No. 18-11479

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHAD EVERT BRACKEEN, JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,

Plaintiffs - Appellees,

v.

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants - Appellants

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants - Appellants.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF INDIAN LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

Counsel for *Amici Curiae* Indian Law Scholars, Matthew L.M. Fletcher, hereby submits this brief in accordance with Fed. R. App. P. 29, 5th Cir. R. 29, and other relevant rules. The parties have consented to the filing of this brief. The names and affiliations of the individual *amici* are included the Appendix attached to the end of this brief.

/s/ Matthew L.M. Fletcher
Counsel for *Amici Curiae*
Indian Law Scholars

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Statement of Interest of Amici Curiae

Amici, listed in the Appendix, are professors and scholars of federal Indian law. *Amici* are interested in the proper review of Congressional statutes relating to Indian affairs. 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* respectfully submit this brief to highlight the extent to which the District Court 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.

Counsel for all parties in this matter consented to the filing of this brief.

Summary of Argument

Tribes' separate political status is acknowledged in the U.S. Constitution, hundreds of treaties, and thousands of statutes, executive orders, and regulations. As these laws attest, the federal government has recognized and protected American Indian tribes' separate existence since the Founding of the United States. The Founding Generation understood that the duty of protection included more than matters of military and economic alliance, criminal jurisdiction, or trade. The duty also encompassed 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 services for Indian children.

The Indian Child Welfare Act is a signature example of the federal government's trust obligations to tribes and their children. Like all legislation addressing the distinct political and legal status of tribes, the Act necessarily defines the objects of its protection—Indian children. The Act defines Indian children as those already members of federally recognized tribes, or those eligible for membership and the biological children of tribal members. Children who have Native ancestry but are neither members nor eligible for membership do not fall within the Act's purview. The Act's definition of Indian children is therefore a political classification, not one based on racial identity, and falls well within Congress's power to enact legislation that furthers its "unique obligations" to American Indians. *Morton v. Mancari*, 417 U.S. 535, 555 (1974). When it overruled the Indian Child Welfare Act, the district court misapplied centuries of precedent regarding the federal government's trust relationship with tribes, including its obligations to protect Indian children, as well as established caselaw holding that classifications in furtherance of those obligations do not violate equal protection.

Argument

I. The Historical Origins of the Indian Child Trust Relationship

The federal-tribal relationship derives from centuries of federal constitutional, treaty, legislative, and judicial precedents. 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; the weaker nation does not surrender its right to self-government. *Id*. at 551–56, 560–61.

"Protection" means the United States undertakes a legal duty of preserving tribal sovereignty and property. *United States v. Kagama*, 118 U.S. 375, 384 (1886). Numerous Indian treaties reflect the duty of

protection. *E.g.*, 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*. . . .") (emphasis added); Treaty with the Chickasaw, preamble & art. 2, Jan. 10, 1786, 7 Stat. 24 (" "The Commissioners . . . 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 . . . .") (emphasis added); 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 . . . .") (emphasis added).

The Constitution's relevant provisions and structure relating to Indian affairs – including the Commerce Clause, Const. art. I, § 8, cl. 3; Necessary and Proper Clause, art. I, § 8, cl. 18; Treaty Clause, art. II, § 2, para. 2; Property and Territory Clause, art. IV, § 3, cl. 2; Foreign Affairs and War Powers, art. II, § 2, para. 1; Indians Not Taxed Clause, amend. XIV, § 2; and Supremacy Clause, art. VI, para. 2 – authorize the

United States to implement the duty of protection. *United States v. Lara*, 541 U.S. 193, 200-01 (2004).

The Supreme Court has acknowledged "the undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The Supreme Court describes the modern understanding of the duty of protection as a general trust relationship, an additional source of Congressional authority in Indian affairs. *Kagama*, 118 U.S. at 384.

The United States initially implemented its duty of protection to Indian nations and people by focusing resources on the education of Indian children, and by holding the property of Indian children in trust. The federal government's education and trust asset obligations are the origin of its ongoing obligation to provide for the welfare of Indian children.

A. Education and Land Rights

United States Indian education initiatives began during the Revolution and have continued throughout American history. Article 3 of the 1778 Treaty with the Delawares, the first American treaty with

Indian nations, provided for the protection of Indian women and children. 7 Stat. 13 (guaranteeing the "better security of the old men, women and *children* of the aforesaid nation, whilst their warriors are engaged against the common enemy") (emphasis added). On July 12, 1775, the Continental Congress funded Indian education at Dartmouth. Marilyn Irvin Holt, *Indian Orphanages* 87 (2001).

