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; and DANIELLE CLIFFORD,

Plaintiffs-Appellees,

v.

DAVID BERNHARDT, 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 THE 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; QUINALT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants-Appellants.

No 18-11479

MOTION OF THE STATES OF CALIFORNIA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, AND THE DISTRICT OF COLUMBIA TO FILE A BRIEF AS AMICI CURIAE ON REHEARING EN BANC IN SUPPORT OF THE UNITED STATES AND INTERVENOR TRIBES AND URGING REVERSAL

The State of California respectfully brings this motion to file the attached brief as amicus curiae in support of Appellants, on its own behalf and on behalf of the States of Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Washington, Wisconsin, and the District of Columbia (collectively with California, "Amici States"). Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the Amici States are not required to obtain the consent of parties or leave of Court to file an amicus brief. Regardless, Amici States have contacted all parties through their counsel and received consent to file an amicus brief. Therefore, Amici States respectfully request that the brief be filed with the Court.

Dated: December 13, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 27(d)(2)(A) and Fifth Circuit Rule 27.4, because it contains 130 words, according to the count of Microsoft Word. I further certify that this motion complies with typeface requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) and Fifth Circuit Rule 27.4 because it has been prepared in 14-point Times New Roman font.

Dated: December 13, 2019

/S/ CHRISTINA M. RIEHL
Christina M. Riehl

CERTIFICATE OF SERVICE

I certify that on December 13, 2019, the foregoing **Motion of the States of California, Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Washington, Wisconsin, and the District of Columbia, to File a Brief as Amici Curiae on Rehearing En Banc in Support of the United Sates and Intervenor Tribes and Urging Reversal** was served electronically via the Court's CM/ECF system upon all counsel of record.

Dated: December 13, 2019

/S/ CHRISTINA M. RIEHL
Christina M. Riehl

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.

DAVID BERNHARDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. 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 THE 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; QUINALT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, No. 4:17-CV-00868-O
Honorable Reed O'Connor

BRIEF OF THE AMICUS STATES OF CALIFORNIA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, AND THE DISTRICT OF COLUMBIA ON REHEARING EN BANC IN SUPPORT OF THE UNITED STATES AND INTERVENOR TRIBES AND URGING REVERSAL

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December 13, 2019

SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies the following list of persons and entities have an interest in this amicus curiae brief. These representations are made so the judges of this court may evaluate potential disqualification or recusal.

Amicus Curiae States on this brief:

Alaska
Arizona
California
Colorado
Connecticut
District of Columbia
Idaho
Illinois
Iowa
Maine
Massachusetts
Michigan
Minnesota
Mississippi
Montana
Nevada
New Jersey
New Mexico
New York
Oklahoma
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INTRODUCTION AND INTEREST OF AMICI STATES

The States of California, Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Washington, and Wisconsin, and the District of Columbia (Amici States) file this amicus curiae brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). Amici States urge the Court to preserve the Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (ICWA), a comprehensive statutory scheme designed to safeguard "the continued existence and integrity of Indian tribes" by protecting their greatest treasure—their children. 25 U.S.C. §§ 1901(3), 1902. ICWA is an appropriate exercise of congressional powers and an important means of supporting Indian tribes and families, as well as strengthening state-tribal relationships.

ICWA plays a critical role in protecting the best interests of Indian children, *see* 25 U.S.C. §§ 1903(4), (8), residing in Amici States, and supports the cultural integrity and survival of the tribes within their borders. The welfare of Indian children and the continued stability and security of Indian tribes are of vital importance to the Amici States, which are home to ninety-four percent of the

federally-recognized tribes in the United States[1] and sixty-nine percent of the overall American Indian and Alaska Native population.[2]

ICWA also furthers important state-tribal relations. Amici States value their relationships with Indian tribes and have a strong interest in continuing to partner with tribal entities to protect the health and welfare of Indian children. Amici States work cooperatively with their tribal partners on child welfare matters to seek the best outcomes for Indian children. This interest is most significantly manifested by the statutory schemes of the Amici States that are predicated upon, have incorporated, or supplement the federal ICWA. Amici States California,[3]

[1] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200, 1200–1205 (Feb. 1, 2019).

[2] U.S. Census Bureau, *American Factfinder* (2017), https://tinyurl.com/U-S-Bureau.

[3] 2018 Cal. Stat. ch. 833 (AB 3176); 2006 Cal. Stat. ch. 838 (SB 688); 1999 Cal. Stat. ch. 275 (AB 65); *see also* Cal. Code Regs. tit. 22, §§ 35353–35387; Cal. R. of Ct. 5.480–.487, 5.534(i), 5.785, 7.01015; Cal. Fam. Code § 175(a)(1); Cal. Dep't Soc. Serv's Man. Pol'y & Proc., Child. Welf. Serv's Man., Div. 31, Ch. 31-000 to 31-530 (June 16, 2016).

