No. 18-11479

In the United States Court of Appeals
For the Fifth Circuit

CHAD EVERET 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, Fort Worth Division, No. 4:17-cv-00868

BRIEF OF AMICUS CURIAE __ FEDERALLY RECOGNIZED INDIAN TRIBES, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, AND OTHER INDIAN ORGANIZATIONS IN SUPPORT OF APPELLANTS

Dan Lewerenz
NATIVE AMERICAN RIGHTS FUND
1514 P Street, NW, Suite D
Washington, DC 20005
Telephone: (202) 785-4166
lawerenz@narf.org

Samuel F. Daughety
Rose N. Petoskey
DENTONS US LLP
1900 K Street, N.W.
Washington, DC 20006
Telephone: (202) 408-6400
E-mail: samuel.daughety@dentons.com
rose.petoskey@dentons.com

Erin C. Dougherty Lynch
NATIVE AMERICAN RIGHTS FUND
745 W. 4th Avenue, Suite 502
Anchorage, AK 99501-1736
Telephone: (907) 276-0680
dougherty@narf.org

Samuel E. Kohn
DENTONS US LLP
One Market Plaza
24th Floor, Spear Tower.
San Francisco, CA 94105
Telephone: (415) 882-5031
E-mail: samuel.kohn@dentons.com

Attorneys for Amici Association on American Indian Affairs, National Congress of American Indians, National Indian Child Welfare Association, other national and regulation American Indian organizations, and federally recognized Indian tribes.

Attorneys for Amici Association on American Indian Affairs, National Congress of American Indians, and National Indian Child Welfare Association.

Attorneys for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

[To be added]

TABLE OF CONTENTS

[to be added]

TABLE OF AUTHORITIES

[to be added]

INTEREST OF THE *AMICI CURIAE*[1]

Amici are ___ federally recognized Indian tribes, tribal consortia, and national and regional organizations dedicated to the rights of American Indians and tribes. *Amici* share a commitment to the well-being of Indian children and an understanding that the Indian Child Welfare Act of 1978 ("ICWA" or "the Act"), 25 U.S.C. § 1901 *et seq.*, is essential to achieving the best interests of Indian children while preserving Indian families and their tribes. *Amici* share a substantial interest in promoting and securing national conformity with ICWA's procedural and substantive mandates in state child welfare and adoption proceedings involving Indian children. A complete list of *amici* is attached as Appendix __.

INTRODUCTION

ICWA establishes minimum federal standards for state child welfare proceedings involving Indian children. Congress enacted ICWA in response to a nationwide crisis—the wholesale removal of Indian children from their families by state child welfare agencies at rates far higher than those of non-Indian families, and often without due process. In response, Congress carefully crafted ICWA to promote the best interests of Indian children and to protect the rights of parents,

[1] Undersigned counsel hereby certifies that: (1) no counsel for a party authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity—other than *amici curiae*, their members, or their counsel—contributed money intended to fund the preparation or submission of this brief.

while balancing the jurisdiction and political interests of tribes and states.

Amici agree with Defendants–Appellants that the decision below must be reversed, and write separately for three reasons: First, *amici* detail the factual and legal history leading to ICWA's enactment, and show how—even though rational basis is the appropriate level of review—ICWA was narrowly tailored to address compelling governmental interests and, therefore, withstands even strict scrutiny. Second, *amici* illustrate how the District Court's equal protection analysis began from a premise—that Congress's authority to draft legislation on behalf of tribes and Indians is limited to tribes with reservations and their on- or near-reservation members—that is belied both by long-established U.S. Supreme Court precedent and by centuries of Congressional practice. Finally, *amici* demonstrate the fallacy of the District Court's non-delegation holding, which disregarded both tribes' inherent sovereign authority and binding Supreme Court precedent.

ARGUMENT

I. Congress Enacted ICWA in Response to Abuses by State Courts and State and Private Child Welfare Agencies that Led to the Widespread Displacement of Native Children from their Families.

A. Congress Enacted ICWA Against the Historical Backdrop of Disproportionate Removal of Native Children Compared to Non-Native Children.

