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8  
9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE DISTRICT OF ARIZONA**

11 A.D., C.C., L.G., and C.R., by CAROL  
12 COGHLAN CARTER, and DR. RONALD  
FEDERICI, their next friend;  
13 S.H. and J.H., a married couple;  
14 M.C. and K.C., a married couple;  
K.R. and P.R., a married couple;  
15 for themselves and on behalf of a class of  
similarly-situated individuals,  
16 Plaintiffs,

17 vs.

18 KEVIN WASHBURN, in his official  
19 capacity as Assistant Secretary of Indian  
Affairs, BUREAU OF INDIAN AFFAIRS;  
20 SALLY JEWELL, in her official capacity as  
21 Secretary of Interior, U.S. DEPARTMENT  
OF THE INTERIOR;  
22 GREGORY A. McKAY, in his official  
23 capacity as Director of ARIZONA  
DEPARTMENT OF CHILD SAFETY,  
24 Defendants.

No. CV-15-1259-PHX-NVW

**[LODGED] AMICUS  
MEMORANDUM  
OF STATE OF OHIO IN  
OPPOSITION TO  
MOTIONS TO DISMISS**

(Honorable Neil V. Wake)

## INTRODUCTION AND STATEMENT OF AMICUS INTEREST

1           The State of Ohio, like every State, has always governed domestic relations  
2 within its borders, including legal relationships between parents and children. As the  
3 governments in charge of domestic relations, States have always struggled with difficult  
4 issues including when and how to place children in foster or pre-adoption care and when  
5 and how to approve an adoption in the best interests of the child.  
6

7           As the United States Supreme Court and the Ninth Circuit have explained,  
8 “[f]amily relations are a traditional area of state concern.” *H.C. ex rel. Gordon v.*  
9 *Koppel*, 203 F.3d 610, 613 (9th Cir. 2000) (quoting *Moore v. Sims*, 442 U.S. 415, 435  
10 (1979)); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (describing domestic relations as “an  
11 area that has long been regarded as a virtually exclusive province of the States.”). Thus,  
12 States have an interest, on federalism grounds alone, in protecting that area of state  
13 concern from unwarranted federal intrusion.

14           That state interest is magnified when, as here, the federal government seeks to  
15 order States to not only follow different rules, but to discard the States’ usual  
16 commitment to considering the best interests of a child without regard to race or  
17 ethnicity. Ohio, like most States, generally follows these basic precepts: (1) the child’s  
18 best interests, including safety, are paramount, (2) the rights of parents to raise their  
19 children should not be displaced without good cause, and (3) the State must not  
20 discriminate by the race or ethnicity of children, parents, or prospective parents.

21           But the federal government orders the States to do otherwise—to set aside a  
22 child’s best interests and look to ethnicity—where children of Native American ancestry  
23 are involved. The Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (“ICWA”), orders  
24 a State to set aside its usual standards and processes, including the best-interests test,  
25 based ultimately on the presence of Native American ancestry in a child, no matter how  
26 minimal. That is wrong. It is wrong not just because it mandates race-based  
27 decisionmaking contrary to deep constitutional values, but also because it does so in a  
28 way that intrudes on the States’ longstanding power over domestic relations. That type

1 of displacement of state authority is not authorized by the Indian Commerce Clause or  
2 anything else in the Constitution. Worst of all, the ICWA does not merely take away  
3 States' power and allow federal actors to step in, as other laws do, but it commands state  
4 officers and agencies to be the agents of the federal race-based decisionmaking.

5 The State of Ohio submits this amicus to defend the States' power to protect  
6 children, to resist the federal government's unwarranted race-based mandate, and to urge  
7 the Court to deny the motions to dismiss and allow the case to proceed.

8 **ARGUMENT**

9 The State of Ohio submits this amicus brief to addresses the federalism aspects of  
10 this case: ICWA invades state authority, and it is not authorized by the U.S.  
11 Constitution.

12 **A. The ICWA invades the States' authority in multiple ways.**

13 The ICWA improperly intrudes on State authority in multiple ways, as it both  
14 interferes with an area of State concern and commandeers state officers in the process.

