OR IMMEDIATE RELEASE: **Contact:** David Carl

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AG Balderas Files Brief to Protect Native American Children and Families

Files amicus brief to defend federal ICWA

Albuquerque, NM – Today, Attorney General Hector Balderas announced New Mexico joined a bipartisan coalition of attorneys general in filing a brief to defend the federal Indian Child Welfare Act (ICWA). ICWA sets specific child welfare rules designed to ensure that cases regarding abuse, neglect and adoption involving Native American children are handled in a culturally appropriate manner.

"It's critical that the cultures and histories of all of New Mexicans are respected, and that children in dangerous situations can find safe places to call home," said Attorney General Balderas. "The ICWA defends our Native American children and our unique culture, and promotes the stability and security of Native American children and families."

First enacted in 1978, ICWA was a response to a history of culturally biased, and at times, purposefully abusive placement of Indian children with non-Indian families. This resulted in the separation of Indian children from their families, tribes, and heritage. ICWA's purpose is to "protect the best interests of Indian children by establishing minimum Federal standards."

In the last five years, several ideologically conservative legal entities have contested ICWA, wrongly arguing that it is unconstitutional because it "burdens" native children more than their non-native counterparts. Individual plaintiffs, along with the states of Texas, Louisiana, and Indiana, have sued the U.S. Department of the Interior and its Secretary Ryan Zinke to challenge the law. The brief filed today by Attorney General Balderas and six other Attorneys General argues that ICWA complies with the U.S. Constitution.

Joining Balderas in filing today's brief were the Attorneys General of California, Alaska, Montana, Oregon, Utah and Washington.

A copy of the brief can be found here:

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; FRANK NICHOLAS LIBRETTI; HEATHER LYNN LIBRETTI; ALTAGRACIA SOCORRO HERNANDEZ; JASON CLIFFORD; and DANIELLE CLIFFORD,

and

STATE OF TEXAS; STATE OF LOUISIANA; and STATE OF INDIANA,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; BRYAN RICE, in his official capacity as Director of the Bureau of Indian Affairs; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary for Indian Affairs; the BUREAU OF INDIAN AFFAIRS; and the UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants,

CHEROKEE NATION, et al.,

Intervenor-Defendants.

Case No. 4:17-CV-00868-O

AMICUS BRIEF OF THE STATES OF CALIFORNIA, ALASKA, MONTANA, NEW MEXICO, OREGON, UTAH, AND WASHINGTON IN SUPPORT OF DEFENDANTS

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INTRODUCTION AND STATEMENT OF AMICUS INTEREST

The states of California, Alaska, Montana, New Mexico, Oregon, Utah, and Washington (Amici States) together are home to an estimated 1.5 million American Indians and Alaska Natives, and have 415 federally recognized Indian tribal entities within their borders.[1]

The Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (ICWA), is a federal law designed to "protect the best interests of Indian children and promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902 (2016). Passed in response to the longstanding practice of separating Indian children from the tribes of which they are members, ICWA protects the political relationship between Indian children and their tribes and thereby protects the viability of the tribes themselves. *See* 25 U.S.C. § 1901(3) (2016) (finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"). Congress intended that ICWA guide Indian child welfare determinations by state and local entities so they were not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." H.R. Rep. No. 95-1386, at 24 (1978) ("1978 House Report").

States have a strong interest in the welfare of all children residing within their borders, Indian and non-Indian alike. Unnecessary removal of children from their caregivers has profound negative effects on children, in both the short and long term.[2] And a robust body of research has

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[1] Tina Norris, et al., *The American Indian and Alaska Native Population: 2010 Census Briefs,* C2010BR-10, 1, 7 (January 2012); *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 83 FR 4235 (Jan. 30, 2018).
[2] *See, e.g.*, Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. Penn. J. of L. and Soc. Change 207, 211–213 (2016) (citing studies showing that foster home placement and multiple successive non-familial caregivers negatively impact children's ability to form healthy attachments, capacity for social and emotional functioning, adaptive coping, self-regulation,

shown that "identification with a particular cultural background and a secure sense of cultural identity is associated with higher self-esteem [and] better educational attainment . . . and is protective against mental health problems, substance use, and other issues."[3] Conversely, studies also show that forced acculturation—i.e., being forced to be part of a culture group that is not their own—is associated with increased risk of suicide, substance use, and depression among American Indians and Alaska Natives. *Id.*

The Amici States also have an interest in productive government-to-government relationships with tribes. ICWA provides a framework for states and tribes to collaborate to ensure the most appropriate placement and care for Indian children. Many of the Amici States have therefore structured their own placement systems around the framework established in ICWA and have an interest in preserving ICWA and its federal regulations.[4] Amici States also have an interest in ensuring that cases in other states involving children from tribes in Amici States are uniformly handled under ICWA's principles. Plaintiffs' constitutional challenge to ICWA poses a threat both to the state laws that similarly prioritize an Indian child's continued tribal connection and to the nationally uniform handling of child welfare cases involving Indian children.

The Amici States, therefore, submit this brief to support ICWA, which manifests the federal government's obligation to ensure the best interests of Indian children are protected in

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decision making, ability to develop secure attachments, and maintenance of healthy relationships).

