**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

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|---|---|---|
| CHAD EVERET BRACKEEN, et al., | : | |
| | : | |
| Plaintiffs, | : | |
| | : | Case No. 4:17-CV-00868-O |
| v. | : | |
| | : | |
| RYAN ZINKE, in his official capacity as Secretary of the Department of the the Interior, et al., | : | |
| | : | |
| Defendants | : | |

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**PROPOSED *AMICUS* BRIEF OF INDIAN LAW SCHOLARS IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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# TABLE OF CONTENTS

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF *AMICI* INTEREST ..... 1

ARGUMENT ..... 3

I. THE ORIGINAL PUBLIC UNDERSTANDING OF THE CONSTITUTION WAS THAT CONGRESS POSSESSED BROAD AND EXCLUSIVE POWER TO REGULATE INDIAN AFFAIRS GENERALLY. ..... 4

II. THE ENACTMENT OF THE INDIAN CHILD WELFARE ACT IS CONSISTENT WITH THE ORIGINAL PUBLIC UNDERSTANDING OF THE INDIAN AFFAIRS POWERS POSSESSED BY CONGRESS. ..... 14

CERTIFICATE OF SERVICE ..... 23

# TABLE OF AUTHORITIES

## Cases

*Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) ..... 9, 11

*Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998) ..... 5

*Antoine v. Washington*, 420 U.S. 194 (1975) ..... 5

*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) ..... 5, 8

*DeCoteau v. District Court*, 420 U.S. 425 (1975) ..... 20

*Morton v. Mancari*, 417 U.S. 535 (1974) ..... 6

*Negonsott v. Samuels*, 507 U.S. 99 (1993) ..... 5

*Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985).. 5, 7, 8, 11

*Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016) ..... 5

*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) ..... 5

*South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) ..... 5

*United States v. Kagama*, 118 U.S. 375 (1886) ..... 6, 14

*United States v. Lara*, 541 U.S. 193 (2004) ..... 4

*Washington v. Confederated Bands and Tribes of Yakima Natio*n, 439 U.S. 463 (1979) ..... 5

*Worcester v. Georgia*, 31 U.S. 515 (1832) ..... 6, 13, 14

**Statutes**

18 U.S.C. § 1151 ..... 12

25 U.S.C. § 177 ..... 12

25 U.S.C. § 1901 *et seq*. ..... 3

25 U.S.C. § 1901(1) ..... 4

25 U.S.C. § 1902(2) ..... 4

25 U.S.C. § 261 *et seq* ..... 12

Trade and Intercourse Act of 1790, 1 Stat. 137 ..... 12

Trade and Intercourse Act of 1793, 1 Stat. 329 ..... 12

Trade and Intercourse Act of 1796, 1 Stat. 469 ..... 12, 20

Trade and Intercourse Act of 1799, 1 Stat. 743 ..... 12

Trade and Intercourse Act of 1802, 2 Stat. 139 ..... 12, 20

Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49 ..... 10, 15

Treaty with the Chickasaw, Jan. 10, 1786, 7 Stat. 24 ..... 15

Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13 ..... 18

Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 5 ..... 15

**Constitutional Provisions**

Articles of Confederation, art. IX, para. 4 ..... 7

Foreign Affairs and War Powers Clause, art. II, § 2, para. 1 ..... 6

Indian Commerce Clause, Const. art. I, § 8, cl. 3 ..... 5, 7, 8

Indians Not Taxed Clauses, art. I, § 2, para. 3 & amend. XIV, § 2 ..... 6

Necessary and Proper Clause, art. I, § 8, cl. 18 ..... 5

Property and Territory Clause, art. IV, § 3, cl. 2 ..... 6

Supremacy Clause, art. VI, para. 2 ..... 6, 12

Treaty Clause, art. II, § 2, para. 2 ..... 5

**Congressional Authorities**

ANNALS OF CONG. (1792) ..... 20

H. Rep. 95-1386 (1978) ..... 21

**Treatises**

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2012 ed.) ..... 2, 6, 17, 21