Alaska,[4] Arizona,[5] Colorado,[6] Illinois,[7] Iowa,[8] Maine,[9] Massachusetts,[10] Michigan,[11] Minnesota,[12] Montana,[13] New Mexico,[14] New York,[15] Oklahoma,[16] Oregon,[17] Pennsylvania,[18] Utah,[19] Washington,[20] and Wisconsin[21] have enacted

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[4] Alaska Stat. § 47.10.990; Alaska Admin. Code tit. 7, § 54.600; Alaska Child in Need of Aid R. 24.

[5] Ariz. Rev. Stat. § 8-815; Ariz. R. P. Juv. Ct. 8.

[6] Colo. Rev. Stat. § 19-1-126.

[7] 750 Ill. Comp. Stat. § 36/104; 89 Ill. Admin. Code §§ 307.25–.45.

[8] Iowa Code Ann. §§ 232B.1–.14.

[9] Me. Rev. Stat. Ann. tit. 30, §§ 6209-A(1)(D), 6209-B(1)(D), 6209-C(1)(D), 6209-D(1)(D); Me. Rev. Stat. Ann. tit. 22, §§ 4002(9-B), 4008(2)(I), 4062(1).

[10] 110 Mass. Code Regs. § 1.07; Mass. Trial Ct. R. VI(9)(a)(3); Mass. Juv. Ct. R. 14(b), 15(b).

[11] Mich. Comp. Laws Ann. §§ 712B.1-.41.

[12] Minn. Stat. §§ 257.0651, 260.755, subds. 2a & 17a, 260.761, subd. 2(d), 260B.163, subd. 2, 260C.168, 260D.01(g); Minn. R. 9560.0040, subp. 2, .0221, subp. 3, .0223, .0535, subps. 2, 4, .0542, .0545, subp. 1, .0606, subp. 1.

[13] Mont. Code Ann. §§ 41-3-109, -427, -432.

[14] N.M. Stat. Ann. §§ 32A-4-9(A), 32A-1-8(E), 32A-5-5.

[15] N.Y. Soc. Serv. Law § 39; N.Y. Comp. Codes R. & Regs. tit. 18, § 431.18.

[16] Okla. Stat. Ann. tit. 10, §§ 40-40.9.

[17] Or. Rev. Stat. Ann. §§ 109.309(13), 182.164, 419B.090(6); Or. Unif. Trial Ct. R. 3.170(9); Or. Admin. R. 413-115-0000 to -0150.

[18] 23 Pa. Stat. and Cons. Stat. Ann. § 5404.

[19] Utah Code §§ 62A-2-117, 62A-4a-205.5(2), 62A-4a-206(1)(c)(iv).

[20] Wash. Rev. Code Ann. § 13.38.

[21] Wis. Stat. Ann. § 48.028.

statutes, regulations, and rules governing state court proceedings incorporating ICWA's requirements. California,[22] Illinois,[23] Maine,[24] New Mexico,[25] and Washington[26] have also enacted detailed procedures relating to state agency collaboration with tribes in custody proceedings relating to Indian children. Based on Amici States' experience, ICWA provides a framework to further the best interests of Indian children, preserve the Indian family unit, and promote productive government-to-government relationships between states and tribes. The district court's opinion invalidating ICWA significantly harms the above interests of Amici States, is based on fundamental errors of law, and should be reversed.

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[22] *See* Cal. Dep't Soc. Serv's, Tribal Consultation Policy (June 6, 2017), http://tinyurl.com/Cal-Dept-Social-Services; *see generally*, Gov. Jerry Brown, Exec. Order B-10-11 (Sept. 19, 2011), https://water.ca.gov/LegacyFiles/waterplan/docs/cwpu2013/Final/vol4/tribal_history_consultation/06EXECUTIVE_ORDER_B-10-11.pdf.

[23] Ill. Dep't of Child. and Fam. Serv's Proc., §§ 307.10, -.15, -.20, -.25, -.30, -.35, -.40, -.45.

[24] Me. Dep't of Health and Hum. Serv's, Off. of Child and Fam. Serv's Policy, § III (A) (eff. Feb. 1, 2016).

[25] N.M. Stat. Ann. § 11-18-3; N.M. Admin. Code § 8.26.3.44.

[26] Wash. Dep't of Child., Youth, and Fam., *Indian Child Welfare Policies and Procedures*, https://www.dcyf.wa.gov/indian-child-welfare-policies-and-procedures; Wash. Rev. Code Ann. §§ 43.376.010–.060 & 74.13.031(14).

ARGUMENT

I. ICWA IS AN APPROPRIATE EXERCISE OF CONGRESS' PLENARY POWER TO LEGISLATE IN THE FIELD OF INDIAN AFFAIRS.

The district court's opinion misapprehends the trust relationship between the federal government and sovereign tribes and fails to accord the proper deference to Congress' broad authority to adopt statutes like ICWA in this context. Native American tribes and nations have a unique status in their relationships with both the federal government and the states. Native American tribes have been described by the Supreme Court as "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831); "quasi-sovereign nations," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978); "distinct, independent political communities," *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (citation and internal quotation marks omitted); and "unique aggregations possessing attributes of sovereignty over both their members and their territory," *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Congress' relationship with tribes imposes "moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The judiciary has consistently recognized Congress' constitutional authority to define the trust relationship through various federal statutes. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) (recognizing "the organization and management of the trust is a sovereign function subject to the plenary authority of Congress").