After the Revolution, the federal government utilized Indian education policy as a means of securing Indians as allies, and to "civilize" Indian people. Frank Anthony Ryan, *The Federal Role in American Indian Education*, 52:4 Harv. Educational Rev. 423, 424-25 (1982). Article 3 of the 1794 Treaty with the Oneida was the first law providing for Indian education. 7 Stat. 47. Article 3 of the 1803 Treaty with the Kaskakia provided for a Catholic priest, paid for by the federal government, to educate Indian children. 7 Stat. 78. There are more than 110 Indian treaties that made some provision for Indian education. Raymond L. Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. Ark. Little Rock L. Rev. 941, 950 (1998/1999). While Indian nations have taken control of many Indian education programs through the self-governance process,

see 25 U.S.C. § 5301 et seq., the United States continues to operate many Indian schools and provide educational assistance to tribes and Indians. *See generally* Donald L. Fixico, *Indian Resilience and Rebuilding: Indigenous Nations in the Modern American West* 47-69 (2013).

United States protections to Indian children also extended to land rights. In the 19th century, many Indian treaties and federal statutes provided for the allotment of Indian reservation lands to Indian children, often orphans. Article 14 of the 1830 Treaty with the Choctaw provided lands to unmarried children and to orphans. 7 Stat. 333. Article 2 of the 1832 Treaty with the Creeks provided lands to orphans. 7 Stat. 366. The 1836 and 1855 treaties with the Michigan Ottawa and Chippewa nations provided lands to children and orphans. Treaty with the Ottawas and Chippewas, art. 6, March 28, 1836, 7 Stat. 491; 1855 Treaty with the Ottawas and Chippewas, art. 1, para. 8, July 31, 1855, 11 Stat. 621. Finally, the 1887 General Allotment Act specifically provided for allotments to be distributed to orphan Indian children. Act of Feb. 8, 1887, § 1, 24 Stat. 388.

B. Indian Child Trust Funds and Related Child Welfare Obligations

The establishment of educational obligations and land rights for Indian children often necessitated the establishment of minors' trust funds for Indian children, and obliged the federal government to address Indian child welfare. The United States typically used these trust funds to establish Indian boarding schools and orphanages.

Throughout the 19th century, the United States and Indian nations established pools of funds for Indian education and for Indian orphans. George D. Harmon, *The Indian Trust Funds, 1797-1865*, 21:1 Miss. Valley Historical Rev. 23, 23-24 (1934). Numerous Indian treaties established federal trust funds for orphans and for educational purposes. For example, Article 8 of the 1854 Treaty with the Shawnee allowed treaty annuities to be paid into a trust fund established for Indian orphans and administered by the federal government. 10 Stat. 1053. Article 4 of the 1858 Treaty with the Yankton Sioux obligated and authorized the President to expend funds for the benefit of the "helpless

orphans." 11 Stat. 743. That treaty also provided for "minors" to receive allotments of land when they reach the age of majority. *Id.* art. 1.

It was a small step for the United States to take from serving as trustee for Indian children's assets to directly providing for their welfare. For example, the United States, often spending down Indian children's trust assets, established homes for children left as orphans after the Civil War. The 1866 treaty governing the reincorporation of the Cherokee Nation of Oklahoma into the United States after the Civil War provided for the education of Indian children in an "asylum" under the control of the Cherokee government. Treaty with the Cherokee, art. 25, July 19, 1866, 15 Stat. 799. In the early 20th century, at the request of the Choctaw and Chickasaw Indian nations, the federal government set aside land to allow for the creation of the Murrow Indian Orphans' Home. Holt, *supra*, at 171.

Indian treaty provisions sometimes directly established trust funds to pay for Indian education. For example, 1832 and 1833 treaties involving Great Lakes Indian tribes provided significant funds for Indian education. Treaty with the Potawatomi, art. 2, Oct. 20, 1832, 7 Stat. 378; Treaty with the Chippewa, Ottawa, and Potawatomi, art. 3,

Sept. 26, 1833, 7 Stat. 431. Similarly, article 10 of the 1835 Cherokee treaty established large trust funds to educate Indian children. 7 Stat. 478. Along with funds set aside as "school money" by the United States in 1819, the 1835 treaty established a $600,000 investment "for the orphans, for the nation, and for the advancement of education . . . ." Harmon, *supra*, at 335.