CONFERENCE OF WESTERN ATTORNEY'S GENERAL, AMERICAN INDIAN LAW DESKBOOK (2014 ed.) ..... 6, 12

FLETCHER, MATTHEW L.M., FEDERAL INDIAN LAW (West Hornbook Series 2016). 1

RESTATEMENT OF THE LAW OF AMERICAN INDIANS, Tent. Draft No. 1 (April 22, 2015) ..... 6, 7

**Law Reviews**

Ablavsky, Gregory, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) ..... passim

Carpenter, Kristen A. & Riley, Angela R., *Privatizing the Reservation?*, 71 STAN. L. REV. (forthcoming 2019) ..... 1, 2

Fletcher, Matthew L.M. & Jurss, Leah, *Tribal Jurisdiction—A Historical Bargain*, 76 MD. L. REV. 593 (2017) ..... 16, 17

Fletcher, Matthew L.M. & Singel, Wenona T., *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885 (2017) ..... 4, 16, 18, 19

Fletcher, Matthew L.M., *Preconstitutional Federal Power*, 82 TULANE L. REV. 509 (2007) ..... 16

Golove, David M. & Hulsebosch, Daniel J., *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition,* 85 N.Y.U. L. REV. 932 (2010) ..... 17

Natelson, Robert, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007) ..... 11

Riley, Angela R., *Indians and Guns*, 100 GEO. L.J. 1675 (2012) ..... 2

Torres, Gerald & Milun, Kathryn, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 ..... 2

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American Law Institute, How the Institute Works, *available at* https://www.ali.org/about-ali/how-institute-works/ ..... 6

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DE VATTEL, EMER, THE LAW OF NATIONS (Béla Kapossy & Richard Whatmore eds.,Thomas Nugent trans., Liberty Fund 2008) (1758) ..... 18

DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski et al. eds., 2004) ..... 11

*Facing the Future: The Indian Child Welfare Act at 30* (Matthew L.M. Fletcher, Kathryn E. Fort & Wenona T. Singel, eds. 2009) ..... 2

HOLT, MARILYN IRVIN, INDIAN ORPHANAGES (2001) ..... 19

ONUF, PETER S. & GREENWOOD ONUF, NICHOLAS, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814 (1993) 18

PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES (Mark A. Mastromarino ed., 1996) ..... 9

PETERSON, DAWN, INDIANS IN THE FAMILY: ADOPTION AND THE POLITICS OF ANTEBELLUM EXPANSION (2017) ..... 19

Rayman, Ronald, *Joseph Lancaster's Monitorial System of Instruction and American Indian Education, 1815-1838*, 21:4 HIST. OF ED. Q. 395 (1981) ..... 19

RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) ..... 9

THE FEDERALIST No. 42 (Madison) ..... 7, 10

## STATEMENT OF *AMICI* INTEREST

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*Sandoval*, in INDIAN LAW STORIES 109 (Carole Goldberg, Kevin Washburn & Philip P. Frickey, eds., 2011).

The scholarship and clinical practice of *amici* focus on the subject-matter areas—Indian law, tribal powers, and federal- and state-court jurisdiction—that are implicated by this case. *Amici* have an interest in ensuring that cases in these fields are decided in a uniform and coherent manner, consistent with the foundational principles of these areas of law. *Amici* submit this brief to highlight the extent to which the Plaintiffs and *Amici* in support of Plaintiffs incorrectly stated the history of the interpretation of the Constitution in relation to Indian affairs. This brief explains the wealth of constitutional support for the enactment of the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*.

*Amici* submit this brief in their individual capacities, not on behalf of any of the institutions with which they are associated. No counsel for a party authored this brief in whole or in part and no person other than *amici* or their counsel made a monetary contribution for the brief's preparation or submission.

