NO. 20-0081

IN THE SUPREME COURT OF TEXAS

In the Interest of Y.J., a child

On Petition for Review
From the Second Court of Appeals, Fort Worth

BRIEF OF GOLDWATER INSTITUTE AS *AMICUS CURIAE*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Goldwater Institute (GI) was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government and the enforcement of state constitutional protections, through litigation, research, and public debate. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates on behalf of clients and participates as *amicus curiae* in cases involving these principles. GI's Equal Protection for Indian Children project is devoted to protecting Native American children against the unjust and unconstitutional provisions of the Indian Child Welfare Act (ICWA) and its state-law versions.

Through that project, GI has litigated or participated as *amicus* in ICWA cases nationwide, including in Arizona (*S.S. v. Stephanie H.,* 388 P.3d 569 (Ariz. App. 2017), *Gila River Indian Cmty. v. Dep't of Child Safety*, 395 P.3d 286 (Ariz. 2017)), California (*Renteria v. Shingle Springs Band of Miwok Indians,* No. 2:16-cv-1685, U.S. Dist. Ct. E.D. Cal. (2016)); Ohio (*In re C.J. Jr.,* 108 N.E.3d 677 (Ohio App. 2018)), Washington (*In re T.A.W.,* 383 P.3d 492 (Wash. 2016)), as well as the U.S. Supreme Court (*Renteria v. Superior Court,* 138 S. Ct. 986 (2018); *S.S. v. Colorado River Indian Tribes,* 138 S. Ct. 380 (2017)). GI scholars have also published ground-breaking research on the well-intentioned but profoundly flawed workings of ICWA. *See, e.g.*, Mark Flatten, *Death on a Reservation*

(Goldwater Institute, 2015)[1]; Timothy Sandefur, *Escaping The ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1 (2017). GI believes its expertise and public policy experience will assist this Court in its consideration of this case.

[1] https://goo.gl/uiZyJ9.

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Goldwater Institute respectfully submits this *amicus curiae* brief in support of Cross-Petitioners Texas Attorney General and C.B. and J.B., pursuant to Texas Rule of Appellate Procedure 11.

SUMMARY OF ARGUMENT

ICWA was well-intended. But today, its race-based (or national-origin based) mandates and prohibitions restrict states' ability to protect Native children against abuse, or families' ability to provide them the loving, permanent, adoptive homes they often need. This harms children, and violates both the state and federal constitutions.

This brief does four things. First, it explains how ICWA deprives children of one race of the legal protections accorded children of other races. Second, it explains why the rational basis test of *Morton v. Mancari,* 417 U.S. 535 (1974), is inapplicable, and why finding ICWA unconstitutionally race-based would have no effect on other federal Indian laws. Third, this brief explains why ICWA cannot be justified under the treaty power or the Commerce Clause. Finally, it concludes with a discussion of why ICWA's blanket presumption violates the due course of law clause.

I. Y.J. is a citizen of the United States and Texas, not a foreign national.

Discussions of ICWA often overlook an essential point: "Indian children" are citizens of the United States and the state where they reside. They are not "*foreign* nationals," as the Navajo Petition (at 12) suggests.[2] They reside off-reservation (ICWA's restrictions and mandates do not apply on reservations) and may never become tribal members. Their biological ancestry makes them eligible for tribal membership, but like all other Americans, they are entitled to the equal protection of the law, and state attorneys general owe them a duty to prioritize their best interests—that is, their *individual* best interests, in their *particular* circumstances—over other considerations. Tex. Fam. Code § 153.002.