As required by these and many other Indian treaties, the United States established dozens of Indian boarding schools, again usually expending tribal or children's trust assets. In 1819, the federal government made permanent its role in Indian education by establishing the "Civilization Fund." Harmon, *supra*, at 161. By 1824, there were 32 Indian schools; by 1825, there were 38 Indian schools. *Id.* at 163-65. The federal government continues to operate boarding schools on some reservations with tribal input and, often, control. Jon Reyner & Jeanne Eder, *American Indian Education: A History* 250-323 (2004).

C. History Leading to the Indian Child Welfare Act of 1978

The federal government's implementation of its trust obligation to provide for Indian child welfare dating back to the Founding was haphazard until the enactment of ICWA. The United States' provision of education, guarantee of land rights to Indian children, holding of Indian children's financial resources in trust, and establishment of orphanages presaged ICWA, especially as state governments struggled to provide basic child welfare services to any child until the latter half of the 20th century.

Before the 1920s, few state governments assumed a comprehensive role in the regulation of child welfare generally – "[I]n the nineteenth and early twentieth centuries, child protection agencies were nongovernmental." John E.B. Meyers, *A Short History of Child Protection in America*, 42 Fam. L.Q. 449, 452 (2008). State governments were slow to develop child protection programs until the latter half of the 20th century; only the federal government offered child welfare programs during the Great Depression. *Id*. at 452-53. "[F]or the first six decades of the twentieth century, protective services in most communities were inadequate and in some places nonexistent." *Id*. at 454.

Haphazard state government services harmed Indian children significantly. The mid-20th century was a period in which states demanded more control over Indian affairs, and the federal government acquiesced in statutes such as the Johnson-O'Malley Act, Act of April 16, 1934, 48 Stat. 596, and Public Law 280, Pub. L. 83-280, Aug. 15, 1953, 67 Stat. 588. The Johnson-O'Malley Act was Congress's early attempt to subsidize state services to Indian people, and encourage Indian people to rely more on state services. Fixico, *supra*, at 88-89.

By the mid-20th century, the federal government closed many Indian boarding schools, obliging the states to handle Indian child education and welfare matters. Margaret D. Jacobs, *A Generation Removed: The Fostering & Adoption of Indigenous Children in the Postwar World* 6 (2014). Despite the Johnson-O'Malley Act, the states lacked the resources to handle this new obligation. *Id*. In 1958, the federal government attempted to solve these issues with the Indian Adoption Project (IAP). The IAP did not serve the best interests of Indian children. Rather, it aimed to reduce costs for the federal and state governments. *Id*. at 6-7. At that time, "most government officials deemed Indian families inherently and irreparably unfit . . . ." *Id*. at 7.

The IAP worked in tandem with Public Law 280 and the Bureau of Indian Affairs' "Operation Relocation," also known as urban relocation, in which the federal government encouraged Indian adults and families to leave the reservation. Fixico, *supra*, at 96-118; Jacobs, *supra*, at 9. State governments sometimes refused to accept responsibility for the relocated Indian children. Jacobs, *supra*, at 15-16. When they acted, they relied on "foster care and adoption into non-Indian families as the best solution for dependent Indian children." *Id.* at 16. The IAP, urban relocation, and Public Law 280 were hallmarks of the termination era of federal Indian policy, an approximately two decade era in which the federal government attempted to "terminate" the trust relationship between the United States and Indian nations and people. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986). These three federal programs worked to transfer the federal trust responsibility to state governments, all of which negatively impacted Indian children and families.

The federal government's role in child welfare more generally expanded during the 1970s, with the government assuming a "central role . . . in efforts to protect children from abuse and neglect." Meyers,

supra, at 453. Before the enactment of ICWA in 1978, the United States enacted the Child Abuse Prevention and Treatment Act in 1974, Pub. L. No. 93-247, Jan. 31, 1974, 88 Stat. 4. ICWA was the nation's overdue response to the crisis in Indian child welfare. Congress found that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). Congress firmly placed the blame on states: "[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." § 1901(5).

ICWA is fully consistent with centuries of federal Indian law and policy relating to the trust relationship between the United States and Indian children. In ICWA, Congress acknowledged its duty of protection to Indian nations and Indian people. 25 U.S.C. § 1901(2) ("Congress, through statutes, treaties, and the general course of dealing with Indian

tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources. . . ."). Congress further explicitly linked tribal self-government to Indian child welfare. § 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe. . . ."). In later legislation, Congress reaffirmed its trust obligation to Indian children. No Child Left Behind Act of 2002, 20 U.S.C. § 7401 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.").

