of the children in the state's foster care system are American Indians," and "[a]n Indian child is 11 times more likely to be placed in foster care than a white child" as of 2017.[9]

As one example, in a case filed by the ACLU in South Dakota on behalf of the Oglala Sioux Tribe, the Rosebud Sioux Tribe and a class of Indian families illustrated how State officials continue to ignore ICWA in handling Indian child custody cases. In that case, children were removed from their homes following State-court hearings in which parents were not given a copy of the petition accusing them of wrongdoing, were not assigned counsel, and were not permitted to testify, call witnesses, or cross-examine any state employee. The hearings typically lasted fewer than

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[6] Alaska Dep't of Fam. & Cmty. Servs., Off. of Children's Servs., *Alaska Office of Children's Services Statistical Information* (July 2022), https://tinyurl.com/ycra2bu2.

[7] Alaska Dep't of Labor, *Alaska Population Overview: 2019 Estimates* 10 & tbl. 1.3 (2019), https://tinyurl.com/yc3cy85x.

[8] Bayley Bischof, *SPECIAL REPORT: A look at Nebraska's foster care system and how teens need more help*, KOLN-TV (May 12, 2022), https://tinyurl.com/muxhzrb3.

[9] Stephen Pevar, *In South Dakota, Officials Defied a Federal Judge and Took Indian Kids Away From Their Parents in Rigged Proceedings*, ACLU Blog (Feb. 22, 2017), https://tinyurl.com/mtavckbb.

five minutes—some wrapped up in sixty seconds—and the State won 100 percent of the time. *See Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 757 (D.S.D. 2015) (noting that 823 Indian children were removed from their homes between 2010 and 2013 in violation of ICWA), *vacated on other grounds*, 904 F.3d 603 (8th Cir. 2018). In the absence of ICWA's protections, the experience of plaintiff Madonna Pappan, a member of the Oglala Sioux Tribe, was typical. After a hearing that lasted less than sixty seconds, the court issued an order stripping the Pappans of custody over their children for at least sixty days. The forced removal caused Ms. Pappan's children to suffer long-lasting emotional and psychological harm, including (to varying degrees) separation anxiety, bed-wetting, emotional swings, and suicidal tendencies.[10]

According to one 2017 study, Indian children placed for foster care or adoption—many outside their families and tribal communities—reported higher rates than non-Indian adoptees "on all mental health problems measures (*e.g.*, substance abuse, mental health, self-injury, and suicide)." Ashley Landers, et al., *American Indian and White Adoptees: Are There Mental Health Differences?*, 24 Am. Indian & Alaska Native Mental Hlth. Res. 54, 54 (2017). And this study recognized that Indian children "have a number of unique experiences . . . that may distinctly affect their mental health." *Id.* at 56; *see also, e.g.*, Janie M.

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[10] *See* ACLU, *Shadow Report to the 7th–9th Periodic Reports of the United States*, at 56–62, 85th Session of the Committee on the Elimination of Racial Discrimination (July 9, 2014), https://tinyurl.com/mtavckbb.

Braden & K.T. (Hut) Field, *Cultural Issues in the Adoption of Indian Children: Post-Legal*, 5 The Roundtable: J. Natl. Res. Ctr. for Special Needs Adoption 4, 4 (1991) ("An environmental factor contributing to higher suicide rates among Indian youth is adoption *in which Native American youth are placed in non-Indian families*."). In short, although ICWA has improved placement rates for Indian children,[11] the interests that prompted Congress to pass ICWA remain compelling today.