A key component of Congress' obligations to tribes is a duty to respect tribal sovereignty, and Congress does so by protecting tribal resources. *See United States v. Mitchell*, 463 U.S. 206, 224–25 (1983) (noting the "undisputed existence of a general trust relationship between the United States and the Indian people"); *see generally* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 (1994). ICWA reflects Congress' determination that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that 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." 25 U.S.C. § 1901(3).

The Constitution vests Congress with "plenary power to legislate in the field of Indian affairs." *United States v. Lara*, 541 U.S. 193, 200 (2004). This plenary power includes the ability to regulate the relationship between states and tribes. *See, e.g., Antoine v. Washington,* 420 U.S. 194, 205 (1974) (precluding application of state hunting laws to Indians hunting on former reservation land where agreement between tribe and the United States ceding land to latter prohibited limits on Indians' right to hunt there). This power derives from Congress' enumerated powers to enact treaties (U.S. Const. art. II, § 2, cl. 2) and the tri-partite Commerce Clause (U.S. Const. art. I, § 8, cl. 3), by which Congress is

vested with authority to regulate commerce among the states, with foreign entities, and with Indian tribes. *See Lara*, 541 U.S. at 200 (citing the Indian Commerce Clause and the Treaty Clause as the sources of Congress' "broad general powers to legislate in respect to Indian tribes"). The Supreme Court has recognized the federal government's power to intervene on behalf of tribes to protect their integrity, resources, and sovereignty. *See Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 204 (1999) and *Morton v. Mancari,* 417 U.S. 535, 555 (1974). ICWA is comfortably within these broad powers.

The power Congress exercised in enacting ICWA is analogous to the power it has exercised in other cross-jurisdictional family law legislation involving multiple sovereigns, such as the Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–14954. That law similarly imposes duties on state family law courts, *see, e.g.*, *id.* § 14932, which is necessary to implement the United States' treaty obligations to the other signatories of the Hague Convention. *See* Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption, Art. 4, May 29, 1993, 32 I.L.M. 1134 (requiring specific court findings finalizing intercountry adoptions). Likewise, ICWA honors obligations the United States has undertaken to the sovereign tribes through treaties and statutes. In many of the treaties the United States has with tribal nations, the United States assumes responsibility to protect tribal resources and redress "depredations" committed

against the tribe. *See, e.g.*, Treaty with the Cheyenne and Arapaho, 1865, Art. I, 14 Stat. 703. In such treaties, Congress often specifically undertakes obligations for the welfare of Indian children. *See, e.g.*, Treaty with the Navajo, 1868, Art. 6, 15 Stat. 667 (providing a schoolhouse and elementary teacher for every 30 Navajo children between the ages of 6 and 16).

II. ICWA IS CONSTITUTIONAL.

ICWA is an effort by Congress to fulfill its responsibility to help ensure the ability of tribes to self-govern—indeed, to continue to exist—and has been successfully implemented across the country and in Amici States over the last forty years. Far from impeding states' ability to protect the best interests of children whose welfare may be at risk from alleged abuse or neglect, ICWA has been recognized as the "gold standard" of child welfare practices. *See* Brief of Casey Family Programs, et al. as Amici Curiae in Support of Respondent Birth Father, *Adoptive Couple v. Baby Girl,* 570 U.S. 637, 2013 WL 1279468 at *2-3 (Mar. 28, 2013). Congress correctly identified the need to address child welfare practices that threatened the very existence of American Indian and Alaska Native tribes by separating Indian children—current and future tribal members—from their families, tribes, and cultures. Congress' response in enacting ICWA does not violate the anti-commandeering doctrine of the Tenth Amendment or Equal Protection principles.

A. ICWA Does Not Violate the Tenth Amendment's Anti-Commandeering Rule.

The district court erred in ruling ICWA violates the Tenth Amendment's anti-commandeering doctrine. The anti-commandeering doctrine prevents Congress from issuing commands to state legislatures or conscripting state executive officials to enforce federal policy. *Printz v. United States*, 521 U.S. 898, 925 (1997). It reflects the important principle that the Constitution "confers upon Congress the power to regulate individuals, not States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). The doctrine recognizes a "healthy balance of power between the States and the Federal Government reduces the risk of tyranny and abuse from either front." *Id*. at 1477 (quoting *New York v. United States*, 505 U.S. 144, 181–82 (1992)) (punctuation omitted).

While a vitally important legal doctrine, anti-commandeering does not apply here, where Congress merely requires state courts to enforce federal law and employ procedures that would not undercut the rights created through ICWA. "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York*, 505 U.S. at 178–79; *see also Printz*, 521 U.S. at 906–08 (noting statutes enacted by the earliest Congresses demonstrate the Founders understood the Constitution to permit "imposition of an obligation on state *judges* to enforce federal [laws]") (emphasis in original).