This is worth emphasizing because the Navajo Petitioners claim ICWA is an exercise of Congress's treaty obligations, but do not specify which treaty obligation they mean. Moreover, the treaties attached to their Petition predate the Indian Citizenship Act, 8 U.S.C. § 1401(b), which made all Native Americans American citizens. Given the fact that Y.J. is a citizen, not a foreign national, Texas has a constitutional and moral duty to treat her the same as other Texan children. It cannot deprive her of legal protections based on "an immutable

[2] Navajo petitioners refer to children as "their"—i.e., the tribes'—children, Navajo Pet. at 15, but Y.J. is an American and Texan citizen, and an individual with rights—an end in herself, not a means to the ends of others. Tex. Const. art. I § 3; Navajo Nation Code tit. 1 § 3.

characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

Another point worth emphasizing is the distinction between tribal membership—which is a question exclusively of tribal law—and "Indian child" status under ICWA, which is a question of state and federal law. *See In re Abbigail A.*, 1 Cal. 5th 83, 95 (2016) (noting this distinction). While tribes are free to set their criteria as they please, state and federal governments must obey constitutional limits, including prohibitions on race- or national origin-based classifications. This case does not concern tribal authority to determine membership—which would be unaffected by a ruling for the Bs. It concerns the constitutionality of laws that differentiate between children based on biological ancestry.

II. ICWA denies "Indian children" the protections provided children of other races.

ICWA includes several provisions that harm Native children:

1. State law empowers state officials to protect abused or neglected children by terminating the rights of unfit parents based on "clear and convincing" evidence of facts warranting termination. *In re G.M.G.*, 444 S.W.3d 46, 51 (Tex. App—Houston 2014). In contrast, ICWA requires "beyond a reasonable doubt," and also expert witness testimony—an evidentiary burden even more severe than that used in criminal cases. 25 U.S.C. § 1912(f). This means "Indian" children must be

more abused for *longer* than children of other races before the state can rescue them. *See* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1, 42–50 (2017).

2. State officials must return abused and neglected "Indian children" to circumstances they know to be dangerous. *See* Sandefur, *supra* at 38–42. While the state must make "reasonable efforts" to aid families in abusive or neglectful situations, Tex. Fam. Code § 161.001, ICWA requires "active efforts" instead, which has never been adequately defined, but requires something more than "reasonable" efforts. *In re J.S.*, 177 P.3d 590, 592 ¶ 10 (Okla. 2008). And while "reasonable" efforts are excused in cases of "aggravated circumstances," *In re A.L.H.,* 468 S.W.3d 738, 744–45 (Tex. App.—Austin 2015)—since it would be wrong to send children back to abusive households—ICWA's "active" efforts requirement is *not* excused by "aggravated circumstances." *In re K.S.,* 448 S.W.3d 521, 532 (Tex. App.—Tyler 2014).

3. Under Texas law, state officials may place at-risk children in foster or adoptive care without regard to race. But ICWA requires that "Indian children" (of any tribe) be placed with "Indian" adults (of any tribe). This makes it harder to find children safe, loving homes, *see In re Santos Y.*, 112 Cal. Rptr. 2d 692, 727 (Cal. App. 2001), and more likely they will be moved from one foster home to

another. *See* Elizabeth Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, Phoenix New Times, Sep. 7, 2016.[3]

4. Texas law makes a child's best interest the "paramount" and "overriding" consideration in child welfare matters. *In re N.K.*, 99 S.W.3d 295, 301 n.9 (Tex. App.—Texarkana 2003), *Dep't of Family & Protective Servs. v. Alternatives in Motion*, 210 S.W.3d 794, 803–04 (Tex. App.—Houston 2006). This means courts must focus on *the* child's *specific* needs in *her particular circumstances. See, e.g., Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (listing factors to be considered). But ICWA overrides this, and imposes a nationwide "presumption"[4] that all Indian children are better off with other Indians.

Texas courts have even interpreted this as meaning there are two different best interest standards: an "Anglo" version that applies to children of other races, and an "Indian" version under which a child's individual needs do *not* take precedence over the desires of tribal governments. *In re W.D.H.*, 43 S.W.3d 30, 37 (Tex. App.—Houston 2001). Having different standards for different ethnicities is,

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

[4] This is not actually a presumption, but a *stereotype*. *Presumptions* are evidentiary inferences based on probable reasoning. A *stereotype* is a formulaic relegation of an individual to a category, or an automatic generalization about her, based on superficial criteria, such as her ancestry, which is held to override her unique characteristics. *Cf. Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 68 (2001) (defining stereotype as "a frame of mind resulting from irrational or uncritical analysis.").

of course, "separate but equal"—or, more precisely, separate-but-substandard. By overriding the best interests standard, ICWA harms at-risk children.