[3] National Indian Child Welfare Association, *Attachment and Bonding in Indian Child Welfare: Summary of Research* (2016) https://www.nicwa.org/wp-content/uploads/2017/09/Attachment-and-bonding-NICWA-final-breif-092817.pdf (citing five studies).

[4] *See, e.g.,* N.M. Stat. Ann. § 32A-4-9 (2018) (mirroring ICWA's placement preferences), Cal. Code Regs. tit. 22, § 35353 (2018) (requiring compliance with ICWA and California's implementing regulations when "working with children who could be subject to the provisions of the ICWA").

child custody matters, including their connection to their tribes, as well as to ensure the preservation of Indian culture and heritage—and the tribes themselves—through intergenerational continuity. *See* 25 U.S.C. § 1901(3), (5) (2016). Longstanding precedent supports the constitutional validity of ICWA and it is being implemented in each of the Amici States. The Amici States urge the Court to deny Plaintiffs' motion for summary judgment.

ARGUMENT

THE INDIAN CHILD WELFARE ACT IS CONSTITUTIONAL.

ICWA represents a balanced approach by Congress to fulfill its responsibility to ensure the ability of tribes to self-govern—indeed, to continue to exist—and of states to protect the best interests of children whose welfare may be at risk from alleged abuse or neglect. Following decades of brutality towards American Indian populations dating to Colonial times, the federal government has assumed trust obligations vis-à-vis Indian tribes, which emanates both from the Constitution and from the treaties signed with Indian tribes to acquire lands now comprising much of the United States. *See, e.g., United States v. Antelope*, 430 U.S. 641, 645–649 (1977).

Indeed, as the legislative history of ICWA makes clear, it was in light of this trust relationship—and in recognition that a national remedy was necessary to address abusive child welfare practices—that Congress enacted ICWA. Addressing child welfare practices that threatened the very existence of American Indian and Alaska Native tribes by separating Indian children from their families, tribes, and cultures is a permissible exercise of Congress's obligation to tribes and does not violate the Equal Protection Clause.

I. ICWA DOES NOT VIOLATE THE TENTH AMENDMENT.

The Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, "provide[s] Congress with plenary power to legislate in the field of Indian affairs." *United States v. Lara*, 541 U.S. 193, 200 (2004). The federal government's plenary authority regarding the affairs of Indian tribes also

derives from the President's power to make treaties (with the consent of the Senate), U.S. Const. art. I, § 2, cl. 2, and Congress's Debt Clause[5] power, U.S. Const. art. I, § 8, cl. 1. And the Supreme Court has held Congress's authority over Indian affairs to be unique due to the United States' specific obligations toward Indian people. *See infra*, Section I.B.ii. As a result, it is "well established that the Interstate Commerce and Indian Commerce Clauses have very different applications" and the "case law that has developed under the Interstate Commerce Clause . . . is not readily imported to cases involving the Indian Commerce Clause." [6]

Congress acted within its plenary authority when, through ICWA, it established "minimum Federal standards" governing states' intervention in the domestic relations of Indian tribal members to "promote the stability and security of Indian tribes." 25 U.S.C. § 1902 (2016). Courts have repeatedly rejected claims to the contrary, and this Court should as well. *See In re A.B.*, 663 N.W.2d at 636–637 (citing Indian Commerce Clause, holding that "Congress's plenary power to legislate Indian matters is well established, and we conclude ICWA is a rational exercise of that power which does not violate the Tenth Amendment"); *In re N.B.*, 199 P.3d 16, 23 (Colo. Ct. App. 2007) (concluding that "ICWA is constitutional and does not violate the Tenth Amendment"); *In the Matter of Baby Boy L.*, 103 P.3d 1099, 1107 (Ok. 2004) (agreeing with *A.B.* court's rationale). ICWA does not unconstitutionally infringe on the right of states to

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[5] *See generally Morton v. Mancari*, 417 U.S. 535, 552 (1974); *see, e.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 397 (1980) (noting "Congress may recognize its obligation to pay a moral debt" and finding the Debt Clause permits Congress to pay the moral debts owed from the taking of tribal lands).

[6] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *see, e.g. United States v. Holliday,* 70 U.S. 407, 417 (1866) ("commerce" under the Indian Commerce "means commerce with the *individuals* composing [Indian] tribes." (emphasis added)). Thus, Plaintiffs' suggestion that invocation of the Indian Commerce Clause as authority for ICWA equates American Indian and Alaska Native children to "articles of commerce," Second Amended Compl. ("Compl.") ¶ 272, ECF No. 35, is misplaced.

adjudicate child custody disputes; rather, as an exercise of a power expressly delegated to Congress, it protects the rights of American Indian and Alaska Native families, tribes and tribal communities to have a role in child custody proceedings involving Indian children, the lifeblood of the tribes' future.

ICWA's constitutionality is underscored by how the statute addresses custody proceedings relating to Indian children who are not domiciled on the tribe's reservation. In these instances, and absent good cause, the court is to transfer the proceeding to tribal court upon a party's request. However, either parent may object to such a transfer, which keeps the case in state court. 25 U.S.C. § 1911(b) (2016); 25 C.F.R. §§ 23.117(c), -.118 (2018). Thus, while ICWA reflects Congress's determination that a tribe has a distinct sovereign interest in its members regardless of where they reside, and therefore affords tribes certain procedural rights in all child custody cases relating to them, Congress also set limits on tribal jurisdiction. In particular, where Indian children do not live on a reservation and where their parents object to tribal jurisdiction, these cases remain in state court. In this way, Congress crafted a balanced, uniform statutory scheme designed to effectuate its obligation under the Constitution and numerous treaties to protect tribes while respecting the States' traditional role in domestic relations. That statutory scheme should not be upended in this litigation.