ICWA's provisions are consonant with the principles set forth in *Murphy*, *New York*, and *Printz*. In enacting ICWA, Congress established "minimum Federal standards" that "protect the best interests of Indian children and . . . promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. Congress' plenary authority to legislate in the field of Indian affairs empowers it to provide the rights set forth in ICWA to Indian tribes, Indian children, and their parents. As the Supreme Court explained in *Murphy*, when "Congress enacts a law that . . . confers rights on private actors," it preempts any state law that conflicts with the rights provided by that federal law. *Murphy*, 138 S.Ct. at 1480; c*f. McCarty v. McCarty*, 453 U.S. 210, 235–36 (1981) (*superseded by statute as stated in Mansell v. Mansell*, 490 U.S. 581, 584 (1989)) (holding federal military retirement benefits statute preempted state community property law); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584, 590 (1979) (holding federal pension benefits under Railroad Retirement Act pre-empts California community property law in state dissolution proceeding). ICWA affords Indian children and parents the right to have tribal membership appropriately considered when children's placements are changed, as well as the right to culturally appropriate reunification services. 25 U.S.C. §§ 1915, 1912(d). The statute assures Indian tribes' rights to receive notice of such proceedings and to participate in them. *Id.* §§ 1912(a), 1911. It also establishes a preference for placing Indian children in homes where these young

people can be exposed to their tribal culture and help ensure the tribes' continued existence. *Id.* §§ 1902, 1915. Congress acted permissibly when it required state courts to follow minimum standards to protect these federal rights.

In *Nat'l Council for Adoption v. Jewell*, No. 1:15-cv-675, 2015 WL 12765872, at *7 (E.D. Va. Dec. 9, 2015), *vacated as moot*, No. 16-1110, 2017 WL 9440666 (4th Cir. Jan. 30, 2017), the only other decision addressing ICWA and commandeering, the court concluded that even state rules of practice and procedure can be prescribed by federal law, when those prescriptions are adequately limited. Applying to ICWA the principle that Congress can require state courts to enforce federal laws, the *Jewell* court held that "[j]ust as Congress may pass laws enforceable in state courts, Congress may direct state judges to enforce those laws," including the "substantive federal rights" conferred by ICWA.[27] *Id*. (citing *New York*, 505 U.S. at 178; *Brown*, 338 U.S. at 296). Congress is empowered to make these rights real by requiring state courts—which (along with tribal courts) are the forums for child custody matters—to enforce

[27] *See also Quinn v. Walters*, 881 P.2d 795, 811–12 (Or. 1994) (Unis, J., dissenting) (stating that ICWA Guidelines' requirement pertaining to inquiry regarding "Indian child" status aligns with principle that federal standards may displace state procedural rules that restrict litigant's opportunities to assert federal claims) (citing *Dice v. Akron, C. & Y.R. Co.*, 342 U.S. 359, 363 (1952); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 296 (1949)).

them, and by prohibiting state courts from striking a balance different from that crafted by Congress regarding Indian children.

Further, since ICWA applies to both state and private actors, the anti-commandeering doctrine does not apply. *Murphy,* 138 S. Ct. at 1478 ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage"); *see also Reno v. Condon,* 528 U.S. 141, 151 (2000) (Congress not barred from regulating states along with other participants in commercial data marketplace); *Garcia v. San Antonio,* 469 U.S. 528, 556 (1985) (Congress not barred from applying minimum wage and overtime requirements to state as well as private actors).

The district court incorrectly characterized ICWA's placement provisions as applying only when a *state* initiates an adoptive, preadoptive, or foster care placement. *See* Slip Op. at 36 (citing 25 U.S.C. §§ 1915(a)–(c)). ICWA, however, applies equally to "child custody proceedings" where the dispute is purely between private parties. "Child custody proceedings" include four types of actions involving Indian children: (1) foster care placements; (2) terminations of parental rights; (3) preadoptive placements; and (4) adoptive placements. 25 U.S.C. § 1903(1). This includes stepparent adoptions, *Matter of Adoption of T.A.W.*, 383 P.3d 492, 501–02 (Wash. 2016); *In re N.B.*, 199 P.3d 16, 20 (Colo. App. 2007), and has not been limited to actions initiated by child welfare agencies. *See id.*

(recognizing "ICWA's plain language is not limited to action by a social services department").

