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

CHAD EVERET BRACKEEN, et al.,	:	
	:	
Plaintiffs,	:	
	:	Case No. 4:17-CV-00868-O
v.	:	
	:	
RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior, et al.,	:	
	:	
Defendants.	:	

***AMICUS* BRIEF OF THE STATE OF OHIO**
OPPOSING DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION AND STATEMENT OF AMICUS INTEREST

Ohio, like every State, has always governed domestic relations within its borders, including legal relationships between parents and children. "Statutory regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). As the governments in charge of domestic relations, States struggle with difficult issues such as when and how to place children in foster or pre-adoption care and when and how to approve an adoption in the best interests of the child. Thus, States have an interest, on federalism grounds alone, in protecting that area of state concern from unwarranted federal intrusion.

That state interest is magnified when, as here, the federal government seeks to order States not only to follow different rules, but also to discard the States' usual commitment to considering the best interests of a child without regard to race or ethnicity. Ohio, like most States, generally follows these basic precepts: (1) the child's best interests, including safety, are paramount; (2) the rights of parents to raise their children should not be displaced without good cause; and (3) the State must not discriminate by the race or ethnicity of children, parents, or prospective parents.

But the federal government orders the States to do otherwise—to set aside a child's best interests and look to ethnicity—where children of Native American ancestry are involved. The Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*. ("ICWA"), orders a State to set aside its usual standards and processes, including the best-interests test, based ultimately on a child's Native American ancestry, no matter how minimal in degree. That is wrong. It is wrong not just because it mandates race-based decisionmaking contrary to deep constitutional values, but also because it does so in a way that intrudes on the States' longstanding power over domestic relations. That type of displacement of state authority is not authorized by the Indian Commerce

Clause or anything else in the Constitution. Worst of all, the ICWA does not merely take away States' power and allow federal actors to step in, as other laws do. Rather, it commands state officers and agencies to be the agents of the federal race-based decisionmaking.

Ohio submits this brief to defend the States' power to protect children, to resist the federal government's unwarranted race-based mandate, and to urge the Court to deny the motion to dismiss and allow the case to proceed. *See* Local Rule 7.2(b). In particular, this brief addresses the injuries inflicted on the States by the ICWA's invasion of state authority and highlights the "special solicitude" with which the Court must review the State Plaintiffs' standing.

ARGUMENT

The Court should deny the Defendants' motion to dismiss because the Plaintiffs have standing to pursue their claims. As to the State Plaintiffs, the ICWA intrudes on an area of important state concern, in many cases causing a direct injury to the States' abilities to enforce their own laws. That injury to state sovereignty is sufficient to confer standing. The Court should afford the State Plaintiffs' status—sovereign States seeking to protect their sovereign rights—considerable weight in the standing inquiry.

A. States suffer an Article III injury when a federal law displaces traditional state regulation.

1. States may invoke federal jurisdiction to protect their sovereign interests from federal interference and are entitled to "special solicitude" when assessing standing.

As States seeking to protect their sovereign interests from federal interference, Texas, Indiana, and Louisiana (the "State Plaintiffs") are "entitled to special solicitude in [the] standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *Texas v. United States*, 809 F.3d 134, 154 (5th Cir. 2015), *affirmed by an equally divided Court in United States v. Texas*, 136

S. Ct. 2271 (2016) (per curiam). In *Massachusetts*, the Supreme Court found it "of considerable relevance that the party seeking" federal jurisdiction was "a sovereign State." 549 U.S. at 518. It relied in part on the State's "stake" in protecting its sovereign interests. *Id*. at 519-20.

The Fifth Circuit has relied on *Massachusetts* to aid its conclusion that a State has standing to challenge a federal program. *Texas*, 809 F.3d at 151-55 (regarding DAPA). Noting that "being a state greatly matters in the standing inquiry," *id*. at 151 n.26, the court analyzed "two additional considerations" that "help[ed] confer standing" on the challenger State, *id*. at 151 & n.26 (internal quotation marks omitted). One of those considerations was the "substantial pressure" the federal program "impos[ed]" on States "to change their laws." *Id*. at 153. Specifically, a federal immigration program would have granted "lawful presence to a broad class of illegal aliens." *See id*. at 152. This federal immigration decision would have inflicted a fiscal injury on Texas by enabling half a million individuals to apply for driver's licenses in Texas, which under existing Texas law were available to many who were lawfully present in the United States. *See id*. at 155. Thus, a federal immigration decision had cascading effects that implicated other state laws that relied in part on immigration status. To avoid that outcome, Texas would have had to change its own laws.