## ARGUMENT

The Constitution fully authorized Congress to enact the Indian Child Welfare Act [ICWA]. 25 U.S.C. § 1901 *et seq.* In enacting that law, Congress identified the Indian Commerce Clause "and other constitutional authority" as the

source of "plenary power over Indian affairs," which serves as the source of Congressional power to enact ICWA. 25 U.S.C. § 1901(1). Congress also cited the federal-tribal trust relationship as a separate source of power to enact ICWA. 25 U.S.C. § 1902(2). *See generally* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885 (2017).

The original public understanding of the Constitution was that Congress possessed plenary and exclusive powers to regulate the field of Indian affairs, which includes regulating Indian child welfare, both within and without Indian country. The most important sources of Congressional power relevant to ICWA include the Indian Commerce Clause and the Supremacy Clause, but also the Treaty Power and other powers. Collectively, these federal powers provide more than adequate support for ICWA.

## I. THE ORIGINAL PUBLIC UNDERSTANDING OF THE CONSTITUTION WAS THAT CONGRESS POSSESSED BROAD AND EXCLUSIVE POWER TO REGULATE INDIAN AFFAIRS GENERALLY.

Congress possesses powers in relation to Indian affairs that the Supreme Court "consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (quoting *Washington v. Confederated Bands and Tribes*

*of Yakima Natio*n, 439 U.S. 463, 470-471 (1979)). *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016); *Alaska v. Native Village of Venetie*, 522 U.S. 520, 531 n.6 (1998); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993). *Cf. Antoine v. Washington*, 420 U.S. 194, 203 (1975) ("[The 1871 Act barring new treaties with Indian tribes] in no way affected Congress' plenary powers to legislate on problems of Indians[.]"). The Tenth Amendment reserves little to no residual Indian affairs authority to the states. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996) ("[T]he States . . . have been divested of virtually all authority over Indian commerce and Indian tribes."); *see Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law.").

While the Court in the past seemingly cited to the Indian Commerce Clause as the sole source of federal powers in Indian affairs, *e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. . . ."), the more recent and definitive statements from the Court about the powers of Congress draw from multiple provisions in the Constitution — the Indian Commerce Clause, Const. art. I, § 8, cl. 3; the Necessary and Proper Clause, art. I, § 8, cl. 18; the Treaty Clause, art. II, § 2, para. 2; the

Property and Territory Clause, art. IV, § 3, cl. 2; the Foreign Affairs and War Powers Clause, art. II, § 2, para. 1; the Indians Not Taxed Clauses, art. I, § 2, para. 3 & amend. XIV, § 2; and the Supremacy Clause, art. VI, para. 2. Collectively, these Constitutional provisions firmly entrench in Congress the power to broadly regulate Indian affairs. *Lara*, 541 U.S. at 200 (citing the Commerce Clause, the Treaty Clause, the Property and Territory Clause, and "preconstitutional" powers); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) ("[The Constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes.") (emphasis in original omitted); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01[1], at 383-84 (2012 ed.) [COHEN'S HANDBOOK]; CONFERENCE OF WESTERN ATTORNEY'S GENERAL, AMERICAN INDIAN LAW DESKBOOK § 5:1, at 280 (2014 ed.) [CWAG DESKBOOK]; RESTATEMENT OF THE LAW OF AMERICAN INDIANS §§ 7(a)-(c), Tent. Draft No. 1 (April 22, 2015) [RESTATEMENT].[1] The Court also acknowledges the federal-tribal trust relationship as an independent source of Congressional authority. *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Kagama*, 118 U.S. 375, 380 (1886). *See also* RESTATEMENT, *supra*, at §

[1] The American Law Institute [ALI] has fully approved sections 1-9 of the Restatement as of the 2015 annual meeting, and sections 15-16, 20-32, and 34-35 as of the 2018 annual meeting. These sections constitute the official position of the ALI. American Law Institute, How the Institute Works ("Once a draft or section is approved by the membership at an Annual Meeting and Council, it is a statement of the Institute's position on the subject."), available at https://www.ali.org/about-ali/how-institute-works/.

7(d) ("Sources of Congressional authority include . . . [t]he general trust relationship between the United States and Indian tribes and their members.").