Courts have made clear that imposing categorical presumptions in child welfare cases is fundamentally incompatible with the best interests test and the due course of law. *Stanley v. Illinois*, 405 U.S. 645 (1972), invalidated a statute that categorically presumed unmarried fathers were unfit. That violated due process because it was not an individualized assessment of the facts of the particular case. "Procedure by presumption is always cheaper and easier," said the Court, but when a presumption "forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child." *Id.* at 656-57.

Similarly, in *In re J.W.T.*, 872 S.W.2d 189 (Tex. 1994), this Court found it unconstitutional to bar unmarried fathers from overcoming the "marital presumption" which denied them paternal rights over their children. Such a presumption violated fathers' due course of law right to individualized determinations of their claims. *Id.* at 197. And *In re K.D.,* 471 S.W.3d 147, 168-70 (Tex. App. 2015—Texarkana), held that even where a birth mother agrees to termination of her rights, the court must independently determine that that is in the

child's best interests—because children are entitled to individualized determinations of their specific needs.

5. ICWA also unconstitutionally overrides the rights of parents. *Troxel v. Granville,* 530 U.S. 57, 65 (2000), made clear that parents have a fundamental right "to direct the upbringing of their children," and government may not let third parties override that right. Yet ICWA gives tribal governments "an interest in the child … on a parity with the interest of the parents," *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (citation omitted)—not just an interest, but authority to veto the decisions of birth parents to have their children adopted by adults of their choice.

That is unconstitutional. There is no dispute that Y.J.'s mother wants the Bs to adopt Y.J. That decision is plainly in Y.J.'s best interest, and if Y.J. were of any other race, it would doubtless be implemented. But contrary to *Troxel,* her wishes are being voided by a third party thanks to ICWA.

III. ICWA is based on race and/or national origin, not political affiliation.

A. Because ICWA's definition of "Indian child" is based on biological ancestry, the *Mancari* rule does not apply.

ICWA defines "Indian child" as a child who is eligible for tribal membership and whose biological parent is a tribal member. 25 U.S.C. § 1903(4). Eligibility criteria vary from tribe to tribe, but all are based on biological ancestry, and *no* political, social, cultural, or religious factors are included. The Navajo tribe,

for instance, requires that a child have 25 percent Navajo blood. But no tribe requires that a child practice tribal culture, speak a Native language, profess a Native religion, etc., to qualify.

The *sole* criterion is biological ancestry.

Even a child adopted by a tribal member but who does not fit the biological profile will not qualify as an "Indian child," even if she lives on tribal land, is fully acculturated with the tribe, speaks the tribe's language, etc. *In re Francisco D.*, 178 Cal. Rptr. 3d 388, 395-96 (Cal. App. 2014). Sam Houston—who was adopted at 16 by a Cherokee chief, practiced Cherokee culture, spoke the language, and served as a Cherokee ambassador—would not qualify if he were alive today, solely because of his biological ancestry. Marquis James, *The Raven: A Biography of Sam Houston* 20, 127 (Austin: University of Texas Press, 2004) (1929). By contrast, a child like "Lexi," who had no cultural, social, religious, or political affiliation with a tribe, *does* qualify, solely because a remote ancestor was Choctaw. *In re Alexandria P.,* 204 Cal. Rptr. 3d 617 (Cal. App. 2016).

Tribes say ICWA is not race-based because not all Native children qualify as "Indian children." For example, the Navajo require, in addition to the blood quantum, that a child not be a member of another tribe in order to qualify for tribal membership. But this is insufficient to make eligibility for membership non-racial. *Rice v. Cayetano,* 528 U.S. 495, 516–17 (2000), Court explained that "[s]imply

because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral."

For example, if a law only applied to right-handed Asians, it would still be race-based even though it did not apply to left-handed Asians. The fact that some ethnically Native children are excluded from the "Indian children" classification does not mean "Indian child" is not a racial classification.

