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

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; FRANK NICHOLAS LIBRETTI; HEATHER LYNN LIBRETTI; ALTAGRACIA SOCORRO HERNANDEZ; JASON CLIFFORD; and DANIELLE CLIFFORD,

and

STATE OF TEXAS; STATE OF LOUISIANA; and STATE OF INDIANA,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; BRYAN RICE, in his official capacity as Director of the Bureau of Indian Affairs; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary for Indian Affiars; the BUREAU OF INDIAN AFFAIRS; and the UNITED STATES DEPARTMENT OF INTERIOR.

Defendants.

Civil Action No.: 4:17-cv-868-O

BRIEF *AMICUS CURIAE* OF GOLDATER INSTITUTE
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Indian children are citizens of the United States and of the states where they reside. 8 U.S.C. § 1401(b); U.S. CONST. amend. XIV. They are entitled to "the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Yet ICWA deprives them of that protection—solely on the basis of their race. Indeed, it mandates that the state plaintiffs treat children differently due exclusively to the DNA in their blood.

There is no doubt that ICWA was written with the best of intentions. Abusive practices by state and federal governments that sought to remove children from their families, often with insufficient justification, led to abuse and trauma. *See generally* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885 (2017). Unfortunately, ICWA today imposes positive injuries on Indian children by depriving them of "the right to equal treatment guaranteed by the Constitution," *Heckler v. Mathews*, 465 U.S. 728, 739 (1984), making it more difficult for state officials to rescue them from abuse or neglect, and imposing burdensome race-matching requirements that not only make it harder to find Indian children safe foster care or loving, permanent, adoptive homes, but that positively deter adults who would otherwise do so from making the effort to care for these children. *See generally* Elizabeth Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, PHOENIX NEW TIMES, Sept. 7, 2016[1] (noting that ICWA creates a disincentive for foster parents to take in Indian children).

ICWA does not impose a "political classification" as in *Morton v. Mancari*, 417 U.S. 535 (1974), because it applies based on *eligibility* for tribal membership, 25 U.S.C. § 1903(4), which

[1] http://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832.

is based solely on genetic considerations, without reference to political, cultural, or religious factors. A child who is fully acculturated to a tribe is *not* subject to ICWA if she lacks the genetic qualifications, and a person who *has* the genetic qualifications *is* subject to ICWA *without* regard to political, social, or cultural considerations. ICWA is therefore what the law in *Mancari* was not: "directed towards a 'racial' group consisting of 'Indians.'" 417 U.S. at 553 n.24. And it does what the law in *United States v. Antelope*, 430 U.S. 641, 649 n.11 (1977), did not: it "subject[s] [cases involving Indian children] to differing…burdens of proof from those applicable to non-Indians." Because ICWA is triggered solely by genetics—not by political, cultural, or social factors—it is a race-based classification that "singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics,'" and "use[s] ancestry as a racial definition and for a racial purpose." *Rice v. Cayetano*, 528 U.S. 495, 515 (2000).

The consequences of ICWA's separate and less-protective rules for Indian children treatment are deleterious in the extreme. These children are at greater risk of abuse and neglect, alcoholism, drug abuse, gang membership, and suicide, than any other demographic in the United States. *See generally* NAOMI SCHAFER RILEY, THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS viii, 145–68 (2016). They are taken into foster care at a disproportionately high rate, and spend longer in foster care than most other ethnic groups. *See* U.S. DEP'T. OF HEALTH & HUMAN SERVS., Data Brief 2013-1, RECENT DEMOGRAPHIC TRENDS IN FOSTER CARE (Sept. 2013).[2] ICWA's more restrictive and burdensome rules for foster care and adoption of Native children make it harder to find them the permanent, loving homes they need. *See* Stuart, *supra* ("When the state called to ask her to take James … she balked. Would she take a Native American baby? … 'No,' she said. 'Nope. Nope.

[2] https://www.acf.hhs.gov/sites/default/files/cb/data_brief_foster_care_trends1.pdf.

Nope.' She was intimately familiar with the Indian Child Welfare Act, and she wanted nothing to do with it.").

