

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,

and

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

Intervenor Defendants-Appellants.

*On Appeal from the United States District Court for the Northern District of Texas
District Court No. 4:17-cv-00868*

**BRIEF OF CASEY FAMILY PROGRAMS AND 30 OTHER
ORGANIZATIONS WORKING WITH CHILDREN, FAMILIES, AND
COURTS TO SUPPORT CHILDREN'S WELFARE
AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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Brackeen, et al. v. Zinke, et al., No. 18-11479.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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None of the *amici curiae* on this brief has a parent corporation. No publicly held company owns more than 10% of stock in any of the *amici curiae*.

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Hillman v. Maretta, 569 U.S. 483 (2013).....26

In re Adoption of T.A.W., 383 P.3d 492 (Wash. 2016).....24

In re China Oil & Gas Pipeline Bureau, 94 S.W.3d 50 (Tex. App. 2002)24

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 Federal Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976)24

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 83 Fed. Reg. 11,450 (Mar. 15, 2018).....21

OTHER AUTHORITIES

Amy M. Salazar et al., *Trauma Exposure and PTSD Among Older
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Annie E. Casey Foundation,
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CWLA Standards of Excellence for Services to Strengthen and Preserve Families with Children (2003) 7

Evan B. Donaldson Adoption Institute, *Safeguarding the Rights and Well-Being of Birthparents in the Adoption Process* (2007) 8

Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670 25

H.R. Rep. No. 95-1386 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530 28

Jessica Pac et al., *Poverty Among Foster Children: Estimates Using the Supplemental Poverty Measure*, 91 SOC. SERV. REV. 8 (2017) 19

Kristine Nelson et al., *A Ten-Year Review of Family Preservation Research* (2009) 7

Marc A. Winokur et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 FAMILIES IN SOCIETY 338 (2008) 10

National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (2000)9

Office of Juvenile Justice and Delinquency Prevention, *Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence* (Nov. 2014) 16

Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations*, 6 PSYCHOL. SCI. PUB. INT. 1 (2005).....17

Teresa D. LaFramboise et al., *Family, Community, and School Influences on Resilience Among American Indian Adolescents in the Upper Midwest*, 34 J. COMMUNITY PSYCHOL. 193 (2006) 15

Tiffany Conway & Rutledge Q. Hutson, *Is Kinship Care Good for Kids?* (2007)10

Tribal Law and Policy Institute, *Tribal-State Court Forums: An Annotated Directory* (Jan. 2016).....23

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Children’s Bureau, Child Welfare Policy Manual..... 14

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici curiae are Casey Family Programs, Adopt America Network, Alaska Center for Resource Families, American Adoption Congress, Ampersand Families, Annie E. Casey Foundation, Black Administrators in Child Welfare, Center for Native American Youth at the Aspen Institute, Center for Study of Social Policy, Children and Family Futures, Children’s Defense Fund, Children’s Law Center of California, Children’s Law Section of the Michigan Bar Association, Child Welfare League of America, Family Defense Center, FosterAdopt Connect, Foster Care Alumni of America, FosterClub, Generations United, National Advocates for Pregnant Women, National Alliance of Children’s Trust and Prevention Funds, National Association of Counsel for Children, National Center on Adoption and Permanency, Nebraska Appleseed, North American Council on Adoptable Children, Northwest Adoption Exchange, Oregon Post Adoption Resource Center, Spaulding for Children, Tribal Law and Policy Institute, Voice for Adoption, and W. Haywood Burns Institute.

Collectively, *amici* are organizations with decades of experience in research, education, advocacy, and providing services related to child welfare, adoption, and court-system reform, all designed to support children, parents, and families. *Amici*

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief’s preparation or submission. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4).

have firsthand experience advocating for families and developing and implementing best practices and policies for child welfare decision-making. *Amici's* informed perspective, based on vast experience with child welfare, is that the Indian Child Welfare Act (“ICWA”) both embodies and has served as a model for the child welfare policies that are best practices generally. ICWA’s principles are critical to *amici's* work safeguarding the welfare of children and families. Accordingly, many of the *amici* have filed amicus briefs in other cases involving interpreting and applying ICWA. *See, e.g., Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013); *A.D. v. Washburn*, No. CV-15-01259, 2017 U.S. Dist. LEXIS 38060 (D. Ariz. Mar. 16, 2017). The appendix includes statements of interest for each *amicus curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In responding to the widespread and often unwarranted removal of children from American Indian/Alaska Native families recounted by other *amici*, Congress enacted minimum federal standards for qualifying child welfare proceedings that, for 40 years, have exemplified evidence-based best practices in child welfare. *Amici* agree with Appellants’ legal arguments, including that ICWA rests on a political classification rather than a racial one, and falls comfortably within Congress’s power. The important interests served by ICWA within American Indian/Alaska Native communities, discussed by other *amici*, cannot be disputed.

Amici child welfare organizations write separately, however, to emphasize that “the values inherent in the act are the gold standard of child welfare for *all* children and families,” not only children who meet ICWA’s definition of “Indian child.”² Casey Family Programs, for example, structures its social work practice for *all* of the children and families that it serves in its nine nationwide field offices “according to the core principles of the Indian Child Welfare Act.” *Id.*

The district court thus erred in characterizing ICWA’s provisions as race-based classifications—both because the provisions at issue involve children with tribal ties, a political classification, but also because they are not procedures that benefit children only of a particular race. Rather, ICWA standards are context-specific applications of universal best practices in child welfare, supported by decades of experience and research: that children are best served by preserving as many connections with their birth family and community as can be done safely. Research likewise shows that better placement decisions result from applying a structured, transparent, and objective framework that guards against implicit biases, prioritizes maintaining a child’s connections, and minimizes the discretion to sever community ties.

² Casey Family Programs, *Child and Family Services Practice Model 6* (2018), <https://www.casey.org/practice-model/> (“Casey Practice Model”) (emphasis added).

Because evidence shows that ICWA’s framework achieves better outcomes for children, it should be no surprise that Congress increasingly has encouraged state child welfare frameworks to look more like ICWA. With ICWA, Congress has engaged in a carefully considered exercise of federal standard-setting that governs only cases where a child meets the statutory definition of an “Indian child”—cases where the federal government has the unique political relationship, expertise, and interest. Far from representing unprecedented commandeering, this exercise of Article I authority mirrors Congress’s standard-setting for other proceedings involving children with special federal interests to protect, and the congressional authority to do so.

Child welfare *amici* agree with Appellants and other *amici* that ICWA is constitutional. Striking it down not only would be wrong legally, but would have devastating real-world effects. Undoing the careful work Congress has done to enact ICWA standards—which are grounded in best-practices for all children—would cause enormous harm to Indian children and undermine the ability of child welfare agencies and courts to serve them.

