Nos. 21-376, 21-377, 21-378, 21-380

In The
Supreme Court of the United States

DEB HAALAND, Secretary of the Interior, et al.,

Petitioners,

v.

CHAD EVERET BRACKEEN, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN AND THIRTY OTHER CHILDREN'S RIGHTS ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF FEDERAL AND TRIBAL DEFENDANTS

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INTEREST OF AMICI CURIAE[1]

Amici are children's rights organizations throughout the country who provide legal representation to or policy advocacy on behalf of children experiencing foster care. Amici have extensive experience providing legal representation to children in child welfare proceedings, adoption and non-divorce related custody cases, and extensive policy expertise in child welfare and children's rights issues.[2]

SUMMARY OF ARGUMENT

Amici respectfully submit this brief to correct fundamental misrepresentations made by Plaintiffs and their amici regarding the Indian Child Welfare Act's (ICWA) protection of the legal rights and best interests of Indian children. ICWA was enacted to "protect the best interests of Indian children," 25 U.S.C. § 1902, and that is exactly what it does. Plaintiffs and their amici incorrectly claim that ICWA "overrides the 'best interests of the child' rule," Br. of Goldwater Inst., et al. as Amici Curiae 28, and "compels the State[ ] . . . to deny Indian children the best interests determination they would receive under state law," Br. for Individual

[1] Counsel of record for all parties consented to the filing of this brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] See appendix for complete list of amici.

Plaintiffs 32. These representations are false in two key respects.

First, this Court has made clear that the " 'best interest of the child' rule" applies to custody disputes between two parents; it is not the sole standard in proceedings involving the removal of a child from parental custody. *See Reno v. Flores*, 507 U.S. 292, 304 (1993). The Constitution limits the state's intervention in the family, which protects the right to family integrity and promotes the well-being of children. *See Troxel v. Granville*, 530 U.S. 57, 66–69 (2000). It does not permit courts to remove children and dissolve family ties to match children to the "best" resources or to intervene simply because a parent's care does not conform to a court's view of ideal parenting practices. *Id.* While courts do consider a child's best interest when making placement determinations, they do so within these well-established constitutional limitations. ICWA safeguards these rights and interests in child welfare proceedings involving Indian children.

Second, ICWA is consistent with the best interest determinations that state courts make in child welfare proceedings. In addition to binding constitutional principles, numerous state and federal laws guide state courts in all child welfare cases when determining what outcome is in a child's best interest after removal. State statutes typically direct state courts to consider factors that protect and promote children's well-being. These are the same factors that ICWA seeks to maximize: family integrity, placement with extended family, and maintenance of community and culture. ICWA

is simply a specific application of regular child welfare practice for children who—unlike other youth in the child welfare system—have a particular legal status as a result of their tribal affiliation. ICWA does not "override" or "subordinate" any generally applicable state or federal child welfare standard; rather, it addresses the specific situation of Indian children.

Additionally, ICWA remains critical to safeguard the rights and interests of Indian children. To protect children's rights, state courts need complete and accurate information. Child welfare matters involving Indian children require additional information, including the child's tribal membership status and the interest of the Tribe in the proceeding. The unfortunate reality is that child welfare systems across the country are failing the children in their care, limiting the information available to courts. The deplorable condition of many states' child welfare systems is exemplified by Plaintiff State of Texas, where a federal court found that the state's failure to keep children safe from harm "shock[ed] the conscience" and caused children to "age out of care more damaged than when they entered." *M.D. v. Abbott*, 152 F. Supp. 3d 684, 700, 823 (S.D. Tex. 2015). Texas falsely claims that ICWA harms children, when in fact its own child welfare infrastructure has been found to lack basic elements required to keep all children—including Indian children—safe. ICWA assists state courts by ensuring that they have the information and guidance needed to make sound, individualized determinations in Indian children's best interests.

ARGUMENT

I. ICWA SAFEGUARDS THE CONSTITUTIONAL RIGHTS AT STAKE IN CHILD WELFARE PROCEEDINGS FOR INDIAN CHILDREN.

ICWA establishes minimum federal standards consistent with constitutional requirements applicable to state welfare proceedings that ensure the system protects the well-being of children when state intervention is necessary. The Constitution prohibits unwarranted state intervention in the family and the family's right to raise children in accordance with its own culture, traditions and religion. These bedrock principles not only protect parents, but also promote the well-being of children, whose best interests are served by maintaining the integrity of the family. *See* Br. of Casey Family Programs, et al. as Amici Curiae 17–18. The state may therefore intervene to remove a child from parental custody only after making a specific determination that the child is unsafe. The "best interest" standard alone is not enough to overcome the weighty constitutional interest in the parent-child relationship.

ICWA was developed in response to and in accordance with this constitutional doctrine. It establishes sensible procedures and standards to ensure the constitutional rights of Indian children are protected and the children's best interests are promoted. ICWA safeguards Indian children from unwarranted removal from their families. When removal is necessary, it establishes non-dispositive placement preferences that provide Indian children the opportunity to be raised in their communities and remain connected to tribal cultural practices, traditions, and religions.

A. The Constitution Protects Families from Unwarranted State Intervention, Which Supports Children's Well-Being.

The Constitution protects children and families from unwarranted state intrusion in family life. "There does exist a 'private realm of family life which the state cannot enter,' that has been afforded both substantive and procedural protection." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842 (1977) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *see also Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923). "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The core constitutional value protects children who depend on the care of their parents as well as the rights of parents as decision-makers. This constitutional interest is so great that it is entitled to protection even after the involvement of the state has strained family relationships. *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1981) ("If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.").