2. ICWA Furthers the Government's Compelling Interest in Protecting the Stability and Security of Indian Tribes

ICWA also fulfills Congress's "broad and enduring trust obligations to the Indian tribes." *Brackeen*, 994 F.3d at 341. In adopting ICWA, Congress expressly acknowledged that the United States "through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources." 25 U.S.C. § 1901(2). Pursuant to the "trust relationship between the United States and the Indian people," *Mitchell*, 463 U.S. at 225, the government "has charged itself with moral obligations of the highest responsibility and trust, obligations to which the national honor has been committed," *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (cleaned up). Accordingly, Congress possesses a distinct and

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[11] *See* Capacity Building Center for Courts, *ICWA Baseline Measures Project Findings Report* 17, 19 (2020), https://tinyurl.com/spa68nm.

compelling interest in discharging its own trust obligations to preserve the stability and integrity of Indian Tribes through their members and prospective members. *See* 25 U.S.C. § 1902 (declaring that "it is the policy of this Nation" to "promote the stability and security of Indian tribes").

Federal courts have long recognized this interest as compelling. In *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011), for example, the Tenth Circuit considered a Religious Freedom and Restoration Act challenge[12] to the Eagle Act, which generally prohibits possessing eagle feathers, but allows for certain exceptions, including one for Tribes. The Tenth Circuit held that the federal government had a compelling interest in the "protection of the culture of federally-recognized Indian tribes," explaining that this compelling interest "arises from the federal government's obligations, springing from history and from the text of the Constitution, to federally-recognized Indian tribes" and "Congress' 'obligation of trust to protect the rights and interests of federally-recognized tribes and to promote their self-determination.'" *Id.* at 1285–86 (quoting *United States v. Hardman*, 297 F.3d 1116, 1128–29 (10th Cir. 2002)). The Tenth Circuit explained that this compelling interest allows the federal government to take actions that might otherwise be impermissible—in *Wilgus*, by impinging on the religious practices of a non-Tribal

[12] RFRA employs the same strict scrutiny analysis as this Court's equal protection jurisprudence. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006).

member and by granting rights to Tribal members that non-Tribal members do not enjoy.

"The protection of this tribal interest is at the core of the ICWA." *Holyfield*, 490 U.S. at 52. Congress expressly recognized that nothing "is more vital to the continued existence and integrity of Indian tribes than their children," and that Tribes are best positioned to preserve Indian culture, traditions, and communities. 25 U.S.C. § 1901(3). "[T]here can be no greater threat to essential tribal relations, and no greater infringement on the right of the . . . [t]ribe to govern themselves than to interfere with tribal control over the custody of their children." *In re Adoption of Buehl*, 555 P.2d 1334, 1342 (Wash. 1976) (internal quotation marks omitted).

In short, ICWA furthers the federal government's compelling interests in protecting the best interests of Indian children and promoting Indian Tribes.

B. ICWA Is Narrowly Tailored to Achieve the Compelling Interests It Furthers

Congress articulated in ICWA a carefully circumscribed definition of "Indian child" and adopted a "minimum" prophylactic measure regulating the "removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. Both of these provisions are narrowly tailored to achieve the compelling interests outlined above.

First, ICWA narrowly defines "Indian child" to capture a child's connection to a federally recognized Tribe—not, as Plaintiffs claim, simply as a "prox[y] for race." Tex. Br. 42. To the contrary, this definition *excludes* those people who are descendants of Tribe members, *id.*, but who are not members or eligible for membership in a federally recognized Tribe. *Supra* § I.B; *see, e.g.*, *In re T.I.S.*, 586 N.E.2d 690, 692–93 (Ill. Ct. App. 1991) (Canadian Indians not covered by ICWA). The definition also excludes those Indians who are members of Tribes *not* recognized by the federal government, as those Tribes lack the government-to-government relationship at the core of Indians' political status. *See, e.g.*, *In re A.L.*, 862 S.E.2d 163, 168 (N.C. 2021) (child eligible only for membership in state-recognized Tribe is not an "Indian child" for purposes of ICWA).[13] There are approximately 400 Tribes in the United States, including many State-recognized Tribes, that lack federal recognition,[14] and their children are not protected by ICWA. Similarly, "Indian child" excludes individuals who have been disenrolled from their

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[13] "[A] formal government-to-government relationship between the United States and a tribe" is established by "federal recognition of an Indian tribe." U.S. Gov't Accountability Off., GAO-02-936T, Indian Issues: Basis for BIA's Tribal Recognition Decisions Is Not Always Clear 1 (2002).