ICWA negates or dilutes the "best interest of the child" standard that applies to Louisianan, Texan, and Indianan children of all other races. *See, e.g.*, *In re W.D.H.*, 43 S.W.3d 30, 36 (Tex. App.—Houston 2001) (best-interests rule does not apply in ICWA cases). It "deprives [Indian children] of equal opportunities to be adopted that are available to non-Indian children and exposes them … to having an existing non-Indian family torn apart through an after the fact assertion of tribal and Indian-parent rights under ICWA." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 529 (1996). It also dissuades potential foster and adoptive families of caring for Native children, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563–64 (2013), because these families face a greater risk that a child they have grown to love will be taken away and placed with strangers at the behest of a tribal government. *Bridget R.*, 49 Cal. Rptr. 2d at 527.

And all of this, based on race.

ICWA exceeds Congress's authority under the Commerce Clause and violates the Tenth Amendment, because it compels the state to enforce a federal legislative program, in violation of *Printz v. United States*, 521 U.S. 898 (1997). It forces states to discriminate in their law of domestic relations when otherwise they would not—in violation of *United States v. Windsor*, 133 S. Ct. 2675 (2013). And the separate-and-substandard legal regime imposed by ICWA cannot be justified as an exercise of Congress's Fourteenth Amendment powers because it is not congruent and proportional to any existing injury and because it cannot be justified by reference to existing need. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

ARGUMENT

I. THE CHALLENGED PROVISIONS OF ICWA ARE TRIGGERED BY RACE, NOTHING MORE, AND ARE THEREFORE NOT SUBJECT TO *MANCARI*'S RATIONAL BASIS TEST

It is typically argued that constitutional challenges to ICWA are subject to rational-basis scrutiny under *Morton*, 417 U.S. at 555, because a law that treats Indians differently from non-Indians is based not on race, but on political affiliation, which is not a suspect class. *See, e.g., In re Santos Y.*, 112 Cal. Rptr. 2d 692, 728 (2001). But that argument misreads both ICWA and *Mancari*.

It misreads ICWA because ICWA is *not* triggered by tribal membership or any *political* factor. Rather it applies to cases involving "Indian children," a term which is defined by reference to genetics. 25 U.S.C. § 1903(4) defines "Indian child" as a child who is *eligible* for membership in a tribe, and is the "biological child" of a tribal member. Meanwhile, eligibility for membership depends solely on biological considerations.

The Cherokee Constitution, for example, imposes no political, social, or cultural criterion for tribal membership—one need merely be a direct biological descendant of a signer of the 1906 Dawes Rolls. CHEROKEE CONST. art. IV, § 1.[3] The Navajo Nation likewise requires *only* biological factors: one must have 25 percent Navajo blood. Navajo Nation Code Ann. tit. 1 § 701(B).[4] The White Earth Ojibwe require that a person be a direct biological descendant of other tribal members. CONST. OF WHITE EARTH NATION, Chap. 2 art. 1.[5] Yselta del sur Pueblo Tribe requires that a person be a direct descendant of an individual listed on a tribal roll and be at least

[3] http://www.cherokee.org/Portals/0/Documents/2011/4/308011999-2003-CN-CONSTITUTION.pdf
[4] http://www.dncouncil.navajo-nsn.gov/Portals/0/Navajo%20Nation%20Codes/V0010.pdf?ver=2015-01-13-153210-447
[5] http://www.whiteearth.com/data/upfiles/files/Proposed_White_Earth_constitution_2.pdf

1/8 degree of Tigua-Yselta del Sur Pueblo Indian blood. Yselta del sur Pueblo Tribe Code of Laws § 3.01[6]; Pub. Law 100-89, 101 Stat. 669 (1987).

A person who has the required DNA is eligible for tribal membership, regardless of whether he has any or no cultural or political affiliation with the tribe—and a person who is fully acculturated or affiliated with the tribe in a political or cultural sense is *not* eligible if he lacks the right type of blood in his veins. The *necessary* and *sufficient* criterion is *biological*, not political, cultural, or religious. Someone like Texas hero Sam Houston—who was adopted at the age of 16 by a member of the Cherokee tribe, MARQUIS JAMES, THE RAVEN: A BIOGRAPHY OF SAM HOUSTON 20 (Austin: University of Texas Press, 2004) (1929), spoke Cherokee and even acted as Cherokee ambassador to the U.S. government, *id.* at 128, would therefore *not* qualify as an "Indian child" under ICWA—because he lacked the *genetic* requirement.