The Supreme Court's longstanding holdings affirming broad Congressional powers in Indian affairs are supported in the historical record concerning the original public understanding of the Constitution. As the Court recognized, the Framers insisted on a Constitution that would ensure the national government had primacy in Indian affairs. *Oneida*, 470 U.S. at 234 n.4 ("Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1, § 8, cl. 3, that granted Congress the power to regulate trade with the Indians.") (citing THE FEDERALIST No. 42 (Madison)). See generally Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1019-20 (2015) (arguing that "early Americans" understood the Constitution to mean that "the federal government enjoyed exclusive constitutional authority" in Indian affairs).

The Indian Commerce Clause originated in the concluding days of the Constitutional Convention. Madison argued in favor of a fix to the problems created in Indian affairs by Article IX, paragraph 4 of the Articles of Confederation. That provision stated that Congress possessed "sole and exclusive right and power of . . . regulating the trade and managing all affairs with the

Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated. . . .” During the six years from the ratification of the Articles until the 1787 Convention, expansionist states’ “assertions of authority against the federal government undermined national Indian policy and spawned costly wars.” Ablavsky, *supra*, at 1033-34. More wars loomed, and so the Convention agreed with Madison’s suggestion to correct the significant problem of state interference with Indian affairs that was inherent in the Articles. *Id*. at 1034. During the later stages of the Convention, Madison proposed a provision in the Constitution in response to Article IX that eventually became the Indian Commerce Clause. *Oneida*, 470 U.S. at 234 n.4. Madison’s proposal came after the Committee of Detail had already drafted the Foreign and Interstate Commerce Clauses. Ablavsky, *supra*, at 1022. That fact explains the awkward syntax of the final version of the Commerce Clause: “Congress shall have power . . . To regulate commerce with foreign nations, *and* among the several states, *and* with the Indian tribes.” Const. art. I, § 8, cl. 3 (emphasis added). The extra “and” before the Interstate Commerce Clause lends textual support for the history of the drafting of the Commerce Clause, and why the Indian Commerce Clause should not be interpreted synonymously with the other two Commerce Clauses. *See Cotton Petroleum*, 490 U.S. at 192 (noting in dicta that “the Interstate Commerce and Indian Commerce Clauses have very different applications”).

While the better reading of Congress' Indian affairs powers would be to consider all relevant constitutional provisions, the Indian Commerce Clause independently supports the enactment of ICWA. Contrary to *amici* and commentators that support a restrictive view of the Commerce Clause, the Indian Commerce Clause should be read broadly. The final version of the Clause omitted any of the qualifiers codifying state authority that had appeared in Article IX of the Articles of Confederation: in fact, the Constitutional Convention rejected a proposal to reintroduce to the Constitution similar language protecting state authority. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 367, 493 (Max Farrand ed., 1911). Moreover, textual evidence from the late eighteenth century demonstrates that "commerce" in the context of Indian affairs was not solely synonymous with "trade." Ablavsky, *supra*, at 1028 (describing historical uses of the phrase "commerce with Indians" to describe the exchange of religious ideas as well as sexual relationships). One of the most common synonyms for commerce in the eighteenth century was "intercourse." *See Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring) (quoting Samuel Johnson's 1773 definition of commerce as "intercourse"). In the context of Indian affairs, "intercourse" was a frequently used term of art that broadly described the diplomatic relationship between the United States and Indian tribes. *See* 6 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 393-94 (Mark A. Mastromarino

ed., 1996) (instructing a state governor that the United States possessed "the only authority of regulating an intercourse with them [the tribes]"); Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49 (describing the intent to restore "a friendly intercourse" between the United States and warring tribes, and discussing land cessions intended for "convenient intercourse").

