

No. 21-15097

In the United States Court of Appeals
For the Ninth Circuit

STEPHEN C., et al.,
Plaintiffs-Appellants,

v.

BUREAU OF INDIAN EDUCATION, et al.,
Defendants-Appellees.

**On Appeal from the United States District Court
for the District of Arizona
3:17-cv-08004-SPL
Judge Steven Paul Logan**

**BRIEF OF *AMICI CURIAE* AMERICAN INDIAN LAW SCHOLARS
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae is a group of individuals, all of whom are Indian law Scholars. There is no parent company, and no public company has any ownership interest.

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**STATEMENT OF IDENTIFY OF AMICI CURIAE,
INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE**

Amici are law professors and educational practitioners with expertise in federal Indian law.¹ Professor Barbara Creel is a Professor of Law holding the Karelitz Professorship for Evidence Law and Procedure at the University of New Mexico School of Law where she served as former Director of the Southwest Indian Law Clinic. Professor Creel has over 30 years-experience in teaching and practicing in federal Indian law and holds a special interest in education and the civil rights of American Indians under the United States Constitution. Professor Gregory Ablavsky is an Associate Professor of Law and Helen L. Crocker Faculty Scholar at the Stanford Law School. Robert Kelty has worked in Indian education over two decades, is a former educator, head of school superintendent, county superintendent, and is Senior Development Manager of the International Baccalaureate Organization, a nonprofit education organization. Tierra Marks is an Adjunct Professor of Law for the Tribal Law Journal at the University of New Mexico School of Law.

¹ No counsel for any party authored this brief in whole or in part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than amici curiae or their counsel contributed money intended to fund preparation of this brief or its submission. All parties have consented to the filing of this amicus curiae brief.

Amici have an interest in ensuring the coherent development of the field of federal Indian law and Indian education policy. In particular, they have an interest in ensuring that American Indians enjoy the full scope of access to education afforded to them by the Constitution and laws of the United States. In their current and previous positions, amici have taught, researched, written about, and litigated cases involving federal Indian law and the rights of American Indians. Amici also teach students who will practice in this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Indian children are the only people in the United States to whom the federal government promised an education in exchange for land and resources ceded to the United States by the leaders of the Indian tribes in which the children are members.² This promise, reflected over centuries in Treaties, the United States Constitution, acts of Congress, and federal policy, is the foundation upon which the federal-tribal trust relationship was established and exists to the present day. This brief discusses the federal promises underpinning the federal government's obligations to Indian children, including:

- As early as 1775, Congress provided funding for Indian children to attend universities.
- After the American Revolution, President George Washington and Secretary of War Henry Knox implemented the “civilization policy” to assimilate Indian people.
- In 1819, Congress enacted the Civilization Fund Act, formalizing its efforts to educate Indian children.

² We use the term “Indian children” in this brief to track the statutory language in the Indian Self Determination Education Assistance Act, the Indian Education Amendments Act of 1978 and all subsequent Amendments to the Indian Education Amendments Act. It is a term used in federal law to identify American Indian and Alaska Native children who are beneficiaries of the education system at issue in this case.

- In the Appropriations Act of 1870, Congress expanded the federal system of Indian education.
- In 1891, Congress gave the Commissioner of Indian Affairs statutory authority to ensure compulsory school attendance for Indian children.
- By 1916, the BIA had established a formal curriculum for Indian children for use in all Bureau schools.
- In 1975, Congress enacted the Indian Self Determination Education Assistance Act, confirming “[f]ederal responsibility for and assistance to education of Indian children.” 25 U.S.C. § 5301(b)(2).
- In 1978, Congress enacted the Indian Education Amendments Act reconfirming the federal government’s “unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.” 25 U.S.C. § 2000.
- In 2001, Congress enacted the No Child Left Behind Act of 2001, reiterating the federal government’s “goal of ensuring that the programs of the Bureau of Indian Affairs-funded school system are of the highest quality.” Pub. L. No. 107-110, 115 Stat. 2007

The United States Constitution confirms the federal government’s promise to provide education to Indian children both through its silence with respect to education (thereby leaving it to the states) and its placement of Indian affairs,

which includes education, within the exclusive province of federal law. U.S. Const., art. 1, § 8, cl. 3. While education is generally a state and local responsibility, Indian education is the exception because early on – in statutes, treaties, and the general course of dealing with Indian tribes – the federal government assumed sole responsibility for the education of Indian children.