ARGUMENT

I. ICWA Exemplifies Social Work Best Practices, Including Trauma-Informed Care Principles.

Child welfare’s core principle is that children are best served by preserving and strengthening their birth family relationships. This interest in maintaining

family integrity includes the mesh of ties that surround a child, from the closest ties (birth parents, siblings), to extended family, to the child's broader community. The gold standard in child welfare thus calls for practices that maintain a safe environment for the child while preserving as many of a child's connections as possible. *See* Casey Practice Model at 9.

ICWA exemplifies that gold standard. Its placement preferences and related provisions work together, in harmony, to prioritize maintaining a child within the child's birth family first, placement with extended family next (even if they have no tribal connection), then members of the child's broader community, including the child's tribe. 25 U.S.C. § 1915(a), (b). The role of tribal placements within that framework is thus a context-specific application of the universal best practice of preserving as many of a child's connections to the community as possible. The Act's structured framework for decision-making ensures that placements adhere as much as feasible to these priorities, which have proved over decades of research and experience to serve the best interests of all children, while always permitting courts to make case-specific departures for good cause.

The district court's evaluation of ICWA missed this central truth. Instead, by framing the interest served by the Act as only maintaining a child's relationship with the child's tribe, the district court found that interest ill-served because two of three ICWA placement preferences (extended family placement and placement

with members of other tribes) were not necessarily connected to the child's tribal membership (as a child's extended family might not be members of the child's tribe). Slip Op. 27–29. But the district court's conception of the interest served by ICWA was too narrow. ICWA's interest in preserving a child's ties to a tribe—only one of the government interests ICWA serves—is best understood as implementing the universal best practice of prioritizing placements that will maintain as many of a child's networks, and as much stability and sense of identity, as possible.

Data demonstrates that ICWA's structured process, when followed, serves that critical goal for the wide range of child custody proceedings that it covers—not just infant adoptions, but also removal of older children from families and communities in which they have lived their entire lives. Encouraging results about how many American Indian/Alaskan Native children find family member placements or avoid group homes are a testament to the effectiveness of the Act's focus on strengthening, and not unnecessarily severing, a child's birth ties. All children would benefit from such a commitment, which is a central part of *amici's* child welfare practice for Indian and non-Indian children alike.

A. ICWA Implements the Foundational Principle of Child Welfare that Children Are Best Served by Preserving Family and Community Connections.

1. Extensive Research Supports ICWA’s Provisions Promoting and Maintaining Family Ties.

The first priority in an effective child welfare system is to limit the separation of children from parents, and to encourage reunification even after a separation has occurred. Research and experience confirm that, when possible, children’s interests are best served by staying with their families. *See, e.g.,* Kristine Nelson et al., *A Ten-Year Review of Family Preservation Research* 1 (2009);³ Annie E. Casey Foundation, *Every Kid Needs a Family* 11 (2015) (“Whenever possible, children should remain at home with their parents or with a caring relative[.]”).⁴ To that end, well-functioning child welfare systems provide robust services to prevent the separation of children from their parents in the first instance. *See, e.g.,* Family First Prevention Services Act, Pub. L. No. 115-123, § 50702, 132 Stat. 64, 232 (2018) (enabling states to use federal funds to “prevent foster care placements through ... mental health and substance abuse prevention and treatment services, [and] in-home parent skill-based programs”); Child Welfare League of America (“CWLA”), *CWLA Standards of Excellence for Services to Strengthen and Preserve Families with Children* 20 (2003) (recognizing the importance of

³ Available at https://rhyclearinghouse.acf.hhs.gov/sites/default/files/docs/18970-A_Ten-Year_Review_of_Family_Preservation_Research.pdf.

⁴ Available at <http://www.aecf.org/resources/every-kid-needs-a-family/>.

“provid[ing] [parents] with services and support” so that “children c[an] be safely protected and treated within their own homes”). For voluntary adoptions, prioritizing parental ties means that parents must be provided “waiting periods of at least several days after childbirth before signing relinquishments, and adequate revocation periods during which [they] can change their minds.” Evan B. Donaldson Adoption Institute, *Safeguarding the Rights and Well-Being of Birthparents in the Adoption Process* 5 (2007).⁵

ICWA embodies these best practices in several ways. ICWA limits the removal of children to cases of serious emotional or physical damage. 25 U.S.C. § 1912(e). It requires that any party (whether a state agency or private party petitioner) seeking to “effect a foster care placement of, or termination of parental rights to, an Indian child under State law” must establish “that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.” *Id.* § 1912(d). It also provides for a robust waiting period and process to ensure that relinquishments of parental rights are voluntary. *Id.* § 1913(a) (10-day waiting period to consent to adoption).⁶

⁵ Available at https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2006_11_Birthparent_Study_All.pdf.

⁶ ICWA’s coverage of children who are eligible for membership in a tribe (and have a parent who is a member), as well as those who already are members, 25 U.S.C. § 1903(4), is a necessary adjunct to its safeguards for infant adoptions,

Many states share ICWA’s emphasis on family preservation. *See* Child Welfare Information Gateway, *Determining the Best Interests of the Child* 2 (2016) (“Best Interests”) (finding most frequent guiding principle in state statutes for determining a child’s best interests is the “importance of family integrity and preference for avoiding removal of the child from his/her home”).⁷ The federal government, too, seeks to encourage family preservation for all children. *See* U.S. Dep’t of Health & Human Servs. (“HHS”), Admin. for Children & Families, Information Memorandum on Reshaping Child Welfare in the United States to Focus on Strengthening Families Through Primary Prevention of Child Maltreatment and Unnecessary Parent-Child Separation (Nov. 16, 2018).⁸

Unfortunately, it is not always possible to avoid removing children from their parents. The next best option then is placement with extended family. *See* National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 11 (2000) (“An appropriate relative who is willing to provide care is almost always a preferable caretaker to a non-relative.”);⁹ CWLA, *CWLA Standards of Excellence for Adoption Services* § 1.10 (2000) (“The first option considered for children

which often take place before there is sufficient time to enroll a newborn as a tribal member.

⁷ Available at https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

⁸ Available at <https://www.acf.hhs.gov/sites/default/files/cb/im1805.pdf>.

⁹ Available at <http://www.ncjfcj.org/sites/default/files/Adoption%20and%20Permanency%20Guidelines.pdf>.

whose parents cannot care for them should be placement with extended family members”).

Kinship care “maximizes a child’s connection to his or her family.” *Id.* § 8.24; see Tiffany Conway & Rutledge Q. Hutson, *Is Kinship Care Good for Kids?* 2 (2007) (finding research supports kinship care).¹⁰ Children in temporary kinship care are less likely to experience multiple placements and more likely to be successfully reunified with their parents, among other beneficial outcomes. See Marc A. Winokur et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 FAMILIES IN SOCIETY 338, 344–45 (2008). Consistent with this research, all but two states give preference to extended family placements. See Child Welfare Information Gateway, *Placement of Children with Relatives* 2 (2018) (“Placement with Relatives”) (48 states require consideration of “giving preference to relative placements”).¹¹

So does ICWA. 25 U.S.C. § 1915(a), (b) (member of child’s extended family is first priority placement when foster care or adoptive placement is necessary). To ensure that the preference for extended family has meaning, moreover, ICWA’s implementing rules require courts, when faced with the argument that a preferred placement is unavailable, to find that a “diligent search”

¹⁰ Available at <https://www.clasp.org/sites/default/files/public/resources-and-publications/files/0347.pdf>.