15 *First*, no one doubts that domestic relations, which includes adoption and parental  
16 rights, is "an area that has long been regarded as a virtually exclusive province of the  
17 States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see In re Burrus*, 136 U.S. 586, 593–  
18 94 (1890).

19 Indeed, the commitment of domestic relations to the States is so important that  
20 the Supreme Court has long recognized a "domestic relations exception" to diversity  
21 jurisdiction in federal courts. That exception "divests the federal courts of power to  
22 issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S.  
23 689, 703 (1992). The exception is notable in that it goes even further than a  
24 commitment to state law rather than federal law. Most traditionally state law issues,  
25 such as tort or contract, *may* still be heard in federal courts in diversity cases. The  
26 domestic relations exception says that such issues are left to state courts *even when* they  
27 would otherwise be eligible for federal determination. Domestic relations issues are left  
28 to state substantive law *and* to state courts. While the ICWA, by setting federal standards

1 to be applied in state courts, does not violate the domestic relations exception  
2 specifically, the principle it embodies is worse than the harm that the exception is meant  
3 to prevent. The domestic relations exception prevents federal courts from even hearing  
4 and applying *state law*, but if the exception were gone and that scenario occurred, at  
5 least state substantive law would still control. Under the ICWA, federal law controls.

6 *Second*, state officers must apply the ICWA. That result—i.e., that state actors  
7 must do the federal government’s bidding—violates the anti-commandeering limitations  
8 in Article I of the Constitution, as confirmed by the Tenth Amendment. *Printz v. United*  
9 *States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). In *Printz*,  
10 the Court invalidated a federal law that ordered state officers to conduct background  
11 checks on would-be handgun buyers. The Court justified and applied a bright-line  
12 principle: The “Federal Government may not compel the States to implement, by  
13 legislation or executive action, federal regulatory programs.” 521 U.S. at 925.

14 Here, the ICWA seeks to compel the States to implement its mandates. Notably,  
15 it does not merely order state courts, in hearing cases, to apply federal law. Instead, as  
16 in *Printz* and other anti-commandeering cases, the federal law orders state and local  
17 *executive* officers and employees to carry out its terms. For example, state agencies that  
18 oversee adoptions or foster care, such as children’s services agencies, must seek to place  
19 those categorized as Indian children with Indian parents. Further, the federal  
20 government (in regulations) tells state executive officials to enroll Indian children in  
21 tribes. 80 Fed. Reg. at 10153, B.4(d)(iii). And if a child might be Indian, state officers  
22 may be told to trace records and prepare genealogy charts going back generations in a  
23 hunt for Indians. 80 Fed. Reg. at 10152, B.2(b)(1)(i).

24 The ICWA, by intruding upon state domestic relations law, and ordering state  
25 actors to follow federal mandates, violates limitations inherent in Congress’s Article I  
26 powers (as construed against the Tenth Amendment’s backdrop). And by impeding  
27 States from acting in the best interests of children—who are, of course, not political  
28 abstractions, but real flesh and blood people who need protection—the ICWA invades

1 not merely abstract “state interests,” but harms the States’ real-world efforts to help the  
2 most vulnerable among us.

3 **B. The ICWA is not authorized by the Indian Commerce Clause or any other**  
4 **constitutional provision.**

5 Aside from its unconstitutional commandeering of the States, the ICWA is  
6 beyond the scope of federal power because the entire regime is not rooted in any express  
7 congressional power in the first place, whether the Indian Commerce Clause or anything  
8 else.

9 The Indian Commerce Clause empowers Congress to “regulate Commerce . . .  
10 with the Indian Tribes.” U.S. Const., Art. I, § 8, cl. 3. Notably, the Indian Commerce  
11 Clause is not a freestanding clause devoted to Indian Commerce, but is part of the  
12 broader Commerce Clause. That clause refers to “Commerce” just once, with three  
13 branches regarding foreign, interstate, and Indian Commerce: “To regulate Commerce  
14 with foreign Nations, and among the several States, and with the Indian Tribes.” *Id.*  
15 Whatever the definition of “Commerce” in the Commerce Clause, it has that meaning as  
16 applicable to each of the circumstances the Clause addresses.