[14] U.S. Gov't Accountability Off., GAO-12-348, Fed. Funding for Non-Federally Recognized Tribes 1 (2012).

Tribes.[15] If the classification were based on race, there would be no such rulings governing any individuals "terminated" or "disenrolled" from the category. ICWA's definitions of "Indian" and "Indian child" turn on status relative to a federally recognized Tribe, and is thus narrowly tailored to the government's compelling interest in fulfilling its trust obligations towards federally recognized Tribes, regardless of race.

Second, ICWA's placement preferences are specifically tailored to address Congress's finding that vague and discriminatory standards had resulted in the failure of "administrative and judicial bodies" to "recognize . . . the cultural and social standards prevailing in Indian communities and families," 25 U.S.C. § 1901(5). ICWA's placement preferences respond to this problem head on—prioritizing placement with an Indian child's family or Tribe. *See* 25 U.S.C. § 1915(b). ICWA's preferences thus aim to keep Indian children connected to their families, Tribes, and culture, consistent with child welfare practices recognized today as the best practices for all children—to focus on strengthening families instead of

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[15] *See, e.g.*, *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) (concluding a person from a terminated Tribe is not an "Indian" under federal law); *Allen v. United States*, 871 F. Supp. 2d 982, 985 (N.D. Cal. 2012) (disenrolled individuals from the Pinoleville Pomo Nation did not constitute a "Tribe" under the Indian Reorganization Act); *In re K.P.*, 195 Cal. Rptr. 3d 551, 554 (Cal. Ct. App. 2015) (affirming ruling of juvenile court that disenrolled children "are not Indian children within the meaning of ICWA" despite their mother being an enrolled member of the Pala Band Tribe).

removing children from families considered unfit. *See* Casey Br. 18–32.

Congress also tailored ICWA to ensure that every case involves an individualized consideration of the child's needs, and courts can deviate from the placement preferences whenever "good cause" exists to do so. 25 U.S.C. § 1915(a), (b). ICWA also provides for emergency removal or emergency placement of a child "in order to prevent imminent physical damage or harm." *Id.* § 1922. The "good cause" exception ensures that the statute's placement preferences do not control in circumstances in which the child's best interests require a different approach. *See, e.g.*, *In re Interest of Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983) (explaining that ICWA's placement preference and "good cause" exception reinforce "the cardinal rule that the best interests of the child are paramount").

BIA regulations provide five bases for establishing "good cause":

> (1) [t]he request of one or both of the Indian child's parents . . . (2) [t]he request of the child, if the child is of sufficient age and capacity to understand the decision that is being made; (3) [t]he presence of a sibling attachment; (4) [t]he extraordinary physical, mental, or emotional needs of the Indian child . . . ; [and] (5) [t]he unavailability of a suitable placement after a determination by the court that a diligent search was conducted . . . .

25 C.F.R. § 23.132(c)(1)–(5). The BIA has further explained that these factors are not exclusive, as "there may be extraordinary circumstances where there is good cause to deviate from the placement preferences based on some reason outside of the five specifically-listed factors." Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38839. "[T]he final rule says that good cause 'should' be based on one of the five factors, but leaves open the possibility that a court may determine, given the particular facts of an individual case, that there is good cause to deviate from the placement preferences because of some other reason." *Id.*; *see also, e.g.*, *Alexandra K. v. Dep't of Child Safety*, No. 1CA-JV 19-0081, 2019 WL 5258095, at *4 (Ariz. Ct. App. Oct. 17, 2019) ("[A] state court need not find one of the factors identified in 25 C.F.R. § 23.132(c) before it may conclude that there is good cause to deviate from a preferred placement."). The "good cause" exception thus ensures that the statute is neither over- nor under-inclusive: it provides a calibrated structure for preserving a child's connections to the Indian community, while still permitting departures as the circumstances of a particular case and the best interests of the child may require.