The Court should grant the State Plaintiffs the same latitude in this case. The reasons for doing so here are more compelling than they were in *Texas*. Here, the "pressure to change state law," *see id*. at 153, is a mandate. For example, the ICWA dictates who receives preference "[i]n any adoptive placement of an Indian child under State law." 25 U.S.C. § 1915(a). If an Indian child is involved, the ICWA also forbids state courts from terminating parental rights "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody" with the Indian parent or

custodian "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). Federal law is not merely influencing the States' terms—it is dictating them.

The state sovereignty concerns are also stronger here than in *Texas*. Domestic relations are not an area where States have "surrendered some of their sovereign prerogatives" to the federal government, as was the case in *Texas* with immigration. *Compare Texas*, 809 F.3d at 153 (noting that States "cannot establish their own classifications of aliens"), *with Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930) (observing "the common understanding" at the time of the Constitution's adoption "that the domestic relations of . . . parent and child were matters reserved to the States"). As explained more fully below, *see infra* Parts B and C, the federal government has crossed into an area that is otherwise governed by state law. The State Plaintiffs are not suing to oversee the federal government's stewardship of ceded powers; they are suing to reclaim powers reserved to them under the Constitution. States should receive special solicitude to protect this important federalism concern.

2. States suffer an injury when federal statutes or regulations contradict or undermine the enforceability of state law.

The ICWA injures states like Ohio and the Plaintiff States by interfering with state laws governing child custody. *See infra* Part B. This direct injury to state sovereignty confers standing.

a. States suffer an Article III "injury in fact" when federal laws or regulations interfere with state law. It is settled that States have a core sovereign interest in "the exercise of sovereign power over individuals and entities within" their borders—that is, "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982); *Texas*, 809 F.3d at 153. The Fifth Circuit has recognized that "states may have standing based on (1) federal assertions of authority to regulate matters [States] believe they control, (2) federal

preemption of state law, and (3) federal interference with the enforcement of state law" under certain circumstances. *Texas*, 809 F.3d at 153 (footnotes omitted). "[W]here a state complains that a federal regulation will preempt one of the state's laws," that interference is "the institutional analogue to a restraint on a human being's freedom of locomotion." *Ill. Dep't of Transp. v. Hinson*, 122 F.3d 370, 372 (7th Cir. 1997). Such a theory of direct injury is distinct from a claim of *parens patriae* standing. *See Wyoming v. Oklahoma*, 502 U.S. 437, 448-49 (1992).

Several examples demonstrate that state standing may be based on an injury to a State's ability to enforce its own laws and to "protect federalism principles." *See generally* Tara Leigh Grove, *When Can a State Sue the United States?*, 101 Cornell L. Rev. 851, 863-80 (2016) (endorsing a narrow view of standing that would still recognize the state standing in the circumstances presented here). In *Missouri v. Holland*, Missouri sued a federal game warden to prevent the enforcement of the federal Migratory Bird Treaty Act on the grounds that the statute "interfere[d] with the rights reserved to the States by the Tenth Amendment, and . . . invade[d] the sovereign right of the State and contravene[d] its will manifested in statutes." 252 U.S. 416, 430-31 (1920). Missouri alleged a direct conflict between its existing state laws regulating wild game and the federal statute. *See* Grove, *supra*, 101 Cornell L. Rev. at 864 & n.65 (citing briefs). The Court concluded that the suit could proceed, reasoning that "it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State." *Holland*, 252 U.S. at 431. The Court thus found standing based on the alleged injury to Missouri's interest in its own state laws (but went on to uphold the federal law).