II. ICWA DOES NOT VIOLATE EQUAL PROTECTION.

Plaintiffs also argue that ICWA constitutes racial discrimination in violation of the equal protection component of the Fifth Amendment's Due Process Clause. But as courts have repeatedly ruled, eligibility for the protections set forth in ICWA is based on tribal membership—a political classification—not race; therefore, far from impermissibly

discriminating, Congress acted rationally to fulfill its obligation to protect Indian tribes when it adopted ICWA.

A. ICWA Is Not Constitutionally Suspect Because Its Application Depends on Tribal Membership, Not Race or Ethnicity.

Provisions aimed at furthering Indian self-government can "readily co-exist" with general rules prohibiting racial discrimination. *Mancari,* 417 U.S. at 550. In *Mancari*, the Supreme Court ruled that an "Indian preference law" in Bureau of Indian Affairs hiring was "not directed toward a 'racial' group consisting of 'Indians'" but instead applied "only to members of 'federally recognized' tribes." *Id.* at 555; *see also id.* at 553 n.24. Because that classification was "reasonable and rationally designed to further Indian self-government," it was not unconstitutional. *Id.*; *see* Section I.B.ii., *infra*. Consistent with *Mancari*, the Court has upheld classifications based on tribal membership, because such legislation "is not to be viewed as [race] legislation."[7]

ICWA's definition of "Indian child" is tied to tribal membership.[8] ICWA thus applies only when the child's affiliation and affinity with a tribe creates a protectable interest in where

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[7] *Antelope*, 430 U.S. at 646 (upholding tribal court criminal jurisdiction over Indian defendants' crimes against non-Indians); *see, e.g.*, *Washington v. Confederated Tribes & Bands of the Yakima Nation*, 439 U.S. 463, 499–502 (1979) (upholding a provision treating Indians residing in "Indian Country" differently than non-Indians with respect to both civil and criminal tribal court jurisdiction), *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84–85 (1977) (upholding omission of Indian tribe which had splintered from original tribe from property distribution), *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479–480 (1976) (affirming exemption from state taxes for Indians residing on reservation), *Fisher v. Dist. Ct. of Sixteenth Jud. Dist.*, 424 U.S. 382, 390–391 (1976) (recognizing exclusive jurisdiction in tribal court over adoption proceedings regarding tribal members even before ICWA was enacted).

[8] *See* 25 U.S.C. § 1903(4) (2016) ("Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe").

and how that child is placed. This definition is a political, rather than racial, classification because it sets American Indians and Alaska Natives apart based not on their race or ethnicity but, instead, on their membership or eligibility for membership (if their parent is a tribal member) in "political communities."[9]

Tribal members must voluntarily decide to affiliate themselves as such and can terminate their tribal membership of their own free will, underscoring the political dimensions of tribal membership; one cannot renounce one's race or ethnicity in this manner. *See Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005) ("[Petitioner] has chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe. His Indian status is therefore political, not merely racial."). Furthermore, the decision regarding whether a person has the political status of being a tribal member is solely at the discretion of the tribes themselves, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72 (1978) (federal court lacked jurisdiction regarding tribe's membership determination); *id.* at 72 n.32 (Court noting that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community" [citing *Roff v. Burney*, 168 U.S. 218, (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76, (1906)]), which requires an applicant to show some "documented tribal lineage" rather than accept would-be members who only assert Indian "racial" status.[10]

Numerous courts have thus concluded that, under *Mancari*, ICWA does not draw suspect racial classifications. For example, the South Dakota Supreme Court rejected an equal protection

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[9] *Antelope*, 430 U.S. at 646; *see also* 1978 House Report at 17 (citing, inter alia, *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899)) (explaining that including children who are eligible for tribal membership as well as actual members is important because "Indian children . . . because of their minority, cannot make a reasoned decision about their tribal and Indian identity").

[10] *See, e.g.,* Gary D. Sandefur et al., *Changing Numbers, Changing Needs: American Indian Demography and Public Health* (1996) https://www.ncbi.nlm.nih.gov/books/NBK233104/.

and substantive due process challenge to ICWA, holding that "[t]he different treatment of Indians and non-Indians under ICWA is based on the political status of the parents and children and the quasi-sovereign nature of the tribe." *In re A.B.*, 663 N.W.2d at 636 (citing *In re Appeal in Pima County Juv. Action No. S-903*, 635 P.2d 187, 193 (Ariz. 1981); *In re Marcus S.*, 638 A.2d 1158, 1159 (Me. 1994); *In re Miller*, 451 N.W.2d 576, 579 (Mich. Ct. App. 1990); *In re Arnold*, 848 P.2d 133, 134 (Or. Ct. App. 1993); *In re Guardianship of L.*, 291 N.W.2d 278, 281 (S.D. 1980)); *see also In re Vincent M.*, 59 Cal. Rptr. 3d 321, 335–337 (Ct. App. 2007) ("ICWA does not conflict with the United States Constitution"); *Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605, 610–611 (Ct. App. 2006) (agreeing with analysis of *A.B.*),[11] *In re Armell*, 550 N.E.2d 1060, 1068 (Ill. Ct. App. 1990) ("The provisions of the ICWA were deemed by Congress to be essential for the protection of Indian culture and to assure the very existence of Indian tribes. Those provisions do not contravene equal protection."); *see generally In re Adoption of Child of Indian Heritage*, 529 A.2d 1009, 1010 (N.J. Super. Ct. App. Div. 1987) (noting that "[t]he Act has been held constitutional under the Indian Powers Clause, the Tenth Amendment and the Due Process and Equal Protection Clauses of the Fifth Amendment.") ICWA simply does not create a constitutionally suspect racial classification.