During the years prior to ICWA's passage, congressionally commissioned reports and wide-ranging testimony taken from interested Indians and non-Indians, and from governmental and nongovernmental agencies, wove together a chilling narrative—state and private child welfare agencies, with the backing of state courts, had engaged in the systematic removal of Indian children from their families without evidence of harm, and without due process of law. *See, e.g.*, H.R. REP. NO. 95-1386, at 27-28 (1978), reprinted in 1978 U.S.C.C.A.N. 7530 ("1978 House Report"). The Association on American Indian Affairs ("AAIA") documented that Indian children were placed in foster care at much higher rates than non-Indian children. *Id.* at 9. Indian placement rates by state ranged from double to more than 20 times the non-Indian rate, with the percentage of Indian children placed in non-Indian foster homes ranging from 53% to 97%.[2] Nationwide, "[t]he adoption rate of Indian children was eight times that of non-Indian children [and] [a]pproximately 90% of the . . . Indian placements were in non-Indian homes."[3]

---

[2] *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 1, 539 (1977) ("1977 Senate Hearing").

[3] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1989) (citing *Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs, S. Comm. on*

Among Indian children placed for adoption, as many as 97% in Minnesota—home to Child P. in the matter before this Court—were placed in non-Indian homes. 1977 Senate Hearing at 537-603. Indeed, in 1971 and 1972, nearly one-quarter of *all* Indian children in Minnesota under one year of age were adopted. 1978 House Report at 9. In Arizona—home to A.L.M.—Indian children were three-and-a-half times more likely than non-Indian children to be removed from their homes and placed in adoptive homes or foster care. 1977 Senate Hearing at 544, 546 (noting that in one county, 45 times as many Indian children as non-Indian children were in state-administered foster care). In Nevada—home to Baby O.—Indian children were seven times more likely than non-Indian children to be removed and placed in foster care. *Id.* at 574; *see also* 1974 Senate Hearings at 40-44. Overall, the evidence presented to Congress was both stunning and bleak: "25-35% of . . . Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Holyfield*, 490 U.S. at 32.

The crisis of Indian child removals and adoptions arose in large part from decades of official federal policy aimed at assimilating Indians, and particularly Indian children, into mainstream society, and the complicity of state entities in these practices. Throughout the late 19th and early 20th centuries, the federal government

Interior and Insular Affairs, 93rd Cong. 1, 3, 75-83 (1974) ("1974 Senate Hearings") (statement of William Byler)).

forcibly removed Indian children from their families to military-style boarding schools. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 76 (Nell Jessup Newton ed. 2012); 1978 House Report, at 9 (noting that federal boarding school programs "contribute[d] to the destruction of Indian family and community life."). In the 1950s, the federal government partnered with state and private agencies to form the Indian Adoption Project, which furthered the then-prevailing policy of "Indian extraction," whereby Indian children would be adopted out to primarily non-Indian families in order to reduce the populations of Indian reservations, reduce spending on boarding schools, and satisfy a growing demand for adoptive children. ELLEN SLAUGHTER, UNIVERSITY OF DENVER RESEARCH INSTITUTE, INDIAN CHILD WELFARE: A REVIEW OF THE LITERATURE 61 (1976), *available at* http://files.eric.ed.gov/fulltext/ED138422.pdf.

During the same decade, the Bureau Indian Affairs ("BIA") began the Urban Indian Relocation Program to encourage tribal members to leave their reservations and relocate to urban areas around the country. Thomas A. Britten, *Urban American Indian Centers in the late 1960s-1970s: An Examination of their Function and Purpose*, Vol. 27, No. 3 INDIGENOUS POL'Y J. 1, 2 (Winter 2017). By 1970, the BIA had facilitated the relocation of nearly 87,000 Indians from their reservations to urban areas around the country—more than a quarter of the 340,000 Native

Americans living in urban areas at the time.[4] One of the primary relocation cities was Dallas, Texas, where the BIA established a relocation assistance center. Britten, *supra*, at 2. By 1969, Dallas was home to an estimated 15,000 Indians representing 84 tribes, some as far away as Alaska.[5]

Relocated Indians faced a host of social and economic problems, including intense racial prejudice, sporadic or underemployment, low pay, inadequate housing, insufficient health care, crime, and high student drop-out rates—factors that all contribute to family stress and child welfare issues. Britten, *supra*, at 3. With the BIA's urban offices ill-equipped to address the issues that relocation had created, Congress funded 58 urban Indian centers between 1970 and 1975 to provide more than 140,000 relocatees with housing and employment assistance, legal aid, social gathering places, and a "'safe place' for the observance and preservation of Indian values." *Id.* at 5 (citing REPORT ON URBAN AND RURAL NON-RESERVATION INDIANS, TASK FORCE NO.8, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 10 (1976)).

---

[4] U.S. DEP'T OF HEALTH, EDUC., & WELFARE, OFFICE OF SPECIAL CONCERNS, A STUDY OF SELECTED SOCIO-ECONOMIC CHARACTERISTICS OF ETHNIC MINORITIES BASED ON THE 1970 CENSUS, VOL. III: AMERICAN INDIANS 83, Table J-1 (July 1974).