The fact that ICWA imposes a racial, and not a political or cultural category, is made clearer by the adoption preferences in Section 1915. They require that an Indian child be adopted—not necessarily by a member of the same tribe, but by "other *Indian* families," *regardless* of tribe. 25 U.S.C. § 1915(a)(3) (emphasis added). ICWA's placement preferences do *not* depend on tribal or political or cultural affiliation; they depend on generic "Indianness." Thus in the case of A.L.M., for example, who has both Cherokee and Navajo ancestry, *see* First Am. Compl. ¶ 109, ICWA's adoption preferences make *no distinction* between Cherokee and Navajo tribal culture and history—even though these are tribes separated by a vast cultural, linguistic, religious, and historical gulf, and their ancestral homelands are as far apart as Paris is from Moscow. As far as ICWA Section 1915 is concerned, one tribe is as good as any other. But the concept of generic "Indian" is a racial category that originated with European settlers

[6] https://www.narf.org/nill/codes/ysletacode/ysletaarticle3.html#3

upon their arrival in the New World. ROBERT M. UTLEY, THE INDIAN FRONTIER 1846-1890 at 4-6 (Allen Billington et al., eds., University of New Mexico Press, rev. ed. 2003) (1984). These settlers overlooked the substantial distinctions between tribes and classified the aboriginal peoples of North America as a single ethnic category, labeled "Indian." ICWA perpetuates this "ahistorical assumption[]" by "treating all Indian tribes as an undifferentiated mass." *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring).

Morton is therefore inapposite. That case dealt with adults who chose to become or remain members of a tribe in its political capacity. The Court specifically noted that the law in that case was "not directed towards a 'racial' group consisting of 'Indians.'417 U.S. at 553 n.24. Similarly, in *Antelope*, 430 U.S. at 646 n.7,[7] which again applied rational basis scrutiny to a law that treated Indians differently from non-Indians, the Court specifically reserved the question, noting that it was "not called on to decide" the constitutionality of laws that treated Indians differently on the basis of their genetics alone.

But *did* address these questions. It defined a racial classification, as opposed to a political classification, as "that which singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics.'" 528 U.S. at 515 (citation omitted). That is what ICWA does: it applies different substantive and procedural law to cases involving children who are "eligible for membership" in a tribe, and eligibility is determined exclusively by reliance on genetic, ethnic considerations. At least in cases in which a child has no political, social, or

[7] In fact, *Antelope* specifically withheld consideration of whether it would be constitutional to subject Indians to "differing…burdens of proof from those applicable to non-Indians charged with the same [criminal] offense." *Id.* at 649 n. 11. ICWA, however, specifically *does* impose different burdens of proof in cases involving Indian children than apply in cases involving children of other races, because it imposes the "beyond a reasonable doubt" and expert-witness requirements in TPR cases where state law would otherwise require the "clear and convincing" standard.

cultural connection to the tribe, the application of ICWA falls within *Rice*'s definition of a racial classification. *See In re Santos Y.*, 112 Cal. Rptr. 2d at 730 (imposing different rules on adoption or TPR cases based on the child's genetics alone is a race-based classification).

It is true that not all Native American children are subject to ICWA. A child might be racially Native American but not an "Indian child," perhaps because she has no parent enrolled in the tribe. But that does not mean ICWA is not race-based, as the *Rice* Court noted when it held: "Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." 528 U.S. at 516–17. This makes sense: a law that imposed a burden on, say, all right-handed black people would still be a racial classification even though it did not apply to left-handed black people.

It is also often argued that tribes, as sovereign entities, have authority to determine tribal membership without interference by state courts. This is true but irrelevant, because this argument confuses eligibility, which is indeed a matter of tribal law, and not subject to constitutional limitations, with "Indian child" status under ICWA, which is a conclusion of *federal* and *state* law triggered by that eligibility. *See In re Abbigail A.*, 375 P.3d 879, 885–86 (Cal. 2016) (observing this distinction). The latter *is* subject to constitutional limitations—including the Constitution's nearly absolute prohibition on race-based differential treatment. The question here is not whether tribes may accord citizenship to a child based on genetics—they certainly can. It is whether federal and state governments can treat the child differently—by denying an adoption petition, or sending the child to a different state to live with total strangers[8]—based on race. ICWA, after all, applies only to *state* courts—not tribal courts—and

[8] *See* First Amended Complaint ¶¶ 2, 109-33; *In re Alexandria P.*, 1 Cal. App. 5th 331 (2016), *cert. denied sub nom. R.P. v. Los Angeles Cty. Dep't of Children & Family Servs.*, 137 S. Ct. 713

therefore must comply with constitutional limits just like any other federal law. The federal government simply lacks authority to command that state governments treat people differently based on their genetics.