[11] A review of decisions holding to the contrary reveals that they often "erroneously racialize tribal citizenship, pay too little heed to the Supreme Court's equal protection jurisprudence in the field of Indian law, and would force state courts into misguided attempts to judge the experience of belonging to a tribal community." Nell Jessup Newton ed., *Cohen's Handbook of Federal Indian Law* 865 & nn.27–29 (2012) (citing Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 630-631, 633–636 (2002), and Carole Goldberg, *Descent into Race*, 49 UCLA L. Rev. 1373, 1383–1384 (2002).)

B. ICWA's Placement Preferences Rationally Advance Nonracial Interests.

Once Congress's use of tribal membership to determine ICWA's applicability is seen in the correct (non-racial) light, the rational basis for its decision to adopt ICWA's placement preferences is clear.

Congress has generally acted to support a preference for foster placements with family members. *See* 42 U.S.C. § 671(a)(19), 25 U.S.C. § 1915(b) (2016). In enacting ICWA, Congress further provided that, absent good cause to the contrary, when a member of the Indian child's extended family is not available for placement, the child should be placed with a foster home licensed, approved, or specified by the Indian child's tribe. 25 U.S.C. § 1915(b)(ii) (2016). If this placement is unavailable, the Indian child should be placed in an Indian foster home. 25 U.S.C. § 1915(b)(iii) (2016). The definition of an "extended family member" takes note of tribal law or custom. 25 U.S.C. § 1903(2) (2016). Further, "[t]he standards to be applied in meeting the preference requirements . . . shall be the prevailing social and cultural standards of the Indian community in . . . which the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915(d) (2016). The Supreme Court has held that when "special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 555. Just as in *Mancari*, the preferences found in ICWA are reasonable, rational means of furthering tribal self-government and, therefore, do not violate the equal protection principles of the Fifth Amendment's Due Process Clause. *See, e.g.*, *In re A.B.*, 663 N.W.2d at 636 (ICWA is "rationally related to the protection of the integrity of American Indian families and tribes and . . . to the fulfillment of Congress's unique guardianship obligation toward Indians." (citations omitted).)

To be sure, the Supreme Court suggested in dicta in the *Adoptive Couple* case that certain hypothetical interpretations of ICWA's placement preferences—such as an Indian father abandoning his child *in utero*, then invoking ICWA to override both the child's best interests and a mother's decision regarding adoption—"would raise equal protection concerns." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013). Some courts have applied this dicta to hold that ICWA's placement preferences do not bar non-Indian families from adopting Indian children when no other eligible prospective adoptive families have come forward.[12] But even if some outlier applications of ICWA, such as that addressed in the *Adoptive Couple* dicta, might be unconstitutional, that would not mean the statute is unconstitutional in all of its applications, as would be required for the State Plaintiffs' facial challenge to succeed. *See United States v. Salerno*, 481 U.S. 739, 745-6 (1987) (finding a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). And the circumstances of the individual plaintiffs' cases are a far cry from the extreme facts hypothesized by the *Adoptive Couple* Court, as well as the facts in *Tununak. See also In re N.B.*, 199 P.3d 16, 22 (treating challenge to ICWA in adoption proceeding as facial challenge despite stepmother's argument that challenge is "as-applied," because "plaintiff seeks to render [ICWA] utterly inoperative"). This Court should reject Plaintiffs' Equal Protection arguments.

ICWA SEEKS TO REMEDY PAST ABUSIVE PRACTICES TOWARD AMERICAN INDIAN AND ALASKA NATIVE CHILDREN, FAMILIES, AND TRIBES AND ENSURE TRIBAL PRESERVATION AND VITALITY.

[12] *Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs.,* 334 P.3d 165, 172 (Alaska 2014); *but see id.* at 179-80 (Winfree, J., dissenting) (language in *Adoptive Couple* is dicta, and Supreme Court "made no holding about [the placement preferences].").

Plaintiffs' arguments should be viewed in light of the factual context that led Congress to enact ICWA. Congress gathered a mountain of evidence of the severe national crisis in excessive Indian child removal and its consequences before adopting the statute in 1978. Congress heard that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions," *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 32 (1988), and that the children of tribes were the tribes' "greatest resource, and without them [tribes] have no future."[13] ICWA therefore aims to remedy the harms caused by the "wholesale separation of Indian children from their families," 1978 House Report at 9, separation that was often the direct result of actions by federal, state and local governmental actors. The legislative history makes clear that a national remedy was necessary because many state and local agencies were undermining American Indian and Alaska Native culture, families, and tribes by unnecessarily removing Indian children from their homes and tribal communities.[14]

Organized, forcible removal of Indian children from their families began in Colonial America and persisted for centuries.[15] In 1867, the Commissioner of Indian Services declared to Congress that the best way to deal with the "Indian problem" was to separate the Indian children completely from their tribes. H.R. Rep. No. 104-808, at 15 (1996) ("1996 House Report"). To carry out this plan, the government and private institutions developed "boarding schools" for

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[13] *Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs,* 95th Cong. 78 (1978) (testimony of Puyallup Tribe official).