[5] Mary Patrick, *Indian Urbanization in Dallas: A Second Trail of Tears?*, 1 Oral Hist. Rev. 48, 49 (1973); James H. Gundlach & Alden Roberts, *Native American Indian Migration and Relocation: Success or Failure*, 21 Pac. Soc. Rev., 117, 118-19 (Jan. 1978).

These policies had a profound effect on Indian children and families. During the lead-up to ICWA's passage, witnesses described the "constant two-way movement of Indian families and individuals between reservations and urban areas," 1977 Senate Hearing at 350 (letter from Don Milligan, State of Washington Department of Social and Health Services as testimony for Urban and Rural Non-Reservation Task Force), and the high rate of separation for families living off-reservation. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and a member of the National Tribal Chairmen's Association, testified that "[t]he problem exists both among reservation Indians and Indians living off the reservation in urban communities. . .The rate of separation is much higher among Indians than in non-Indian communities." 1978 Hearing at 191. In some states, off-reservation Indian children made up the majority of Indian children in state custody who were eventually adopted out to non-Native families. 1977 Senate Hearing at 351; *see also* 1974 Senate Hearings at 38 (testimony of Bertram Hirsch, AAIA). This was true for Native children across the board, from those in state and private foster care programs to those who were eventually adopted. For example, Washington State reported that in 1975, approximately 75% of the Indian children in state custody were located in urban or rural non-reservation areas. *Id.* at 351. For Indian children in the custody of private foster care programs, 90% were living in urban and rural off-reservation areas. *Id*.

B. Congress Recognized that States Frequently Disregarded Due Process, Tribal Family Practices and Tribal Sovereignty in Removing Indian Children.

By the time Congress began its formal investigation into the removal of Indian children from their families, state child welfare practices bore significant responsibility for this crisis. The House Committee on Interior and Insular Affairs noted that states had failed "to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future." 1978 House Report at 19; *see also Holyfield*, 490 U.S. at 45 ("Congress perceived the States and their courts as partly responsible for the problem it intended to correct."). Congress ultimately found that "the 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." 25 U.S.C. § 1901(5).

Among Indian children removed from their homes, studies showed that an overwhelming majority were removed for vague reasons such as "neglect" or "social deprivation," or upon the assertion that the children might be subject to emotional damage by continuing to live with their Indian families. 1978 House Report at 10.

One of the most frequent complaints was the tendency of social workers to apply standards that ignored the realities of Indian societies and cultures:

> [T]he dynamics of Indian extended families are largely misunderstood. . . . The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing.

Id. at 10, 20. The failure to account for these cultural practices led "many social workers . . . [to] make decisions that are wholly inappropriate in the context of Indian family life . . . [T]hey frequently discover neglect or abandonment where none exists." *Id.* at 10; *see also* 1977 Senate Hearing at 73 (statement of Sen. Abourezk) ("non-Indian agencies . . . consistently thought that it was better for the child to be out of the Indian home whenever possible"). Children often were removed or threatened with removal because they were placed in the care of relatives or their homes lacked the amenities that could be found in non-Indian society.[6]

Nor were these abuses limited to involuntary removals; state and private adoption agencies sometimes coerced parents into signing "voluntary" consents to adoption. *See, e.g.*, 1978 House Report at 10-12; *see also* TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN

[6] *See, e.g.*, 1977 Senate Hearing at 77-78, 166, 316; *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 1, 115 ("1978 House Hearings").

INDIAN POLICY REVIEW COMMISSION 86 (Comm. Print July 1976); 1977 Senate Hearing at 141; 1974 Senate Hearings at 463 (statement of Sen. Abourezk) ("[i]n many cases [parents] were lied to, they were given documents to sign and they were deceived about the contents of the documents.").

State courts allowed these abuses to occur in virtually an unfettered fashion. "The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law." 1978 House Report at 10-12. Testimony before Congress revealed "substantial abuses of proper legal procedures," and that Indian parents were "often unaware of their rights and were not informed of them, and they were not given adequate advice or legal assistance at the time when they lost custody of their children." 123 Cong. Rec. 21042, 21043 (1977) (statement of Sen. Abourezk). Tribes, too, frequently were kept in the dark about the removal of Indian children from their families. *See, e.g.*, 1977 Senate Hearing at 155-56 (Statement of Hon. Calvin Isaacs) (noting that "[r]emoval is generally accomplished without notice to or consultation with responsible tribal authorities").