Evidence from the Ratification debates supports the argument that the Indian Commerce Clause was part of an overall strategy to federalize Indian affairs. As *Publius*, Madison argued in favor of national control over Indian affairs, a kind of fix to the problems created by the Articles of Confederation, which he condemned as "obscure and contradictory." THE FEDERALIST No. 42 (Madison). Other convention and ratification debate evidence is almost nonexistent, with almost no one voicing public objections to Madison's views on Indian affairs. The lone exception historians can find in the record is from Abraham Yates, Jr., a New York Anti-Federalist. He argued that the adoption of the Indian Commerce Clause and the Supremacy Clause would "totally surrender into the hands of Congress the management and regulation of the Indian affairs. . . ." Ablavsky, *supra*, at 1036 (citation omitted); *see id*. at 1041 (citing Yates' reference to "the federal government's new legislative, executive and judicial powers") (quotation marks omitted). Of course, that was exactly what Madison and the Framers had hoped to accomplish in Indian affairs with the Constitution. In short, the sole opponent on

record during the ratification debates to the robust national power in Indian affairs authorized by the Indian Commerce Clause and the Supremacy Clause agreed with Madison that the Constitution would "totally surrender" the Indian affairs power to Congress in light of the supremacy of powers delegated to Congress.[2]

Other evidence from the Founding era shows that the effective goal of the Constitution was to centralize Indian affairs powers in the federal government. The earliest Congressional enactment in Indian affairs realized the Framers' goal of federalizing Indian affairs by literally excluding any state or citizen from engaging in relations with Indians and tribes with federal authority. *Oneida*, 470 U.S. at 234. The First Congress enacted *An act to regulate trade and intercourse with the*

[2] In an article on the original understanding of the Indian Commerce Clause extensively relied on by Justice Thomas in his concurrence in *Adoptive Couple*, 570 U.S. at 657 (Thomas, J., concurring), Robert Natelson quoted an inaccurate transcription of Yates's statement, one that omitted the language quoted above concerning surrendering control over Indian affairs into the hands of Congress. *Compare* Robert Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 247-48 (2007) (citing 6 THE COMPLETE ANTI-FEDERALIST 112 (Herbert J. Storing ed., 1981)), *with* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1153, 1156-67 (John P. Kaminski et al. eds., 2004) (accurately reprinting Yates's statement as it appeared in the original newspaper source, Sydney, To the Citizens of the State of New York, N.Y. J., June 13, 1788, at 2). Restoring the historically correct version significantly alters the implications of Natelson's analysis. *See* Natelson, *supra*, at 247-48 (observing, while relying on the inaccurate transcription, that Yates "opposed the Indian Commerce Clause in particular, so if there had been any reasonable interpretation of that provision that included plenary authority over Indian affairs, *he certainly would have pointed it out*.") (emphasis added).

*Indian tribes*, 1 Stat. 137, in 1790, the first of the Trade and Intercourse Acts.[3] The first three sections created a licensure scheme for Indian traders, 1 Stat. at 137-38, which remains codified as amended at 25 U.S.C. § 261 *et seq*. Section 4 barred the sale of Indian lands without federal authorization, 1 Stat. at 138, and remains codified as amended at 25 U.S.C. § 177. Sections 5 and 6 extended federal criminal jurisdiction in Indian country,[4] creating the crime of trespass on Indian lands. 1 Stat. at 138. The Indian trader regulations, the restrictions on alienation of Indian lands, and the trespass provisions constituted a powerful statement on Indian affairs under the nascent Constitution. Literally no one could legally engage in trade, commerce, or other interactions with Indians and tribes without federal consent. Contradictory state laws would be invalid in light of the Supremacy Clause.

The breadth and scope of the Trade and Intercourse Acts, when coupled with the Supremacy Clause, effectively served at that time – and now – as field preemption of Indian affairs. "[T]he Trade and Intercourse Act of 1790 reflected an intent, which has never changed, to occupy the area of Indian affairs with federal law." CWAG DESKBOOK, *supra*, at § 1:8, at 52. *See also id*., at § 1:8, at 55 ("The

[3] The first trade and intercourse act had a three year expiration date, id. § 7. Congress renewed the 1790 Act with amendments broadening the scope of the laws in 1793, 1 Stat. 329, in 1796, 1 Stat. 469, and in 1799, 1 Stat. 743. Congress made permanent the trade and intercourse acts, in 1802. 2 Stat. 139.