The Constitutional interest of parents in the relationship with their children includes the family's right to "bring up children" in accordance with its own

culture, traditions, and religion. *See Meyer v. Nebraska*, 262 U.S. at 399; *see Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control"). This right protects children by ensuring their care and connection with their communities. It also provides an important protection for families to impart traditions and values free from state intrusion. The diversity of traditions and values is core to our democratic traditions.[3] For example, Amish families have the right to educate their children to honor a unique "traditional way of life . . . shared by an organized group, and intimately related to daily living." *Yoder*, 406 U.S. at 216. And multilingual parents have the right to educate their children to learn their native languages. *Meyer*, 262 U.S. at 401.

B. The Constitution Limits the Circumstances Under Which the State May Remove a Child from Parent Custody.

Because the Constitution protects the relationship between parent and child, whether the state may

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[3] The National Association of Counsel for Children's forthcoming Red Book provides an overview of how this Court's "strong respect for family integrity" serves as "a tool to protect a diverse society." Josh Gupta-Kagan, Nat'l Ass'n of Counsel for Child., *The Constitutional Right to Family Integrity, in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* §§ 1.4, 1.5G, 1.6 (4th ed. forthcoming 2022); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) (describing families as the means through which "we inculcate and pass down many of our most cherished values, moral and cultural").

intervene to remove a child from a parent's care is a fundamentally different inquiry than other types of child custody determinations.[4] Plaintiffs' amici incorrectly suggest that children can and should be removed from their parents' custody based merely on a showing that removal would be in "the best interest of the child." Br. of Goldwater Inst., et al. as Amici Curiae 28–29. Plaintiffs' amici claim that ICWA overrides the best interests standards adopted by states and "deprives at-risk children of the legal protections they need." *Id.* But as this Court explained in *Reno v. Flores*, the subjective "best interest rule" is not the applicable standard when determining whether to remove a child from parental custody:

> "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody

[4] ICWA applies to foster care placements, termination of parental rights, pre-adoptive placements, and adoptive placements. 25 U.S.C. § 1903(1). It does not cover divorce proceedings or custody disputes between two parents. *Id.*

> of its parents so long as they were providing for the child *adequately*.

507 U.S. 292, 303–04 (1993) (citing *Quilloin*, 434 U.S. at 255) (emphasis in original).

The Constitution does not permit courts to remove children and dissolve family ties to match children to the "best" resources or to intervene simply because a parent's care does not conform to a court's view of ideal parenting practices. Rather, the Constitution "strictly limit[s] the authority of the state to remove a child from the care of a parent" as the state only "has an interest in safeguarding children *from serious harm*." Restatement (First) of Child. & the L. § 2.40 (Am. L. Inst., Tentative Draft No. 4, 2022) (emphasis added). When articulating the standard for removal, "many [state] statutes use language such as: imminent risk; risk of harm; imminent risk of severe harm; immediate physical danger; threat of harm; threat of imminent harm. . . . [but *t*]*he critical question remains whether or not the child is safe*, regardless of the terms in [the] statute." Therese Rowe Lund & Jennifer Renne, *Child Safety: A Guide for Judges and Attorneys*, American Bar Association, 2 (2009) (emphasis in original); *see*, *e.g.*, Tex. Fam. Code Ann. § 262.101 (providing for removal if "immediate danger to the physical health or safety of the child"). In addition, because "the state has an obligation, rooted in the Fourteenth Amendment" to protect "the integrity of the parent-child relationship," courts have a responsibility to create responsive plans and provide necessary resources to keep families together. Restatement (First) of Child. & the L. §§ 2.30

cmt. a, 2.40 cmt. a (Am. L. Inst., Tentative Draft No. 4, 2022).

ICWA's active efforts and qualified expert witness provisions help safeguard this directive, requiring the state to respect the integrity of the family unless a child is unsafe.

C. ICWA Preserves the Constitutional Right to Family Integrity by Preventing Unwarranted Removals.

ICWA is consistent with well-established constitutional principles safeguarding the parent-child relationship. Within those limitations, it provides tailored protections that reflect the historical treatment of Indian families and children, the sovereignty of tribes, and the special protection owed to children. ICWA protects families from "unwarranted" removals, 25 U.S.C. § 1901(4), by establishing standards and procedures designed to ensure that Indian children are removed from their parents only when necessary to safeguard them from serious harm, and that families are reunified when possible. ICWA prohibits removal of an Indian child into state custody or termination of parental rights unless the state court finds that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved

unsuccessful."[5] 25 U.S.C. § 1912(d) ("active efforts provision"). An Indian child may be removed to state custody or have parental rights terminated only upon a showing that remaining in parental custody "is likely to result in serious emotional or physical damage to the child," supported by testimony by a qualified expert witness. *Id.* § 1912(e), (f) ("qualified expert witness provision").[6]

ICWA's safeguards to prevent the break-up of the Indian family, and to reunify families when possible, are consistent with well-established constitutional law. If temporary removal from parental custody is warranted, ICWA's direction to provide "remedial services and rehabilitative programs" continues to protect the right to family integrity and the best interests of Indian children. *Id.* § 1912(d). These protections ensure that the relationship between the parent and child is preserved when possible, and that it is severed only within the bounds of the Constitution. Information published by U.S. Department of Health and Human Services confirms that, consistent with ICWA, the first goal of child welfare is to reunite children with their

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[5] Contrary to Plaintiffs' assertions, the active efforts provision does not impair or prevent emergency removals. 25 U.S.C. § 1922.

[6] ICWA provides for appropriate standards of proof at each stage of a dependency case. In order to place an Indian child in foster care, this showing must be supported by "clear and convincing evidence," 25 U.S.C. § 1912(e), while termination of parental rights requires "evidence beyond a reasonable doubt," *id.* § 1912(f).

families as soon as possible.[7] The field has developed an array of practices and strategies to provide reunification supports for families.[8] ICWA's standards and procedures safeguard the constitutional right to family integrity and promote the best interests of the child by serving this purpose.

D. ICWA Preserves the Constitutional Right to Family Integrity by Prioritizing Placement with Extended Family and Other Tribal Members.