C. Congress Found that the Removal of Indian Children to Out-of-Home, Non-Indian Placements Was Not in the Best Interests of Indian Children, Families, and Tribes.

"Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture." *Holyfield*, 490 U.S. at 49-50.

Testimony at congressional hearings was replete with examples of Indian children placed in non-Indian homes who later suffered from identity crises in adolescence and adulthood. *See, e.g.*, 1974 Senate Hearings at 113-14 (statement of Dr. James H. Shore, Psychiatry Training Program and William W. Nichols, Director, Confederated Tribes of the Warm Springs Reservation Tribal Health Program); *id.* at 46 (testimony of Dr. Joseph Westermeyer). This phenomenon led to significant disparities between children raised in their tribal culture, who maintained a high cultural identity, and those with a comparatively low cultural identity. The former group "were statistically more apt to be employed; if they had been in the services, they had honorable discharges; they were mostly married and caring for their children . . . [and] had a low incidence of history of social problems such as imprisonment, commitment to a State mental health institute" and the like. The "reverse [was] true" for the latter group, who "tend[ed] to have poor coping and also significant social problems." 1974 Senate Hearings at 46-47. Such testimony led the American Indian Policy Review Commission to conclude that "[r]emoval of Indians from Indian society has serious long- and short-term effects . . . for the individual child . . . who may suffer untold social and psychological consequences." S. REP. NO. 95-597, at 43.

Finally, the legislative record reflects "considerable emphasis on the impact on the tribes themselves of the massive removal of their children." *Holyfield,* 490

U.S. at 34. "For Indians generally and tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as ongoing, self-governing communities." 124 Cong. Rec. 38103 (1978) (statement of Rep. Lagomarsino); *see also id*. at 38102 (statement of sponsor Rep. Udall) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy.").

D. ICWA Was Carefully and Narrowly Tailored to Address the Nationwide Crisis that Congress Identified.

Following years of hearings and deliberation, Congress enacted ICWA to remedy the widespread harms that states had helped to enable. At its core, ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. ICWA's substantive and procedural mandates were carefully crafted to address the harms identified during Congressional hearings, thereby reflecting "a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37 (*quoting* 1978 House Report at 23).

As noted further below in Section __, and as discussed at greater length by Defendants-Appellants, ICWA is well within Congress's Indian affairs power and is thus properly afforded rational basis scrutiny. Therefore, the court below erred in applying strict, rather than rational basis, scrutiny to determine whether the Act

complied with the equal protection clause. The court compounded its error by finding that the Act was not narrowly tailored to meet the compelling interests that spurred its passage. In the court's view, this was because ICWA provided for the placement of "*potential* Indian children" (emphasis original)—the court's term for children who are eligible for membership in a federally recognized tribe and the biological child of a tribal member—with "any Indian, regardless of whether the child is eligible for membership in that person's tribe" or with "family members who may not be tribal members at all." *Slip Op.* 28-29 (citing 25 U.S.C. §§ 1903(4) and 1915(a)(3) and (a)(1)).

But Congress readily supplied evidence to support these provisions. First, ICWA's ambit includes some children who are not (yet) tribal members to ensure that parents and the child's tribe had the opportunity to perfect tribal membership, and thus ICWA's protection, for their children. *See, e.g.*, 1978 House Report, at 17 (noting that "[t]he constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity"). These requirements are consistent with United States citizenship practices, *see, e.g.*, 8 U.S.C. §§ 1401, 1431 (children born outside U.S. qualify for citizenship if one or both parents are U.S. citizens and other

conditions are met). Cognizant of adult adoptees who had lost their "right to share in the cultural and property benefits" of tribal membership, 124 Cong. Rec. 38103 (statement of Rep. Udall), ICWA also provided a mechanism for the disclosure of "information necessary for the enrollment or for determining any rights or benefits associated with that membership" for such individuals. *See* 25 U.S.C. § 1951(b).

Second, and as set forth above, "[o]ne of the particular points of concern [underlying ICWA's passage] was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society." *Holyfield*, 490 U.S. at 35 n.4. The provisions in ICWA's placement preferences that provide for placement with non-Indian relatives and "other Indian families," 25 U.S.C. § 1915(a)(1) and (a)(3), recognize and effectively codify protections for the extended family dynamic discussed at length in testimony, which, Congress found, had certain commonalities that spanned tribal cultures. *See, e.g.*, 1978 House Hearings at 69 (statement of LeRoy Wilder, AAIA) ("Indian cultures universally recognize a very large extended family."). But far from treating "all Indians as an undifferentiated mass," *Slip Op.* 28 (quoting *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring), Section 1915(c) allows tribes, should the needs of their members differ from ICWA's framework, to exercise their inherent authority to establish different preferences that meet these needs.[7]

[7] This subsection and its treatment by the court below is addressed in further detail in Section III.