In another case, the Supreme Court again concluded that a State had standing to sue the federal government based on interference with the State's sovereign interest in its laws and

regulations. *See Colorado v. Toll*, 268 U.S. 228 (1925). In *Toll*, federal regulations purported to control for-hire transportation inside Rocky Mountain National Park in Colorado. *Id*. at 229. Colorado sued the Park Superintendent, alleging that the regulations preempted its own laws and thus "interfere[d] with the sovereign rights of the State." *Id*.; *see also* Grove, *supra*, 101 Cornell L. Rev. at 866 & n.78 (citing pleadings and transcript). The district court had dismissed the suit "for want of equity," *Toll*, 268 U.S. at 230, but the Supreme Court reversed, *id*. at 230-32. "The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy." *Id*. at 230 (citing *Holland*, 252 U.S. at 431). The injury to State sovereignty again allowed a case against the federal government to proceed.

In a more recent decision, the Tenth Circuit found that Wyoming had standing to sue federal defendants based on an alleged interference with Wyoming's legal code. *See Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008). There, a federal agency informed Wyoming that a state law intended to expunge certain convictions for the purposes of restoring firearms rights did not satisfy a federal statute and thus "would not restore federal firearms rights." *Id*. at 1238-39. Wyoming sued in federal district court and alleged that it had "suffered an injury in fact because [the agency's] interpretation of [Wyoming's law] undermine[d] its ability to enforce its legal code." *Id*. at 1241. The Tenth Circuit recognized that "[f]ederal regulatory action that preempts state law creates a sufficient-injury-in-fact" and, applying the "special solicitude" owed to a state litigant, concluded that "Wyoming's stake in [the] controversy [was] sufficiently adverse" to confer standing. *Id*. at 1241-42.

Together, these cases show that a State suffers an injury when federal law interferes with or undermines a State's ability to enforce its own laws. *See also New York v. United States*, 505

U.S. 144 (1992) (considering the merits of a State's commandeering challenge to a federal law without questioning the State's standing); *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (concluding that a State "satisf[ied] the constitutional requirement of genuine adversity" because it "clearly has a legitimate interest in the continued enforceability of its own statutes").

b. *Massachusetts v. Mellon*, 262 U.S. 447 (1923), is not to the contrary. Defendants cite *Mellon* for the proposition that "suits brought by a state to protect its citizens from the *application* of a federal statute"—i.e., certain *parens patriae* suits—"are barred." Mot. at 18. But *Mellon* separately considered whether Massachusetts could "sue *in its own behalf*." *See* 262 U.S. at 484 (emphasis added); *see also id*. at 480 ("The State of Massachusetts in its own behalf, in effect, complains that the act . . . is a usurpation of power, viz: the power of local self government reserved to the States."). By splitting these two grounds for standing, *Mellon* recognizes that a direct-state-injury theory of standing is distinct from a *parens patriae* theory. *See id*. at 485 (proceeding to consider "whether the suit may be maintained by the State as the representative of its citizens").

On the question of whether a State may sue over an invasion of its sovereign rights, *Mellon* is consistent with *Holland* and *Toll*. In *Mellon*, a federal law intended to reduce maternal and infant mortality provided funds to States that complied with the law's provisions. 262 U.S. at 479. States that did not wish to comply were free to decline the federal funds. *Id*. at 480, 482. Massachusetts "ha[d] not accepted the act," yet sued on the grounds that the law imposed "an illegal and unconstitutional option either to yield to the federal government a part of its reserved rights or lose the share [of funds] which it would otherwise be entitled to receive." *Id*. at 479-80. The Court rejected Massachusetts's asserted right "to sue in its own behalf" because no state law was "actually invaded or threatened." *Id*. at 484-85. In other words, the federal law only

theoretically affected Massachusetts's sovereign powers; it did not *actually* affect any existing state law. This was in contrast to the Court's earlier decision in *Holland*; in that case, "there was an invasion, by acts done and threatened, of the quasi-sovereign right of the State to regulate the taking of wild game within its border." *See id*. at 482 (citing *Holland*).

Subsequent cases make evident the distinction between *parens patriae* and direct-injury theories of state standing. Notably, *Toll*—which also involved actual federal interference with state law—was decided after *Mellon*. More recent cases highlight the same point. *See Oklahoma*, 502 U.S. at 448-49 (distinguishing between "claims of *parens patriae* standing" and "allegations of direct injury to the State itself"); *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 n.1 (D.C. Cir. 1989) ("Inasmuch as the States' sovereign interest in law enforcement is sufficient to support standing, we need not delve into the issue of *parens patriae* standing.").