The partial dissent of the initial panel decision was concerned that "[f]oster care placement is not undertaken by private individuals or private actors." *Brackeen v. Bernhardt,* No. 18-11479, slip op. at 49 (5th Cir. Aug. 9, 2019, modified Aug. 16, 2019) (Owen, J., dissenting), *reh'g en banc ordered* Nov. 7, 2019. However, ICWA broadly defines the term "foster care placement" to include "**any** action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." 25 U.S.C. § 1903(1)(i) (emphasis added). As numerous courts across the country have made clear, the broad category of foster care placements under ICWA is not limited to state-initiated proceedings. *See, e.g.*, *In re Custody of C.C.M.*, 202 P.3d 971, 977 (Wash. Ct. App. 2009) (finding grandparent's petition for non-parental custody qualifies as an action for foster care placement under ICWA); *Empson-Laviolette v. Crago*, 760 N.W.2d 793, 799 (Mich. Ct. App. 2008) (applying ICWA to voluntary guardianship proceedings); *J.W. v. R.J.*, 951 P.2d 1206, 1213 (Alaska 1998) (applying ICWA to custody proceedings between child's father and stepfather) (overruled on other grounds by *Evans v. McTaggart*, 88 P.3d 1078

(Alaska 2004)); *Matter of Guardianship of Ashley Elizabeth R.,* 863 P.2d 451 (N.M. Ct. App. 1993) (applying ICWA to dispute over custody between Navajo Nation and paternal great-aunt and her husband after mother's death); *In re Custody of A.K.H.,* 502 N.W.2d 790, 792–93 (Minn. Ct. App. 1993) (applying ICWA to custody dispute between parents and grandparents); *Matter of Guardianship of Q.G.M.*, 808 P.2d 684 (Okla. 1991) (applying ICWA to intra-family custody dispute).

Finally, ICWA requires "active efforts" to prevent the breakup of the Indian family in proceedings initiated by private as well as public actors, since "Congress made no exception for stepparent adoptions or other types of non-dependency adoption proceedings, although the petitioning party in these proceedings will not have the resources of a social services department." *In re N.B.*, 199 P.3d at 23–24. Courts have noted that in addition to efforts by public agencies, "informal private initiatives aimed at promoting contact by a parent with the child and encouraging that parent to embrace his or her responsibility to support and supervise the child" can also fulfill this requirement. *S.S. v. Stephanie H.*, 388 P.3d 569, 575–76 (Ariz. Ct. App. 2017) (applying ICWA to a private abandonment and step-parent adoption proceeding, stating "Congress did not intend that ICWA would apply only to termination proceedings commenced by state-licensed or public agencies"); *see also In re C.A.V.,* 787 N.W.2d 96, 103 (Iowa Ct. App. 2010); *In re N.B.*, 199

P.3d at 25. ICWA governs the actions of both state and private actors in Indian child custody proceedings.

In short, the provisions at issue simply (1) require state courts to ensure the enforcement of federal rights, or (2) impose requirements on both public and private parties to child custody proceedings. These provisions do not unconstitutionally commandeer state governments.

B. ICWA Does Not Violate Equal Protection Principles.

The district court also erred in stating that "ICWA relies on racial classifications." Slip Op. at 26. The Supreme Court has recognized that distinctions in federal laws derived from tribal membership are not based on suspect classifications but are based, instead, on political classifications and therefore are constitutional. *See, e.g., Mancari,* 417 U.S. at 552–55 (upholding a hiring preference for Indians and finding the "preference does not constitute 'racial discrimination'" because the preference does not apply "to Indians . . . as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities"). The Supreme Court explained the distinction in *United States v. Antelope,* 430 U.S. 641 (1977), in which it upheld a tribal court's criminal jurisdiction over Indian defendants' crimes against non-Indians, stating:

> [F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign

> political communities; it is not to be viewed as legislation of a "'racial' group consisting of 'Indians'. . . ."

Id. at 646 (quoting *Mancari*, 417 U.S. at 533 n.24)); *see also Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 499–502 (1979) (upholding provision treating Indians residing in "Indian Country" differently than non-Indians with respect to both civil and criminal tribal court jurisdiction); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479–80 (1976) (affirming exemption from state taxes for Indians residing on reservation); *Fisher v. Dist. Ct. of Sixteenth Jud. Dist.*, 424 U.S. 382, 390–91 (1976) (recognizing tribal court's exclusive jurisdiction over adoption proceedings regarding tribal members even before ICWA's enactment).

In *Mancari*, the Supreme Court upheld a Bureau of Indian Affairs (BIA) hiring preference for Indian applicants over non-Indian applicants, finding no violation of the Fifth Amendment. *Mancari*, 417 U.S. at 552–55. The *Mancari* Court determined the BIA's preference did not violate equal protection because the classification was not racial in nature and the special treatment of Indians was "reasonable and rationally designed to further Indian self-government." *Id*.

Like the hiring statute in *Mancari*, ICWA's definition of "Indian child" is tied directly to the child's tribal citizenship: To be covered by the statute, a minor must either be "a member of an Indian tribe or . . . eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe." 25 U.S.C. §

1903(4). This definition is a political, rather than racial, classification because it distinguishes American Indians and Alaska Natives based not on their race or ethnicity but, instead, on their membership or eligibility for membership (if their parent is a tribal member) in "political communities." *Antelope*, 430 U.S. at 646. In fact, ICWA's definition of "Indian child" is more specifically tied to tribal membership than the hiring language at issue in *Mancari* because it contains no specific blood quantum requirement. The hiring preference in *Mancari* required that "[t]o be eligible for preference . . . an individual must be one-fourth or more degree Indian blood **and** be a member of a Federally-recognized tribe." *Mancari*, 417 U.S. at 553 n.24 (emphasis added).