Over time the federal government has shifted the way in which it administers the programs it uses to fulfill its Indian education responsibility, but the long-standing and well-grounded federal promise of education to Indian tribes and their children endures. The district court in this case failed to acknowledge this federal commitment and failed to enforce the requirements enacted by Congress that direct the Bureau of Indian Education to fulfill the federal government's trust promise of an education for the Indian children at Havasupai.

ARGUMENT

I. The Early Federal Promise of Education for Indian Children.

A. Since its Founding, the Federal Government Dominated Formal Indian Education.

The obligations of the Bureau of Indian Education and its parent agency, the Bureau of Indian Affairs, are rooted in the history of Indian education in the United States. An understanding of that history is critical to the analysis of the federal government's current obligation to provide an education for the children at Havasupai.

European colonizers believed that educating Indian children in formal institutions would assimilate and “civilize” Indian people and prepare them for the duties of colonial citizenship. To colonizers, “civilize” meant to educate, and “to educate means the breaking up of tribal customs, manners” and assuming those of the “superior race.” Office of Indian Affairs, Department of the Interior, *Annual Report of the Commissioner of Indian Affairs for the Fiscal Year Ended June 30, 1901*, at 9 (1902). Working from this colonial perspective, as early as 1775, Congress provided funding for Indian children to attend all-white universities, such as Dartmouth and Princeton College. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885, 911 (2017); see e.g. 28 *Journals of the Continental Congress 1774-1781*, at 411 (Roscoe R. Hill ed., 1936).

After ratification of the Constitution in 1790, President George Washington and Secretary of War Henry Knox implemented the “civilization policy” to assimilate Indian people by giving them domestic animals and tools for crops and farms. 1 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 135-58 (1984). This policy also embraced educating Indian children, especially in the practical skills of agriculture. 7 *Papers of George Washington: Presidential Series* 204-07 (Jack D. Warren, ed. 1998). By the early nineteenth century, missionaries and others had founded schools specifically

intended to educate Indian children. John Demos, *The Heathen School: A Story of Hope and Betrayal in the Age of the Early Republic* 32 (2014).

In 1819, Congress enacted the Civilization Fund Act, formalizing its efforts to educate Indian children. Pub. L. No. 15-85, 3 Stat. 516. The Act supplied annual funding for schools to “provid[e] against the further decline and final extinction of the Indian tribes.” *Id.* Over the following decade, the federal government helped support over thirty-eight Indian schools. Fletcher & Singel, *supra*, at 914. By 1830, the federal government was paying for at least 1,500 Indian children to be educated in Anglo-American schools. Prucha, *supra*, at 151.

B. Eighteenth and Nineteenth-Century Treaties Incorporated the Education of Indian Children into the Federal-Tribal Trust Responsibility.

Until 1871, treaties negotiated with Indian nations were the predominant means by which the federal government regulated Indian affairs. *See generally* Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* (2013). Under these treaties Indian people relinquished large tracts of land and were required to live on small often remote “reservations.” In return, the federal government routinely guaranteed the health, safety, and remaining land rights of the Indian tribe treaty party. These treaties form the earliest basis of the federal-tribal trust relationship.

Education for Indian children featured prominently in these treaties, with the federal government committing to provide schoolhouses and financial support, and teachers to instruct Indian children in “reading, writing, [and] arithmetic.” Fletcher & Singel, *supra*, at 913-16 (collecting treaties); Treaty with the Winnebago, art. 4, Sept. 15, 1832, 7 Stat. 370, *reprinted in 2 Indian Affairs: Laws & Treaties* 346 (Charles J. Kappler, ed. 1904). Treaties were used as tools to promote federal interests and create alliances with tribes while encouraging Indian assimilation and conversion to Christianity. Fletcher & Singel, *supra*, at 911.