II. ICWA VIOLATES THE TENTH AMENDMENT

A. ICWA Imposes Race-Based *Substantive* Mandates that Texas, Louisiana, and Indiana's Child Welfare Agencies are Required to Follow.

Child welfare and adoption are the "virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Federal courts do not even have jurisdiction to decide child custody matters. *Ankenbrandt v. Richards*, 504 U.S. 689, 703-07 (1992).

Nothing could be clearer than that the state plaintiffs' interest in protecting the best interests of children is "overriding," *In re J.F.C.*, 96 S.W.3d 256, 294–95 (Tex. 2002), and "paramount," *Firmin v. Firmin*, 770 So. 2d 930, 932 (La. App. 2000), and that the child's best interest is the "lodestar" of state law. *In re A.W.J.*, 758 N.E.2d 800, 804 (Ill. 2001).

But ICWA preempts state child welfare law by declaring that when a child qualifies as an "Indian child," 25 U.S.C. § 1903(4), different substantive laws apply to that child's case—laws that even override the "best interest of the child" rule. *See, e.g., In re W.D.H.*, 43 S.W.3d at 36 ("the term 'best interests of Indian children,' as found in the ICWA, is different than the general Anglo American 'best interest of the child' standard used in cases involving non-Indian children."). These include: the "active efforts" requirement of Section 1912(d)—in place of the "reasonable efforts" requirement that applies to all other children under state law—and the race-based foster care and adoption preferences of Section 1915, under which states are compelled to place Indian children with Indian families rather than with families of other races.

(2017) (sending 6-year old who had lived with California foster parents for 4 years to live with a Utah family instead, despite psychological trauma it would inflict.)

The "active efforts" requirement forces state child welfare officers to treat Indian children differently from children of other races, by requiring that state officials make "active efforts" to reunite Indian children with their birth parents—whereas state law typically only requires "*reasonable* efforts."[9] In practice this means that state officials are forced to repeatedly return Indian children to the parents who have abused or neglected them, which would not happen if the children were white, black, Hispanic, Asian, or of any other race. Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 35–42 (2017) (citing examples).

The race-based placement preferences of ICWA also explicitly contradict state law, which forbids courts from basing adoption or foster care decisions on racial factors. *See, e.g., In re Gomez*, 424 S.W.2d 656 (Tex. App.—El Paso 1967) (per curiam) (courts may not base adoption decisions on race); *In re Marriage of Brown*, 480 N.E.2d 246, 248 (Ind. App. 1985) (same); *Compos v. McKeithen*, 341 F. Supp. 264, 268 (E.D. La. 1972) (declaring Louisiana law against interracial adoption unconstitutional).

Perhaps more dramatically, courts have routinely found that ICWA overrides the typical state-law "best interests of the child" rule, because ICWA prescribes what is in the best interests of all Indian children, *per se*. *See, e.g., In re W.D.H.*, 43 S.W.3d at 36; *In re C.H.*, 997 P.2d 776, 782 ¶ 22 (Mont. 2000) ("while the best interests of the child is an appropriate and significant factor in custody cases under state law, it is improper" in ICWA cases because "ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences"); *In re Zylena R.*, 825 N.W.2d 173, 186 (Neb. 2012) ("Permitting a state court to

[9] *See, e.g.*, *In re T.F.*, 743 N.E.2d 766, 773–74 (Ind. App. 2001); *In Interest of A.L.H.*, 468 S.W.3d 738, 744–45 (Tex. App.—Houston 2015); *In re M.B.*, 108 So. 3d 1237, 1243–44 (La. App. 2013).

deny a motion to transfer [to tribal court] based upon its perception of the best interests of the child negates the concept of 'presumptively tribal jurisdiction"'). California courts have been quite clear: while for children of other races, "[t]he overriding concern is and remains the best interests of the child," *Catherine D. v. Dennis B.*, 220 Cal. App. 3d 922, 933 (1990), the best interest of an Indian child is only "one *of the constellation of factors*" a court should consider. *In re Alexandria P.*, 1 Cal. App. 5th at 351 (emphasis added).