B. The ICWA invades the States' sovereign authority in multiple ways.

The ICWA represents a major intrusion in areas where States have traditionally exercised broad control. The law "actually invade[s]" the States' sovereign powers over domestic relations and does not merely present "abstract questions of political power, of sovereignty, of government." *Cf. Mellon*, 262 U.S. at 485; Am. Compl. ¶ 26 ("State Plaintiffs cannot remedy these injuries through their sovereign lawmaking powers because Defendants mandate compliance with ICWA."). Because of the ICWA, the States are forced to apply a different legal standard to proceedings involving children with Native American ancestry. They must exempt a child custody proceeding from normal standards "to the extent that the proceeding is governed by" the ICWA. *See, e.g.*, Ohio Rev. Code § 3127.03(A); *cf.* Am. Compl. ¶ 173 ("But for ICWA, the State Plaintiffs' courts would apply nondiscrimination laws to child custody proceedings."). Thus, ICWA's requirements "often lead to different outcomes than would result under state law." *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2566 (2013) (Thomas, J., concurring).

This interference with state law has real consequences for state courts and the officials charged with applying laws that protect children. A recent Ohio case in which the ICWA derailed a custody proceeding shows the disruption to the States' laws and courts that the ICWA can cause.

1. The ICWA interferes with an area of exclusive state concern and commandeers state officers in the process.

The ICWA intrudes on state authority over domestic relations and forces state officers to implement a federal program.

First, no one doubts that domestic relations, which includes adoption and parental rights, is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see In re Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of . . . parent and child[] belongs to the laws of the [S]tates and not to the laws of the United States."). The commitment of domestic relations to the States is so important that the Supreme Court has long recognized a "domestic relations exception" to diversity jurisdiction in federal courts. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *see also Rykers v. Alford*, 832 F.2d 895, 900 (5th Cir. 1987) ("If the federal court must determine which parent should receive custody, what rights the noncustodial parent should have, how much child support should be paid and under what conditions, or whether a previous court's determination on these matters should be modified, then the court should dismiss the case."). The exception goes even further than a commitment to state law rather than federal law. Most traditionally state-law issues, such as tort or contract, *may* be heard in federal courts in diversity cases. The domestic relations exception, on the other hand, leaves those issues to state courts *even when* they would otherwise be eligible for federal determination. Domestic relations issues are left to state substantive law *and* to state courts.

The ICWA, by purporting to impose certain federal, race-based standards in state courts, does not violate the domestic relations exception specifically. But the principle it embodies is worse than the harm that the domestic relations exception is meant to prevent. The domestic relations exception prevents federal courts from even hearing and applying *state law*; if it did not exist, however, state substantive law still would control. Under the ICWA, *federal law* controls.

Second, if the ICWA applies, federal law requires state officers to implement it. *Cf.* Ohio Rev. Code § 3127.03(A) (acknowledging that child custody proceeding involving an Indian child as defined in the ICWA is exempt from Ohio jurisdictional provisions "to the extent that the proceeding is governed by the [ICWA]"). The ICWA's mandate that state actors do the federal government's bidding violates the anti-commandeering limitations in Article I of the Constitution, as confirmed by the Tenth Amendment. *Printz v. United States*, 521 U.S. 898 (1997). In *Printz*, the Court invalidated a federal law that ordered state officers to conduct background checks on handgun buyers. *Id.* at 933-35. The Court justified and applied a bright-line principle: The "Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id*. at 925; *see also New York*, 505 U.S. 144.

Yet the ICWA seeks to compel the States to implement its mandates. It does not merely order state courts to apply federal law. Instead, just like the unconstitutional laws in *Printz* and other anti-commandeering cases, the ICWA orders state and local *executive* officers and employees to carry out its terms. For example, it requires state agencies to track down and verify that they have "identif[ied] and work[ed] with" tribes in which a child may be a member. *See* 25 C.F.R. § 23.107(b)(1); *see also, e.g.*, 25 U.S.C. § 1912(d); 25 C.F.R. §§ 23.2, 23.120.