If temporary or permanent removal from parental custody is warranted, ICWA promotes the right to family integrity by prioritizing placement with extended family and other tribal members.[9] This prioritization helps protect the child when removal occurs.

When Indian children require foster care, or preadoptive, or adoptive placements, ICWA's non-dispositive placement preferences promote the right to family integrity and the "stability and security of Indian Tribes and families." 25 U.S.C. § 1902. Prioritizing placement with extended family and other caregivers identified

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[7] U.S. Dep't of Health & Human Servs., Administration for Children & Families, Children's Bureau, *Reunifying Families*, https://www.childwelfare.gov/topics/permanency/reunification/; *see also* Br. of Casey Family Programs, et al. as Amici Curiae 18–19.

[8] *Id.*

[9] ICWA further protects Indian children's right to family integrity by ensuring that their families and Tribes have notice of their welfare proceedings and can exercise due process rights. 25 U.S.C. § 1912(a).

by the Indian child's Tribe maintains a network of familiar relationships, maximizing continuity and protecting children facing the trauma of family separation.[10] *See* Br. of Casey Family Programs, et al. as Amici Curiae 20–21. A significant body of research supports the importance of preserving family integrity for children. Developmental research firmly establishes the importance of maintaining a network of relationships. *Id.* 24–25 (discussing stability and long-term benefits of placement with child's kin and community). ICWA aligns with social science demonstrating that Indian children benefit from intergenerational relationships.[11] ICWA recognizes the important support that Tribes and tribal members can provide to Indian children.

ICWA's placement preferences also protect the family's right to "bring up children" in accordance with its own tradition and religion by preserving, when the family so desires, connection to the cultural and religious traditions unique to each Indian child's Tribe and, when that is not possible, to other Indian families who share the experience of being members of Indian

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[10] American Bar Association Resolution 118 2019A § VI.i. (2019) ("Decades of research confirms that children who cannot remain with their parents thrive when raised by relatives and close family friends, known as kinship care. Children in foster care with relatives have more stable and safe childhoods than children in foster care with non-relatives, with greater likelihood of having a permanent home.").

[11] Carmella B. Kahn, et al., *American Indian Elders' Resilience: Sources of Strength for Building a Healthy Future for Youth*, 23 Am. Indian & Alaska Native Mental Health Rsch. 117, 123–25 (2016).

Tribes.[12] *See Meyer*, 262 U.S. at 399; *Yoder*, 406 U.S. at 216. Moreover, by seeking to preserve, where possible, an Indian child's connection to his or her Tribe, ICWA safeguards Indian children's access to the unique rights and benefits conferred by tribal membership that are grounded in the Constitution.[13]

II. ICWA ALIGNS WITH STATE COURTS' EFFORTS TO SERVE THE BEST INTERESTS OF INDIAN CHILDREN.

State courts are charged with the complex task of balancing the rights and interests of the child, parents, state, and in the case of Indian children, the Tribe, to make decisions about children's lives. As described above, these decisions are circumscribed by constitutional protections for the family, particularly when a child's removal from that family is contemplated. Within these constitutional limitations, state courts

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[12] If one or more of the Indian child's parents does not wish for a child to maintain this connection, this would constitute "good cause" to depart from the placement preferences. 25 C.F.R. § 23.132(c).

[13] *See*, *e.g.*, Br. of Family Defense Attorneys as Amici Curiae 21–22 (showing that ICWA's tribal notification and intervention provisions result in jurisdictional choice benefiting parents); Br. of Indian Tribes and Tribal and Indian Organizations as Amici Curiae 28–29 (discussing this Court's recognition of tribal membership as fundamental to tribal sovereignty), 29–31 (describing how placement with Indian family protects child's personal identity as Indian); Br. for Members of Congress as Amici Curiae 15, 18–19 (describing benefits of federal trust relationship with Indian children, including employment and educational support); *see also infra* Section II.B.

are also guided by numerous state and federal laws, which direct courts to take specific considerations into account when determining what outcome is in a child's best interest. Nearly every state has a statute articulating the core values that guide decision-making in child welfare matters. And twenty-two states and the District of Columbia have enacted statutes that enumerate specific factors that state courts should consider when analyzing a child's best interest. Congress likewise has created similar guidelines and presumptions in generally applicable federal laws regulating the child welfare system, including in Titles IV-E and IV-B of the Social Security Act. 42 U.S.C. §§ 672(a)(2)(A)(ii), 671(a)(15), (19), (29). Within these parameters, ICWA provides guidance for making nuanced decisions about child placements that serve the best interests of Indian children.

Contrary to Plaintiffs and their amici, ICWA is not at all inconsistent with the best interest analysis that states would otherwise undertake. Indeed, the guiding principles that animate ICWA—promoting family integrity, placement with extended family, and maintaining community and culture—are the very same factors that state statutes and other federal law already direct courts to consider when determining a child's best interests. *See infra* Section II.A. ICWA is simply a specific application of regular child welfare practice for children who—unlike other youth in the child welfare system—have a particular legal status as a result of their tribal affiliation. And it is an interpretation that states have embraced. Many states have affirmed the

legality of ICWA and incorporated its protections into their own state law, with some establishing even higher standards of protection. *See infra* Section II.B. In child welfare and adoption matters involving Indian children, ICWA helps state courts get these high-stakes and challenging decisions right.