[4] "Indian country" is a legal term of art now first defined in Section 1 of the 1796 Act, 1 Stat. 469, and now codified as amended at 18 U.S.C. § 1151.

importance of the various Trade and Intercourse Acts . . . lay in Congress's unmistakable objective: to exercise plenary control over Indian affairs. In large measure, that control was manifested by restricting the access of non-Indians to Indian country and thereby insulating tribes from unwarranted outside contact."); *cf. Worcester*, 31 U.S. 515 at 559 (observing that the constitutional powers granted by the federal government under the Constitution "comprehend all that is required for the regulation for our intercourse with the Indian[s]. They are not limited by any restrictions on their free actions."). As Anti-Federalist Yates predicted, the United States quickly dominated the field of Indian affairs. Ablavsky, *supra*, at 1041. Founding era leaders George Washington, Thomas Jefferson, Henry Knox, and Edmund Randolph – who had sharply divergent views about the scope of federal power – nonetheless all agreed that the United States possessed broad and exclusive powers in Indian affairs after the enactment of the Trade and Intercourse Acts. *Id*. at 1041-43. Even the states acquiesced to federal power, as the governor of South Carolina and the legislatures of Georgia and Virginia specifically acknowledged federal supremacy in Indian affairs immediately following ratification. *Id*. (citations omitted).

## II. THE ENACTMENT OF THE INDIAN CHILD WELFARE ACT IS CONSISTENT WITH THE ORIGINAL PUBLIC UNDERSTANDING OF THE INDIAN AFFAIRS POWERS POSSESSED BY CONGRESS.

Founding era American leaders understood that the scope of the Indian affairs power extended to federal regulation of Indian child welfare. As citizens of domestic nations governed at least in part by international law and customs, Indian children were critically important to the federal Indian policy.

The Founding generation understood the federal-tribal relationship in terms of international law principles, most notably the duty of protection that superior sovereigns owe to consenting inferior sovereigns. *Worcester v. Georgia*, 31 U.S. 515 (1832). In *Worcester*, the Court held the relationship of Indian tribes to the United States is founded on "the settled doctrine of the law of nations" that when a stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one; the weaker nation does not surrender its right to self-government. *Id*. at 551–56, 560–61. "Protection" was a term of art under international law that meant then and now that the United States agreed to a legal duty of preserving Indian and tribal property and autonomy to the maximum extent allowable in the national interest. *United States v. Kagama*, 118 U.S. 375, 384 (1886). Ratification era treaties reflect that the United States agreed to take Indians and tribes under its "protection." Treaty with the Six Nations,

preamble, Oct. 22, 1784, 7 Stat. 5 ("The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection. . . ."); Treaty with the Chickasaw, preamble & art. 2, Jan. 10, 1786, 7 Stat. 24 ("[The] Commissioners Plenipotentiary of the United States of America give peace to the Chickasaw Nation, and receive them into the favor and protection of the said States. . . ."; "The Commissioners Plenipotentiary of the Chickasaws, do hereby acknowledge the tribes and the towns of the Chickasaw nation, to be under the protection of the United States of America, and of no other sovereign whosoever."); Treaty of Greenville, art. 5, Aug. 3, 1795, 7 Stat. 49 ("[T]he United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever."). The Founding Generation understood that the duty of protection included more than matters of military and economic alliance, criminal jurisdiction, or trade with Indians – they also involved the protection of Indian children. From its inception, the United States engaged with Indian nations on a nation-to-nation basis, and that engagement included a wide variety of protections and government services for Indian children.