Similarly, this Court upheld a federal regulation exempting a church whose membership was limited to "Native American members of federally recognized tribes who have at least 25% Native American ancestry" from the generally applicable prohibition on peyote use. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991). The court held the regulation was permissible under equal protection principles because it represented a "political classification . . . rationally related to the legitimate governmental objective of preserving Native American culture." *Id.*[28] Given this Court's

[28] The district court briefly mentioned *Peyote Way* in its ruling but did not analyze its impact on the equal protection claim. Slip Op. at 24 n.8.

holding in *Peyote Way*, ICWA is a fortiori constitutional: ICWA contains no separate or additional blood quantum requirement and relies solely on tribes' decisions regarding membership and eligibility for membership when the child is the "biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4)(b).

There are several factors underscoring the political nature of tribal membership. First, individuals voluntarily decide whether to assert (or renounce) their tribal membership. *See Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005) ("[Petitioner] has chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe. His Indian status is therefore political, not merely racial."). Additionally, tribes have the sole discretion to accept or reject individuals as tribal members. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72 n.32 (1978) (explaining federal court lacked jurisdiction regarding tribe's membership determination because "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community") (citation omitted). Finally, the group of American Indians and Alaska Natives who are members of, or eligible for membership in, federally recognized tribes is a subset of the group of people who are American Indian or Alaska Natives by ancestry or descent. *Mancari*, 417 U.S. at 553 n.24 (recognizing, where "Indian" means "members of 'federally recognized' tribes[, t]his operates to exclude many individuals who are racially

classified as 'Indians.' In this sense, the preference is political rather than racial in nature.").

Once Congress' use of tribal membership to determine ICWA's applicability is viewed in the correct (non-racial) light, the reason for its decision to adopt ICWA is evident, and the statute easily survives rational basis review. Congress acknowledged a disproportionate number of Indian children were being removed from their homes—and the parental rights of Indian parents were being terminated—because of state social workers' ignorance of "Indian cultural values and social norms," misevaluations of parenting skills, unequal considerations of such matters as parental alcohol abuse, and other cultural biases. H.R. Rep. No. 95-1386 (1978) at 10. It was in light of this evidence that Congress, "concerned with the rights of Indian families and Indian communities vis-à-vis state authorities," adopted ICWA. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1988). Congress felt a national standard was needed because it "perceived the States and their courts as partly responsible for the problem it intended to correct." *Id.* (citing 25 U.S.C. § 1901(5)); *see also* 124 Cong. Rec. 38,103 (1978) (ICWA sponsor Rep. Morris Udall stating "state courts and agencies and their procedures share a large part of the responsibility" for the uncertain future threatening the "integrity of Indian tribes and Indian families"). As

explained below, ICWA has been a useful tool in combating cultural bias in custody proceedings and furthering the important goal of tribal sovereignty.

Even if, contrary to decades of Supreme Court precedent, ICWA's reliance on membership in an Indian tribe could be characterized as a racial classification, ICWA would survive strict scrutiny because it is narrowly tailored to further the compelling governmental interest in preserving Native families and tribal sovereignty. *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). The federal government has trust obligations with regard to Indian tribes, which emanate both from the Constitution, *see, e.g., Antelope*, 430 U.S. at 645–49 ("classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians"), and the treaties signed with Indian tribes to acquire their lands, *see, e.g.,* Treaty with the Navajo, 1868, Art. 6, 15 Stat. 667. These trust obligations gave rise to a compelling federal interest in protecting the integrity of Indian families and the sovereignty of tribal communities from ignorant and problematic child welfare practices that threatened the future of Indian tribes. ICWA's legislative history makes clear that Congress enacted ICWA to fulfill its historical trust obligations and in recognition that a nationwide remedy was necessary to redress biased state child welfare practices. *Holyfield*, 490 U.S. at 44–45.

ICWA is narrowly tailored to cover neither too many nor too few people to further this compelling interest. The district court interpreted the statute's preference for placement with "other Indian families" as treating "all Indian tribes as an undifferentiated mass." Slip Op. at 28. In fact, by including placement with "other Indian families" within the list of possible priority placements, Congress appropriately accommodated the interests of an Indian child who may be best served by such a placement.[29] In enacting ICWA, Congress was not merely protecting the ability of sovereign tribes to continue to exist and thrive but was doing so in response to the existential threat posed by unwarranted removal of Indian children from their parents and cultures. H.R. Rep. No. 95-1386 (1978) at