A. State Best Interest Factors Are Aligned with ICWA.

Consistent with its goal of protecting the best interests of Indian children, ICWA's provisions reflect the same factors that states direct their courts to consider when making best interests determinations. Twenty-two states—including Texas—and the District of Columbia have enacted statutes directing state courts to consider enumerated factors when making best interest determinations.[14] The factors identified by these state statutes align with ICWA's fundamental principles: preserving family integrity, prioritizing

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[14] *See* U.S. Dep't of Health & Human Servs., Children's Bureau, *Determining the Best Interests of the Child* 2 (June 2020), https://www.childwelfare.gov/pubPDFs/best_interest.pdf; *see also* Conn. Gen. Stat. § 45a-719; Del. Code Ann. tit. 13, § 722; D.C. Code § 16-2353; Fla. Stat. Ann. § 39.810; Ga. Code Ann. § 15-11-26; Haw. Rev. Stat. § 587A-2; 705 Ill. Comp. Stat. 405/1-3(4.05); Kan. Stat. Ann. § 38-2201(b); Ky. Rev. Stat. Ann. § 620.023; Me. Stat. tit. 22, § 4055(2)-(3); Md. Code Ann., Fam. Law § 5-525(f)(1); Mass. Gen. Laws ch. 119, § 1; Mich. Comp. Laws § 722.23; Nev. Rev. Stat. § 128.005(2)(c); N.D. Cent. Code § 14-09-06.2(1); Ohio Rev. Code Ann. § 2151.414(D)(1); Or. Rev. Stat. § 107.137(1); S.D. Codified Laws § 26-7A-56; Tenn. Code Ann. § 36-1-113(i); Tex. Fam. Code Ann. § 263.307(b); Vt. Stat. Ann. tit. 15A, § 3-504(c); Va. Code Ann. § 20-124.3; Wis. Stat. § 48.426(2)-(3).

placement with relatives, and maintaining community and culture.

Family Integrity: ICWA's "overriding purpose is to protect, preserve, and advance the integrity of Indian families." Cohen's Handbook of Federal Indian Law § 11.01 (Nell Jessup Newton ed., 2019) ("Cohen's Handbook"); *see also* 25 U.S.C. § 1902. ICWA promotes family integrity by establishing a high threshold for removing a child from parental custody (through active efforts and qualified expert witness requirements) and by prioritizing placement with family (through the non-dispositive placement preferences). *See supra* Sections I.C-.D.

Family integrity likewise is a critical consideration in the majority of relevant state statutes, including among states that do not enumerate specific factors in their best interests inquiry but include reference to this principle in their legislative purpose statement. At least twenty-six states and four territories prioritize family integrity as a guiding principle in their statutes or regulations.[15] And several states guard against

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[15] *See* Ala. Code § 12-15-101(b)(1); Alaska Stat. § 47.05.065(4); Am. Samoa Code Ann. § 45.0102(a)(1)-(3); Cal. Welf. & Inst. Code § 16000(a)-(c); Colo. Rev. Stat. § 19-1-102(1); Ga. Code Ann. § 15-11-1; 19 Guam Code Ann. § 5129; Haw. Rev. Stat. § 587A-2; Idaho Code § 16-1601; Ind. Code § 31-34-19-6; Kan. Stat. Ann. § 38-2201(b); Me. Stat. tit. 22, § 4003; Miss. Code Ann. § 43-21-103; Mo. Rev. Stat. § 211.443; Mont. Code Ann. § 41-3-101; Neb. Rev. Stat. § 43-533; N.H. Rev. Stat. Ann. § 169-C:2(III); N.J. Stat. Ann. § 30:4C-1(a) to (b), (f); N.M. Stat. Ann. § 32A-1-3; N.C. Gen. Stat. § 7B-100; N.D. Cent. Code § 14-09-06.2(1); Okla. Stat. tit. 10A, § 1-1-102(B); P.R. Laws Ann. tit. 1, § 421; R.I. Gen. Laws § 42-72-2(1) to (2);

government intrusion in family life by including family integrity as a specific factor to be considered as part of a court's best interest determination.[16] Twelve states guide courts to determine whether a noncustodial parent or relative is a suitable placement for the child prior to seeking alternative placements.[17]

Federal law likewise emphasizes the importance of family preservation and preventing removal to improve permanency,[18] and research consistently demonstrates the value of kinship placements in ensuring stability and reducing moves between temporary placements.[19] The Restatement confirms that the

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S.C. Code Ann. § 63-1-20(d); Utah Code Ann. §§ 80-2a-201(1), (3), (7), 80-3-302(7)(d); V.I. Code Ann. tit. 5, § 2501(e); Wash. Rev. Code § 13.34.020; W. Va. Code § 49-1-105; Wyo. Stat. Ann. § 14-3-201.

[16] *E.g.*, N.D. Cent. Code § 14-09-06.2(1)(d); Haw. Rev. Stat. § 587A-2(2).

[17] *See* Ariz. Rev. Stat. Ann. § 8-514.02; Ark. Code Ann. § 9-27-355(a)(1)(A); Colo. Rev. Stat. §§ 19-3-403, 19-3-508(1)(b); Fla. Stat. Ann. §§ 39.401(2)(a)(3), 39.5085; Mont. Code Ann. §§ 41-3-101(3) to (5), 41-3-439(1); N.Y. Fam. Ct. Act §§ 1017, 1055-b; N.C. Gen. Stat. § 7B-505; Ohio Rev. Code Ann. § 5153.161; 42 Pa. Cons. Stat. § 6351; Utah Code Ann. § 80-3-302; Vt. Stat. Ann. tit. 33, §§ 5307-5308; Wyo. Stat. Ann. § 14-3-208.

[18] *See*, *e.g.*, Titles IV-B and IV-E of the Social Security Act, 42 U.S.C. §§ 627(a), 629, 671(a)(15); *see also* U.S. Dep't of Health & Human Servs., Children's Bureau, *Achieving Permanency for the Well-Being of Children and Youth* 3–4 (2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf (providing federal best practice guidance for Titles IV-B and IV-E implementation that "are intended to preserve a child's family and support meaningful efforts towards reunification").

[19] Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 Stan. L. & Pol'y Rev. (forthcoming

state's obligation to make reasonable efforts to reunify the family when a child is placed in foster care is the core of the child welfare system and rooted in the Constitution. Restatement (First) of Child. & the L. § 2.50 (Am. L. Inst., Tentative Draft No. 4, 2022).