II. ICWA FURTHERS CONGRESS'S UNIQUE OBLIGATION TO TRIBES AND DOES NOT VIOLATE EQUAL PROTECTION.

A. The District Court's Decision Directly Conflicts with Controlling Supreme Court Precedent.

As documented above, the federal government has treated American Indian tribes and tribal members differently from non-Indians since the founding of the republic. *See Morton v. Mancari*, 417 U.S. 535, 552-53 (1974). *See also United States v. Lara*, 541 U.S. 193, 200-01 (2004) (describing the Constitutional sources of Congressional authority in Indian affairs). There are hundreds of treaties, and thousands of statutes, executive orders, and regulations, that establish and further the distinct federal treatment of tribes and their members.[1] Because Congress is expressly authorized by the Constitution to regulate Indian affairs, the Supreme Court defers to the political branches and upholds classifications so long as they can be tied to

[1] *See Indian Affairs: Laws and Treaties, Vol. I-VII* (Charles J. Kappler, ed. 1903-1971) (multi-volume compilation of all treaties with Native Americans from 1778-1883 in Volume II, and all laws and executive orders through 1972 in Volumes I and II-VII); *Supplement to Kappler's Indian Affairs, Laws and Treaties* (1975) (compiling federal regulations relating to Indians); *Early Recognized Treaties with American Indian Nations* (2006) (including nine treaties omitted from Kappler's volume).

Congress's "unique obligations toward the Indians." *Mancari*, 417 U.S. at 555.

Under *Mancari*, federal classifications that further Congress's obligation to tribes are subject to a form of rational basis review, which inquires only whether "the special treatment can be tied rationally" to congressional goals. If so, "such legislative judgments will not be disturbed." 417 U.S. at 555. The Court has applied this approach in diverse areas of Indian law. *E.g.*, *United States v. Antelope*, 430 U.S. 641, 647-49 (1977) (rejecting equal protection challenge to the Major Crimes Act); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501-02 (1979) (rejecting equal protection challenge to a state law effectuating a federal statutory scheme); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85-90 (1977) (rejecting equal protection challenge to a federal statute settling an Indian Claims Commission case).

The Court's deferential approach to Congressional classifications in the Indian law context is similar to other areas where Congress's lawmaking authority is broad or exclusive. In immigration law, Congress has "plenary power to make rules" for the admission and

exclusion of aliens. *Boutlier v. Immigration and Naturalization Service*, 387 U.S. 118, 123 (1967). Courts reviewing equal protection challenges to immigration classifications therefore only inquire whether Congress had a "facially legitimate and bona fide reason." *Fiallo v. Bell*, 430 U.S. 787, 795 (1977); *see also Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 332 (5th Cir. 2004) ("In light of Congress's plenary power to pass legislation concerning admission or exclusion of aliens, . . . no more searching review than . . . rational basis is appropriate."). Similarly, congressional classifications rooted in the Constitution's District and Territories Clauses are subject only to rational basis review. *See Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam); *Calloway v. Dist. of Columbia*, 216 F.3d 1, 7-8 (D.C. Cir. 2000). As these cases reflect, there is nothing unusual in affording Congress leeway in areas where the Constitution has delegated broad and exclusive authority to the legislative branch. In similar fashion, the Supreme Court defers to the federal government with regard to recognition of Indian tribes and individual Indians. *United States v. Holliday*, 70 U.S. 407, 419 (1865) ("[I]t is the rule of this Court to follow the action of the executive and other political departments of the government whose more special duty it is to

determine such affairs. If by them those Indians are recognized as a tribe, this Court must do the same. If they are a tribe of Indians, then by the Constitution of the United States they are placed, for certain purposes within the control of the laws of Congress.").

Mancari requires that the judiciary assess only whether Congress's treatment of Indians is reasonably related its "unique obligations" to tribes and their members. *See* 417 U.S. at 555. ICWA does so. Congress stated in the statute itself that an "alarmingly high percentage" of Indian children are removed from their families "by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions. . . ." 25 U.S.C. § 1901(4). In extensive hearings before Congress, tribal members and experts testified about the discriminatory practices of state and private welfare and adoption agencies, as well state courts' abuse of their authority. *See* H.R. Rep. 95-1386 (1978), at 9-11. The removals were often based on biases or misunderstandings about American Indian family structures and norms, and were sufficiently widespread to create existential threats to some tribes. *See id*. at 10.