Claiming that this exception "does nothing to salvage the regime," Individual Plaintiffs misrepresent regulations they say "prevent[] state courts from considering 'ordinary bonding or attachment'" in evaluating good cause. Ind. Pet'rs Br. 43 (quoting 25 C.F.R. § 23.132(c), (e)). Individual Plaintiffs fail to mention that this limitation applies, in any form, *only* to "time spent" in a "non-preferred placement *that was made in violation of ICWA*." 25

C.F.R. § 23.132(e) (emphasis added). And even as to "time spent" with a family in violation of ICWA, the regulation does not prevent consideration of such time—only "sole[]" reliance on that factor. *Id.*; *see, e.g.*, *Navajo Nation v. Dep't of Child Safety*, No. 1 CA-JV 21-0225, 2022 WL 402700, at *5 (Ariz. Ct. App. Feb. 10, 2022) (considering "close bond" between Indian child and non-Indian "foster parents of three years, whom he called 'mom' and 'dad'"). As this Court has recognized, "the law cannot be applied so as to automatically reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." *Holyfield*, 490 U.S. at 54 (cleaned up).

Third, ICWA is tailored to reflect that—contrary to Plaintiffs' assertions—Indian families and Tribes are best positioned to raise their children, both for the best interest of the children and the stability and well-being of the tribe. *Cf., e.g.*, Tex. Br. 54. As the Chief of the Mississippi Band of Choctaw testified in a hearing that led to ICWA's enactment, "the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are raised in non-Indian homes and denied exposure to the ways of their people." *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs*, 95th Cong. 193 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians). Plaintiffs do not meaningfully rebut the testimony Indian leaders provided to Congress, and they provide no basis to ignore the importance of an Indian household as a means of preserving tribal

traditions and culture for all involved. *See In re Interest of J.R.H.*, 358 N.W.2d 311, 321 (Iowa 1984) (considering "the rich Indian heritage these children will be deprived of if placed" in a non-Indian foster home and the impact of "cultural adjustments these [Indian] children . . . would have to make").

Fourth, ICWA—like nearly all federal laws—appropriately applies uniformly nationwide because a purportedly "narrower" state-by-state focus would be a poor fit that fails to address the problems that led to ICWA's passage. *See Holyfield*, 490 U.S. at 47 ("We therefore think it beyond dispute that Congress intended a uniform" national application of ICWA). Texas claims that Congress should have "limit[ed] ICWA's requirements to States whose race-based child-custody practices supposedly incited the Act." Tex. Br. 54. But singling out individual States for disparate treatment "imposes substantial federalism costs and differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Shelby County*, 570 U.S. at 540 (quotation marks omitted). And as a practical matter, it would make no sense for federal law to consider a child an "Indian child" if she lived in Oklahoma but strip away that status if she crossed the border into Texas, for whatever reason and for whatever period of time. And since Indian Tribes stretch across state lines, the geographic limitation Plaintiffs propose would *fracture* Indian communities—doing exactly the opposite of what ICWA intended.

Congress was not concerned solely with geography. Rather, it sought to address threats to the integrity and existence of Tribes, both on and off

reservations. Congress received expert testimony finding that "[m]any Indian families move back and forth from a reservation dwelling to border communities or even to distant communities." S. Rep. No. 95-597, at 51 (1977). Accordingly, to achieve its specific objectives, ICWA is not limited by geography, but by the relevant individuals it covers—Indian children from federally recognized tribes. *Cf.* Ind. Pet'rs Br. 44–45 (arguing that ICWA's placement preferences are disconnected from Congress's goal of preventing the "removal of children from tribal lands"). The Individual Plaintiffs' attempt to cabin Congress's concerns by geography does nothing to suggest, much less demonstrate, overbreadth.