¹¹ Available at <https://www.childwelfare.gov/pubPDFs/placement.pdf>.

for relatives or other preferred placement has been undertaken before finding good cause to deviate from the Act's placement preferences. 25 C.F.R. § 23.132(c)(5).

ICWA's focus on family connections is not unique. Congress values this approach in federal efforts for all children. For example, Congress offers federal funds to states that "consider giving preference to an adult relative over a non-related caregiver ..., provided that the relative caregiver meets all relevant State child protection standards," and to states that exercise "due diligence" to identify, locate, and notify relatives when children enter the foster care system. 42 U.S.C. § 671(a)(19), (29). Encouraging states to make their generally-applicable child welfare systems more like ICWA's demonstrates how ICWA's placement preferences embody best practices for all children.

2. ICWA's Community Placement Provisions Match Best Practices and Implement Important Principles of Trauma-Informed Care.

When extended family members are not available, ICWA next looks to a child's web of connections beyond relatives: the child's community. In the context of Indian children, a child's community includes his or her tribe or related tribes. 25 U.S.C. § 1915(a), (b). Preserving such ties embodies evidence-based best practices of maintaining a child's connection to a broader network of caring adults, and placing them within familiar settings. Such within-network or within-community placements serve several interests.

First, placement within the child’s community or network serves the interest of stability. Out-of-home placements are very disruptive, and community placement helps the child to “maintain a continuity of schools, providers and participation in their community.” Casey Practice Model at 10; *accord* Child Welfare Information Gateway, *Community-Based Resources: Keystone to the System of Care* 2–3 (2009) (recognizing “the importance of maintaining the valuable connections children have with friends, extended family, neighbors, and perhaps most importantly, their school”).¹²

Second, placement within the child’s larger community supports the maintenance or creation of a network of relationships with caring adults. On occasion, a primary caregiver may be identified who, though unrelated, has significant ties with the child. A model child welfare system will assess a child’s “family friends ... and neighbors,” along with members of a child’s tribe or clan where applicable, “to determine their willingness and ability to provide care and protection” before making a more removed placement. CWLA, *CWLA Standards of Excellence for Kinship Care Services* § 2.8 (2000). More than half of states, in fact, provide a preference for “fictive kin”—unrelated adults who are known to the family, have a relationship with the child, and are willing and able to provide a home. *See* Placement with Relatives at 2.

¹² Available at <https://www.childwelfare.gov/pubPDFs/community.pdf>.

Even when a “fictive kin” primary caregiver is not identified, placement within a child’s broader community or network can help ensure a core group of adults whom a child can rely upon for different forms of support, mentoring, and guidance; sometimes called “relational permanency.” Legal permanency means a child’s placement with a parenting adult whose relationship is recognized by law, e.g., birth parents, guardianship, or adoption. *See* Annie E. Casey Foundation, *What Is Permanence?* (Feb. 5, 2012).¹³ For all children, however—even (or especially) those who face the prospect of “aging out” of the foster care system without achieving legal permanence—relational permanency is just as essential. That means promoting and recognizing “the many types of important long-term relationships that help a child or young person feel loved and connected,” including relationships with siblings, family friends, and other caring adults such as neighbors, teachers, members of their church, etc. *Id.*

Preservation of “continuity of family relationships and connections” is thus one of two permanency outcomes against which the federal government evaluates the success of state child welfare programs for all children. *See* Child Welfare Information Gateway, *Permanency and the Child and Family Services Reviews*.¹⁴ The Children’s Bureau (a division of HHS responsible for such evaluations)

¹³ Available at <https://www.aecf.org/blog/what-is-permanence/>.

¹⁴ Available at <https://www.childwelfare.gov/topics/permanency/administrators/cfsr/>.

assesses the degree to which child welfare systems help children maintain ties with a network beyond their families. *See id.* (specifying evaluation criteria including “whether, during the period under review, concerted efforts were made to maintain the child’s connections to his or her neighborhood, community, faith, extended family, Tribe, school, and friends”). And the Children’s Bureau recognizes that a placement serving a child’s cultural needs is important for all children. HHS, Children’s Bureau, Child Welfare Policy Manual § 4.3, Question 3.¹⁵

ICWA’s tribal placement preferences serve these same interests in stability, relational permanency, and community connections. For most proceedings covered by the statute—which, as discussed below, often involve older children removed from communities where they have developed ties—the community from which a child is removed is the child’s tribe or a related tribe. Specifying placement within the tribe is thus best understood as context-specific shorthand for placement preferences that help maintain stability and the broad network of relationships that a child needs to thrive. 25 U.S.C. § 1915(a), (b). Where that placement does not make sense in terms of a child’s developed relationships, alternative placements are possible based on good cause, *id.*, but ICWA helps ensure that relational permanency objectives are achieved by requiring consideration of tribal placements first. *See id.*; 25 C.F.R. § 23.132(c)(5).

¹⁵ Available at https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp_pf.jsp.

These ICWA priorities, like preferences for community placements applicable to all children, serve the compelling interest of maintaining or strengthening a child’s community ties and produce better outcomes. Maintaining “[c]onnection to family, community and culture creates relational permanency that ensures there are adults who are reliable and committed to the youth throughout their life.” Casey Practice Model at 7. Studies have shown that fostering children’s connection to a broader cultural community improves their resilience. *See, e.g.,* Teresa D. LaFromboise et al., *Family, Community, and School Influences on Resilience Among American Indian Adolescents in the Upper Midwest*, 34 J. COMMUNITY PSYCHOL. 193, 203–04 (2006).

Ensuring community connections is also key to providing trauma-informed care. Most children separated from their biological families—particularly when such separation is involuntary—have experienced some trauma before separation, and the removal itself is traumatic. Amy M. Salazar et al., *Trauma Exposure and PTSD Among Older Adolescents in Foster Care*, 48 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 545, 547, 550 (2013) (noting that “the overall trauma exposure rate for youth in foster care was double that found in the ... general population”). In *amici*’s firsthand experience, children who have been removed from their biological family suffer significantly. Their sense of security and belonging are injured, which can create deep rifts in a child’s sense of identity and

connection to a shared history. Providing trauma-informed care to this vulnerable group of children means that beyond focusing on a youth's safety and permanency, a social worker must seek to understand a constellation of mental health, emotional, and social development needs. Casey Practice Model at 7. Given that American Indian/Alaska Native children experience posttraumatic stress disorder at triple the rate of the general population—along with the historical trauma suffered by tribal children and families, *Br. for Federally Recognized Indian Tribes, et al., as Amici Curiae*, Section I.A—maintaining their familial, community, and cultural connections is a particularly compelling concern when designing a framework to serve this population. Office of Juvenile Justice and Delinquency Prevention, *Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence* 6 (Nov. 2014).¹⁶ ICWA's placement preferences thus reflect core principles of trauma-informed care by prioritizing placements connected to a child's community when family placements cannot be found.