Placement with Relatives: If temporary or permanent removal from parental custody is warranted, ICWA directs state courts to prioritize, but does not mandate, placement with extended family members. *See supra* Section I.D.; *see also In re Dependency of K.W.*, 504 P.3d 207, 219 (Wash. 2022) (recognizing legislative findings that "placement with relatives will very often support the child's best interests").

In this way, ICWA is consistent with the law in most states and with other federal law. A majority of states—including Texas—express preference in statute for the placement of a child with relatives,[20] and a

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2022) (manuscript at 26); *see also* Eun Koh, *Permanency Outcomes of Children in Kinship and Non-kinship Foster Care: Testing the External Validity of Kinship Effects*, 32 Child. & Youth Servs. Rev. 389, 390 (2010); Marc A. Winokur et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 Fams. in Soc'y: J. Contemp. Soc. Servs. 338, 341–42 (2008).

[20] *See* Ala. Code § 38-12-2(b); Alaska Stat. § 47.14.100(e); Ariz. Rev. Stat. Ann. § 8-514.02; Ark. Code Ann. § 9-27-355; Cal. Welf. & Inst. Code § 361.3; Colo. Rev. Stat. § 19-3-403; Conn. Gen. Stat. § 17a-101m; Del. Code Ann. tit. 31, § 356; Fla. Stat. Ann. §§ 39.521(3), (8), 39.401(2); Ga. Code Ann. §§ 15-11-211, 15-11-135; 19 Guam Code Ann. §§ 13317, 13324; Haw. Rev. Stat. §§ 587A-9 to -10; Idaho Code § 16-1629(11); 20 Ill. Comp. Stat. 505/7; Ind. Code § 31-34-4-2; Iowa Code § 232.84; Kan. Stat. Ann. § 38-2255(d); Ky. Rev. Stat. Ann. § 620.090; La. Stat. Ann.

number of states include this preference in their statutory guidance for determining a child's best interests.[21] Federal law also supports and incentivizes placement with relatives and kin.[22] The American Bar Association (ABA) suggests that state courts should preference placement with relatives, and, if the state must assume custody, emphasizes the importance of respecting family integrity and minimizing disruption to the child's family and community ties by prioritizing "kinship care."[23]

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§ 46:286.1; Me. Stat. tit. 22, § 4062(4); Md. Code Ann., Fam. Law § 5-534(c); Mass. Gen. Laws ch. 119, § 23(c); Mich. Comp. Laws § 722.954a; Minn. Stat. §§ 260C.212, subd. 1, 259.77; Miss. Code Ann. § 43-15-13; Mo. Rev. Stat. § 210.565; Mont. Code Ann. § 41-3-439; Neb. Rev. Stat. § 43-533; Nev. Rev. Stat. § 128.110(2)(a); N.J. Stat. Ann. § 30:4C-12.1; N.M. Stat. Ann. § 32A-4-21; N.Y. Fam. Ct. Act § 1017; N.C. Gen. Stat. § 7B-505; Ohio Admin. Code 5101:2-42-05; Okla. Stat. tit. 10A, § 1-4-204; Or. Rev. Stat. § 419B.192(1); 42 Pa. Cons. Stat. § 6351; R.I. Gen. Laws § 40-11-12.2; S.C. Code Ann. § 63-7-2320; S.D. Codified Laws § 26-7A-19.1; Tenn. Code Ann. § 37-2-403; Tex. Fam. Code Ann. § 264.752; Utah Code Ann. § 80-3-302; Vt. Stat. Ann. tit. 33, §§ 5307-5308; Va. Code Ann. § 16.1-281; Wash. Rev. Code §§ 13.34.130, 13.34.060; Wyo. Stat. Ann. § 14-3-208.

[21] *See* Cal. Welf. & Inst. Code § 16000(a); Fla. Stat. Ann. § 39.810; Haw. Rev. Stat. § 587A-2; Me. Stat. tit. 22, § 4003; Minn. Stat. § 260C.193, subd. 3(a); Mont. Code Ann. § 41-3-101; Neb. Rev. Stat. § 43-533.

[22] *See* 42 U.S.C. §§ 627(a), 671(a)(19), (29), 675(1)(F); *see also Achieving Permanency*, *supra* note 18, at 11, 17–18.

[23] ABA Resolution 118 2019A § VI.i. (2019), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/118-annual-2019.pdf; *see also* National Council of Juvenile and Family Court Judges, *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 137–38 (2016).

Maintaining Community and Culture: ICWA recognizes the importance of "the retained practices that give content to the child's tribal identity and engender the special connection that each native nation has with its land and environment." Cohen's Handbook § 11.01. ICWA therefore directs state courts to prioritize placement with other members of a child's Tribe or, when unavailable, with other Indian families. *See supra* Section I.D. ICWA's notice provision also ensures that Indian families and Tribes are properly informed of the relevant child welfare proceedings. *See In re Dependency of Z.J.G.*, 471 P.3d 853, 867–69 (Wash. 2020) (holding that the notice requirement gives tribes opportunity to intervene and prevents improper removal "without respect for social and cultural differences").

Numerous state statutes also direct courts to consider community placement and the child's cultural needs and identity when making best interests determinations.[24] For example, Georgia directs courts to consider the "child's background and ties, including familial, cultural, and religious," Ga. Code Ann. § 15-11-26(12), and Hawaii requires that "[f]ull and careful consideration [] be given to the religious, cultural, and ethnic values of the child's legal custodian" when determining a child's placement. Hawaii Rev. Stat. § 587A-2. Further, seven states have statutes allowing

[24] *See* Cal. Fam. Code § 175(a); Ga. Code Ann. § 15-11-26(12); Haw. Rev. Stat. § 587A-2; 705 Ill. Comp. Stat. 405/1-3(4.05)(f); Iowa Code § 232B.2; Mont. Code Ann. § 41-3-101(1)(f); N.M. Stat. Ann. § 32A-1-3(d).

members of an Indian child's Tribe to be considered "extended family members" for the purposes of placement.[25]