Thus ICWA overrides non-discriminatory state law regarding the protection and adoption of children, and substitutes a different set of substantive rules for children of Native American ancestry—rules that are deleterious to their welfare. That is unconstitutional.

In *United States v. Windsor*, 133 S.Ct. at 2692, the Court found that the federal Defense of Marriage Act (DOMA) unconstitutionally overrode state marriage law. Family law is a state concern, it noted, and while state laws must not violate constitutional minimums—that is, such laws must be non-discriminatory—"'the domestic relations of husband and wife and parent and child'" are otherwise "'matters reserved to the States.'" *Id.* at 2691 (quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930)). Yet DOMA "reject[ed] [that] long-established precept," *id*. at 2692, and *compelled states to discriminate*, instead. *See id*. at 2693 (the "essence" of DOMA was to "interfere[] with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power."). In other words, "[t]he principal purpose" of DOMA was "to impose inequality" where the states had chosen to treat people equally. *Id.* at 2694. That, the Court declared, was unconstitutional.

ICWA goes even further in that direction: it compels states to treat abused and neglected children differently—to provide them *less* protection—based on their race, and to deny them adoption, even though state law ordinarily takes no cognizance of race. Its principal purpose is

to impose inequality—to impose a separate and substandard legal regime—based exclusively on the genetic ancestry of the children involved.

B. ICWA Displaces Race-Neutral State Procedural Law, Which Imposes Significant Burdens on Citizens.

Not only do ICWA and its regulations displace state *substantive* law regarding child welfare, they also displace state *procedural* law, and state court jurisdiction.

First, ICWA imposes separate evidentiary standards in cases involving Indian children. In a case involving termination of parental rights ("TPR"), for example, state laws typically require that the grounds for TPR be found by clear and convincing evidence.[10] But ICWA requires "beyond a reasonable doubt"—and requires expert witness testimony. 25 U.S.C. § 1912(f). In fact, the Supreme Court adopted the "clear and convincing" standard in TPR cases in *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982), and *refused* to adopt the "reasonable doubt" standard, because it "would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption." *Id.* at 769. But ICWA imposes that unreasonable barrier in cases involving children who are eligible for tribal membership.

Forcing adults who love and wish to care for Indian children to satisfy these evidentiary burdens imposes major costs on them that are not born by parties to cases that do not involve Indian children. The issues involved in ICWA cases are usually not objective, easily ascertainable matters, but are subjective, psychological factors such as whether or not termination of parental rights is "likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). That is precisely why the *Santosky* Court rejected use of the reasonable-doubt standard for children of *other* races: "the psychiatric evidence ordinarily

[10] *See, e.g.*, TEX. FAM. CODE § 161.001(b); *In re T.D.*, 221 So. 3d 290, 295–96 (La. App. 2017); *Egly v. Blackford Cnty. Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1233–34 (Ind. 1992).

adduced" in such hearings, the Court noted, "is rarely susceptible to proof beyond a reasonable doubt." 455 U.S. at 768–69. And expert testimony is expensive and difficult to obtain. These costly burdens mean that "caseworkers and attorneys are sometimes reluctant to accept surrenders of, or terminate parental rights to, an Indian child." Debra Ratterman Baker, *Indian Child Welfare Act,* 15 CHILD. LEGAL RTS. J. 28, 28 (1995).

ICWA also forces state courts to relinquish jurisdiction over cases involving Indian children to tribal courts, even where the children involved are not, and have never been, domiciled on a reservation, and where tribal courts have no personal jurisdiction over the children. Sandefur, *supra* at 23–32 (citing cases). At a minimum, this causes delay and uncertainty in cases involving abused and neglected children who need stable, loving homes as quickly as possible. For example, in *In re Armell*, 550 N.E.2d 1060 (Ill. App. 1990), Illinois courts ordered a case transferred to tribal court *three years* after the child was placed in foster care—even though the child was not a domiciliary of a reservation, and did not have any "minimum contacts" with the tribal forum. *Id.* at 1068. Jurisdiction transfer also has serious consequences because protections for civil rights are severely limited in tribal court; litigants there have virtually no recourse to federal court, thanks to limitations on the Indian Civil Rights Act. *See generally Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). A transfer to tribal court therefore amounts to the elimination of critical guarantees of due process.