Congress's solution was to bolster legal protections for Indian families based on their status as members of sovereign Indian nations, and to recognize rights in both family members and tribes to enforce the law. In passing ICWA, Congress established procedural and substantive requirements that mandate tribal court jurisdiction in some cases, 25 U.S.C. §§ 1911(a)-(b), allow tribal participation in state proceedings in others, § 1911(c), and impose standards for removal, §§ 1912(c)-(d), placement, § 1915, and termination of parental rights, § 1912(f). Through these provisions, ICWA addressed the fundamental problem of discriminatory interference in the families of Indian tribal members. By intent and design, ICWA furthers Congress's unique obligations to tribes in an area that lies at the heart of tribal political self-determination: the ability to safeguard connections between tribal members and their children. § 1901(3). If a separate federal criminal regime to prosecute members of Indian tribes satisfies *Mancari*'s deferential equal protection threshold, *see Antelope*, 430 U.S. 641, then ICWA should be well within Congress's authority to fulfill "unique obligations to the Indians."

B. ICWA Classifications are Political Classifications

The Supreme Court's equal protection approach to classifications affecting federally recognized tribal members rests on tribes' political status as governments within the United States. The Court explained this in *Mancari*, distinguishing between classifications based solely on "racial" status and those that rest on membership in federally recognized tribes: "The preference is not directed towards a 'racial' group consisting of 'Indians': instead it applies only to members of 'federally recognized' tribes. 417 U.S. at 552, n. 24. ICWA's definitions are precisely in line with this distinction. The Act defines Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). ICWA therefore applies only to children with a political connection to a federally-recognized tribe. For example, a child who is 100% Native American could nonetheless be exempt from ICWA's coverage if neither parent is an enrolled tribal member. Just as in *Mancari*, ICWA's definition of Indian child 'operates to exclude many

individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial." 417 U.S. at 552.

The district court made a crucial mistake when it paraphrased ICWA's definition of Indian child as "one who is a member 'of an Indian tribe' as well as those children simply *eligible* for membership who have a biological Indian parent." *Brackeen v. Zinke*, 338 F. Supp. 2d 514, 533 (N.D. Tex. 2018) (emphasis in original.) By omitting the part of the definition that requires children eligible for membership to have a biological parent who is a "*member of an Indian tribe*," § 1903(4)(b) (emphasis added), the court lopped off the part of the statute that plants it firmly on the "political" side of *Mancari*'s distinction. The district court therefore incorrectly concluded that ICWA's distinction was based on "blood" rather than political membership. *Brackeen*, 338 F. Supp. 3d. at 533.

Further, it makes good sense for ICWA to include children who are eligible for enrollment, but not yet enrolled in their tribe, within ICWA's protections. Infants, by and large, are not born with automatic membership in a federally-recognized tribe; they are enrolled through their parents or relatives. ICWA's definition of Indian child recognizes

this, foreclosing the absurd result of defining infant children of tribal members as non-Indian. The domicile provisions of ICWA, as well as state and federal laws regarding children's legal residency or citizenship, attribute parental legal status to children for similar reasons. *See Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 48 (1989) (attributing Indian parents' domicile to their infant children because "most minors are legally incapable of forming the requisite intent to establish a domicile."); *Yarborough v. Yarborough,* 290 U.S. 202, 211 (1933) (attributing parents' domicile to minor children). The district court's disquiet about applying ICWA to all children who are not yet enrolled, but are eligible for enrollment, would have the effect of eliminating nearly all newborns from ICWA's coverage, a result that would accomplish neither equal protection of the law nor any other laudable purpose.

C. The Indian Child Welfare Act does not Rely on Ancestry as a "Proxy for Race."

In addition to misstating ICWA's definition of "Indian child," the district court incorrectly concluded that ICWA's classifications violate

equal protection because they use ancestry as a "proxy for race." *Brackeen*, 338 F. Supp. 3d at 534. As noted above, ICWA's definition of Indian child includes children politically classified as Indian, not racially classified as such, and appropriately includes children who are eligible for the political status of being tribal members. The definition therefore fits within *Mancari*'s distinction between political classifications subject only to deferential review and other classifications that might warrant heightened scrutiny. *See* 417 U.S. at 552-53.

The district court relied on *Rice v. Cayetano*, 528 U.S. 495, 514 (2000), to bolster its conclusion that ICWA's definition of "Indian child" should be subject to heightened equal protection scrutiny. The district court's reliance on *Rice* was misguided. In *Rice*, the Supreme Court struck down a state law that allowed only Native Hawaiians to vote for board members of a state agency that governed programs for Native Hawaiians. *Id.* at 498-99. In doing so, the Court stated that "ancestry can be a proxy for race." *Id.* at 514. But two crucial aspects of *Rice* make its holding and this statement irrelevant to ICWA. First, as *Rice* was careful to note, Native Hawaiians are not a federally recognized tribe.