E. ICWA Remains Vital Legislation for the Protection of Indian Children, Families, and Tribes

ICWA's protections for Indian children and families are now widely praised among national child welfare organizations and family court judges and practitioners alike.[8] However, while ICWA's procedural safeguards have significantly improved Indian child welfare outcomes, this progress is not universal. As the American Psychological Association testified nearly 20 years after ICWA's passage, "[m]any of the controversial cases surrounding the adoption of Indian children appear to have developed as a result of poor or non-existent enforcement of ICWA provisions." *Joint Hearing Before the S. Comm. on Indian Affairs and the H. Comm. on Resources on S. 569 and H.R. 1082, To Amend the Indian Child Welfare Act of 1978*, 105th Cong. 1, 228 (1997). Many states continue to have vastly disproportionate rates of Indian children in out-of-home placements compared to the general child population.[9] In addition, serious due process violations in child custody proceedings

[8] *Amici* Casey Family Programs et al. detail this point, and undersigned *amici* urge this Court's attention to this brief.

[9] *See* NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE 5-6 (Sept. 2017), *available at* https://www.ncjfcj.org/sites/default/files/NCJFCJ-Disproportionality-TAB-2015_0.pdf. In Minnesota, for example, Indian children have been placed in out-of-home care at a rate more than twice that of any other group and were 12 times more likely than white children to spend time in placement. CENTER FOR ADVANCED STUDIES IN CHILD WELFARE, POLICY BRIEF, CHILD WELL-BEING IN MINNESOTA 2 (2013), *available at* http://cascw.umn.edu/wp-content/uploads/2013/11/policyreport3_web-versionFINAL.pdf. In Alaska, Indian children only make up 18.9% of the overall population of Alaskan children, but represent 55% of children removed by the state and placed in out-of-home care. U.S. DEP'T OF HEALTH AND HUMAN SERVS.,

involving Indian children were uncovered recently in South Dakota, where a state judge conducted cursory removal hearings lasting no more than a few minutes and at which parents were not allowed even to view documents outlining the case against them, leading a federal court to enjoin the practice. *See Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 770 (D.S.D. 2015), *on reconsideration in part sub nom. Oglala Sioux Tribe v. Hunnik*, No. CV 13-5020-JLV (D.S.D. Feb. 19, 2016), *rev'd on other grounds sub nom. Oglala Sioux Tribe v. Fleming*, No. 17-1135 (Sept. 14, 2018).

In recognition of the evident need for consistent implementation, the Department of the Interior's Final Rule for Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38777 (June 14, 2016), furthers ICWA's laudable goals by synthesizing nearly forty years of case law, legislative changes, and evolution in social work practice to provide state courts with additional clarity in implementing the law. *Amici* were not alone in supporting these efforts. As Defendants–Appellants previously noted, Texas's Department of Family Protective Services submitted (albeit untimely) comments stating that it "fully supports the Indian Child Welfare Act." [ROA cite]. It is clear that ICWA and its protections for Indian children, families, and tribes remain as vital as it was 40 years ago.

CHILDREN'S BUREAU, CHILD AND FAMILY SERVICES REVIEW: 2017 STATEWIDE ASSESSMENT 2 (2017), *available at* http://dhss.alaska.gov/ocs/Documents/CFSR.pdf.

II. The District Court's Attempt to Limit Congressional Authority Over Indians to Those "On or Near Reservations" is Inconsistent With Supreme Court Precedent and Would Lead to Absurd Results.

A. The "Political Class" Doctrine Articulated in *Mancari* and Subsequent Cases is Not Limited by Geography.

In *Morton v. Mancari*, 417 U.S. 535 (1974), the U.S. Supreme Court drew upon almost two centuries of Indian law in concluding that an employment preference for Indians in the Bureau of Indian Affairs ("BIA") and the Indian Health Service ("IHS") "does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference." *Id.* at 553. Rather, the Constitution "singles Indians out as a proper subject for separate legislation," *id.* at 551-52, due to "the unique legal status of Tribal Nations under federal law and upon the plenary power of Congress [drawn from the Constitution], based on a history of treaties and the assumption of a guardian-ward status." *Id.* at 551. This seminal holding is one of the cornerstones of federal Indian law and has been applied in many cases upholding actions carrying out the unique obligations the United States owes to Indians.