3. ICWA's Structured Decision-Making Framework Is an Essential Component of Best Practices.

Successful implementation of these data-informed best practices requires a structured framework that guides placement determinations yet permits contextual,

¹⁶ Available at <https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf>.

child-specific decision-making in every case. Child welfare decision-making is complex, and disputes frequently are emotionally charged. Different parties may each seek to serve the best interests of the child but nonetheless vehemently disagree about the best course of action.

Providing a structured system that imposes rebuttable presumptions and objective factors can improve decision-making, and thereby improve outcomes. Otherwise, without some structure, decisions based on the child’s “best interest” often are not supported by evidence-based practices. Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations*, 6 PSYCHOL. SCI. PUB. INT. 1, 7–8 (2005) (describing the “absence of scientific support” for many assessments designed to identify the best interests of children). Judges “may find it difficult, in utilizing vague standards like ‘the best interests of the child,’ to avoid decisions resting on subjective values.” *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 835 n.36 (1977). Many states agree that objective criteria are important, and therefore specify mandatory factors for best-interests-of-the-child determinations. *See Best Interests at 2.*

Congress did the same with ICWA. ICWA embodies the objective, yet individualized decision-making framework preferred by child welfare practitioners because it mandates structured placement preferences while permitting customized consideration of each child’s needs. Congress rejected an open-ended “best

interest” standard that would leave courts with unbridled discretion, concluding that the best interests of children were better served by a framework of presumptive placements. *See generally* 25 U.S.C. § 1915(a), (b). And it did so after specifically contemplating the limitations of a structureless best interest standard. H.R. Rep. No. 95-1386, at 19 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7542 (purpose of ICWA is to serve the best interests of children, but without structure the best interest standard “is vague, at best”). Yet Congress simultaneously provided for all-important individualized decision-making by permitting departure from placement preferences upon a showing of good cause. 25 U.S.C. § 1915(a), (b). Consistent with the statutory mandate to balance structured preferences with individualized decision-making, the Bureau of Indian Affairs has provided objective criteria to guide courts’ decision-making with respect to whether “good cause” exists. 25 C.F.R. § 23.132. Such objective criteria ensure that good cause does not itself become a vehicle for the unbridled, subjective decision-making that child welfare experts, and Congress, recognize does not work as well for children.

Congress also recognized that, for a structured decision-making framework to be effective, there must be a way to void placements that deviate from the preferred framework without cause or, worse still, due to fraud or duress. Children removed from their families “are disproportionately drawn from families living in

poverty.” Jessica Pac et al., *Poverty Among Foster Children: Estimates Using the Supplemental Poverty Measure*, 91 SOC. SERV. REV. 8, 8 (2017). Being outgunned in custody proceedings, even in ostensibly voluntary relinquishments of parental rights, raises the risk of improper placements.

Thus, to ensure the integrity of its model decision-making framework, ICWA properly permits collateral attack on terminations of parental rights or foster care placements that were made in violation of specific ICWA provisions. 25 U.S.C. § 1914. If a petitioner can prove fraud or duress, and sues within two years, ICWA allows an adoption to be vacated for those incredibly serious violations. *Id.* § 1913(d). Moreover, ICWA’s implementing rules provide that a child’s ordinary bonding with a temporary non-family custodian does not constitute good cause for deviating from ICWA’s placement preferences when that bonding stems from a “placement that was made in violation of ICWA.” *See* 25 C.F.R. § 23.132(e).

But if ICWA’s structured framework is followed, non-compliant placements can be avoided altogether—along with the attendant need to remove children from these placements. ICWA’s implementing rules require notice to tribes when a court has “reason to know” a child might have a connection to a tribe, thereby increasing the likelihood that a child’s initial placement will be in the child’s family or community, and setting the case on the right track from the start. 25 C.F.R. § 23.111.

ICWA's framework is sound practice for all children. It would defeat the purpose of a structured decision-making system altogether if the inquiry into priority placements could be cursory, and bonding during a non-compliant placement could justify maintaining a wrong decision made without the right information. *See, e.g., Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53–54 (1989) (stating the law should not reward those who obtain custody, lawfully or unlawfully, during protracted litigation). At bottom, ICWA provides a path for states to *avoid* situations where a child spends extended periods of time in a non-preferred placement that is not consistent with child welfare best practices. Efforts at the front-end, guided by complete information and structured decision-making, best serve the interest of preserving a child's ties to his or her family and community.

B. ICWA Achieves Better Outcomes.

ICWA's successful outcomes—across the range of proceedings that it covers—reflect the congruence between ICWA's principles and child welfare best practices. Plaintiffs focus their claims on very young children. But child welfare best practices must serve not only newborns, but also older children who have lived for years with their families, and communities. For children who are eligible for tribal membership, such communities will often include their tribes.

As is more typical in child welfare proceedings, the majority of children

affected by ICWA are older children who have been removed from their families. See Child Welfare Information Gateway, *Foster Care Statistics 2016* at 7 (2018) (median age of entry into foster care is 6.3 years old);¹⁷ Child Welfare Information Gateway, *Enhancing Permanency for Youth in Out-of-Home Care 2* (2013) (more than 42% of the children in foster care are aged 11 years or older).¹⁸ Data from California and Washington (two states with relatively large numbers of American Indian/Alaska Native children entering care) indicates that between 75-80% of American Indian/Alaska Native children entering foster care in 2016 were age 1 or older (similar to the rates for other children), and 48-53% were school age (ages 5-17).¹⁹ In those circumstances, ICWA's strong preference for preserving the child's network of emotional, familial, and cultural connections is particularly critical.

ICWA appears to be serving that interest well. It is difficult to provide a complete picture of outcomes in ICWA cases because existing federal data sets capture only whether a state identified a child as being American Indian or Alaska Native.²⁰ But initial indications are encouraging. According to federal data, American Indian/Alaska Native children have the highest rate of kinship care

¹⁷ Available at <https://www.childwelfare.gov/pubPDFs/foster.pdf>.

¹⁸ Available at <https://www.childwelfare.gov/pubPDFs/enhancing.pdf>.

¹⁹ Casey Family Programs, *Native American/Alaska Native Children Overview* (2019), <https://www.casey.org/native-american-alaska-native-data-trends/>.