B. States Have Affirmed and Codified ICWA's Protections into Their State Laws.

States have recognized the alignment between ICWA and child welfare law by adopting and building upon ICWA to serve the best interest of Indian children. Through both case law and statutes, a number of states have affirmed and strengthened ICWA's protections at the state level. Nine state courts, including that of Plaintiff Amicus State of Oklahoma, have expressly upheld the constitutionality of ICWA.[26] In addition, ten states that are home to a significant population of Indian children, including Oklahoma, have affirmatively incorporated comprehensive state Indian Child Welfare Acts into their own child welfare

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[25] *See* Alaska Stat. § 47.10.990(10); Minn. Stat. § 260C.007, subd. 26b; N.M. Stat. Ann. § 32A-28-2(F); N.C. Gen. Stat. § 7B-101(15a); Okla. Stat. tit. 10A, § 1-4-204(A)(1); Or. Admin. R. 413-120-0730; Or. Rev. Stat. §419B.192(5); Wash. Rev. Code § 74.15.020(2)(a)(vi).

[26] *See In re Pima County Juvenile Action No. S-903*, 635 P.2d 187 (Ariz. Ct. App. 1981); *In re N.B.*, No. 06CA1325, 2007 WL 2493906 (Colo. App. Sept. 6, 2007); *In re Armell*, 550 N.E.2d 1060 (Ill. App. Ct. 1990); *In re Marcus S.*, 638 A.2d 1158 (Me. 1994); *In re Miller*, 451 N.W.2d 576 (Mich. Ct. App. 1990); *In re A.B.*, 2003 ND 98, 663 N.W.2d 625; *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *In re Angus*, 655 P.2d 208 (Or. Ct. App. 1982); *In re D.L.L.*, 291 N.W.2d 278 (S.D. 1980).

legislation.[27] All ten codify into state law key provisions of ICWA, including the notice, active efforts, qualified expert witness, and records provisions,[28] and foster and adoptive preferences.[29] Some states even require higher standards of procedural protection and heightened efforts regarding Indian children.[30]

In short, contrary to claims by Plaintiffs and their amici that ICWA is harmful to states' efforts to promote the best interests of children, *see* Br. for Plaintiff

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[27] *See* 2006 Cal. Stat. 6535; Iowa Code § 232B.1; Mich. Comp. Laws § 712B.1-.41; Minn. Stat. §§ 260.751-.835; Neb. Rev. Stat. §§ 43-1501 to -1517; N.M. Stat. Ann. §§ 32A-28-1 to -42; Okla. Stat. tit. 10, §§ 40.1-.9; Or. Rev. Stat. §§ 419B.600-.665; Wash. Rev. Code §§ 13.38.010-.190; Wis. Stat. § 48.028.

[28] ICWA's records provision, 25 U.S.C. §§ 1915(e), 1951(a), requires documentation of each Indian child's placement to ensure compliance and records availability to both tribes and Indian children.

[29] *See* Cal. Welf. & Inst. Code §§ 224.2(c), 224.2(e), 361.7, 224.6, 361.31, 361.31(m), Cal. Fam. Code § 9209; Iowa Code §§ 232B.5, 232B.5(19), 232B.6(5)(b), 232B.9, 232B.9(8); Mich. Comp. Laws §§ 712B.25(2), 712B.15(2)-(3), 712B.17, 712B.15(2), (4), 712B.35, 712B.23(7), 712B.23; Minn. Stat. §§ 260.761, subd. 2–3, 260.762, subd. 3, 260.755, subd. 17a, 260.771, subd. 6, 260.755, 260.781, 260.771, subd. 7; Neb. Rev. Stat. §§ 43-1505(1), (4)-(5), 43-1508, 43-1508(5); N.M. Stat. Ann. §§ 32A-28-3(B), 32A-28-15(C) to (E), 32A-28-26(C), 32A-28-17, 32A-28-13(B), 32A-28-6, 32A-28-37, 32A-28-21; Okla. Stat. tit. 10, §§ 40.3(C), 40.5(B), 40.6, 40.9; Or. Rev. Stat. §§ 419B.878, 419B.645, 419B.642, 419B.654(1)-(3), 419B.656; Wash. Rev. Code §§ 13.38.070(1), 13.38.130(1)-(3), 13.38.180; Wis. Stat. § 48.028(4)(a), (d)-(e), (7)(f).

[30] In such cases, ICWA provides that the state law should control. 25 U.S.C. § 1921. *See*, *e.g.*, Okla. Stat. tit. 10A, § 1-4-204(A) (requiring state agency to verify ICWA applicability within three months of child in custody).

State of Texas 50–51; Br. for Individual Plaintiffs 42, 62, the actions taken by states show exactly the opposite. States have endorsed and built upon ICWA because they find it beneficial. The State of Oklahoma, for example, has filed an amicus brief urging this Court to invalidate the protections of the federal ICWA, Br. of Amici Curiae States of Ohio and Oklahoma Supporting Plaintiffs 5–6, but its actions belie this position: the Oklahoma Supreme Court has affirmed the constitutionality of ICWA, *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004), and the Oklahoma Legislature has adopted the Oklahoma Indian Child Welfare Act, affirming and codifying into Oklahoma law most of the protections of ICWA, Okla. Stat. tit. 10, §§ 40.1-.9. And Plaintiff State of Texas's Department of Family Protective Services submitted comments during rulemaking asserting that it "fully supports the Indian Child Welfare Act" and has "worked collaboratively . . . to develop best practices that will inure to the benefit of tribal children and families." Letter from John J. Specia, Jr., Comm'r, Tex. Dep't of Fam. and Protective Servs., to Elizabeth Appel, U.S. Dep't of Interior (May 19, 2015), https://tinyurl.com/3mhja9er ("[O]ur commitment to both the letter and spirit of ICWA is clear.").