They do not have the legal status of political sovereigns with a direct relationship to the federal government, which forms the basis of tribes' distinctive status for many legal purposes, including equal protection analysis. *Id.* at 518. Second, *Rice* was a state voting rights case, and the Fifteenth Amendment's strictures against restrictive state voting requirements are interpreted differently from the Fifth Amendment's equal protection safeguards. *Id.* at 519. It makes little sense to apply *Rice*'s comment outside of its state voting rights context for other reasons as well.

Laws of ancestry and descent acknowledge *family relationships*. Surely ancestry *can be* a proxy for race, in that it can be used in an attempt to disguise the continuation of invidious racially discriminatory policies. *See*, *e.g., Guinn v. United States*, 238 U.S. 347, 364-65 (1915) (striking down a literacy requirement for voting that exempted the descendants of those eligible to vote prior to the adoption of the Fifteenth Amendment, effectively exempting whites while perpetuating the requirement's application to blacks). But as Justice Stevens noted in his *Rice* dissent, ancestry is not always a proxy for racial discrimination, and context and history make all the difference. *Rice*,

528 U.S. at 544-45 (Stevens, J., dissenting); *see also* Carole Goldberg, *Descent into Race*, 49 UCLA L. Rev. 1373, 1390-93 (2002). Equating classifications based on ancestry or descent with those based on racial discrimination could, for example, call into question a diverse array of laws outside of the Indian law context. The laws of intestate succession in all states, for example, rely on descent and ancestry. *See, e.g.*, Ala. Code 1975 § 43-8-41; Ariz. Rev. Stat. § 14-2103; Fla. Stat. § 732.103; Kan. Stat. § 59-506; Wis. Stat. § 852.01; *see also* Unif. Probate Code § 2-103 (Nat'l Conference of Comm'rs on Unif. State Laws 2010) (same) (all requiring an intestate decedent's estate to pass according to descent). U.S. citizenship laws also recognize descent. *See e.g.*, 8 U.S.C. §§ 1401 (c)-(d), (g); 8 C.F.R. § 322.2 (allowing children born outside the U.S. to be eligible for citizenship based on citizenship of parent or parents). In short, the Supreme Court has never held that ancestry is necessarily a "proxy for race," and for good reason. Laws outside of Indian law recognize ancestry and descent as bases for legal distinctions and it would make no sense to subject them to the highest level of judicial review. ICWA's definition of Indian child depends on the child's enrollment, or potential enrollment, in a federally recognized Indian

tribe. It is not a proxy for invidious racial discrimination but rather a classification based on political membership that, for children, may initially depend on connections to a parent. *See Mancari*, 417 U.S. at 552-553.

D. Federally Recognized Tribes are Political Sovereigns and Their Membership Criteria are not Subject to Equal Protection Review

The Supreme Court's deferential approach to classifications that further Congress's unique obligations to tribes should be upheld for two additional reasons. First, tribes' separate legal status, authorized in the Constitution and furthered by hundreds of treaties and thousands of federal statutes and regulations, is rooted in their pre-settlement occupation of the continent. Judicial and administrative definitions of tribes incorporate elements of descent from historic indigenous peoples as a result. Conflating this aspect of tribes' longstanding, constitutionally-based political status with a suspect racial category would put the judiciary in the position of unraveling centuries of law and policy. Second, tribal membership criteria, even if they include

elements of descent or ancestry, are themselves political classifications. The *Mancari* approach to equal protection analysis accommodates both of these core aspects of federal Indian law by focusing appropriately on whether the federal government is furthering its unique obligations to tribes and tribal members, rather than on whether tribes or tribal membership criteria include elements of ancestry or descent.

1. Tribes' Separate Political Status Derives from their Historic Ties to Peoples who Preceded European Settlement

The Department of the Interior maintains a list of tribes that are recognized as political sovereigns by the federal government. *See* 25 U.S.C. § 5131 (requiring the Department to publish a list of all federally recognized tribes no less than once every three years); 83 Fed. Reg. 4235 (Jan. 30, 2018) (most recent list; six tribes have achieved federal recognition since publication). ICWA applies to members of these tribes. 25 U.S.C. 1903(3) (defining "Indian" under ICWA as a member of an Indian tribe). Today there are 573 federally recognized tribes.