²⁰ Researchers lack complete data regarding the outcomes in child welfare cases where ICWA applies because available federal data does not currently track this information. A rule that would add some of this information to state reporting requirements has been delayed. 83 Fed. Reg. 11,450 (Mar. 15, 2018).

among different populations in foster care (35% compared to 32% for white children and 31% for Black/African American children). They have the lowest rate of congregate care, i.e., placement in institutional settings (8% compared to 12% for white children and 14% for Black/African American children), and have one of the lowest rates of children aging out of care without an adoptive family (6% compared to 7% for white children and 11% for Black/African American children).²¹ In sum, the available data suggests that even though ICWA implementation varies significantly across the country, ICWA's placement preferences are working, and helping to keep the children covered by ICWA better connected to family and community.²²

II. Enacting Best-Practice Standards For State Courts To Apply Where Congress Has Authority To Legislate Is Commonplace Federal Law-Making, Not Commandeering.

In addition to providing direct social work services, Casey Family Programs and other *amici* also provide technical assistance to state and tribal courts on best practices for child welfare case proceedings. *Amici* have thus witnessed firsthand how federal standards—some accepted by states as conditions of federal funding,

²¹ American Indian/Alaska Native children do tend to have longer stays in foster care. However, the reason for this cannot easily be determined, and it might be a result of one of ICWA's success stories: placement with relatives can result in longer stays, and a high percentage of American Indian/Alaska Native children are placed with extended family because of ICWA.

²² The statistics cited were determined by staff at Casey Family Programs, who analyzed a 2016 federal data set. The full analysis has been posted to Casey's website at <https://www.casey.org/native-american-alaska-native-data-trends/>.

others mandated with normal preemptive effect—play a valuable role in court decision-making. *Amici* who work with courts across the country have seen how ICWA has improved the communication between state and tribal courts to better serve children and families, as evidenced by the proliferation of tribal-state court forums that have created ICWA implementation materials. See Tribal Law and Policy Institute, *Tribal-State Court Forums: An Annotated Directory* (Jan. 2016).²³

In the combined state and federal web that governs child welfare, ICWA represents one of countless ways in which the federal government sets standards to guide state courts' actions—including other congressional enactments that set standards for state courts to apply in child custody proceedings where the children involved implicate a particular federal interest. This is a normal, and necessary, adjunct to the relevant congressional power to legislate, and is done under transparent Article I authority. It is not unconstitutional commandeering.

A. Far from Improper Commandeering, ICWA Is but One of Many Congressional Enactments Setting Standards for Child Custody Proceedings Under a Valid Exercise of Federal Authority.

The combined state-federal framework governing child welfare includes many federal standards with preemptive force. As recognized in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), conferring federal rights or imposing federal restrictions on parties to litigation (as opposed to ordering states to legislate) does not violate

²³ Available at <https://www.home.tlpi.org/tribal-state-court-collaboration-publica>.

anticommandeering principles when Congress legislates in an area where it has an enumerated power. *Id.* at 1479–81. ICWA does just that: imposes federal restrictions on parties to litigation, including private actors, seeking to terminate parental rights or alter the placements of Indian children.²⁴ It is just one of several such examples in the child custody or family law context.

When Congress acts in this way, it does not matter whether Congress supplies federal causes of action or simply mandates federal standards that apply in existing state procedural vehicles. In either case, Congress has acted to protect federal interests under enumerated powers in state court cases. For example, the Federal Sovereign Immunities Act (“FSIA”), Pub. L. No. 94-583, 90 Stat. 2891 (1976), imposes federal standards in state courts without providing a federal cause of action. *See, e.g., Chiapas v. Quaestor Invs., Inc.*, 982 S.W.2d 144 (Tex. App. 1998) (FSIA service provisions apply in state suit); *In re China Oil & Gas Pipeline Bureau*, 94 S.W.3d 50 (Tex. App. 2002) (applying FSIA burden of proof and waiver standards in state mandamus action). There is thus no basis for the district

²⁴ The district court erred in stating that ICWA does not apply to private actors. Slip Op. 37–38. ICWA’s standards apply to *any* person who petitions to terminate parental rights or to alter custodial placements. *See, e.g.,* 25 U.S.C. § 1912(a) (applicable to any “party seeking the foster care placement ... or termination of parental rights”). Although petitioners often are state agencies, that is not always the case. *See, e.g., In re Adoption of T.A.W.*, 383 P.3d 492, 503 (Wash. 2016) (holding that “any party, including a parent seeking to involuntarily terminate the parental rights of the other parent, must comply with the active efforts requirements ICWA offers no exceptions for privately initiated actions.”); *S.S. v. Stephanie H.*, 388 P.3d 569, 573–74 (Ariz. Ct. App. 2017).

court's insistence that only statutes that create their own rights of action can impose federal standards on state courts.

Indeed, there is no general federal cause of action for divorce, or for modifying child custody decrees. Yet Congress often has acted to set standards governing state court resolution of such proceedings. For example, the Servicemembers Civil Relief Act (“SCRA”) sets rules for default judgments, stays, and the consideration of deployments in child custody proceedings involving military personnel. 50 U.S.C. §§ 3931–3932, 3938. It plainly applies to solely state court causes of action.²⁵

ICWA and SCRA are far from the only examples of congressional mandates for state child custody proceedings. The International Child Abduction Remedies Act (ICARA), 22 U.S.C. §§ 9001-9011, implements the Hague Convention, a multilateral treaty setting standards to “protect children internationally from the harmful effects of their wrongful removal.” Hague Convention on the Civil Aspects of International Child Abduction, preamble, Oct. 25, 1980, T.I.A.S. No. 11,670. The Act requires state courts to promptly order a return of children who were “wrongfully removed or retained within the meaning of the Convention.” *Abbott v. Abbott*, 560 U.S. 1, 9 (2010). Relatedly, the Parental Kidnapping

²⁵ It has been applied by state courts as such. *See, e.g., Mims Bros. v. N.A. James, Inc.*, 174 S.W.2d 276 (Tex. Civ. App. 1943); *In re Larson*, 183 P.2d 688 (Cal. Ct. App. 1947), *overruled on other grounds by In re Marriage of Schiffman*, 620 P.2d 579 (Cal. 1980).

Prevention Act establishes national standards for the assertion of child custody jurisdiction to prevent forum shopping. 28 U.S.C. § 1738A. The Full Faith and Credit for Child Support Orders Act likewise limits state courts’ authority to modify child support orders from other states and sets rules governing conflicts. *Id.* § 1738B.²⁶

None of the preceding examples presents a commandeering problem, and neither does ICWA. When there is federal authority over and interest in a particular class of litigants, Congress can protect that interest by mandating federal standards for state courts to apply. In ICWA, Congress has done just that.

ICWA provides “minimum Federal standards,” 25 U.S.C. § 1902, applicable only to Indian children—meaning children who are members of a tribe or eligible for membership with a parent who is a member, *id.* § 1903(4)—because the Act’s coverage is necessarily coextensive with Congress’s “plenary power ... in the field of Indian affairs.” *United States v. Lara*, 541 U.S. 193, 200 (2004) (citation omitted). Congress passed a law to protect the ties that nurture Indian children because it concluded that state authorities “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).