The ICWA thus unconstitutionally orders state actors to "implement . . . [a] federal regulatory program." *Printz*, 521 U.S. at 925. By intruding upon state domestic relations law

and ordering state actors to follow federal mandates, the ICWA violates limitations inherent in Congress's Article I powers (as clarified by the Tenth Amendment). And by impeding States from acting in the best interests of children, the ICWA blocks States from implementing the policy towards children that those States and their citizens think best promote those interests.

ICWA's injuries are not abstract. A recent Ohio case shows exactly how the law causes substantial interference with state power over domestic relations. *See generally, In re: C.J., Jr.* ___N.E.3d ___, Franklin App. Nos. 17AP-162 and 17AP-191, 2018-Ohio-931. Franklin County Child Protective Services took custody of an Ohio child when he was two years old and placed him with an Ohio foster family. *Id.* ¶ 3. The child was born in Ohio to parents domiciled in Ohio and has lived in Ohio since his birth. *Id.* ¶ 2. When the Ohio court considered a motion to award custody to the foster parents, an Indian tribe from Arizona (the Gila River Indian Community) intervened in the case. *Id.* ¶ 12.

Under Ohio law, the primary consideration at that point *should* have been whether this arrangement was within the child's best interests. *See In re Cunningham*, 391 N.E.2d 1034, 1038, 59 Ohio St.2d 100 (Ohio 1979). "[T]he time-honored precedent in [Ohio is] that the 'best interests' of the child are the primary consideration in questions of possession or custody of children." *Id.* (collecting cases). And Ohio courts normally give full consideration to the position of the child's guardian ad litem, whose role "is to protect the interests of the child." *In re C.T.*, 895 N.E.2d 527, 119 Ohio St.3d 494, ¶ 14 (Ohio 2008) (citing Ohio Rev. Code § 2151.281(B)(1)).

Because of the ICWA, however, this child's best interests were disregarded in the juvenile court. An Indian tribe from Arizona ("the tribe") claimed that the child is Indian based on his paternal ancestry. *In re: C.J., Jr.*, 2018-Ohio-931 at ¶ 9 n.2. The child has never been to

the tribe's reservation, let alone Arizona. *Id.* at ¶ 97. After intervening in the case, the tribe obtained an ex parte order from its own tribal court declaring the child to be a ward of the tribal court. *Id.* ¶ 26. The order placed the child under the control of the Gila River Indian Community Tribal Social Services and decreed that the child be placed with two individuals whom the child had never met. *Id.* Bowing to the ICWA, and over the biological mother's written objection, the Ohio juvenile court transferred jurisdiction over the child to the tribal court. *Id.* ¶¶ 28, 13. The appeals court, in reversing, later concluded that the tribe's ex parte order "bootstrap[ed]" its own jurisdiction and therefore violated due process. *Id*. ¶¶ 101-04.

Aside from diverting attention from the child's best interests, the ICWA had the added effect of turning an ordinary custody proceeding into a procedural quagmire. Put simply, the tribe's intervention resulted in two separate Ohio juvenile court cases, an ex parte tribal court proceeding, and multiple parallel Ohio appeals, each involving motions to dismiss on grounds unrelated to the merits. *See id.* ¶ 115 (describing the case as generating "pervasive" "procedural anomalies"). While these proceedings were purportedly about the custody of a single child, the ICWA diverted the Ohio courts' attention to questions about the Indian tribe's intervention, the validity of ex parte orders by the tribal court, and the consequences of the (now deceased) mother's prior non-consent to the Arizona placement. *Id*. ¶¶ 123-34 (Luper-Schuster, J., concurring). These issues drove the litigation—and consumed the resources of Ohio's courts—which proceeded "without any analysis" of the child's best interest. *Id*. ¶ 108 (lead opinion).

C. The ICWA is not authorized by the Indian Commerce Clause or any other constitutional provision.

The injuries to state sovereignty here are real. And, because, "in some instances," a State may be "the only entity capable of demonstrating the requisite injury" from federal statutes,

Bond v. United States, 564 U.S. 211, 225 (2011), Ohio explains below why the ICWA is not a valid exercise of congressional power.

The ICWA is beyond the scope of federal power because it is unmoored from any congressional power. The ICWA asserts that "Congress has plenary power over Indian affairs" through the Indian Commerce Clause and "other constitutional authority." 25 U.S.C. § 1901(1). But the U.S. Constitution does *not* "grant[] Congress [the] power to override state custody law whenever an Indian is involved." *Adoptive Couple*, 133 S. Ct. at 2566 (Thomas, J., concurring).