Navajo Petitioners, relying on *Mancari*, argue that laws that "provid[e] special treatment based on membership in a federally recognized Indian tribe do not impose suspect racial classifications." Navajo Pet. at 13. But they ignore *Mancari*'s limits. For example, they never cite *Rice*, which made clear that "'racial discrimination' is that which singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics,'" and that such discrimination is *not* subject to rational basis. 528 U.S. at 515 (citation omitted).

Mancari itself said it was limited. That case reserved the question presented here, by emphasizing that rational basis was "not" necessarily applicable to laws "directed towards a 'racial' group consisting of 'Indians.'" 417 U.S. at 554 n.24. Three years later, *United States v. Antelope*, 430 U.S. 641, 649 n.11 (1977), again reserved the question: "we are not concerned with instances in which Indians … are subjected to differing … burdens of proof from those applicable to [cases involving] non-Indians."

But ICWA *does* single out an identifiable class of persons solely based on ancestry, because political, cultural, or social factors are irrelevant to "Indian child" status; biological ancestry is the only consideration. ICWA applies to children who may never become tribal members, and does not apply to children who are fully acculturated with a tribe, but lack the requisite biology.

Also, ICWA *is* directed toward a racial group consisting of Indians, because it is not based on tribal relationships (which are political), but on generic "Indianness"— and is aimed at separating "Indian children" from non-"Indian" foster homes or adoptive families. For example, Section 1915's placement preferences mandate placement of "Indian children" with "Indian" adults and "Indian" institutions, *regardless of tribe*. In other words, a Cherokee child must be placed with a Navajo family instead of a white or black family—despite the fact that these tribes have radically different histories and cultures—for the purpose of keeping "Indians" in the "Indian" community. Generic "Indian" is not a political classification, however, but a racial one. *See* Robert Utley, *The Indian Frontier, 1846-1890* at 4-6 (Allen Billington et al., eds., University of New Mexico Press, rev. ed. 2003) (1984). In other words, ICWA "use[s] ancestry as a racial definition and for a racial purpose." *Rice*, 528 U.S. at 515.

Finally, ICWA *does* subject cases involving Indians to different burdens of proof than those that apply to non-Indians. For instance, as noted above, Texas

law uses the "clear and convincing" standard for termination of parental rights, *In re G.M.G.*, 444 S.W.3d at 51, whereas ICWA requires "beyond a reasonable doubt" instead—a standard the U.S. Supreme Court rightly criticized for "erect[ing] an unreasonable barrier to state efforts to free permanently neglected children for adoption." *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

In short, ICWA is premised on generic "Indianness," which is a racial, not a political classification, and it seeks to place "Indian" children with "Indian families," 25 U.S.C. § 1915(a)(3), regardless of tribal affiliation. *Mancari* was concerned with adults who chose to be members of a political community. ICWA concerns children whose distant ancestors were Indians. *Mancari* simply does not apply.

B. Using biological ancestry as a "proxy" for political affiliation is national-origin-based discrimination.

The Fifth Circuit panel opinion in *Brackeen* held that ICWA does not create a racial classification, but only uses ancestry as "a proxy … for not-yet-formalized tribal affiliation." *Brackeen v. Bernhardt*, 937 F.3d 406, 428 (5th Cir. 2019) (rehearing pending). This rationale is unpersuasive, however, because using biological ancestry as a proxy for future political affiliation is the definition of a *national-origin*-based classification, which is subject to the same strict scrutiny as race-based classifications.

In *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), the Supreme Court explained that "national origin" classification means not only classifications predicated on a person's foreign citizenship, *id.* at 89, but also classifications based on "the country from which his or her ancestors came." *Id.* at 88. Likewise, in *Oyama v. California*, 332 U.S. 633, 645 (1948), the Court found that California's Alien Land Act erected a form of national-origin discrimination because it was triggered by the nation from which a child's ancestors came: "as between the citizen children of a Chinese or English father and the citizen children of a Japanese father, there is discrimination," the Court said—which constituted national origin discrimination even if it was not racial discrimination.

The same applies here. "Not-yet-formalized tribal affiliation" is based on biological descent and therefore just *is* a national origin classification, under another name. ICWA's definition of "Indian child" is triggered solely by whether a child's ancestry includes members of a nation—a tribe—just as the law in *Oyama* was triggered by whether the children's ancestors were members of the Chinese or Japanese nations.