17 The clause’s text alone dooms the ICWA, as *adoption of children* is neither  
18 “commerce” nor an arrangement with Indian “Tribes.” However broad one’s conception  
19 of “commerce,” it does not involve termination of parental rights or approving adoption.  
20 And the ICWA, by applying to *individual* children who have not joined a tribe, does not  
21 involve Congress’s power to regulate commercial relations with “the Indian Tribes.”  
22 While the text and a dictionary are enough to end the matter, caselaw and original  
23 meaning confirm the result.

24 Justice Thomas explained all of this in his concurrence in *Adoptive Couple v.*  
25 *Baby Girl*, 133 S.Ct. 2552, 2565 (2013). In that case, the Court held that certain ICWA  
26 provisions did not apply, as a statutory matter, to the facts at issue there. Those facts  
27 involved a baby girl who was “classified as an Indian because she [was] 1.2% (3/256)  
28 Cherokee.” *Id.* at 2556 (majority op.). Because of that ancestry, the South Carolina

1 Supreme Court had “held that certain provisions of [ICWA] required her to be taken, at  
2 the age of 27 months, from the only parents she had ever known and handed over to her  
3 biological father, who had attempted to relinquish his parental rights and who had no  
4 prior contact with the child.” *Id.* But the Court rejected that conclusion, by interpreting  
5 the statute’s own terms narrowly not to cover Baby Girl’s situation. Thus, the Court did  
6 not reach any constitutional issues, although it noted that the rejected “interpretation  
7 would raise equal protection concerns.” *Id.* at 2565.

8 Justice Thomas more fully explained that the Court’s result was compelled by  
9 constitutional avoidance. In his view, the ICWA was not authorized by the Indian  
10 Commerce Clause. He reviewed the understanding of the term “commerce with Indian  
11 tribes” at the “time of the founding,” which of course meant “trade with Indians.” *Id.* at  
12 2567 (citing Natelson, *The Original Understanding of the Indian Commerce Clause*, 85  
13 *Denver U.L.Rev.* 201, 215-16 and n.97 (2007), and Report of Committee on Indian  
14 Affairs (Feb. 20, 1787), in 32 *Journals of the Continental Congress 1774–1789*, pp. 66,  
15 68 (R. Hill ed. 1936)). Justice Thomas also carefully reviewed colonial regulations of  
16 Indian trade, the Articles of Confederation, and the drafting history of the clause at the  
17 Constitutional Convention. *Id.* at 2567-70. All of those materials pointed to one  
18 conclusion: The Constitution gave Congress the “power to regulate trade with the  
19 Indians,” not a broader “power to regulate all Indian affairs.” *Id.* at 2569.

20 In addition to exploring the Clause’s overall meaning, Justice Thomas also noted  
21 the two discrete textual problems described above. First, the ICWA concerns “child  
22 custody proceedings,” not “commerce.” *Id.* at 2570. Second, the ICWA provisions “do  
23 not regulate Indian tribes as tribes,” but regulate individual children without regard to  
24 tribal membership. *Id.* Consequently, Justice Thomas rightly concluded that “[b]ecause  
25 adoption proceedings like this one involve neither ‘commerce’ nor ‘Indian tribes,’ there  
26 is simply no constitutional basis for Congress’ assertion of authority over such  
27 proceedings.” *Id.* at 2571.

28

1 Any other reading leads to a massive expansion of federal power. If Congress  
2 could tell States to treat Indians differently based on their ethnicity alone without regard  
3 to tribal status, it could order state courts to use different legal rules in all criminal or  
4 civil cases involving Indians. *See id.* If Congress could treat child custody proceedings  
5 as “commerce,” then it could regulate all interstate adoptions under the interstate  
6 Commerce Clause. But neither of those principles or outcomes is correct as a matter of  
7 law. Nor is either the right thing for the children involved. *Cf. Adoptive Couple*, 133 S.  
8 Ct. at 2564 (state Supreme Court’s reading of ICWA mandate requirements “would, in  
9 turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding  
10 a permanent and loving home ....”).