The bottom line is that ICWA's mandates impose significant costs on both the state agencies and the private parties involved in cases that touch on the welfare of Indian children. The result is to deter adults who are otherwise eager to care for needy children to choose not to—as the Supreme Court recognized in *Adoptive Couple* when it noted that the emotional and

financial costs involved likely "dissuade some of them from seeking to adopt Indian children." 133 S. Ct. at 2563–64.

C. ICWA Exceeds Congress's Commerce Clause Power.[11]

Whatever else "[c]ommerce…with the Indian tribes" might mean, U.S. CONST. art. I, § 8, it does not mean domestic family relations that are already governed by state law in accordance with the traditional understanding of federalism. This conclusion is compelled either by the original understanding of the Constitution, or by more recent Supreme Court precedent.

At the time of the Constitution's framing, the term "commerce" was not understood as referring to such matters as child dependency hearings, TPR cases, adoption cases, and the like. *See generally* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007). Rather, it referred to "trade with Indians," who, "though not members of a State" were "yet residing within its legislative jurisdiction." THE FEDERALIST No. 42, at 284-85 (James Madison) (J. Cooke ed., 1961). The Clause specifically contemplated *economic* exchange. When anti-federalists expressed fear that the Commerce Clause might be interpreted to authorize federal interference with traditional state authority over domestic-relations law, federalists responded that such an interpretation was "plain[ly] and simpl[y]" absurd. THE FEDERALIST No. 33, at 207 (Alexander Hamilton) (J. Cooke ed., 1961). It "cannot easily be imagined" how Congress might "attempt to vary the law of descent [*i.e.*, intestacy] in any State," wrote Hamilton, but any attempt to do so would so "evident[ly]" exceed federal power that only "the imprudent zeal" of the Constitution's opponents could enable them to imagine such a thing. *Id.* at 206. The law of child welfare is simply one of the things reserved to

[11] The private litigants have standing to raise a Tenth Amendment/Commerce Clause challenge under *Bond v. United States*, 564 U.S. 211, 223–24 (2011).

state authority. *See id.* No. 45, at 313 (James Madison). And, as noted above, that understanding remains true today. *Windsor*, 133 S. Ct. at 2692 (family law is a state matter).

True, the Commerce Clause has been interpreted more broadly than the founders expected in the years since, but it has nevertheless been confined to federal regulation of channels of commerce; instrumentalities, persons, or things in commerce; or activities having a substantial relation to commerce—all meaning things that are in some sense economic. *United States v. Morrison*, 529 U.S. 598, 609 (2000).

The Court emphasized this point in *United States v. Lopez*, 514 U.S. 549, 560 (1995), when it observed that "[e]ven *Wickard* [*v. Filburn*, 317 U.S. 111 (1942)], which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity." In fact, *Lopez* explained why the economic tie was necessary when it noted that if the connection to economic transactions were disregarded, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: *family law* (including marriage, divorce, and *child custody*), for example…where States historically have been sovereign." *Id.* at 564 (emphasis added). That outcome was plainly unacceptable.

Lopez and *Morrison* also emphasized the fact that the subject matters in both of those cases—gun possession and violence against women, respectively—were already fully governed by state law. "[W]e can think of no better example," the *Morrison* Court said, of a subject matter "which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." 529 U.S. at 618. But there *is* a better example: the law of child welfare.

The answer typically given is that relations with Indian tribes are different—and that states historically abused their powers relating to child protection in ways that harmed members

of tribes. *See generally* Fletcher & Singel, *supra.* (describing historical abuses). But this cannot warrant use of the Commerce Clause to override state child welfare laws pursuant to ICWA for two reasons.

First, whatever these abuses, Congress's authority under the Commerce Clause is limited to matters relating to "[c]ommerce…with the Indian tribes," U.S. CONST. art. I, § 8, and the protection of abused or neglected children who do not reside on reservation, or the adoption of such children, is simply not *commerce* with the Indian tribes.