1. The Indian Commerce Clause does not authorize the ICWA. That clause empowers Congress to "regulate Commerce . . . with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. Notably, it is not a freestanding clause devoted to Indian Commerce, but is part of the broader Commerce Clause. The clause refers to "Commerce" just once, branching to foreign, interstate, and Indian Commerce: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* Whatever the definition of "Commerce" in the Commerce Clause, it must be consistent in each circumstance—foreign, interstate, and Indian.

The clause's text alone dooms the ICWA, as *adoption of children* is neither "commerce" nor an arrangement with "Indian Tribes." However broad one's conception of "commerce," it does not involve termination of parental rights, approving adoption, or legal custody. Congress could never regulate non-Indian custody and adoption proceedings under the guise of the Commerce Clause as applied to the States. Furthermore, the ICWA applies to *individual* children who have not joined a tribe, and so does not invoke Congress's power to regulate "commerce" with "the Indian Tribes." From a textual perspective, then, the ICWA has no constitutional basis.

Case law and original meaning confirm the ICWA's unconstitutionality, as Justice Thomas explained in his concurrence in *Adoptive Couple*, 133 S. Ct. at 2565. In that case, the Court held that certain ICWA provisions did not apply, as a statutory matter, to a girl who was "classified as an Indian because she [was] 1.2% (3/256) Cherokee." *Id.* at 2556 (majority op.). Because of her ancestry, the South Carolina Supreme Court had "held that certain provisions of [the ICWA] required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child." *Id.* But the Court rejected that conclusion by interpreting the statute's own terms narrowly not to cover Baby Girl's situation. *Id*. at 2565. In doing so, the Court avoided any constitutional issues, although it noted that the rejected "interpretation would raise equal protection concerns." *Id.*

Justice Thomas explained that the Court's result was compelled by constitutional avoidance. *Id*. (Thomas, J., concurring). In his view, the ICWA was not authorized by the Indian Commerce Clause. He began with the term "commerce," which at the founding did not include economic activity like manufacturing, "let alone noneconomic activity such as adoption of children." *Id*. at 2567. He then turned to the phrase "commerce with Indian tribes" which "was invariably used during the time of the founding to mean 'trade with Indians.'" *Id.* at 2567 (citing Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201, 215-16 & n.97 (2007), and Report of Committee on Indian Affairs (Feb. 20, 1787), in 32 Journals of the Continental Congress 1774–1789, pp. 66, 68 (R. Hill ed. 1936)).

Justice Thomas also reviewed colonial regulations of Indian trade, the Articles of Confederation, and the drafting history of the Indian Commerce Clause at the Constitutional Convention. *Id.* at 2567-70. These materials all pointed to one conclusion: The Constitution

gave Congress the "power to regulate trade with the Indians," *not* the "power to regulate all Indian affairs." *Id.* at 2569.

Justice Thomas also highlighted the textual problems described above. First, the ICWA concerns "child custody proceeding[s]," 25 U.S.C. § 1903(1), *not* "commerce." *See Adoptive Couple*, 133 S. Ct. at 2570 (Thomas, J., concurring). And the ICWA does "not regulate Indian tribes as tribes," but regulates individual children, "regardless of whether an Indian tribe is involved." *Id.* Because adoption proceedings "involve neither 'commerce' nor 'Indian tribes,'" Justice Thomas rightly concluded that "there is simply no constitutional basis for Congress' assertion of authority over such proceedings." *Id.* at 2571.

Any other reading of the ICWA massively expands federal power. If Congress could tell States to treat Indians differently based on their ethnicity alone, without regard to tribal status, it could order state courts to use different legal rules in all criminal or civil cases involving Indians. *Id.* If Congress can characterize child custody proceedings as "commerce," it could regulate all interstate adoptions under the interstate Commerce Clause. But neither of those principles or outcomes is correct as a matter of law. Nor are they the right thing for the children involved. *Cf. id*. at 2564 (majority op.) (noting that South Carolina Supreme Court's reading of the ICWA would "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home").