[14] A national framework is further necessary because tribal lands may cross state borders. U.S. Census Bureau, *Map of American Indians and Alaska Natives in the United States* (2010), https://www2.census.gov/geo/maps/special/AIANWall2010/AIAN_US_2010.pdf.

[15] Kristalyn Shefveland, *Indian Enslavement in Virginia*, Virginia Humanities (April 7, 2016), https://www.encyclopediavirginia.org/Indian_Enslavement_in_Virginia#start_entry (detailing 17th century Virginia practice of English colonists demanding that Indian children serve as hostage-servants in English households).

Indian children, many of which were actually "custodial institutions at best, and repressive, penal institutions at worst." S. Rep. No. 91-501, at 103 (1969) ("1969 Senate Report"). Some children were forcibly taken by armed police.[16] By 1900, more than 20,000 Indian children were attending such schools.[17] These schools "contribute[d] to the destruction of Indian family and community life." 1978 House Report at 9. Indian children were "forbidden to engage in cultural practices or speak their languages and suffered harsh punishment if they disobeyed. . . . [C]ultural disruption [at these schools] was profound."[18] These policies continued well into the second half of the twentieth century. *See, e.g.,* 1969 Senate Report at 100.

The adoption of Indian children into non-Indian homes represented a different policy with a similar goal as the "boarding school" institutions, and was widespread throughout the 1950s and 1960s. *See* 1996 House Report at 15. The federal Indian Adoption Project was established in 1959 and "was premised on the view that Indian children were better cared for in non-Indian homes." *Id.* at 16. It is estimated that more than 12,000 Indian children were adopted during this era.[19] Little attention was paid by federal or state government agencies to providing services on reservations that would strengthen and maintain Indian families. *See* 1996 House Report at 16.

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[16] Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008), https://www.npr.org/templates/story/story.php?storyId=16516865.

[17] C. Eric Davis, *In Defense of the Indian Child Welfare Act in Aggravated Circumstances*, 13 Mich. J. of Race & L. 433, 438 (2008).

[18] Teresa Evans-Campbell, et al., *Indian Boarding School Experience, Substance Use, and Mental Health among Urban Two-Spirit American Indian/Alaska Natives*, 38 Am. J. Drug Alcohol Abuse 421 (2012).

[19] Claire Palmiste, *From the Indian Adoption Project to the Indian Child Welfare Act: the Resistance of Native American Communities*, 22 Indigenous Pol'y J. 1, 5–6 (2011).

By the 1970s, even as the boarding schools were winding down or being converted to tribal control, Indian children were still being removed from their homes and tribes at very high rates, an "alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children . . . and . . . an alarmingly high percentage of such children [were] placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4) (2016). At congressional hearings on ICWA, "witness after witness testified to the automatic removal of Indian children, often without a scintilla of due process."[20] State actors made decisions to remove Indian children with "few standards and no systematic review of judgments" by impartial tribunals. *Id.* at 4.

Congress found that "the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," 25 U.S.C. § 1901(5) (2016); *see also Holyfield*, 490 U.S. at 35–36. This led to concerns that the disproportionate rates of terminating parental rights to Indian children was caused by an insensitivity to "Indian cultural values and social norms," misevaluations of parenting skills, and unequal considerations of such matters as parental alcohol abuse. 1978 House Report at 10. State courts have recognized similar problems. *See, e.g.*, *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986).

Congress thus determined that, absent ICWA, "[m]any of the individuals who [were] decid[ing] the fate of our children [were] at best ignorant of [Indian] cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." 1978 House Report at 191–192 (tribal chief's

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[20] Matthew L. M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History*, Mich. St. Univ. Coll. of L., Indigenous L. & Pol'y Ctr. Occasional Paper Series (Apr. 10, 2009) at 3.

testimony). As the Supreme Court noted, Congress was responding to a consistent "failure of non-Indian child welfare workers to understand the role of the extended family in Indian society." *Holyfield*, 490 U.S. at 35 n.4 (citing 1978 House Report at 10.)

In addition to the grave harm to children at being separated from and left without a cultural connection to their families and tribes, the "massive removal of their children" had profound impacts on Indian tribes. As one tribal chief testified, the "chances of Indian survival" and "tribes' ability to continue as self-governing communities" were at serious risk if "children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People." 1978 Hearings at 193. Congress was very concerned about "the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians," *Holyfield*, 490 U.S. at 49; 25 U.S.C. § 1901(3) (2016) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children").

It was in light of this evidence that Congress, "concerned with the rights of Indian families and Indian communities vis-à-vis state authorities," adopted ICWA; specifically, Congress found that a national standard promulgated through federal legislation was needed because it "perceived the states and their courts as partly responsible for the problem it intended to correct." *Holyfield*, 490 U.S. at 44–45 (citing 25 U.S.C. § 1901(5) (2016)); *see also* 124 Cong. Rec. 38,103 (1978) (ICWA sponsor Rep. Morris Udall stating that "state courts and agencies and their procedures share a large part of the responsibility" for the uncertain future threatening the "integrity of Indian tribes and Indian families").