Even if it were, ICWA's race-based provisions and jurisdiction-transfer rules would still fall outside Congress's Commerce Clause powers. In *Reid v. Covert*, 354 U.S. 1 (1957), the Court held that Congress, acting under its treaty powers and its power to regulate the armed forces—both of which are at least as broad as its commerce power—still could not force citizens who happened to be married to servicemen stationed overseas to undergo trials before military commissions that lacked the full due process protections of ordinary U.S. courts. *Id.* at 16-18. Even though Congress has broad authority to make treaties with other sovereignties, and to govern the military, it could not strip American citizen civilians of legal protections and force them into a separate legal system. *Id*. at 40. "The idea that the relatives of soldiers could be denied a jury trial in a court of law and instead be tried by court-martial under the guise of regulating the armed forces," said the Court, "would have seemed incredible" to the authors of the Constitution. *Id.* at 23. Yet that is precisely what ICWA does: it orders that child welfare cases that arise from transactions or occurrences *off*-reservation, and involving parties who have no minimum contacts with the tribe, be sent to tribal court in most instances. 25 U.S.C. § 1911(b). In those tribal courts, the litigants are deprived of the due process protections that apply in state and federal courts. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (due process requirements

inapplicable in tribal court). And it mandates race-matching in foster and adoption cases which inherently deprives children of their right to equal protection, guaranteed by the Fifth Amendment's Due Process component. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Thus, even if ICWA were viewed as an exercise of Congress's treaty-making power, its race-based requirements and jurisdiction-transfer rules are unconstitutional.

Finally, ICWA intrudes on state authority because it commandeers state officials to enforce a federal program. In *Printz*, 521 U.S. at 904, the Court found that Congress has no authority under the Commerce Clause to "direct state law enforcement officers to participate, [even if] only temporarily, in the administration of a federally enacted regulatory scheme." The law at issue in that case required state law enforcement officers to "make a reasonable effort" to determine whether a purchase of firearms was legal, and if not, to provide the would-be purchaser with a written explanation. *Id.* at 903. The Court found that this exceeded federal power. ICWA is far more commanding. It compels state child welfare officers to place children in foster care or adoptive families in conformity with its race-matching rules, 25 U.S.C. §§ 1915(a)–(b), mandates state record-keeping and inspection practices, *id.* § 1915(e), and requires that state officers make "active efforts" to reunite Indian families--which includes "provid[ing] remedial services and rehabilitative programs" to abusive parents. *Id*. § 1912(d). The *Printz* Court was particularly troubled by the "reasonable efforts" provision in the firearms law, because it essentially forced states to adopt compliant policies, and "'dragooned"' state officers "into administering federal law." 521 U.S. at 927-28. ICWA does precisely that—commanding not only that states adopt and implement "active efforts" policies, but also that they comply with the administration of a federally-mandated body of family law.

D. ICWA Cannot be Rationalized as an Exercise of Fourteenth Amendment Power.

Congress could certainly override state family law pursuant to its Fourteenth Amendment power to protect civil rights against injuries by state governments—but it can do so only when that is "congruent and proportional" to the injury, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003), and where the circumstances necessitating federal action actually exist. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2619 (2013) ("the Act imposes current burdens and must be justified by current needs." (citation omitted)). Even if ICWA were interpreted as an exercise of Congress's Fourteenth Amendment powers—which would be a novelty[12]—it would still fail these tests.

ICWA would fail the "congruent and proportional" test because it only allows Congress to provide "an appropriate remedy for identified constitutional violations," and does *not* allow it "to substantively redefine the States' legal obligations." *Hibbs*, 538 U.S. at 728 (citation omitted). In *Kimel*, 528 U.S. 62 (2000), the Court indicated that the Age Discrimination in Employment Act failed the congruent-and-proportional test because it did not prohibit unconstitutional conduct as much as it sought to change the substance of state age-discrimination law. *Id.* at 88. Instead of addressing a genuine problem of age-discrimination, Congress had "effectively elevated the standard for analyzing age discrimination to heightened scrutiny," *id.*, which is beyond Congress's power.

ICWA is even more offensive in this regard, because it *expressly* creates a separate and less-protective evidentiary standard for state courts to apply in cases involving *off*-reservation

[12] ICWA expressly purports to be an exercise of Congress's Commerce Clause power. 25 U.S.C. § 1901(1). While that is not dispositive—*see National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 561 (2012)—the fact that Congress did not view ICWA as an exercise of its Fourteenth Amendment power is a factor in determining whether ICWA is "congruent and proportional."

Indian children—thus substantively rewriting state law in cases involving their welfare. In addition, ICWA is not tailored to address the concerns Congress had in mind when enacting the statute. As *Kimel* held, the congruence-and-proportionality test is violated if Congress "prohibits substantially more … practices than would likely be held unconstitutional under the applicable equal protection … standard." *Id.* at 86.