²⁶ The displacement of state standards with federal ones, even absent a federal cause of action, is commonplace in cases where federal interests are present. *See, e.g., Hillman v. Maretta*, 569 U.S. 483 (2013) (holding federal statute regarding life insurance for federal employees preempted Virginia law).

Congress could have erected an entirely separate federal system for child welfare proceedings involving Indian children. Instead, it recognized the expertise of states and state courts in this area. Rather than reinvent the entire wheel, Congress instead provided core best practice standards as a federal minimum for this federally-protected population, *see* 25 U.S.C. § 1921 (permitting more protective state standards), while leaving some standards open to state variation, and most of such proceedings governed by state law.

Such federal standard-setting is not only a constitutional commonplace, it has been welcomed by the state and tribal judges that *amici* work with day in and day out. Before ICWA, state courts faced many complex questions regarding overlapping tribal and state court child-welfare jurisdiction because tribes retain inherent authority over their child welfare matters. Br. for Admin. Law & Constitutional Law Scholars as *Amici Curiae*, Section II. Specifically, state courts had to grapple with how to determine when a tribe had exclusive or concurrent jurisdiction, and how to transfer cases from state to tribal court when appropriate.²⁷ ICWA not only resolves that complexity and helps guide interactions between state and tribal courts when transfer is necessary, 25 U.S.C. § 1911(b), but it does so by enshrining in federal law standards that represent best practices for all children.

²⁷ “Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA.” *Holyfield*, 490 U.S. at 42 (citing pre-ICWA cases from state court addressing exclusive tribal jurisdiction).

B. The States and the Federal Government Have Long Shared Responsibility for Child Welfare.

Beyond laws with preemptive effect, federal spending-clause enactments dictate many elements of state child welfare proceedings in states that accept federal funding—which every state does.²⁸ Combined, these two sets of laws show that the district court’s premise—that, absent ICWA, child welfare would be a state-governed activity without federal influence, Slip Op. 34–35—contradicts reality.

To give a few examples, state courts must make findings that “reasonable efforts” have been made to “preserve and reunify families,” for a child to be placed into foster care. 42 U.S.C. § 672(a)(2)(A)(ii); *id.* § 671(a)(15). But state courts can bypass that “reasonable efforts” requirement when they determine certain aggravating circumstances are present. *Id.* § 671(a)(15). Federal law also provides that the health and safety of children must be the paramount concern in all decision-making. *Id.* § 671(a)(15)(A). In fact, federal law sets a host of standards for state child abuse and neglect programs in exchange for grants. *Id.* § 5106a(b)(2)(B). And the Family First Prevention Services Act requires state courts to make certain findings if states seek to place a foster child in certain institutional settings. *Id.* § 675a(c)(2). These are just a few of the ways that federal

²⁸ See, e.g., HHS, Children’s Bureau, *Title IV-E Foster Care* (May 17, 2012), <https://www.acf.hhs.gov/cb/resource/title-ive-foster-care> (describing compliance reviews in 50 states, the District of Columbia, and Puerto Rico).

law influences child welfare proceedings for all children—some of which, like the “reasonable efforts” provision, encourage states to adopt provisions similar to ICWA’s for all children.

* * * * *

Far from being an unprecedented exercise in commandeering, ICWA is a commonplace use of federal law to preempt or supplement particular state rules in service of a specific federal interest. ICWA’s standards exemplify best practices in child welfare, are effective at meeting their goals, and serve as a model for all proceedings. Dismantling ICWA is not constitutionally required, and would be a great disservice to the children and families of this nation.

CONCLUSION

The judgment of the district court should be reversed.

January 16, 2019

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 6,488 words, and thus complies with the type-volume limitation set forth in Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

s/Hyland Hunt
Hyland Hunt

January 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on January 16, 2019, I served the foregoing brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

s/Hyland Hunt

Hyland Hunt

APPENDIX

Casey Family Programs is the nation's largest operating foundation focused on safely reducing the need for foster care and building Communities of Hope for children and families across America. Casey has provided direct family services to children and families involved in public and tribal foster care systems for more than 50 years, and currently provides such services in five States, including Texas. It also works to improve the nation's child welfare systems by providing technical assistance and consulting to state child welfare agencies in all 50 states, the District of Columbia, and two territories, and to sixteen tribal nations, by providing research, data analysis, and education to policymakers nationwide about best practices in child welfare.

Adopt America Network is a national adoption charity that works to find adoptive families for the over 120,000 children waiting in U.S. foster care and to support families united by adoption. For 35 years, Adopt America Network has provided a broad range of services to families including pre-adoptive training, home study assessments, matching, placement, supervision, and post-adoption supports. Adopt America Network assists public agencies in identifying adoptive families for their waiting children and works collaboratively throughout the adoption process to ensure permanency. Adopt America welcomes all families and

is committed to achieving permanency for the children and youth in U.S. foster care.

The mission of the **Alaska Center for Resource Families** (“ACRF”) is to provide support and training to all of Alaska’s resource families (foster, adoptive, relative caretakers, and guardianship families) in order to strengthen them and enhance current skills, while developing new ones. ACRF seeks to support, encourage, and assist individuals who wish to become foster parents or to adopt through the foster care system. Working in collaborative relationships with state, tribal, and other partners, ACRF’s vision is that all resource families in Alaska have the information, training, support and skills to provide quality care to the children in their homes.

The **American Adoption Congress** (“AAC”), founded in 1978, is a national non-profit organization whose members include adoptees, birth parents, adoptive parents and their families. The AAC believes that the needs of children are most easily met when they can grow up in the families into which they were born. When birth families are unable to meet those needs, however, the AAC supports adoption as the best alternative—provided the adoptions are humane, honest, and rooted in the understanding that adoption does not erase a child’s connections to their birth family. In the AAC’s view, ICWA provides an optimal pathway for securing such adoptions.

Ampersand Families is Minnesota's only non-profit agency focused exclusively on meeting the permanency needs of teens and pre-teens served by the state's child welfare system. Our mission is to recruit and support permanent families for older youth and to champion practices in adoption and permanency that restore belonging, dignity and hope. Ampersand Families views the principles outlined in ICWA as setting the standard for keeping children connected to relatives, kin, community and culture even as their families struggle. Our decade of experience leads us to stand in firm opposition to any effort to weaken or eliminate ICWA.

The **Annie E. Casey Foundation** is a national philanthropy that uses reliable data, research and staff expertise to ensure that all children have a brighter future, especially children who face the greatest obstacles to stability and opportunity. The Foundation helps child welfare agencies, policymakers and advocates improve systems that are responsible for meeting the needs of children who have been abused or neglected and to keep them connected to their families and communities. Consistent with those goals, the Foundation supports the Indian Child Welfare Act and its success over 40 years in preventing American Indian children from being harmed by removal from their tribal communities.