Nevertheless, in its finding that ICWA violates equal protection, the District Court casually invented a new physical location requirement for the political classification—one neither articulated by the Supreme Court in *Mancari*, nor employed by any other court. Under the District Court's reading of *Mancari*, this preference "provided special treatment only to Indians living on or near reservations." *Slip Op.* at 24.

The District Court's suggestion, however, has no basis in *Mancari*. The statute at issue in that case did not limit the employment preference to "on or near reservation" Indians, but rather extended the preference to qualified Indian applicants regardless of where they live or the locations of their BIA or IHS offices. 25 U.S.C. § 5116 (*previously codified at* 25 U.S.C. § 472); *Mancari*, 417 U.S. at 537-39. Further, the *Mancari* Court wrote nothing that would limit the political classification to on-reservation Indians. In fact, during the very term that the Court decided *Mancari*, it also unanimously decided *Morton v. Ruiz*, where it explored the meaning of "on or near reservations," and explicitly noted that certain federal Indian programs, such as the Relocation Program discussed above in Section I, "explicitly extend beyond the reservation [and] are not limited to 'on or near.'" 415 U.S. 199, 228 (1974).[10] It is perhaps unsurprising, then, that this Court applied *Mancari* to uphold an exemption for the use of peyote that similarly did not contain an "on or near reservation" requirement. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F. 2d 1210, 1212 (5th Cir. 1991).

[10] In fact, Congress has enacted a variety of statutes directed specifically at off-reservation Indians. *See, e.g.*, 25 U.S.C. § 1651 *et seq.* (provision of health services for urban Indians off-reservation); 42 U.S.C. § 9836(h) ("For purposes of this subchapter, a community may be . . . Indians in any off-reservation area designated by an appropriate tribal government . . . to operate a Head Start program."); 29 U.S.C. § 764(b)(13) ("Research grants may be used to conduct studies of . . . effective mechanisms for the delivery of rehabilitation services to Indians residing on and off reservations."); *see also* 25 U.S.C. § 5116 (BIA employment preference for Indians with no geographic restriction); 25 U.S.C. § 5307(b) (granting a preference for hiring Native American contractors with no geographic restriction).

What is more, such a requirement would have excluded hundreds of thousands of off-reservation Indians—and hundreds of tribes and all of their members—from Congress's reach. As noted above, for some 20 years preceding *Mancari* and *Ruiz*, Congress had funded the Relocation Program, which established off-reservation BIA offices in cities around the country; by 1970, over 340,000 Indians—nearly half the Native population—had moved to urban areas, largely as a result of federal action.[11] The District Court's unprecedented reading of *Mancari* would have excluded hundreds of off-reservation BIA and IHS employees from the employment preference at issue, and would have effectively terminated the Indian status of the 340,000 Indians then living off-reservation. That neither Congress nor the Court intended such a result is evident in the 1978 House Report, which relied on *Mancari* and other precedent to note that "[t]he power of Congress to regulate or prohibit traffic with tribal Indians within a State *whether upon or off an Indian reservation* is well settled . . . ." 1978 House Report at 15 (emphasis original) (*quoting United States v. Nice*, 241 U.S. 591, 597 (1916)).[12]

[11] *See* n. __, *supra*, and accompanying text.

[12] *See also* 1977 Senate Hearing 104, 106-07 (testimony of Gregory Frazier) (discussing the federal relocation policy and estimating that, by the time of the hearing, nearly 500,000 Indians then fully half of all Indians in the country—resided in urban areas).

B. The District Court's Off-Reservation Rule Would Create Absurd Results, Effectively Making ICWA a Nullity in Areas That Have No Indian Reservations, Including Virtually All of Alaska.

The District Court's attempt to limit *Mancari*'s political classification doctrine only to Indians who live on or near reservations—and, by extension, to limit ICWA's application to on- or near-reservation Indian children—makes even less sense given the large numbers of tribes who lacked reservations when ICWA was enacted.

For example, there are 229 federally recognized tribes in Alaska, nearly 40% of the nation's tribes.[13] Yet only one of these 229 tribes has a reservation. Most of the lands in and around these 228 tribal communities were conveyed under the Alaska Native Claims Settlement Act ("ANCSA").[14] ANCSA was passed in 1971, seven years before ICWA, and revoked the reservation status of all Alaska Native villages except the Metlakatla Indian Community. The Supreme Court has held, however, that such ANCSA lands do not constitute "Indian country" within the meaning of 18 U.S.C. § 1151.[15] As a result, most of the land held by 228 of Alaska's

[13] See 25 U.S.C. § 479a, 479a–1 (authorizing the Secretary of the Interior to publish a list of recognized tribes, including "Alaska Native tribe[s]");, 83 Fed. Reg. 4235, 4239-41 (Jan. 30, 2018) (listing the 229 Alaska tribes as federally recognized tribes that have "the immunities and privileges available to federally recognized Indian Tribes . . . as well as the responsibilities, powers, limitations and obligations of such Tribes").