11 None of the federal government’s arguments or authorities compel, or even allow,  
12 a contrary result. The federal government cites cases describing federal power over  
13 Indian “affairs” as “plenary.” ECF No. 68 (Federal Defendants’ Motion to Dismiss) at  
14 29 (citing *United States v. Lara*, 541 U.S. 193, 200 (2004)). But despite that generic  
15 language of “plenary” power, the actual powers at issue in every other case involve  
16 Indian *tribes* and tribal membership: The Court has never blessed a law that singled out  
17 all Indians based on ethnicity or blood alone, as the ICWA does. Instead, the Court has  
18 dealt with laws that involved tribes or reservations, not individuals alone. *See, e.g.,*  
19 *Worcester v. Georgia*, 31 U.S. 519, 559 (1832) (describing “Indian nations” as “distinct,  
20 independent communities” in context of regulations of federal relations with “tribes”);  
21 *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding federal employment preference for  
22 members of Indian *tribes* as against challenge that it was an impermissible racial  
23 classification; law turned on tribal membership and not mere ethnicity).

24 The Court’s treatment of the ICWA in particular does not support the federal  
25 government’s view. In one case, the Court addressed the ICWA in terms of its reach  
26 regarding “domicile” on a reservation, but did not address application to individuals.  
27 *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). Further,  
28 *Mississippi Band* involved provisions granting jurisdiction to tribal courts, not mandates

1 to State agencies and courts. In a case involving the ICWA’s application to a child  
2 based on ancestry, the Court held that the statute did not apply on those facts, and noted  
3 that such an application would raise constitutional concerns. *Adoptive Couple*, 133 S.  
4 Ct. at 2565. Thus, while the Court has used the phrase “plenary power,” its application  
5 has always been as to tribes and reservations, not as to individuals with Native American  
6 ancestry.

7 Just as the federal government’s elision from “Indian tribes” to “Indians” is  
8 unsupported by actual legal applications, so too is its over-reading of “commerce” to  
9 include child custody proceedings. It insists that the meaning of “commerce” changes in  
10 the Indian Commerce context from its meaning in the Interstate Commerce or Foreign  
11 Commerce contexts. ECF No. 68 at 29-30. The federal government cites *Cotton*  
12 *Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), for the proposition that the  
13 “extensive case law that has developed under the Interstate Commerce Clause,  
14 moreover, is premised on a structural understanding of the unique role of the States in  
15 our constitutional system that is not readily imported to cases involving the Indian  
16 Commerce Clause.” That is absolutely true, in terms of many substantive rules of  
17 interstate commerce that do not extend to Indian commerce, such as the pre-emption  
18 issue raised in *Cotton Petroleum*.

19 But the baseline *definition* of what constitutes “commerce” remains the same for  
20 all three prongs of the Commerce Clause, even if the resulting substantive law outcome  
21 that governs each type of commerce differs. After all, this is not just a matter of the  
22 same term “commerce” being used in parallel provisions near one another. The  
23 Commerce Clause uses the word “commerce” only once, before branching into three  
24 applications within the same sentence. The federal government cites no authority, and  
25 Ohio is aware of none, treating *the same word in the same place* to have shifting  
26 meanings as applied to different clauses in the same sentence. Defendants cite none in  
27 the Commerce Clause context, or in any context. Indeed, to the contrary, at the time of  
28 the Clause’s adoption, an established “rule of construction [held] that the same word



1 normally had the same meaning when applied to different phrases in an instrument.”  
2 See Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver  
3 U.L.Rev. 201, 215 and n.96 (citing cases for rule).

4 Because “Commerce” in the Commerce Clause means “Commerce” every time,  
5 any reading of “Commerce” to include child-custody proceedings for children within the  
6 States borders would radically expand federal power under the Commerce Clause and  
7 destroy the understanding that domestic relations are a State concern. *Sosna*, 419 U.S. at  
8 404.