ICWA has been successful in the goals set out for it by Congress. In states where a high percentage of placements of Indian children are made in accordance with ICWA's placement

preferences, there is a correspondingly high level of state-tribal cooperation in working with Indian families and children.[21] It has also been shown that "compliance with ICWA promotes better outcomes through reunification." *Id.* Further, while studies show that disparities still exist in child removals, those disparities are significantly less than the rates before ICWA.[22] For example, in Utah, in 1976 an Indian child was 1,500 times more likely to be in foster care than a non-Indian child; that disparity dropped to 4 times by 2012.[23] And Indian children are more likely to receive services at home after an investigation is initiated than other children,[24] implying that social services agencies are complying with ICWA's mandate to make "active efforts" to "provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d) (2016).

Thus, ICWA is achieving the purpose for which it was intended by Congress; it has created a national standard for the treatment of Indian children that seeks to preserve their connections with their tribes and culture. In this way, ICWA also works to preserve tribal self-governance and start the process of reversing the generational harms done by the federal government and states.

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[21] *See, e.g.*, Gordon E. Limb, et al., *An empirical examination of the Indian Child Welfare Act and its impact on cultural and familial preservation for American Indian children*, 28 Child Abuse & Neglect 1279–1289 (2004) (study showing that 83 percent of Indian children were placed per ICWA preferences).
[22] *See* Joshua Padilla & Alicia Summers, *Disproportionality Rates for Children of Color in Foster Care*, Nat'l Council of Juv. and Fam. Ct. Judges (May 2011).
[23] Brooke Adams, *American Indian children too often in foster care*, Salt Lake Tribune, Mar. 24, 2012, http://archive.sltrib.com/article.php?id=53755655&itype=CMSID.
[24] Jason R. Williams, et al., *A Research and Practice Brief: Measuring Compliance with the Indian Child Welfare Act* 5, Casey Fam. Programs (Mar. 2015).

THIS COURT SHOULD NOT ISSUE RELIEF THAT WOULD INTERFERE WITH STATE PROCEEDINGS AND THE NATIONAL IMPLEMENTATION OF ICWA.

Amici States have embraced the fundamental change ICWA effectuated in the historical relationship between state and local child welfare agencies and tribes. Indeed, Amici States have made intentional policy choices to implement ICWA in their child welfare and custody schemes. Plaintiff's Equal Protection constitutional challenge to ICWA threatens those state laws and regulations. Further, the protections that federal ICWA provides to Indian children who are living in states other than the one in which their tribe is situated are at risk until this Court rejects Plaintiffs' Equal Protection challenge to ICWA.

Many of the Amici States have enacted statutes, regulations, and rules based on the federal ICWA. For example, California has acted "to protect[] the essential tribal relations and best interest of an Indian Child," Cal. Fam. Code § 175(a)(1) (West 2018). It has also recognized that the stability and security of Indian tribes and families require compliance with ICWA in all Indian child welfare and custody proceedings by enacting multiple laws, including an entire legislative package.[25] Additionally, California's Department of Social Services recently updated its regulations for child welfare agencies to increase understanding and implementation of its provisions in the child welfare court system.[26] ICWA is also an integral part of Alaska's child protection system. Alaska's statutes and regulations reference ICWA, and the Alaska Court System has incorporated ICWA into its rules governing child protection proceedings, including

[25] 2006 Cal. Stat. ch. 838 ("SB 688"); 1999 Cal. Stat. ch. 275 ("AB 65"); *see also* Cal. Code Regs. tit. 22, §§ 35353-35387 (2018) (setting forth child welfare agency procedures for ICWA compliance); Cal. R. of Ct. 5.480-487, 5.534(i), 5.785, 7.01015 (family, dependency, and probate court rules implementing ICWA).

[26] Cal. Dep't Soc. Svcs. Man. Pol'y & Proc., Child. Welf. Svcs. Man., Div. 31., Ch. 31-000 to 31-530 (June 16, 2016).

provisions for registration and expedited enforcement of tribal court orders.[27] Montana has incorporated ICWA into its statutes.[28] New Mexico amended its Abuse and Neglect Act in 1993, implementing ICWA requirements in state law. N.M. Stat. Ann. § 32A-4-9(A) (2018). Oregon "recognizes the value" of ICWA and incorporates the "policies of that Act" into its Juvenile Code. Or. Rev. Stat. Ann. § 419B.090(6) (West 2018). These policies include the recognition that "there is no resource more vital to the continued existence and integrity of Indian tribes than their children." Or. Admin. R. 413-115-0010 (2018). Oregon also requires adoptions of minor children comply with ICWA. Or. Rev. Stat. Ann. § 109.309(13) (West 2018). And the State of Washington, in addition to enacting its own state ICWA that is substantively similar to the federal ICWA, Wash. Rev. Code Ann. ch. 13.38 (West 2018), provides equal eligibility and payment rates for foster care services for Indian children regardless of whether they are in the custody of a federally recognized tribe or in the custody of the state. Wash. Rev. Code Ann. § 74.13.031(14) (West 2018).