The Founders' understanding of the scope of the Indian affairs power – and relations with Indians and tribes generally – was that it was far broader than mere commerce or trade, and that it included important aspects of international diplomacy. Indian trade in the Founding era was "a form of diplomacy and politics, the defining feature of Native-colonial relations." Ablavsky, *supra*, at 1030 (quotation marks omitted). *See also id.* at 1032 (characterizing Indian affairs as akin to "cross-cultural diplomacy."). "[F]ederal authority over Indian nations was a nation-to-nation exercise." Fletcher & Singel, *supra*, at 894. Founding era leaders were preoccupied with the possibility that Indian tribes could wage a devastating war on the still-weak American Republic. Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TULANE L. REV. 509, 547-48 (2007). Additionally important to the Founders was the issue of the western lands, those lands west of the Appalachian Mountains still owned by Indian tribes that would serve as an important source of national wealth and power. *Id*. at 550-53. Founding era Americans knew that quest for western expansion would inevitably lead to conflicts with Indian tribes, and that required federal oversight and power. *Id*. at 553. The Indian trader program initiated in the first Trade and Intercourse Act was a means of diplomacy intended to allow Americans to peacefully penetrate Indian country. Ablavsky, *supra*, at 1028-32; Matthew L.M. Fletcher & Leah Jurss, *Tribal Jurisdiction—A Historical Bargain*, 76 MD. L. REV. 593, 597-602 (2017).

Intermarriage between Americans and Indians, a longstanding tradition and practice during the fur trade era, was informally part and parcel of the Indian trader program. Fletcher & Jurss, *supra*, at 602-13. The federal government also established a "factory system" of Indian trading houses, COHEN'S HANDBOOK, *supra*, at § 1.03[2], at 37, further expanding trade's "central" role in "federal diplomacy in Indian relations." Ablavsky, *supra*, at 1030-31.

The diplomatic nation-to-nation relationship between the United States and Indian tribes had important legal consequences. During and after the drafting of the Constitution, the Founders were profoundly concerned with creating a political structure that would enable the United States to adhere to the law of nations and thereby earn respect on the international stage. David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition,* 85 N.Y.U. L. REV. 932 (2010). They also concluded that the law of nations governed their relationship with Indian tribes and so sought to apply its principles in Indian affairs. Ablavsky, *supra*, at 1059-61. This goal was a particular project of then-Secretary of State Thomas Jefferson, who frequently argued with Spanish and British emissaries over the international legal status of Indian tribes within the United States. *Id.* at 1061-67.

To determine the content of the law of nations, the Founders often relied on the canonical treatise of the eighteenth-century Swiss jurist Emerrich de Vattel. *See* PETER S. ONUF & NICHOLAS GREENWOOD ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814, at 11 (1993) ("Translated immediately into English, it [*the Law of Nations*] was unrivaled among such treatises in its influence on the American founders."). As Vattel's treatise made clear, children were at times central to the legal relationship between sovereigns, whether it concerned questions of naturalization, birth, or belonging, EMER DE VATTEL, THE LAW OF NATIONS (Béla Kapossy & Richard Whatmore eds.,Thomas Nugent trans., Liberty Fund 2008) (1758), bk 1, ch. XIX, § 215-20, pp. 219-22; the laws of war and captivity, *id.* bk. III, ch. V, § 72, p. 510; *id.* bk. III ch. VIII, § 145, p. 549; or the right to travel, *id.* bk. III, ch. XVII, § 271, p. 635.

Consistent with this contemporary legal understanding, children played a central role in cross-cultural diplomacy on the early American frontier. Fletcher & Singel supra, at 899-909. In Article III of the first American treaty with Indian tribes, the 1778 Treaty with the Delawares that established a military alliance, the United States specifically promised the protection of Indian women and children by the Americans while Indian men were away at war against the British. 7 Stat. 13. American political elites also engaged in the sale or acquisition of Indian