III. ICWA PROVIDES CRITICAL INFORMATION AND SUPPORT TO STATE COURTS.

From the moment a young person is placed in foster care, everything is at stake—their home, school, belongings, community, and relationships with family

and friends. In short, their future. Judicial officers are faced with complex, weighty decisions and need more information—not less—to get it right. Any change to or limitation on ICWA would inevitably deprive courts of evidence they need to make these crucial determinations. In matters involving Indian children courts must consider the effect of the child's tribal membership and the Tribe's interest in the proceeding. ICWA articulates clear procedures to ensure that courts have the information necessary to protect the specific rights and interests of Indian children.

ICWA is particularly important in light of the many practical constraints under which state courts operate. An appropriate best interest determination requires a "holistic examination of *all of the relevant circumstances* that might affect the child's situation." *In re B.T.B.*, 436 P.3d 206, 219 (Utah Ct. App. 2018), *aff'd on other grounds*, 472 P.3d 827 (2020) (emphasis added) (citation omitted). ICWA eases that complex calculation by providing for tribal advocates and expert witnesses. This support is invaluable to judges and child welfare professionals who may lack sufficient knowledge of tribal law, government, and culture to appropriately evaluate circumstances specific to Indian children. For state child welfare systems that far-too-frequently fail to protect the rights of children in their care, ICWA improves the quality of the information provided to courts responsible for making best interests determinations. Amici's extensive on-the-ground experience providing representation in child welfare proceedings confirms that ICWA is an important tool

for eliciting the information that courts need to adjudicate the particular rights and interests of Indian children.

A. State Child Welfare Systems Across the Country Face Persistent Challenges and Resource Constraints that Compromise the Information Provided to State Courts in Individual Proceedings.

ICWA is crucial in light of the pressures facing child welfare systems across the country. Judges depend on the information provided to them to inform their decisions regarding the vast number of children interacting with child protective services; in 2020, about 3.1 million children received an investigation or alternative response.[31] State child welfare systems across the country face real challenges that compromise the quality and availability of the information necessary to make decisions that protect the rights of the participants in the case and that are in children's best interests. Some of these challenges include high caseloads, lack of appropriate training, and high turnover among social workers; poor data collection and utilization; lack of appropriate judicial training and

[31] U.S. Dep't of Health & Human Servs., Administration for Children and Families, *Child Maltreatment 2020* 19 (2022), https://www.acf.hhs.gov/cb/data-research/child-maltreatment.

education on issues facing children in the child welfare system; and unavailable and inadequate placements.[32]

Plaintiff State of Texas falsely claims that ICWA harms children, *see* Br. for Plaintiff State of Texas 6–8, 56, when in fact its own child welfare infrastructure has been found to lack basic elements required to keep all children—including Indian children—safe. The U.S. Department of Health and Human Services periodically reviews state child welfare systems to ensure that states comply with minimum federal child welfare requirements.[33] Texas was not in substantial conformity of with *any* of the seven outcomes, which focus on safety, permanency, and the well-being of children.[34]

Like most other states, the Texas child welfare system has been subject to litigation due to its failures

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[32] *See*, *e.g.*, National Council of Juvenile and Family Court Judges, *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 30 (2016).

[33] *See* U.S. Dep't of Health & Human Servs., Administration for Children and Families, Children's Bureau, *Child and Family Services Review Round 3 Report for Legal and Judicial Communities* (January 2021).

[34] U.S. Dep't of Health & Human Servs., Administration for Children and Families, Children's Bureau, *Child and Family Services Reviews*, Fact Sheet for Tribal Child Welfare Officials 2, https://www.acf.hhs.gov/sites/default/files/documents/cb/cfsr_tribal_factsheet.pdf (emphasis added); *see* U.S. Dep't of Health & Human Servs., Administration for Children and Families, Children's Bureau, *Child and Family Services Reviews Texas Final Report* 3–4 (2016).

to adequately protect children in state custody.[35] In 2015, a federal district court judge determined that Texas's failure to keep children safe from an unreasonable risk of harm "shock[ed] the conscience" and therefore constituted a violation of the children's substantive due process rights. *M.D. v. Abbott*, 152 F. Supp. 3d 684, 697, 700, 828 (S.D. Tex. 2015). The court found that in Texas, "foster children often age out of care more damaged than when they entered." *Id.* at 823. In the same case in 2018, the Fifth Circuit held that Texas's inadequate monitoring and oversight policies, coupled with overburdened caseworkers, caused children in the Texas foster care system to be exposed to unreasonable harm. *M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 267 (5th Cir. 2018); *see also M.D. by Stukenberg v. Abbott*, 929 F.3d 272, 278 (5th Cir. 2019). Despite years of court oversight, Texas has repeatedly failed to protect the children in its custody. Most recently, court monitors have found that children continue to be placed at substantial risk of harm. The monitors reported that during 2021, "25% of the children that [the Department of Family and Protective Services] identified as victims of sexual abuse were victimized or re-victimized *after entering foster care*."[36]

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[35] Douglas E. Abrams, Susan V. Mangold & Sarah H. Ramsey, *Children and the Law: Doctrine, Policy and Practice* 440 (7th ed. 2020).

[36] Fourth Report of the Monitors at 12, *M.D. by Stukenberg v. Abbott*, No. 2-11-CV-00084 (S.D. Tex. 2015) (filed June 2, 2022) (emphasis added).

The systemic failures of the child welfare system in Texas and other states make the ICWA's guidance and support all the more necessary to protect Indian children.

B. ICWA Ensures that State Courts Have Critical Information Necessary to Promote the Constitutional Rights and Best Interests of Indian Children.

State courts need accurate and complete information to protect the rights of all parties with an interest in child welfare proceedings and to make correct determinations regarding the best interests of the child. Unique information is required in child welfare proceedings involving Indian children because tribal membership can impact the child's best interest in a variety of ways. But many state court judges and others in the child welfare system are unfamiliar with Indian tribal law, government, and culture. *See*, *e.g.*, *In re Dependency of G.J.A.*, 489 P.3d 631, 643, 647 (Wash. 2021) (holding that the department's referrals failed to provide active efforts for reunification and were "completely lacking of any evidence regarding culturally appropriate services").