9 Instructive is the Court’s decision in *United States v. Morrison*, 529 U.S. 598  
10 (2000), in which the Court held that the Commerce Clause did not empower Congress to  
11 enact certain provisions of the Violence Against Women Act creating a federal civil  
12 remedy for certain gender-based violence. The Court explained that “[g]ender-  
13 motivated crimes of violence are not, in any sense of the phrase, economic activity.” *Id.*  
14 at 613. The Court rejected the argument that the effects of gender-based violence  
15 “substantially affected” interstate commerce. And notably, the Court said that  
16 “Petitioners’ reasoning, moreover, will not limit Congress to regulating violence but  
17 may, as we suggested in *Lopez*, be applied equally as well to family law and other areas  
18 of traditional state regulation since the aggregate effect of *marriage, divorce, and*  
19 *childrearing* on the national economy is undoubtedly significant.” *Id.* at 615-16  
20 (emphasis added). The Court thus rejected the notion that “effects” on commerce could  
21 justify a federal takeover of “childrearing”—and of course, if childrearing or adoption  
22 *themselves* were somehow found to constitute commerce, then Congress could take over  
23 those fields even without any showing of “effect.” But the Court rejected such a course.  
24 Domestic relations are not commerce under the Commerce Clause, and Congress’s  
25 power “To regulate Commerce with foreign nations, and among the several States, and  
26 with the Indian tribes” therefore does not extend to domestic relations under that clause.

27 In addition, the federal government’s argument regarding the Tenth Amendment  
28 relies wholly upon its claim about the Indian Commerce Clause. Once the latter

1 collapses, so, too, does the former. The federal government argues only that the Tenth  
2 Amendment cannot be implicated when Congress acts pursuant to an enumerated power,  
3 ECF No. 68 at 31, so without the support of the Indian Commerce Clause as an  
4 enumerated power, its opposition to the Tenth Amendment argument disintegrates. *Cf.*  
5 Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 *Texas L. Rev.* 331, 410  
6 (Dec. 2004) (comparing Tenth Amendment’s declaration of “principle of enumerated  
7 power” in limiting federal power to Ninth Amendment’s role as rule of construction in  
8 reading enumerated powers narrowly).

9 Further, without support for the ICWA in the Indian Commerce Clause, no other  
10 constitutional authority supports the ICWA. As Justice Thomas noted, “no other  
11 enumerated power . . . could even arguably support Congress’ intrusion into this area of  
12 traditional state authority.” *Adoptive Couple*, 133 S.Ct. at 2566 (quoting Fletcher, *The*  
13 *Supreme Court and Federal Indian Policy*, 85 *Neb. L.Rev.* 121, 137 (2006) (“As a matter  
14 of federal constitutional law, the Indian Commerce Clause grants Congress the only  
15 explicit constitutional authority to deal with Indian tribes”; and citing Natelson, *The*  
16 *Original Understanding of the Indian Commerce Clause*, 85 *Denver U.L.Rev.* 201, 210  
17 (2007) (explaining lack of other sources of authority supporting congressional power  
18 over Indians). Thus, Justice Thomas rightly concluded that “[t]he assertion of plenary  
19 authority must, therefore, stand or fall on Congress’ power under the Indian Commerce  
20 Clause.” *Id.* That means that it falls, not stands.

21 In sum, the Indian Commerce Clause does not support the ICWA’s invasion of  
22 State authority over parental rights and adoption. It simply does not authorize federal  
23 dictates putting “certain vulnerable children” at a “great disadvantage solely because an  
24 ancestor—even a remote one—was an Indian.” *Cf. Adoptive Couple*, 133 S. Ct. at 2565.