[29] Specifically allowing placement with "other Indian families" was another way to address Congress' concern that inappropriate standards were being applied by state and private foster care or adoptive placement agencies to foreclose placements with Indian families to the detriment of Indian children. *See* H.R. Rep. No. 95-1386 (1978) at 9–11 & 24 (discussing the importance of using standards prevailing in the Indian community when establishing placement preferences to help avoid the problem of Indian children who "have to cope with the problems of adjusting to a social and cultural environment much different than their own"). Further, while ICWA does not contain a specific definition of the term "Indian family," *see, e.g., B.O. v. Texas Dep't of Family & Protective Servs.*, No. 03-12-00676-CV, 2013 WL 1567452, at *2 n.1 (Tex. App. Apr. 12, 2013), it does define "Indian," and does so in political, not racial, terms. 25 U.S.C. § 1903(3) ("any person who is a member of an Indian tribe, or who is an Alaska Native"); *see also id.* § 1903(8) ("'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village.").

10 (explaining ICWA was necessary because "many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life"). Therefore, Congress not only needed to consider the needs of tribes but also had to consider a framework for establishing the best interests of Indian children, as the child's best interest is the touchstone of child welfare law. *See, e.g.,* 42 U.S.C. § 621(1) (stating the purpose of federal-state cost sharing child welfare program is to ensure "all children are raised in safe, loving families by . . . protecting and promoting the welfare of all children"). Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture." H.R. Rep. No. 95-1386 (1978) at 8. Congress rationally concluded that an Indian child placed with an Indian family, even from a different tribe, is more likely to retain their tribal identity than one placed with a non-Indian family, vindicating ICWA's goal. *See Quinn,* 881 P.2d at 810 (citing *Holyfield*, 490 U.S. at 50 n.24).

As this Court has held, ICWA's goal of "preserving Native American culture" is a "legitimate governmental objective." *Peyote Way*, 922 F.2d at 1216. A robust body of research shows that "identification with a particular cultural background

and a secure sense of cultural identity is associated with higher self-esteem [and] better educational attainment . . . and is protective against mental health problems, substance use, and other issues."[30] *See also In re Baby Boy D.*, 742 P.2d 1059, 1075 (Okla. 1985) (Kauger, J., concurring in part, dissenting in part) (recognizing the "significant social and psychological problems among Indian children placed in non-Indian homes").[31] Moreover, Indian children eligible for membership in a tribe may miss many of the benefits of tribal membership if they are placed in non-Indian homes.

Additionally, the district court incorrectly concluded that ICWA is "broader than necessary because it establishes standards that are unrelated to specific tribal interests and applies those standards to *potential* Indian children." Slip Op. at 28. ICWA's definition of "Indian child"—which includes an unmarried person under the age of eighteen who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," 42 U.S.C. § 1903(4)(b)—is

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[30] Nat'l Indian Child Welfare Ass'n, *Attachment and Bonding in Indian Child Welfare: Summary of Research* (2016), https://tinyurl.com/NICWA-Final-Brief.

[31] Further, to the extent the district court found ICWA's placement preference for placement with "other Indian families" over placement with non-Indian families unconstitutional, it should have excised only the unconstitutional portion of the placement preference. *See, e.g., United States v. Booker*, 543 U.S. 220, 258 (2005) (courts "must refrain from invalidating more of the statute than is necessary") (citation and internal quotation marks omitted).

consistent with tribal membership requirements and the practical limitations on children's ability to apply for membership. Membership in an Indian tribe is not necessarily automatic, often requiring putative members to take affirmative action to become members.[32] Thus, Congress specifically extended ICWA protections to children who are eligible for membership (but not yet members) to ensure that their inability to take those steps did not prejudice them. H.R. Rep. No. 95-1386 (1978) at 17 (recognizing that a minor child "does not have the capacity to initiate the formal, mechanistic procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom"). Applying ICWA to children who are *eligible* for membership and the biological child of a member recognizes that an Indian child's rights should be protected even if the child is limited in his or her ability (due to age) to register as a tribal member.[33] This provision does nothing to change the fundamentally political

[32] *See, e.g.*, Modoc Tribe, *Tribal Enrollment*, https://tinyurl.com/ya3vc7nb (requiring applicants to submit "documented proof of ancestry"); *see generally* Tanana Chiefs Conf., *Tribal Enrollment*, https://tinyurl.com/yatbj4m2 (describing enrollment process for Alaska tribes, including providing documentation of lineal descent from member of tribe).

[33] *See id.* (citing, *inter alia*, *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899)) (explaining that including children who are eligible for tribal membership as well as actual members is important because "Indian children . . . because of their minority, cannot make a reasoned decision about their tribal and Indian identity").

nature of an Indian child's tribal membership, which is the focus of ICWA and key to the constitutional analysis.

III. ICWA IS A CRITICAL TOOL THAT FOSTERS STATE-TRIBAL COLLABORATION TO IMPROVE THE HEALTH AND WELFARE OF INDIAN CHILDREN.