children through adoption, as hostages to guarantee treaty enforcement, or as slaves. DAWN PETERSON, INDIANS IN THE FAMILY: ADOPTION AND THE POLITICS OF ANTEBELLUM EXPANSION 10-11, 35-42 (2017); Ablavsky, supra, at 1031. The federal government's project of "civilizing" Indians, recounted in the 1793 Trade and Intercourse Act, included federal funding for the education of children and religious missions to Indian country. Fletcher & Singel, supra, at 911-12. In 1775, the Continental Congress approved funds to educate Indian children at Dartmouth. MARILYN IRVIN HOLT, INDIAN ORPHANAGES 87 (2001). President Washington received a request from the Seneca Nation of Indians for educational funding in 1791. Ronald Rayman, *Joseph Lancaster's Monitorial System of Instruction and American Indian Education, 1815-1838*, 21:4 HIST. OF ED. Q. 395, 396 (1981). In short, national Indian affairs policy has always included Indian child welfare and adoption. *See generally* Fletcher & Singel, supra, at 892-912 (surveying the federal treaties and enactments during the Founding era that regulated Indian children and finding there were more than 100 Indian treaties with educational provisions).

These early efforts to "civilize" Indians through Indian children were part of a broader effort by the Founding-era Congress and the federal government to regulate Indians within the United States, both inside and outside what the law labelled "Indian country." The 1796 Trade and Intercourse Act initiated regulation of Indian affairs involving Indians who had left Indian country and those Indians

residing on Indian lands located within state borders. Section 13 articulated the national goal of the promotion of "civilization among the friendly Indian tribes[.]" 1 Stat. at 472. Section 14 promised to indemnify any American citizen for damages suffered if Indians crossed into American lands and committed a depredation. 1 Stat. at 472-73. Section 19 authorized general intercourse between Indians and American citizens for Indians residing within state borders. 1 Stat. at 474. The 1802 Act allowed the federal government to reinstate the restrictions on intercourse between Indians and American citizens within state borders upon the application of the Indians. 2 Stat. at 145. Again, the historical record shows that American "political elites" in Congress and the Executive branch understood that several provisions of the Constitution, not merely the Indian Commerce Clause, served collectively as the sources of authority to enact the Trade and Intercourse Acts. Ablavsky, supra, at 1043-44; 1 ANNALS OF CONG. 750-51 (1792) (relying on the Treaty and Territory Clauses to support congressional authority to enact the criminal provisions of the Trade and Intercourse Act).

The duty of protection, grounded in international customs, owed by the United States to Indian tribes and individual Indians predates the Framing of the Constitution. In a very real sense, Founding era Americans would have understood that the provisions of the Constitution authorized Congress to enact laws to fulfill that duty of protection wherever Indians are located. *Cf. DeCoteau v. District*

*Court*, 420 U.S. 425, 460 (1975) (rejecting state child welfare agency jurisdiction over Indian child domiciled on the reservation even though half of the mother's actions took place on non-Indian lands). The Indian Child Welfare Act is simply one of those laws. COHEN'S HANDBOOK, *supra*, at § 11.06, at 862 ("Since the United States has the responsibility to protect the integrity of the tribes, we can say with the *Kagama* court, 'there arises the duty of protection, and with it the power.'") (quoting H. Rep. 95-1386, at 15 (1978)).

## CONCLUSION

In sum, the historical record that gives us the original public understanding of the Constitution strongly supports the Supreme Court's views that Congress possesses plenary and exclusive power to regulate Indian affairs. That power derives from the Indian Commerce Clause, the Supremacy Clause, and several other Constitutional provisions. The Constitutional drafters fully intended to centralize Indian affairs in the federal government to the exclusion of the States. The First Congress preempted the field in its initial Indian affairs legislation. The historical record also supports the original public understand of the Indian affairs power to include federal regulation of trade and commerce, land sales, trespass on Indian lands, Indian education, and the adoption and capture of Indian children as a tool of diplomacy.

Since before the Ratification of the Constitution and continuing today, the United States owes a duty of protection to Indian tribes and individual Indians. The original public understanding of the Constitution was that Congress possessed broad power to fulfill that duty of protection. In fact, the earliest enactments of Congress and the earliest Indian treaties ratified by the Senate included provisions regulating the affairs of individual Indians, including children, both within and without Indian country. The Indian Child Welfare Act is merely one example of a valid federal legislative enactment that attempts to implement the federal government's duty of protection.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of May, 2018, the *proposed* amicus brief was filed electronically. Notice of this filing therefore will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system, and parties may access this filing through the Court's system.

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