Tribal notice and participation in child welfare proceedings is necessary because Tribes possess critical information that might not otherwise be available to the courts or child welfare professionals.[37] For

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[37] Adrea Korthase, Sophia I. Gatowski & Mark Erickson, *Indian Child Welfare Act (ICWA) Courts: A Tool for Improving*

example, Tribes have sole authority over membership determination. The proper identification of a child's tribal membership thus depends on collaboration with the Tribe.[38] And as ICWA recognizes, tribal law defines the relationships that state courts must take into account when determining a child's placement, such as the definition of an "extended family member." 25 U.S.C. § 1903(2). Tribal representatives' input is crucial to provide the court with knowledge about tribal resources for families and the potential harms the child may sustain from removal[39] or a culturally inappropriate placement.[40] Tribal participation also ensures that courts have access to information regarding family histories, support for families specific to the Indian child's Tribe, and tribal cultural knowledge[41] regarding "the special connection that each native nation

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Outcomes for American Indian Children and Families, National Council of Juvenile and Family Court Judges 6–7 (2021).

[38] Terry L. Cross & Robert J. Miller, *The Indian Child Welfare Act of 1978 and Its Impact on Tribal Sovereignty and Governance*, *in Facing the Future: The Indian Child Welfare Act at 30* 13, 14–15 (Matthew L.M. Fletcher et al. eds., 2009).

[39] American Bar Association, Children's Rights Litigation Committee, *Trauma Caused by Separation of Children from Parents: A Tool to Help Lawyers* 6–10 (2020).

[40] *ICWA Compliance Task Force Report to the California Attorney General's Bureau of Children's Justice* 72–73 (2017), https://theacademy.sdsu.edu/wp-content/uploads/2015/06/icwa-compliance-task-force-final-report-2017.pdf.

[41] *See* Carol L. Tebben, *In Defense of ICWA: The Constitution, Public Policy, and Pragmatism*, *in Facing the Future: The Indian Child Welfare Act at 30* 270, 285 (Matthew L.M. Fletcher et al. eds., 2009).

has with its land and environment." Cohen's Handbook § 11.01. These considerations—each an essential part of a court's "best interest" determination for an Indian child—can only be undertaken with input from the Tribe.

ICWA's expert witness requirement functions similarly. Qualified expert witnesses "should have specific knowledge of the Indian tribe's culture and customs" as evidenced in the preference for a member of the Indian child's tribe or another tribe who is "recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices." 80 Fed. Reg. 10157 (Feb. 25, 2015); *see* 25 C.F.R. § 23.122. At a minimum, qualified expert witnesses have expertise specific to Indian children and Tribes beyond the typical social worker. *See*, *e.g.*, Minn. Stat. § 260.755, subd. 17a; Iowa Code § 232B.10. They are uniquely positioned to speak to specific tribal customs and practices pertaining to family organization and childrearing.[42] The qualified expert witness provision helps "to provide the Court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias." *In re N.L.*, 754 P.2d 863, 867 (Okla. 1988). ICWA improves a court's adjudicatory process by providing necessary information to permit a court to consider tribal affiliation

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[42] Suzanne L. Cross et al., *Working on the Front Lines: The Role of Social Work in Response to the Indian Child Welfare Act of 1978, in Facing the Future: The Indian Child Welfare Act at 30* 114–125 (Matthew L.M. Fletcher et al. eds., 2009).

as a factor in the best interest determination. *See In re Pima County Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981).

Ensuring that Tribes have sufficient notice and opportunity to participate in child welfare proceedings also benefits Indian children by enabling Tribes to offer services that a state agency may not be able to otherwise, such as the assistance of elder tribal mentors to children, culturally informed contribution to safety plans, culturally responsive counseling, or trauma-informed practices based in tribal traditions.[43] Tribal-state coordination further benefits the court's and agency's treatment of each child by improving the quality and process of protective services, development and implementation of case plans, and placement process.[44]

For amici, lawyers who represent children in state courts, ICWA is critical to providing quality representation to Indian children. ICWA is essential because attorneys for children, like other participants in the child welfare system, may not have significant

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[43] *ICWA Compliance Task Force Report*, *supra* note 40, at 34, 20, 43; *see* U.S. Dep't of Health & Human Servs., Children's Bureau, *Developing a Trauma-Informed Child Welfare System* (May 2015), https://www.childwelfare.gov/pubpdfs/trauma_informed.pdf.

[44] Tebben, *supra* note 41, at 281–82 (citing improvements in Wisconsin after DCF-tribal efforts to improve coordination and ICWA compliance).

experience representing Indian children.[45] Information obtained pursuant to the requirements of ICWA can inform the representation, helping lawyers for children ensure that the child is in an appropriate placement and receiving all benefits of tribal enrollment. Without ICWA, Amici fear there will be a devastating roll back of decades of progress made towards fair consideration of the rights and best interests of Indian children. For example, without ICWA, practitioners fear that there will be additional litigation over issues now resolved by ICWA mandates delaying permanency for Indian children. As an Amicus with extensive experience representing Indian children explained it: ICWA is the definition of best interests for Indian children.

[45] Many Indian children lack representation altogether because fourteen states—including Plaintiff State of Texas—do not guarantee children a right to counsel through the pendency of child welfare proceedings. *See* National Association of Counsel for Children, *State Models of Children's Legal Representation* (May 2022), https://secureservercdn.net/50.62.198.124/zmc.c18.myftpupload.com/wp-content/uploads/2022/06/Model-of-Rep-Chart-2022.pdf.

CONCLUSION

Amici Children's Rights Organizations respectfully request that this Court uphold the constitutionality of the Indian Child Welfare Act.

Respectfully submitted,

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