Black Administrators in Child Welfare, Inc. ("BACW") is the nation's oldest member organization devoted to ensuring that the racial, ethnic and cultural

experiences of Black children and families are recognized, understood and served by child welfare agencies. BACW's membership consists of individuals and agencies, both public and private, that provide services to all children and families engaged in the child welfare system. Since its inception in 1972, BACW has advanced best practices in child welfare with an intentional focus on meeting the unique needs of American children of African heritage. BACW supports both the letter and the spirit of the Indian Child Welfare Act in its role to preserve families of Native American heritage.

Founded by former U.S. Senator Byron Dorgan, the **Center for Native American Youth** ("CNAY") is a policy program within the Aspen Institute, headquartered in Washington, DC. CNAY is a national advocacy organization working to improve the health, safety, and overall well-being of Native American youth ages 24 and under. The vision of CNAY is for all Native American youth to lead full and healthy lives, to have equal access to opportunity, and to draw strength from their culture and inspire one another. CNAY strives to bring greater national attention to the issues facing Native American youth while fostering community-driven solutions, with special emphasis on youth suicide prevention.

The **Center for the Study of Social Policy** ("CSSP") is a national non-profit organization dedicated to building a racially, socially, and economically just society. We are committed to ensuring that all children and youth served by public

systems achieve positive outcomes and have opportunities to maximize their potential. We advocate with and for children, youth and families marginalized by ineffective public policies and institutional practices to ensure systems are not only organized to be responsive to their needs but also to promote their well-being. CSSP serves as a federal court-appointed monitor in several states engaged in system improvement while under a class action Settlement Agreement—and are recognized for our work in reforming public systems to better serve families. Central to this work is a focus on transforming child welfare systems to effectively serve children and families, including American Indian/Alaska Native children and families, who are disproportionately involved with child welfare systems and experience disparate outcomes once involved compared to other children and families. CSSP recognizes the historical trauma inflicted on American Indian/Alaska Native children and families and supports their right to remain together when safe and possible and remain within their home communities when they are placed in out of home placements. Further, CSSP recognizes the critical role that the Indian Child Welfare Act plays in ensuring that American Indian/Alaska Native children and families are not unnecessarily separated and when temporary separation is necessary, that children are able to remain connected to their home and community.

Children and Family Futures is a national non-profit organization based in Lake Forest, California, focused on improving outcomes for children and their families at the intersections of child welfare and substance use disorder treatment agencies and the courts. For twenty-five years we have worked with public and private agencies in all fifty states and tribal organizations to help these systems collaborate better and meet the treatment needs of this population of families. Our roles in providing technical assistance and evaluation support have enabled us to help these agencies improve their outcomes, consistent with federal and state requirements including the critical family and cultural relationships supported by the Indian Child Welfare Act.

The **Children's Defense Fund** ("CDF") Leave No Child Behind® mission is to ensure every child a Healthy Start, a Head Start, a Fair Start, a Safe Start and a Moral Start in life and successful passage to adulthood with the help of caring families and communities. CDF has worked relentlessly for more than four decades to ensure a level playing field for all children, with special attention to the needs of poor children and children of color. We seek to lift children out of poverty, ensure them quality health care, offer them quality early childhood and education experiences, and protect children at risk of entering the child welfare or juvenile justice systems. Since our earliest days, we have sought to rid the child welfare system of the pervasive anti-family bias that too often shapes decisions

about children. CDF works collaboratively at the federal, state and local levels to achieve reforms to keep children safely with family, and when that is not possible to ensure children are placed in the most family-like settings appropriate within reasonable proximity to their families and community, to seek safe timely reunification with help for both parents and children, and only when reunification is not appropriate, to move children promptly to new permanent families through adoption or kinship guardianship.

Children's Law Center of California (www.clccal.org) is a non-profit, public interest law firm that serves as appointed counsel for children under the jurisdiction of the juvenile dependency courts in Los Angeles, Placer, and Sacramento Counties. Children's Law Center of California is the largest children's legal services organization in the nation, representing over 33,000 abused and neglected children at any given time. Our attorneys provide an unparalleled level of child advocacy expertise in dependency proceedings and in a host of related hearings that seek to ensure the wellbeing and future success of each child. Children's Law Center of California is a driving force in local, state and national policy change and child welfare system reform.

The **Children's Law Section** is a recognized section of the State Bar of Michigan. The Section has over 400 members who are attorneys and judges practicing in Michigan's child welfare system. Working together, the Section's

members make crucial decisions each day that directly and substantially affect the lives of children and families. The Section provides services to its membership in the form of educational seminars, advocating and commenting on proposed legislation relating to child welfare law topics, and filing *amicus curiae* briefs in selected child welfare law cases filed in Michigan and Federal Courts. The Section, because of its active and exclusive involvement in the field of child welfare law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in all of these legal areas. The instant case is of particular interest to members of the Children's Law Section because it concerns ICWA, an essential and important federal law which protects Native American children, families, and culture. Michigan's Indian Family Preservation Act (MIFPA) is directly related to the ICWA, and mirrors the important policy goals and efforts ICWA was intended to address. The Children's Law Section believes strongly that ICWA helps to preserve and protect Native American children, families, and culture, and does so legally and constitutionally.

Established in 1920, the **Child Welfare League of America** ("CWLA") is the nation's oldest and largest membership-based child welfare organization. CWLA is a coalition of public and private agencies serving children and families who are vulnerable, including those in tribal communities, by advancing standards of excellence, accreditation, and the best research-based practices with respect to

child welfare work. In particular, CWLA is recognized nationally as the standard-setter for child welfare services and publishes thirteen “Standards of Excellence” as a means to achieve professionalism and uniformity in the administration of child welfare services, including in particular Standards of Excellence for Adoption Services. CWLA adheres to and supports ICWA in its Standards of Excellence. CWLA’s Standards also influence and improve child welfare practices throughout North America, as well as inform the Standards of Accreditation for agency administration, management, and service delivery for accredited child welfare agencies.

The **Family Defense Center** is the only charitable organization in the country that focuses its legal expertise on providing a wide range of strategies for families who must navigate child protection investigations that often lead to unjustified and traumatic family separations. The Center provides direct representation in investigations and appeals to hundreds of Illinois parents each year through its award-winning staffed legal services and pro bono program, and it also pursues impact litigation and policy advocacy to change systemic practices that hurt families. The Center is based in Chicago and its vision is a child welfare system where families are respected, protected, and supported.

FosterAdopt Connect is a non-profit based in Missouri and Kansas dedicated to increasing the quality of life experienced by foster and adopted

children and all children who experience significant abuse and neglect, by providing support and advocacy to create a more caring and effective child welfare system. We believe the best place for a child to begin healing from abuse and neglect is in the home of a dedicated, loving caregiver. Each of our innovative programs and services directly benefit foster families and children by encouraging the practice of new, evidence-based techniques and strategies for caregiving, and by connecting families to a wide network of peers who can provide individualized support and advocacy. We envision a future where every abused and neglected child receives the services needed to thrive, and where families receive the support to be effective caregivers.