2. Arguments to the contrary are unpersuasive. Despite cases generically describing federal power over Indian "affairs" as "plenary," *see, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004), the actual powers at issue in every other case addressed Indian *tribes* and tribal membership. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974) (upholding federal employment preference for members of Indian *tribes* against challenge that it was an

impermissible racial classification because law turned on tribal membership, rather than mere ethnicity); *Worcester v. Georgia*, 31 U.S. 515, 519 (1832) (describing "Indian nations" as "distinct, independent political communities" in context of regulations of federal relations with "tribes"). By contrast, the Court has never blessed a law that singled out all Indians based on ethnicity or blood alone, as the ICWA does.

The Court's treatment of the ICWA, in particular, does not support the view that Congress has "plenary" power to regulate all Indian affairs. In one case, the Court addressed the ICWA in terms of its reach regarding "domicile" on a reservation, but did not address its application to individuals or to non-tribal members. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). Further, *Holyfield* involved provisions granting jurisdiction to tribal courts, not mandates to state agencies and courts. *Id*. at 32. And in *Adoptive Couple*, which *did* involve the ICWA's application to a non-tribal member based on ancestry, the Court held that the ICWA did not apply on those facts and noted that its application would raise constitutional concerns. 133 S. Ct. at 2565. So, while the Court has used the phrase "plenary power," its application has always been as to tribes and reservations, not as to individuals with Native American ancestry.

Nor should "commerce" be read to include child custody proceedings. True, the "extensive case law that has developed under the Interstate Commerce Clause . . . is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). But while many substantive rules of interstate commerce do not apply to Indian commerce—including the preemption issue in *Cotton*

Petroleum—the baseline *definition* of "commerce" must be the same for all three prongs of the Commerce Clause.

This is not an instance where "commerce" is used in parallel provisions near one another. The Commerce Clause uses the word "commerce" just once, covering three applications within the same sentence. Ohio is aware of no authority giving different meanings to *the same word in the same place* as applied to different clauses *in the same sentence*. To the contrary, at the time of the Clause's adoption, an established "rule of construction [held] that the same word normally had the same meaning when applied to different phrases in an instrument." *See* Natelson, *supra*, 85 Denver U. L. Rev. at 215 & n.96 (citing cases for rule).

No plausible argument suggests that child-custody proceedings are part of "commerce" if they *affect* commerce. Because "commerce" in the Commerce Clause means "commerce" in every application, reading it to include child-custody or adoption proceedings would radically expand federal power and destroy the understanding that domestic relations are a state concern. *Cf. Sosna*, 419 U.S. at 404. Consider the Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598 (2000), where the Court held that the Commerce Clause did not empower Congress to enact certain provisions of the Violence Against Women Act creating a federal civil remedy for certain gender-based violence. *Id*. at 601-02. The Court explained that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. Nor are child-custody or adoption proceedings.

Morrison rejected the argument that the effects of gender-based violence "substantially affect[ed]" interstate commerce. *Id*. at 609-10. Notably, the Court said that an effects-based reasoning "will not limit Congress to regulating violence but may . . . be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of

marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-16. The Court thus rejected the idea that "effects" on commerce could justify a federal takeover of "childrearing." So, under any test, child-custody and adoption proceedings are not "commerce" within the meaning of the Commerce Clause, and Congress's power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes," U.S. Const. art. I, § 8, cl. 3, does not extend to custody or adoption proceedings.

3. Nor does some "other constitutional authority," 25 U.S.C. § 1901(1), support the ICWA. As Justice Thomas noted, "no other enumerated power . . . could even arguably support Congress' intrusion into this area of traditional state authority." *Adoptive Couple*, 133 S. Ct. at 2566 (Thomas, J., concurring). He rightly concluded that "[t]he assertion of plenary authority must, therefore, stand or fall on Congress' power under the Indian Commerce Clause." *Id.* That means that it falls, not stands.

In sum, the Indian Commerce Clause is the only source of congressional power over Indian affairs, and it does not support the ICWA's invasion of state authority over parental rights and adoption. It simply does not authorize federal mandates putting "certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Id.* at 2565 (majority op.).

CONCLUSION

For the reasons stated above, Ohio urges the Court to deny the Motion to Dismiss, and to allow the case to proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April 2018, the foregoing proposed amicus brief was filed electronically as an exhibit to the motion seeking leave of Court. 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.

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