Tribes achieve federal recognition, and therefore their place on this list, by federal acknowledgment of a tribe's sovereignty by either

Congress or the Executive branch. Pub. L. 103-454, § 103(3), Nov. 2, 1994, 108 Stat. 4791. In each instance of federal recognition, the federal government requires Indian ancestry or descent. Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 Stanford L. Rev. 491, 528 (2017). The Supreme Court repeatedly affirmed this requirement in cases addressing the definition of "tribes" under federal law. For example, in *United States v. Sandoval*, 231 U.S. 28 (1913), the Supreme Court recognized that Congress had wide leeway to enter into relationships with tribes, yet could not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." Id. at 46. The Court then held that the Pueblos were "tribes" in the constitutional sense by virtue of their distinct treatment by the federal government, history of separate existence, and "*Indian lineage*." *See id*. at 47 (emphasis added).

The current federal acknowledgement regulations likewise require tribes seeking federal recognition to show descent from historic indigenous peoples. First, the regulations define the term "indigenous" to mean "native to the continental United States . . . at the time of first sustained contact . . . ." 25 C.F.R. § 83.1. Second, several of the seven

criteria for federal recognition include aspects of showing ties to peoples who are "native" in the same sense. 25 C.F.R. §§ 83.11(a) ("Indian identity" requirement), (b) ("distinct community" requirement), and (e) ("descent" requirement). The "descent" criterion requires that the petitioning group show that its membership consists of "individuals who descend from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity.)" 25 C.F.R. § 83.11(e).

Tribes' distinct constitutional status, and Congress's exclusive and broad powers to legislate in furtherance of that status, rest in part on their ties to pre-contact peoples. These ties need not be genetic or "racial;" tribes, like all peoples and cultures, incorporate individuals of varying backgrounds over time. Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 Washington L. Rev. 1041, 1130 (2012). They are historic, however, and in this sense, ancestry and descent are integral to the definition of federally recognized tribes both in long-established caselaw and current federal regulations, and should not become the basis for judicial scrutiny of legislation that protects that very status.

2. Federally Recognized Tribes' Membership Rules are Political

Tribes have the power to determine their own membership rules. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 (1978). In general, tribes' decisions about membership are not subject to judicial review. S*ee id*.[2] Just as descent and ancestry are inextricably linked to tribes' constitutionally-based political status, descent and ancestry requirements are aspects of many tribes' own membership rules. *See* Krakoff, *Inextricably Political*, *supra*, at 1126. These are not the same as, nor should they be equated with, invidious racial classifications. First, federally recognized tribes themselves are often composed of multiple ethnic and linguistic groups, reflecting the political process of emerging from pre-contact indigenous peoples to today's federally recognized tribes. The Colorado River Indian Tribes, for example, include people of Navajo, Hopi, Chemehuevi, and Mojave descent. *See id*. at 1044; *see also About the Mohave, Chemehuevi, Hopi and Navajo*

[2] If the Secretary of the Interior has power to review a tribe's membership provisions, there may be a cause of action against the Secretary for unlawful approval. *See Santa Clara Pueblo*, 436 U.S. at 66 n. 22.

Tribes, Colo. River Indian Tribes, http:/www.crit-nsn.gov/crit_contents/about/ (last visited Jan. 6, 2019).

Second, many tribes' descent-based requirements were (and in many cases still are) artifacts of the political relationship between tribes and the federal government, in that they reflect the federal government's forced imposition of numerical rolls and/or blood quantum as pre-requisites for federal recognition. Eva Marie Garroutte, *Real Indians: Identity and the Survival of Native America* 21-22 (2003). It would be inappropriate, if not cruel, for courts to hold that history against tribes today. And finally, descent or blood-quantum requirements also reflect tribes' efforts to ensure their distinct status as indigenous peoples, and to perpetuate cultural and political cohesion, not to impose racial or genetic requirements. For example, the Seminole Tribe of Florida, which itself derived from multiple historic peoples,[3] today has three requirements for membership: (1) descent from 1957 census rolls; (2) one quarter or more degree of Seminole Indian blood "which indicates that she is *no more than a single generation removed*

[3] *See* Sarah Krakoff, *Constitutional Concern, Membership, and Race*, 9 Fla. Int'l L. Rev. 295, 312-21 (2014) (describing Seminole and Miccosukee Tribes' history of federal tribal recognition).

from the cultural heritage," and (3) sponsorship by a current tribal member and an affirmative vote by the Tribal Council. Seminole Tribe of Florida, Frequently Asked Questions, "Why does a person have to be a quarter Seminole to be a member of the tribe?" http://www.semtribe.com/FAQ/ (emphasis added) (last visited Jan. 6, 2019); *see also* Const. and Bylaws of the Seminole Tribe of Fla. (as amended), U.S. Dep't. of Int., Bureau of Indian Affairs (D.C., 1957). It is clear from the Seminole Tribe's explanation that its goals are to ensure connections to their political and cultural community, not to implement "racial" or genetic tests. Indeed, Seminole tribal members can be, and many are, derived from a variety of racial backgrounds.