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1 **C. The ICWA applies to individual children, and the federal defendants cannot**  
2 **rely on federal power to address tribes as “political entities” to justify**  
3 **reaching individual children based on ancestry.**

4 Ohio is concerned with its State sovereignty and with federalism, especially  
5 where, as here, the well-being of children is at stake. Thus, Ohio does not fully address  
6 the other important issues at stake here, but addresses one aspect of the equal protection  
7 argument because it overlaps with the federal government’s lack of authority under the  
8 Commerce Clause. The federal government seeks to shoehorn the ICWA under the  
9 Commerce Clause by describing it as protecting the interests of the “tribes,” thus coming  
10 closer to the Clause’s scope in concerning “Commerce . . . with the Indian Tribes.” U.S.  
11 Const., Art. I, § 8, cl. 3; ECF No. 68 at 29-30. Similarly, in responding to the challenge  
12 that the ICWA discriminates by ethnicity, the federal government argues that ICWA is  
13 tied to “Affiliation with a Political Entity” through tribal membership, not ethnicity  
14 alone. ECF No. 68 at 20 (“The law expressly limits its application based on political  
15 affiliation with a tribe; it makes no mention of race or ancestry.”). But, as explained  
16 above, the ICWA does govern individual children based on Native American ancestry; it  
17 goes beyond addressing tribes as political affiliations.

18 On its own terms, the ICWA expressly turns on whether the child’s *parent* is a  
19 tribal member, and it does not always require the child to be a member. The federal  
20 government seeks to blur that line by first asserting that ICWA categorically “does *not*  
21 apply to proceedings involving children who may have Indian ancestry but are neither  
22 members of a tribe, nor eligible for membership and the child of a tribal member.” ECF.  
23 No. 68 at 22. But it then footnotes a concession that its “does *not* apply” language is  
24 exceedingly qualified, and admits that the “definition of ‘Indian child’ encompasses  
25 some children who are not themselves yet enrolled in a tribe . . . .” *Id.* at 22 n.10.  
26 Arguing that the parent’s tribal membership is a close proxy for the child’s future  
27 interest in joining, the federal government quotes what it says is Congress’s view that  
28 Indian children, “because of their minority, cannot make a reasoned decision about their

1 tribal and Indian identity.” *Id.* In other words, such children have not chosen a political  
2 affiliation, so the law assumes that choice based on . . . ancestry. So the entire recasting  
3 of ethnicity as political affiliation reverts, in the end, to ethnicity.

4 Indeed, the federal government admits that equation, but says it is legitimate  
5 because “blood descent is typically shorthand for the social, cultural, and communal ties  
6 a person has with a sovereign entity.” ECF No. 68 at 23. That “blood descent” as  
7 “shorthand” for communal ties *fails*, however, at least with regard to an infant or toddler  
8 who has no such communal ties but was fathered by a tribal member who had not seen  
9 the child, as in *Baby Girl*.

10 Moreover, the cases that the federal government cites all concerned statutes that  
11 actually involve a tribal status or directly involve relations with a tribe or reservation;  
12 not one involves the kind of ancestry-alone provision that ICWA does. *See* above at 7-8;  
13 *see* ECF No. 68 at 21 n.9 (citing cases); *see also* ECF no. 178 (Federal Defendants’  
14 Memorandum in Support of Motion to Dismiss First Amended Complaint). Further still,  
15 the reliance on ethnicity, and not tribal membership, is shown by the preferences that  
16 ICWA requires for placement with an adoptive family: The law requires preference for  
17 parents in the same tribe as the child, or, as a backup, for *any Indian prospective foster*  
18 *or adoptive parent to be preferred to non-Indians.* 25 U.S.C. 1915(a)(3), (b)(iii). Even  
19 if each tribe is a political affiliation, no such umbrella political affiliation exists for all  
20 Indians. Thus, that preference is one of ethnicity and “blood descent.”

21 In sum, the ICWA indeed classifies individual children based on ethnic ancestry  
22 or “blood descent.” It does not deal with “tribes” alone, and just as the ICWA’s reach to  
23 individuals rather than tribes undercuts the claim of authority under the Indian  
24 Commerce Clause, so too does that mean that a reliance upon “tribes” as “political  
25 affiliations” does not insulate the ICWA from an equal-protection challenge.

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**CONCLUSION**

For the reasons above, Amicus State of Ohio urges the Court to deny the Motions to Dismiss, and to allow the case to proceed.

**RESPECTFULLY SUBMITTED** this 9th day of May, 2016 by:

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