[14] 43 U.S.C. § 1601 *et seq*.

[15] *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532-34 (1998).

tribes is not within a "reservation," as that term is defined in ICWA.[16] Congress was well aware that the majority of Alaska tribes lacked reservation land, and also was aware that tens of thousands of Alaska Natives had moved thousands of miles away from Alaska. 1978 House Hearing, *supra* at 104 ("There are between 20,000 and 28,000 Alaska Natives in the Lower 48.") (testimony of Gregory Frazier, National Urban Indian Council). With that knowledge, Congress expressly included Alaska tribes in ICWA's definition of an "Indian tribe," 25 U.S.C. § 1903(3), and expressly included Alaska Natives within ICWA's definition of "Indians." *Id.* § 1903(8). Not surprisingly, ICWA's application in Alaska has been affirmed by both the Alaska Supreme Court, *State v. Native Vill. of Tanana*, 249 P.3d 734, 750-51 (Alaska 2011) (*quoting John v. Baker*, 982 P.2d 738, 747-59 (Alaska 1999) ("Congress's purpose in enacting ICWA reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes")),[17] and the United States Court of Appeals for the Ninth Circuit, *Kaltag Tribal Council v. Jackson*, 344 Fed. Appx. 324 (9th Cir. 2009), *cert. denied* 131 S. Ct. 66 (2010).[18]

[16] 25 U.S.C. § 1903(10).

[17] *See also In re C.R.H.*, 29 P.3d 849, 854 (Alaska 2001) (upholding the right of Alaska tribes to secure transfer jurisdiction under § 1911(b) and overruling previous decisions to the contrary).

[18] In *Kaltag*, the State of Alaska unsuccessfully argued that Alaska Tribes had no authority to hear "child protection proceedings arising outside of a reservation" and that ICWA's "plain language and its legislative history show that tribes without reservations do not have concurrent jurisdiction with the State over children's proceedings." Appellant's Opening Br. at 8, 15, *Kaltag Tribal Council v. Jackson*, 344 Fed. Appx. 324 (9th Cir. 2009) (No. 08-35343), 2008 WL 4298040.

Alaska tribes are not alone in lacking reservations. There are 573 federally-recognized tribes in the United States, yet there are only 326 Indian land areas in the United States administered as federal Indian reservations.[19] The District Court's new and extreme limitation on the *Mancari* political classification—and on ICWA—to Indians who live on or near reservations has never been adopted by any other court and would exclude over 40% of the nation's tribes from the provisions of ICWA. For these reasons, ICWA's application has never been dependent on reservation status. Such an extreme interpretation makes no practical sense, is directly contrary to ICWA's policy and purpose, and finds no support in centuries of established federal Indian law.

III. The District Court Erred In Concluding That ICWA's Section 1915(C) Executes an Unconstitutional Delegation of Legislative Authority to Tribes.

A. Section 1915(C) *Is Not* a Delegation of Powers to Tribes, But Instead Merely Affirms Inherent Sovereign Authority That Tribes Have Had From Time Immemorial.

Section 1915(c) provides in pertinent part that "if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order . . . ." This is, quite plainly, not a delegation

[19] U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, FREQUENTLY ASKED QUESTIONS, "What is a federally recognized tribe?", https://www.bia.gov/frequently-asked-questions (last visited Jan. 14, 2018); *Id.* at "What is a federal Indian reservation?" ("Not every federally recognized tribe has a reservation.").

to tribes at all, but rather a recognition of authority that tribes already possess. "From the earliest years of the republic, courts have recognized the political independence and self-governing status of Indian tribes." COHEN'S HANDBOOK, *supra*, at § 4.01[1][a], 209. Tribes are "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), "having institutions of their own, and governing themselves by their own laws." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-43 (1832); *see also id.* at 559 ("The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights."). Tribes' powers of self-governance "existed prior to the [U.S.] Constitution." *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