Anxiety about tribes' membership rules lurks behind the district court's mistaken conclusion that ICWA violates Fifth Amendment guarantees of equal protection. *See Brackeen*, 338 F. Supp. 3d at 533, n. 10. (citing to *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655 (2013)). Yet there is no going down the road of subjecting tribes' membership rules to heightened scrutiny as "racial" classifications without undermining the entirety of tribes' separate and constitutionally guaranteed status, recognized in treaties, statutes, regulations, and

executive orders since the Founding. As *Mancari* correctly held nearly a half century ago, not all classifications that recognize difference are suspect racial classifications. Tribal membership rules, which are not subject to judicial review in any event, should not be used to undermine Congress's efforts to fulfill its "unique obligations" to Indian tribes and their children.

Conclusion

The district court overlooked the long history of the federal government's trust obligations to Indian children. These obligations, like the broader federal-tribal relationship, have existed since the Nation's Founding and are enshrined in the Constitution and myriad federal laws and regulations. The Indian Child Welfare Act is based on this constitutional relationship. The Act does not classify Indian children based on race, and its reversal would undermine decades of progress for Indian children. Upholding the district court's decision would also throw much of federal Indian law into question, and could

sow confusion about judicial review of other diverse areas of law. The district court's decision should be reversed.

Respectfully submitted,

/s/ Matthew L.M. Fletcher

Counsel for *Amici Curiae*

Indian Law Scholars

SARAH KRAKOFF
University of Colorado
Law School
407 Wolf Law Bldg.
401 UCB
Boulder, CO 80309
(303) 492-2641
sarah.krakoff@colorado.edu

MATTHEW L.M. FLETCHER
Michigan State University
College of Law
648 N. Shaw
East Lansing, MI 48824
(517) 432-6909
matthew.fletcher@law.msu.edu

Appendix

Amici American Indian Law Scholars

Robert T. Anderson
Charles I. Stone Professor of Law
Director, Native American Law Center
University of Washington School of Law

Barbara A. Atwood
Mary Anne Richey Professor of Law Emerita
Co-Director, Family and Juvenile Law Certificate Program
James E. Rogers College of Law
University of Arizona

Bethany Berger
Wallace Stevens Professor of Law
University of Connecticut School of Law

Kristen A. Carpenter
Council Tree Professor of Law
Director, American Indian Law Program
University of Colorado Law School

Matthew Fletcher
Professor of Law
Director of Indigenous Law & Policy Center
Michigan State University College of Law

Carole Goldberg
Distinguished Research Professor
UCLA School of Law

Lorie Graham
Visiting Professor
Harvard Law School

Sarah Krakoff
Moses Lasky Professor of Law
Associate Dean for Faculty Affairs
University of Colorado Law School

Angela Riley
Professor of Law
Director, Native Nations Law and Policy Center
UCLA School of Law

Addie C. Rolnick
Professor of Law
William S. Boyd School of Law
University of Nevada, Las Vegas

Alex Skibine
S.J. Quinney Professor of Law
University of Utah College of Law

Maylinn Smith
Co-Director
Margery Hunter Brown Indian Law Clinic
Alexander Blewett III School of Law
University of Montana

Michalyn Steele
Associate Professor of Law
Brigham Young University Law

Rebecca Tsosie
Regents Professor of Law
James E. Rogers College of Law
University of Arizona

Charles Wilkinson
Distinguished Professor Emeritus
University of Colorado Law School

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this brief contains 6,292 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Matthew L.M. Fletcher

Counsel for *Amici Curiae*

Indian Law Scholars

MATTHEW L.M. FLETCHER
Michigan State University
College of Law
648 N. Shaw
East Lansing, MI 48824
(517) 432-6909
matthew.fletcher@law.msu.edu

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2019, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

DATED: January 16, 2019.

/s/ Matthew L.M. Fletcher

Counsel for *Amici Curiae*

Indian Law Scholars

MATTHEW L.M. FLETCHER
Michigan State University
College of Law
648 N. Shaw
East Lansing, MI 48824
(517) 432-6909
matthew.fletcher@law.msu.edu