Some of the Amici States have enacted far-reaching compacts or collaborations to fulfill their obligations under ICWA—and, in some cases, to go even further than ICWA's requirements. For example, ICWA authorizes states and tribes to "enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings." 25 U.S.C. § 1919(a) (2016). That provision is the foundation for a recent compact to transform Alaska's child welfare system, with the goal that tribes and tribal organizations will

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[27] *See, e.g*., Alaska Stat. § 47.10.990 (2017); Alaska Admin. Code tit. 7, § 54.600 (2018); Alaska Child in Need of Aid R. 24.

[28] *See, e.g.* Mont. Code Ann. §§ 41-3-109 (all proceedings involving an Indian child are subject to ICWA), 41-3-422, 41-3-427 (ICWA standards of proof are required for any proceeding involving an Indian child),41-3-432 (2017) (qualified expert witness required at hearing to show cause involving and Indian child).

provide child welfare services directly in their communities through Support, Services, and Funding Agreements.[29] And Alaska's child welfare agency currently employs five ICWA specialists whose job is to provide leadership and direction to staff on ICWA to increase ICWA compliance and enhance Tribal partnerships.[30] New Mexico has also recognized the need for government-to-government relationships between the State and tribes for over 70 years, in 1953 creating the New Mexico Commission on Indian Affairs, followed by the Office of Indian Affairs and, ultimately, the cabinet-level Indian Affairs Department. N.M. Stat. Ann. §§ 9-21-1 to 9-21-15 (2018). The State-Tribal Collaboration Act requires every state agency to "collaborate with Indian nations, tribes or pueblos in the development and implementation of policies, agreements and programs of the state agency that directly affect American Indians or Alaska Natives." N.M. Stat. Ann. § 11-18-3 (2018). It mandates the appointment of a tribal liaison from each executive agency to be trained and equipped to work appropriately with tribes, nations and pueblos to represent state interests to the separate tribal governments. N.M. Stat. Ann. § 11-18-1 to 11-18-5 (2018). Similarly, Washington has worked with tribes to improve the outcomes for Indian children involved in the child welfare system for decades. In 1987, Washington's Department of Social and Health Services demonstrated its commitment to following a government-to-government approach of consultation with Washington's federally recognized tribes and collaboration with Recognized American Indian Organizations (RAIOs) when establishing policies and procedures on Indian issues by adopting Administrative Policy No.

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[29] *See Alaska Tribal Child Welfare Compact* (Dec. 15, 2017), http://dhss.alaska.gov/ocs/Documents/Publications/pdf/TribalCompact.pdf.
[30] Alaska Dep't of Health and Soc. Svcs., Office of Children's Servs., *ICWA Specialists*, http://dhss.alaska.gov/ocs/Pages/icwa/contact.aspx.

7.01.[31] Two years later, Washington executed the Centennial Accord with federally recognized tribes in Washington, which establishes a government-to-government relationship between the State and the signatory tribes.[32] This government-to-government relationship is now codified in Washington state law. Wash. Rev. Code Ann. § 43.376 (West 2018).

And Amici States' child welfare agencies have strongly supported ICWA and its goals, through regulation and inter-tribal agreements. California's Department of Social Services is developing an Office of Tribal Affairs, led by a tribal member, and has adopted a Tribal Consultation Policy that, among other things, expressly addresses ICWA compliance.[33] California's court system has forged partnerships with California tribes through its Tribal/State Programs Unit, which implements tribal-state programs to improve the administration of justice in all proceedings with overlapping state and tribal court jurisdiction, including child welfare cases to which ICWA applies.[34] More generally, California values its sovereign-to-sovereign agreements with Indian tribes, and has enacted numerous policies to support these mutually beneficial relationships; California has a strong interest in seeing its tribal partners continue to be

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[31] Wash. St. Dep't of Soc. & Health Servs., Admin. Pol'y No. 7.01 (Rev. Mar. 31, 2015) https://www.dshs.wa.gov/sites/default/files/SESA/oip/documents/DSHS-AP-07-01.pdf.

[32] When the Centennial Accord was signed, there were 26 federally recognized tribes in Washington. Not all of them are signatories to the Centennial Accord. In addition, the Nez Perce Tribe (Idaho) and the Confederated Tribes of the Umatilla Indian Reservation (Oregon) are signatories, demonstrating the cross-border implications of ICWA and the need for a federal standard.

[33] *See* Cal. Dep't Social Svcs., Tribal Consultation Policy (June 6, 2017) http://www.cdss.ca.gov/Portals/9/TribalAffairs/Final%20TCP%206.6.17%20OTA.pdf?ver=2017-08-21-085856-903 (relying on, inter alia, 25 U.S.C. §1901, SB 678, & 42 U.S.C. § 622 [requiring State to describe specific ICWA compliance measures].)