Foster Care Alumni of America (“FCAA”), a national organization of alumni of the foster care system, was formed in 2004. Its vision is to ensure a high quality of life for those in and from foster care through the collective voice of alumni. FCAA hopes to erase the differences in opportunities and outcomes that exist for people in and from foster care compared to those who have not experienced foster care. FCAA also believes that alumni of foster care possess an expertise about foster care that is not available anywhere else. Alumni’s experiences have taught that, when best practices, standards and laws like those embodied in ICWA are not followed, the lives of children in foster care can be drastically affected, in some cases allowing children to linger in the foster care

system until they age out. Upon leaving foster care, children may no longer have any connection to their birth family, and may also lack alternative permanent connections that could help and support them. FCAA supports ICWA and other policies, practices, and laws that ensure that young people in foster care are afforded the best opportunity to grow and lead successful lives.

FosterClub is the national network of young people in foster care. FosterClub's mission is to lead the efforts of young people in and from foster care to become connected, educated, inspired, and represented so that they can realize their personal potential and contribute to a better life for their peers. For over a decade, FosterClub has provided foster youth a place to turn for advice, information, and hope. With over 32,000 members, FosterClub elevates the collective voice of young people who have experienced foster care, including Native American youth involved with the child welfare system. FosterClub's young leaders engage and inform policymakers, practitioners, and the public about the critical needs of children and youth through first-hand stories about what life is like in the foster care system.

Generations United is a proven, effective advocate for children, youth and older adults in communities and in Washington, DC focusing on issues that connect the generations. Generations United is home to the National Center on Grandfamilies, a leading voice for issues affecting families headed by grandparents

and other relatives. Generations United leads an advisory group of organizations and caregivers that set the national agenda to advance public will in support of these families. Center staff conduct federal advocacy, provide technical assistance to state-level practitioners and advocates, and train grandfamilies to advocate for themselves. Generations United provides a range of information and resources available at gu.org and grandfamilies.org.

National Advocates for Pregnant Women (“NAPW”) is a non-profit organization that advocates for the rights, health, and dignity of all people, focusing particularly on pregnant and parenting women, and those who are most likely to be targeted for state control and punishment. Through litigation, organizing, and public education, NAPW advances the principles of reproductive justice, including the right to decide whether and when to have children, and to be able to parent one’s children without unnecessary government intervention.

The **National Alliance of Children’s Trust and Prevention Funds** is a national leader in preventing child abuse and neglect and strengthening families. Its mission includes efforts to promote and support a system of services, laws, practices and attitudes that supports families by enabling them to provide their children with safe, healthy, and nurturing childhoods. It is the only national organization that supports all aspects of the work of state children’s trust and prevention funds, which are special funds established in state law, funded by a

variety of state revenue sources or donations, and dedicated to family strengthening and child abuse and neglect prevention programs. The Alliance provides training, technical assistance, and publications that support effective child and family practices throughout the country, including a 14-hour online training in how to help families build protective factors that have been shown to increase the health and well-being of children and families.

Founded in 1977, the **National Association of Counsel for Children** (“NACC”) is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America’s children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs which serve these goals include training and technical assistance, the national children’s law resource center, the attorney specialty certification program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children and families in state and federal appellate courts and the Supreme Court of the United States.

The **National Center on Adoption and Permanency** (“NCAP”) is a unique non-profit organization that provides a full range of multidisciplinary services, resources and information relating to adoption, foster care and child welfare. NCAP’s mission is to reshape permanency-related policy and practice in the U.S. so that they progress beyond their primary, traditional goal of ensuring that all children live in safe, permanent, loving homes—with their families of origin when possible, and in new families when necessary—to a new paradigm with a more-vital objective: enabling those children and their families to succeed.

Nebraska Appleseed is a non-profit organization that fights for justice and opportunity for all Nebraskans. Nebraska Appleseed has done significant work to address systemic issues affecting Nebraska’s foster care system. Nebraska Appleseed has an interest in this case because it presents a systemic issue of public interest involving the Indian Child Welfare Act and the full enforcement of ICWA is at the core of a fair system of justice for Native American children and families.

The **North American Council on Adoptable Children** (“NACAC”) was founded in 1974 by adoptive parents to meet the needs of children waiting for permanent families and the families who adopt them. NACAC promotes and supports permanent families for children and youth in the United States and Canada who are in state care, especially those in foster care and those who have special needs. Dedicated to the belief that every child deserves a permanent, loving

family, NACAC's activities include advocacy, parent leadership development, adoption support, and education and information sharing. NACAC produces conferences, position statements, articles, and publications highlighting best practices in child welfare and adoption. NACAC fully supports ICWA and several of its position statements highlight the practices codified in ICWA as best practices for all children and youth.

The mission of the **Northwest Adoption Exchange** ("NWAE") is finding adoptive families for the children in foster care, supporting the families who come forward, and educating and advocating for excellence in child welfare. Recognized as a leader in the field of special needs adoptions, NWAE maintains a professional profile gallery that spotlights children in Washington, Oregon, Idaho, and Alaska who are waiting for adoptive homes, and offers resources and education for families who are seeking to adopt. The NWAE also supports the caseworkers who advocate on behalf of children and represent families with information and guidance.

Oregon Post Adoption Resource Center's ("ORPARC") mission is to provide ongoing support, education, information, assistance, and referral services to post adoptive families and assisted guardianship families statewide. In the mid 1990's, as the number of state adoptive families surged, so did the acute need for post placement support. Together with the Oregon Department of Human Services,

a conscientious group of citizens gathered input from families, professionals and stakeholders to innovate an answer: a statewide post adoption resource center. ORPARC was one of the first nationally of its kind, focused intentionally on adoptive family support, referral and response.

Spaulding for Children, a private, non-profit child welfare agency, was established in 1968 when several entities, each seeking a way to make life better for children without families, joined together. Spaulding for Children finds permanent homes for children that are in the public child welfare system and supports families in maintaining their children safely in their homes. It was one of the first agencies in the country that specialized in finding and training adoptive families for the placement of children with disabilities and other challenges.

The **Tribal Law and Policy Institute** is a Native American operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples. We provide training and technical assistance to hundreds of tribal courts and state partners. We believe that children are sacred. We believe the Indian Child Welfare Act is critically necessary to protecting the sacred and ensuring the future well-being of Indian country.

Voice for Adoption (“VFA”) is a membership advocacy organization with a network of grassroots adoption and child welfare advocates throughout the country. VFA develops and advocates for improved adoption policies, and its members recruit and support adoptive families. Recognized as a national leader in adoption, VFA works closely with federal and state legislators to make a difference in the lives of the 123,437 children in foster care who are waiting to be adopted and the families who adopt children from foster care. Voice for Adoption is concerned about preserving best practices for children as outlined in ICWA.

The **W. Haywood Burns Institute** works to improve the life outcomes of youth of color and poor youth in public child serving systems. The Burns Institute facilitates a collaborative environment where community and system stakeholders strategically use data to reduce racial and ethnic disparities and supports capacity building of families and organizations to redirect resources to community-based interventions, thus reducing system involvement.