Truly political associations are fundamentally *optional*. That is why they are subject to rational basis scrutiny.[5] But "race and national origin" are subject to

[5] *See United States v. Crook*, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) (No. 14,891) ("the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it.")

strict scrutiny because they are based on "immutable characteristic[s] determined solely by the accident of birth." *Frontiero*, 411 U.S. at 686. Genetic eligibility for a "not-yet-formalized" political association is therefore not a political classification.

C. Race- or national origin-based discrimination in adoption violates the Texas Constitution.

In *In re Gomez*, 424 S.W.2d 656 (Tex. App.—El Paso 1967) (per curiam), this Court held that forbidding interracial adoption violated the state Constitution. That case involved a black husband who sought to adopt the two daughters ("both members of the white race," *id.* at 657) of his white wife. That was prohibited by statute at that time. *Id.* The Court found the statute "unconstitutional as violative of Section 3 of Article I of the Texas Constitution," because "'[d]istinctions between citizens solely because of their ancestry'" are "'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id*. at 659 (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)).

That was almost 20 years before the U.S. Supreme Court reached the same conclusion in *Palmore v. Sidoti*, 466 U.S. 429 (1984). There, a state court denied custody to a white mother who was living with a black man, on the grounds that the children would face discrimination by others for living with a mixed-race couple. The Court reversed, holding that while "[p]rivate biases may be outside

the reach of the law," the Constitution did not allow government "directly or indirectly, [to] give them effect." *Id.* at 433.

Palmore and *Gomez* must control here. One theory behind ICWA's rules against adoption of Native children by non-Native parents is that children whose biological ancestry makes them eligible for tribal membership suffer from racial discrimination and isolation as a result of such adoption. Even if evidence supported such claims (it does not; *see* Sandefur, *supra* at 18-22), it would not justify the state in discriminating against adoption by non-Indian parents of children deemed "Indian."

IV. ICWA is not a valid exercise of the treaty power or the Indian Commerce power.

A. Even under its treaty powers, Congress may not deprive Americans of their due process rights.

Navajo Petitioners claim ICWA serves Congress's "interest in fulfilling its treaty obligations." Navajo Pet. at 15. They do not specify which treaty obligation they mean, and the treaties attached to their petition predate the Indian Citizenship Act, and therefore contemplate tribal members as non-citizens.

Citizenship is relevant because *Reid v. Covert*, 354 U.S. 1 (1957), made clear that Congress cannot, *even* under the treaty power, subject American citizens to legal proceedings that deprive them of constitutional due process rights. In that case, wives of American service-members stationed overseas were tried for crimes

in military courts, pursuant to international agreement. *Id*. at 14-16. The Court held this unconstitutional, because the wives were American citizens entitled to the full protection of United States civil courts. *Id.* at 22. To deprive them of those protections would be "manifestly contrary" to "our entire constitutional history and tradition." *Id.* at 17.

ICWA violates that rule. It subjects American citizen "Indian children" and the adults who love them to a separate set of less-protective rules based on the children's ancestry. It also forces state judges to send their cases to tribal courts, which are not bound by constitutional guarantees. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014). True, they are supposed to follow the Indian Civil Rights Act, but individuals have no meaningful way to enforce that requirement, given the extreme limitation on appeal rights established in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

In short, forcing Texan children and adults out of state courts that have jurisdiction into tribal courts where their rights are sharply curtailed[6] is unconstitutional *even if* ICWA were based on Congress's treaty powers.

But nothing in the treaties the Navajo Petitioners cite relates to ICWA. They include provisions relating to peace, trade, and property rights, and require children

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[6] And whose personal jurisdiction is unconstitutional based on biological ancestry. *See In re C.J., Jr.*, 108 N.E.3d 677, 695–97 (Ohio App. 2018).

to attend school, but make no reference to any federally-mandated family law governing children who do *not* reside on tribal lands, are *not* necessarily tribal members, and *are* citizens of the United States and Texas. In short, the treaty argument does not withstand analysis.