Also, ICWA goes far beyond the constitutional violations that gave rise to it. Congress had in mind the abuses of the Indian boarding-school era, *see* Fletcher & Segel, *supra,* and it specified in ICWA that it sought to "protect[] Indian children" against "removal, often unwarranted," from their birth families and their "place[ment] in non-Indian foster and adoptive homes and institutions." 25 U.S.C. §§ 1901(3), (4). But ICWA does not merely protect the due process rights of Native American parents and children. It also imposes racial separatism—legally preventing Native American children from being placed in "non-Indian" homes or institutions—which is simply not a legitimate government interest *at all. See Brown v. Board of Educ.*, 347 U.S. 483 (1954). And ICWA's greater evidentiary burdens are overly broad because they make it *harder* to protect Indian children from abuse and neglect or to find them adoptive homes, *see Adoptive Couple*, 133 S. Ct. at 2563-64 (ICWA's mandates "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home"); *In re Bridget R.*, 41 Cal. App. 4th at 1508 ("As a result" of ICWA, "the number and variety of adoptive homes that are potentially available to an Indian child are more limited than those available to non-Indian children, and an Indian child who has been placed in an adoptive or potential adoptive home has a greater risk ... of being taken from that home and placed with strangers.").

ICWA even positively blocks Native parents when they seek to promote their children's best interests. State courts have used it to bar TPR cases in which Indian parents seek to terminate the rights of non-Indian parents due to unfitness. *See, e.g., In re T.A.W.*, 383 P.3d 492 (Wash. 2016); *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. App. 2017), *cert. denied*, 138 S. Ct. 380 (2017).

Finally, the Court has made clear that when the federal government overrides a state's traditional sovereign authority, it cannot do so merely by reference to past abuses by the state—rather, such preemption "must be justified by current needs." *Holder*, 133 S. Ct. at 2619. ICWA, however, was enacted 40 years ago to address abuses dating back to the early part of the century, and specifically, it was aimed at injuries that occurred on reservations, where government officials actively removed Indian children from their families, placed them in boarding schools, and penalized Native Americans for practicing their religions. Fletcher & Singel, *supra*, at 930. But, to borrow a phrase from *Holder*, 133 S. Ct. at 2625, "things have changed dramatically" in 40 years. As Fletcher and Singel write, "[t]he United States now readily acknowledges the federal-tribal trust relationship. … Federal statutes have returned local control of reservation governance to Indian nations, especially in relation to matters involving Indian children and families." *Supra*, at 956.

Thus, while abuses no doubt remain,[13] it is not enough to defend ICWA's constitutionality by pointing to "decades-old data and eradicated practices." *Holder*, 133 S. Ct.

[13] For example, in *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015), the court found that state officials had developed an unconstitutional procedure for removing Indian children from parents without providing appropriate documents and notice, and without providing the parents with legal representation. *Id.* at 770. Yet the court found that these practices violated constitutional due process, *id.* at 771-72, rendering consideration of ICWA superfluous.

at 2627. Rather, Congress, if it is to override the States, must identify the practices it seeks to eradicate or require, "on a basis that makes sense in light of current conditions." *Id*. at 2629. It has never done so.

CONCLUSION

Defendants' motion to dismiss should be *denied.*

RESPECTFULLY SUBMITTED this 26th day of April, 2018 by:

/s/ Matthew Miller
Matthew Miller (Tex. 24046444)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
Fax (602) 256-7045
litigation@goldwaterinstitute.org

Attorneys for Amicus Curaie Goldwater Institute

CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 26th day of April, 2018.

Matthew D. McGill
GIBSON, DUNN & CRUTCHER, LLP
mmcgill@gibsondunn.com

Rebekah Perry Rickets
GIBSON, DUNN & CRUTCHER, LLP
rrickets@gibsondunn.com

Attorneys for Individual Plaintiffs
Mark Fiddler
FIDDLER LAW OFFICE, PA
mark@fiddler-law.com

Attorney for Frank & Heather Libretti, and Jason & Danielle Clifford

David J. Hacker
OFFICE OF THE ATTORNEY GENERAL
David.hacker@oag.texas.gov

Attorneys for State Plaintiffs

/s/ Kris Schlott
Kris Schlott, Paralegal