Moreover, as a matter of legislative history, Texas is also wrong to suggest that Congress considered placement concerns in only a handful of States. To the contrary, the House Committee on Interior and Insular Affairs found that, "[i]n 16 states surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes." H.R. Rep. 95-1386, at 9 (1978); *see also Holyfield*, 490 U.S. at 32–33 (noting that contemporaneous studies regarding the removal of "*all* Indian children" nationwide (emphasis added)). And Texas is no exception to the problems that have plagued other States: according to the Texas Department of Family and Protective Services, Indian children are "more" represented in the Texas "child welfare" system "than their percentage of the general population would indicate and [] their outcomes are poorer." Tex. Dept. of Family & Protective Servs., *Disproportionality in Child Protective Services System*, https://tinyurl.com/kxbfebd2 (last visited Aug. 18,

2022). As Texas's own authorities recognize, Indian children "both nationally and in Texas" are still being thrust disproportionately into the child welfare system. *Id.*

Fifth, ICWA maintains its narrowly tailored approach because it is not a sweeping mandate across all circumstances but instead provides a specific exception for any and all circumstances in which "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). Texas essentially makes that point, noting that this exception could have been even broader—encompassing children subjected to "neglect" as well, Tex. Br. 56. But ICWA already permits variance from its default preferences in cases of neglect under the "good cause" exception discussed above. *See supra* pp. 26–28.

Sixth, ICWA appropriately includes Indian families of Tribes other than the child's in its preference scheme. 15 U.S.C. § 1915(b). As Judge Dennis recognized, "many contemporary tribes descended from larger historical bands and continue to share close relationships and linguistic, cultural, and religious traditions" today. *Brackeen*, 994 F.3d at 345 (Dennis, J.). One example is the Oceti Sakowin band, which is located in Minnesota, Montana, Nebraka, North Dakota, and South Dakota. *Case Study: Oceti Sakowin*, Smithsonian Nat'l Museum of the American Indian, https://tinyurl.com/mns653a6. Families of any Tribe are thus uniquely positioned to integrate children into Indian cultures and to guide and support

a child in connecting to the child's own Tribe as well as tribal resources.

Finally, ICWA is appropriately tailored to address the structure of Indian families, recognizing that an Indian "family" includes "the child's extended family," 25 U.S.C. § 1915(a)—a feature the Individual Plaintiffs ignore. *See* Ind. Pet'rs Br. 45 (arguing that ICWA "applies in situations where no Indian family is being broken up—for example, where the tribal-member parent is completely absent from the child's life"). Congress's conception of "family" makes sense: many Indian Tribes operate as "extended families" for the Indian child, such that the child may "have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." H.R. Rep. 95-1386, at 10 (1978). And importantly, this "extended family" often includes non-Indian relatives. As a further illustration, in both the Apache and Navajo languages, the word for "mother" is the same as the word for "aunt," and the word for "father" is the same as the word for "uncle." *See* Renick, *Nation's First Family Separation Policy*, *supra*. And in any event, ICWA's "good cause" provision similarly prioritizes family unity even when a child's biological parents may not be in a position to raise the child: it facilitates placement at the "request of one or both of the Indian child's parents," based on the "presence of a sibling attachment," and pursuant to the "extraordinary physical, mental, or emotional needs of the Indian child." 25 C.F.R. § 23.132(c)(1)–(5). Individual Plaintiffs may not use a cramped, inapplicable misunderstanding of the word "family" to undermine the ties that suffuse an Indian Tribe.

In short, even if strict scrutiny were applicable here, ICWA's definition of Indian child and placement preferences are narrowly tailored to further its compelling interests in protecting Indian children and Indian Tribes. Plaintiffs' equal protection challenges should be rejected.

CONCLUSION

For all the above reasons, the court of appeals' decision rejecting Plaintiffs' equal protection challenge should be affirmed.

Respectfully submitted,

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