B. Child welfare is not commerce.

Navajo Petitioners claim ICWA is an exercise of the Indian Commerce Clause power, but child welfare, foster care, and adoption are not commercial matters. On the contrary, they are "virtually [the] exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Trahan v. Trahan*, 894 S.W.2d 113, 117 (Tex. App.—Austin 1995) (same). Congress's commerce clause authority allows it to supersede state law, of course, but *United States v. Morrison*, 529 U.S. 598, 610 (2000), made clear that qualitatively non-economic matters—including domestic relations—are beyond that authority. To hold otherwise would give Congress what the Constitution withholds: a general police power. *See* Robert Natelson, *The Original Understanding of the Indian Commerce Clause,* 85 Denv. U. L. Rev. 201, 265 (2007) (clause "did not grant to Congress a police power over the Indians.").

Congress has the same power to "regulate commerce" with tribes as it has to "regulate commerce" with foreign nations[7]—yet nobody would contend that Congress could pass a law giving, for example, the Queen of England power to decide cases involving the custody of Texan children whose great-great-grandparents emigrated from England. Among other things, that would violate the principles enunciated in *Reid, supra.*

Even if Congress did have power to adopt child welfare laws under the Commerce Clause, that power must be exercised consistently with constitutional limitations such as equal protection. *Cf. United States v. Windsor*, 570 U.S. 744 (2013).

Windsor found that the Defense of Marriage Act (DOMA) violated equal protection because it forced states to discriminate against certain family relationships, even though states preferred to treat them as equal. DOMA was adopted pursuant to Congress's authority to define legal terms—a power Congress certainly has, just as it has power to regulate commerce. Yet DOMA was

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[7] Some claim the word "regulate" has different meanings with regard to tribal and foreign governments, *see, e.g,* Matthew L.M. Fletcher, *ICWA and the Commerce Clause, in* Matthew L.M. Fletcher et al. eds., *Facing the Future: The Indian Child Welfare Act at 30* at 33 (2009), but this argument ignores "the basic canon" that "identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co*., 505 U.S. 469, 479 (1992). The phrase "regulate commerce" appears only once in the Commerce Clause, and "must carry the same meaning throughout the sentence, and remain a unit." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824).

unconstitutional because it "depart[ed] from [the] history and tradition of reliance on state law to define marriage" in a way that "impose[d] restrictions and disabilities" upon couples—forcing states to discriminate against them when states would have chosen not to. *Id.* at 768.

ICWA does the same. Texas law prohibits officials from denying adoption based on the race of the parties, *Gomez, supra*, but ICWA, overriding Texas law on this quintessential state-law matter, forces Texas judges and executive officers to do just that. This Congress may not do.

V. Invalidating ICWA will have no effect on other federal Indian laws.

It is sometimes said that finding ICWA unconstitutionally race-based would undermine other federal Indian laws. The *Brackeen* panel opinion, for instance, claimed all Indian laws "would be effectively erased" if ICWA were held to establish a race-based classification. 937 F.3d at 426 (quoting *Mancari*, 417 U.S. at 552). This is false.

No other federal Indian statute is triggered by a person's biological eligibility for tribal membership. All other Indian laws apply based on *actual* membership or govern tribal lands. The Indian Regulatory Act applies to tribal members and tribal land. 25 U.S.C. §§ 5129, 2703(4), (5). The Indian Self-Determination and Education Assistance Act applies to members. 25 U.S.C. § 5304. The only law that comes close to ICWA's biological trigger is the Major

Crimes Act, 18 U.S.C. § 1153, which does not actually include such a provision, but has been interpreted as *possibly* applicable to people who are only potential members. *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015). That interpretation has been criticized for "transform[ing]" the Act into one that "turns on whether a defendant is of a particular race." *Id.* at 1116 (Kozinski, J., concurring). And even under *that* rule, eligibility is not dispositive, as it is in ICWA, but a factor to be considered. *United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005).

Only ICWA applies not to tribal members, but to those who could *become* members. Holding that "Indian child" is an unconstitutional racial classification would therefore have no effect on other Indian laws.

CONCLUSION

The Court should take this case and rule for the Bs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

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