ICWA creates an important framework that has allowed robust state-tribal collaboration in improving the health and welfare of Indian children. Amici States have employed ICWA as a means of strengthening and deepening their important, government-to-government relationships with tribes in this critical area. ICWA authorizes states and tribes to "enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings." 25 U.S.C. § 1919(a). Some Amici States have utilized this provision to enact far-reaching compacts or collaborations to ensure ICWA's goals are realized in their child welfare proceedings. Alaska,[34] Minnesota,[35]

[34] *See Alaska Tribal Child Welfare Compact* (Dec. 15, 2017), http://dhss.alaska.gov/ocs/Documents/Publications/pdf/TribalCompact.pdf.

[35] Minn. Courts, *Tribal/State Agreement* (Feb. 22, 2007), https://tinyurl.com/MN-TribalStateAgreement.

Mississippi,[36] New Mexico,[37] Utah,[38] and Washington[39] all have such agreements in place with tribes, and California's court system has a unit devoted to enhancing cooperation in ICWA cases.[40] These agreements have led to important successes. In Utah, for example, the Ute Tribe has placed 75 percent of its children with relatives. By comparison, only 38 percent of other children in foster care in Utah are placed with relatives.[41] This is consistent with broader studies showing that in states where a high percentage of placements of Indian children are made in

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[36] Miss. Dep't of Health Serv's, *Memorandum of Understanding between Mississippi Department of Human Services, Division of Family and Children's Services and the Mississippi Band of Choctaw Indians* (Oct. 25, 2012), https://tinyurl.com/Miss-Band-MOU.

[37] N.M. Indian Affairs Dep't, *State-Tribal Collaboration Act Summary Report for State Agencies' Activities with New Mexico Indian Tribes, Nations and Pueblos* (FY 2018), https://tinyurl.com/State-Tribal-Collaboration.

[38] Utah Div. of Child and Family Serv's, *CFSP Final Report for Federal Fiscal Years 2010-2014 and CAPTA Update* (June 30, 2014), https://tinyurl.com/CFSP-Final-Report.

[39] Wash. Dep't of Child., Youth, and Fam., *Tribal/State Memorandums of Understanding*, https://www.dcyf.wa.gov/tribal-relations/icw/mou.

[40] Jud. Council of Cal., *S.T.E.P.S. to Justice—Child Welfare* (Mar. 2015), http://www.courts.ca.gov/documents/STEPS_Justice_childwelfare.pdf.

[41] Utah Div. of Child and Fam. Serv's, *Child and Family Services Plan for Federal Fiscal Years 2015-2019* 22, https://tinyurl.com/Child-and-Family-Services-Plan.

accordance with ICWA's placement preferences, there is a correspondingly high level of state-tribal cooperation in working with Indian families and children.[42]

Amici States' experience has shown that adherence to ICWA's standards—in particular, its requirement that active efforts be made to preserve the family—reduces unwarranted removals of children from their Indian homes, removals that have been found to have profound negative short- and long-term effects on children.[43] ICWA's mandate that parties make "active efforts" to "provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family," is working. 25 U.S.C. § 1912(d). While studies show disparities still exist in child removals, those disparities are significantly lower than the rates before ICWA.[44] For example, in Utah, in 1976, an Indian child was 1,500 times more likely to be in foster care than a non-Indian child; that disparity

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[42] Gordon E. Limb, et al., *An empirical examination of the Indian Child Welfare Act and its impact on cultural and familial preservation for American Indian children*, 28 Child Abuse & Neglect 1279, 1279–89 (2004).

[43] *See, e.g.*, Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. Penn. J. of L. and Soc. Change 207, 211–13 (2016) (citing studies showing foster home placement and multiple successive non-familial caregivers negatively impact children's ability to form healthy attachments, capacity for social and emotional functioning, adaptive coping, self-regulation, decision making, and maintenance of healthy relationships); *see also* part II.B., *supra* (explaining ICWA's role in facilitating an Indian child's ability to retain cultural ties).

[44] *See* Joshua Padilla & Alicia Summers, *Disproportionality Rates for Children of Color in Foster Care,* Nat'l Council of Juv. and Fam. Ct. Judges (May 2011).

dropped to 4 times by 2012.[45] In short, ICWA provides a valuable tool for Amici States to both further Indian children's best interests and protect tribal sovereignty through partnerships with Indian tribes.

CONCLUSION

This Court should reverse the district court's order granting plaintiffs' motions for summary judgment.

[45] Brooke Adams, *American Indian Children Too Often in Foster Care*, Salt Lake Trib. (Mar. 24, 2012), https://archive.sltrib.com/article.php?id=53755655&itype=cmsid.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 29(a)(5) and Fifth Circuit Rule 29.3, because it contains 6,436 words, according to the count of Microsoft Word. I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 29(a)(4) and Fifth Circuit Rule 29.2 because it has been prepared in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on December 13, 2019, the foregoing **Brief of the Amicus States of California, Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Washington, Wisconsin, and the District of Columbia** on Rehearing En Banc in Support of the United States and Intervenor Tribes and Urging Reversal was served electronically via the Court's CM/ECF system upon all counsel of record.

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