The U.S. Supreme Court has long recognized that Tribes retain "the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 382 (1886) (citing *Worcester*, 6 U.S. at 536, and *Cherokee Nation*, 5 U.S. at 1); *see also United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"). Accordingly, the Court has repeatedly recognized Tribes' legal authority over matters such as criminal justice, *see, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (Tribe's exercise of law enforcement authority is "part of its retained sovereignty"), *see also Kagama*, *supra*; marriage, *Carney v. Chapman*, 247 U.S. 102 (1918), *United States v. Quiver*, 241 U.S. 602 (1916), *Nofire v. United*

States, 164 U.S. 657 (1897), and child welfare, *Holyfield*, 490 U.S. at 42 ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA."), *Fisher v. Dist. Ct., Sixth Judicial Dist. of Mont.*, 424 U.S. 382 (1976) (per curiam). Tribes' exercise of these core self-governance functions "has never been taken away from them, either explicitly or implicitly, *and is attributable in no way to any delegation to them of federal authority.*" *Wheeler*, 435 U.S. at 328 (emphasis added).

In light of this established precedent, Section 1915(c) is not a delegation of power to tribes. Rather, through Section 1915(c) Congress expressed its policy preference that, where a tribe has exercised its inherent authority to establish adoptive, preadoptive, and foster care placements for its Indian children, and those tribal preferences differ from those provided in ICWA, those tribal preferences would not be displaced by ICWA.

B. Even If Section 1915(C) Does Delegate Authority to Tribes, the Supreme Court Has Affirmed the Constitutionality of Just Such a Delegation.

The District Court held Section 1915(c) to be unconstitutional both because tribes are not legitimate recipients of delegated authority, *Slip Op.* at 32-33, and because it improperly delegates Congress's legislative authority. *Id.* at 30-31. Even if Section 1915(c) were a delegation of authority to tribes (which it is not), the District Court still is wrong on both counts.

The District Court equated tribes with "private entit[ies]," then categorically held that, because tribes are not part of the Federal Government, "the Constitution does not permit Indian tribes to exercise *federal* legislative or executive regulatory power over non-tribal persons on non-tribal land." *Slip Op.* at 32 (emphasis in original) (citing *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1253 (2015) (Thomas, J., concurring)). The District Court reached this conclusion, however, only by ignoring directly applicable Supreme Court precedent—*United States v. Mazurie*. 419 U.S. 544 (1975).

In *Mazurie*, the Court was presented with the question of whether Congress could delegate to tribes the authority "to adopt ordinances controlling the introduction by non-Indians of alcoholic beverages onto non-Indian land." 419 U.S. at 550. The Circuit Court had concluded that such delegation, contained within 18 U.S.C. § 1161, was unconstitutional. *Id.* at 550, 556. Justice Rehnquist, writing for a unanimous Supreme Court, reversed:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus, it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations.

Id. at 556-57 (internal citations and quotations omitted). His opinion belies every element of the District Court's holding. It expressly rejected any comparison between tribes and "private entit[ies]." *Id.* at 557 (describing tribes as "a good deal more than 'private, voluntary organizations,'" but rather "entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life"). It expressly rejected the proposition that Congress could not delegate to tribes authority over non-Indians, particularly where the conduct at issue involves Indians. *Id.* at 557-58. And it rejected the proposition that such a delegation was invalid concerning non-Indian land. *Id.* at 556-57 (recognizing tribes' sovereign authority "*over* both *their members* and their territory (emphasis added)).

Moreover, *Mazurie* rejected the strict legislative-regulatory dichotomy that the District Court found to be dispositive. Even acknowledging its own "recognized limits on the authority of Congress to delegate its *legislative power*," the unanimous *Mazurie* Court nevertheless affirmed the constitutionality of such a delegation because "the entity exercising the delegated authority"—*i.e.*, the tribe—"itself possesses independent authority over the subject matter." *Id* at 556-57 (emphasis added, internal citations omitted).

It is remarkable, then, and fatal to the District Court's reasoning, that it failed to even acknowledge *Mazurie* in its analysis of the non-delegation doctrine. *Slip*

Op. at 29-33.[20] The District Court's holding on non-delegation is wholly incompatible with *Mazurie* and, therefore, should be reversed.

CONCLUSION

For the foregoing reasons, *amici* join Defendant-Appellees in respectfully urging that the decision below be reversed.

[20] *Mazurie* appears in the District Court's decision only in a string citation wherein the District Court seeks to demonstrate that Congress's Indian affairs authority is limited to "affairs occurring in Indian country." *Id.* at 24 n.8.

CERTIFICATE OF COMPLIANCE

[To be added]

CERTIFICATE OF SERVICE

[To be added]