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

viable governmental entities, as ICWA seeks to ensure.[35] Montana has an Indian Child Welfare Specialist within the Montana Child and Family Services Division to assist in providing technical advice to tribal, state, and county agencies and district courts on ICWA; to conduct training on ICWA; and to assist in negotiating cooperative agreements to provide foster care services to Indian children. Mont. Code Ann. § 52-2-117 (2017). To carry out the policies of ICWA, Oregon's Department of Human Services has adopted comprehensive rules to implement ICWA in all phases of a child welfare case. *See* Or. Admin. R. 413-115-0000 to -0150 (2018). Utah's Division of Child and Family Services has pledged its full support and compliance to ICWA's purposes and goals, and entered into intergovernmental agreements to implement ICWA with the two largest Indian Nations in Utah, the Navajo Nation and the Ute Tribe.[36] Those agreements have led to important successes; the Ute Tribe has placed 75% of its children with relatives. By comparison, only 38% of other children in foster care in Utah are placed with relatives.[37]

Plaintiffs' efforts to strike down ICWA would disrupt these state statutory and regulatory schemes; they would also disrupt state court proceedings, including at least one involving potential placement of an Indian child in an amicus State. The Supreme Court has held that a federal court must abstain from interfering in state court proceedings when there are ongoing state judicial proceedings that implicate important state interests and there is an adequate

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[35] *See, e.g.*, Gov. Jerry Brown, Exec. Order B-10-11 (Sept. 19, 2011), https://www.gov.ca.gov/2011/09/19/news17223/ (requiring California state agencies to "encourage communication and consultation with California Indian Tribes.").
[36] Utah Div. of Child and Fam. Servs., *Practice Guidelines*, § 705.2 (2017), https://www.powerdms.com/public/UTAHDHS/documents/275070.
[37] Utah Div. of Child and Fam. Services, *Child and Family Services Plan for Federal Fiscal Years 2015-2019*, at 22, https://dcfs.utah.gov/wp-content/uploads/2017/11/Child-and-Family-Services-Plan-Federal-Fiscal-Years-2015-2019.pdf.

opportunity to raise the federal claims in the state court proceedings. *Middlesex Cty. Ethics Comm. v. Garden St. Bar Ass'n*, 457 U.S. 423, 435 (1982).[38]

The importance of Amici States' interests in their own ongoing child welfare proceedings is clear, as Plaintiffs themselves aggressively assert. *See* Compl. ¶¶ 37-44. These State interests weigh in favor of this Court refraining from exercising its jurisdiction over this matter based on the federalism principles that the Supreme Court has set forth in the line of cases beginning with *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* doctrine instructs federal courts to abstain from interfering in state proceedings when such interference would "disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco*, Inc., 481 U.S. 1, 11 (1987). Additionally, federal courts "should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil*, 481 U.S. at 15.

Specific to this case, federal Courts have held that "*Younger's* principles of comity and federalism" require abstention when there are ongoing state court adoption proceedings. *Morrow v. Winslow*, 94 F.3d 1386, 1395–1396 (10th Cir. 1996) (ordering District Court to abstain from deciding, and to dismiss, federal lawsuit where father challenged Oklahoma state adoption proceedings based on ICWA violation). The *Morrow* court, examining the "state interest" factor, noted that "[t]he Supreme Court has made emphatically clear its recognition that family relations are a traditional area of state concern." *Id.* at 1397, citing *Moore v. Sims*, 442 U.S. 415, 435 (1979) (internal quotation marks and brackets omitted), as well as the State's "interest in the orderly conduct of the proceedings in its courts in a manner which protects the interests of the child and the family relationship." *Id.* These concerns are especially acute for

[38] The abstention issue is extensively and ably discussed in Defendant's Motion to Dismiss, see Mem. in Supp. Def's Mot. to Dismiss 32-36, ECF No. 28; therefore, this brief only addresses the "important state interest" prong of the *Younger* analysis.

amicus State New Mexico here, because the Texas proceeding at issue involves a child from the Navajo Nation, which arranged a tribal placement in New Mexico for the child. *See* Compl. ¶¶ 127, 133.

CONCLUSION

For the reasons stated above, the states of California, Alaska, Montana, New Mexico, Oregon, Utah, and Washington urge the Court to deny the Plaintiffs' Motion for Summary Judgment.

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Respectfully submitted,

/s/*Christina M. Riehl*
XAVIER BECERRA
Attorney General of California
MICHAEL L. NEWMAN
Supervising Deputy Attorney General
JAMES F. ZAHRADKA II
REBEKAH A. FRETZ
CHRISTINA M. RIEHL (*pro hac vice*)
Cal. State Bar No. 216565
Deputy Attorneys General
600 West Broadway, Suite 1800
San Diego, CA 92101
Telephone: (619) 738-9740
Fax: (619) 645-2271
Email: Christina.Riehl@doj.ca.gov
Attorneys for Proposed Amicus Curiae State of California

JAHNA LINDEMUTH
Attorney General
State of Alaska
1031 W. Fourth Ave., Suite 200
Anchorage, Alaska 99501

TIMOTHY C. FOX
Attorney General
State of Montana
MELISSA SCHLICHTING
Deputy Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

HECTOR BALDERAS
Attorney General
State of New Mexico
TANIA MAESTAS
Deputy Attorney General
For Civil Affairs
408 Galisteo Street
Santa Fe, NM 87501
P.O. Drawer 1508
Santa Fe, NM 87504-1508

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street N.E.
Salem, OR 97301

SEAN D. REYES
Attorney General
State of Utah
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320

ROBERT W. FERGUSON
Attorney General
State of Washington
PO Box 40100
Olympia, WA 98504-0100

CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of May, 2018, the foregoing proposed amicus brief was filed electronically as an exhibit to the motion seeking leave of Court. All parties receive notice through the Court's electronic filing system and, notice of this filing therefore will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system, and Parties may access this filing through the Court's system.

/s/ *Christina M. Riehl*
Attorney for Proposed Amicus Curiae
State of California