C. Creation of the Bureau of Indian Affairs Institutionalized the Federal-Tribal Trust Relationship.

Congress reinforced the federal-tribal trust relationship in the first half of the nineteenth century through the creation and expansion of a federal structure to administer and regulate the affairs of Indian people. The “Indian Department” was originally within the Department of War, but was restyled as the Bureau of Indian Affairs (“BIA”) by Secretary of War John C. Calhoun in 1824. Curtis E. Jackson & Marcia J. Galli, *A History of the Bureau of Indian Affairs and Its Activities Among Indians* 40-43 (1977). In 1832, Congress codified the position of Commissioner of Indian Affairs and transferred all responsibility for the federal relationship with tribes to the Commissioner. Act of July 9, 1832, ch. 174, 4 Stat. 564 (codified as amended at 25 U.S.C. § 1). And in 1849, Congress transferred the

BIA to the newly created Department of the Interior. Act of Mar. 3, 1849, ch. 108, 9 Stat. 359.

D. Establishment of Federal Boarding Schools and Compulsory Indian Education in the 1850s.

In the early years of the United States, educational opportunities for Indian children provided by treaty or statute were generally voluntary. Fletcher & Singel, *supra*, at 914. But beginning in the 1850s, treaties began to predicate the federal government's provision of educational services on mandatory school attendance, with federal payment of annuities at stake for noncompliance. *Id.* at 938. The 1837 Treaty with the Pawnees, for example, provided:

each and every one of their children, between the ages of seven and eighteen years, shall be kept constantly at these schools ... and if any parent or guardian shall fail, neglect, or refuse ... then, and in that case, there shall be deducted from the annuities to which such parent or guardian would be entitled, either individually or as parent or guardian, an amount equal to the value, in time, of the tuition thus lost[.]

Art. 3, Sept. 24, 1837, 11 Stat. 729, *quoted in* Fletcher & Singel, *supra*, at 938-39; *see also* Treaty with the Cheyenne and Arapaho Nations, art. 7, Oct. 28, 1867, 15 Stat. 593, *reprinted in 2 Indian Affairs: Laws & Treaties, supra*, at 986 (“In order to insure the civilization of the tribes, the necessity of education is admitted ... and they therefore pledge themselves to compel their children ... to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with.”). Before the end of the Treaty era in 1871, the Senate

ratified eleven treaties mandating school attendance, with some treaties including enforcement provisions to compel attendance. Robert Laurence, *Indian Education: Federal Compulsory School Attendance Law Applicable to American Indians: The Treaty-Making Period: 1857-1871*, 5 Am. Indian L. Rev. 393, 394 (1977).

E. Expansion of BIA Control over Indian Education Following the Civil War.

After the Civil War, the federal government assumed greater control over the internal affairs of Indian people. It was believed that the stability and safety of the federal government was dependent on the education and assimilation of Indian children. Carl Schurz, Secretary of the Interior under President Rutherford B. Hayes, bluntly estimated that it cost a million dollars to kill an Indian in battle but only \$1,200 to provide an Indian child with eight years of education. David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875–1928*, at 19-20 (2020).

President Hayes was a strong proponent of Indian education. He exchanged extensive correspondence with Richard Henry Pratt, the founder of the Carlisle School. Pratt, a former Army officer who fought in both the Civil War and the Indian Wars, infamously stated that Indian education was intended to “[k]ill the Indian and save the man.” *Id.* at 52. Pratt played a key role in shaping Indian education following the Civil War. Instead of relying on missionary and day schools, Pratt urged the creation of federally run boarding schools for Indian

children. In 1879, Pratt, acting under the aegis of the BIA, established the Carlisle Indian Industrial School in Carlisle, Pennsylvania, the first off-reservation Indian boarding school. *Id.* at 48. At Carlisle, Pratt employed an educational strategy that he termed “outing.” *Id.* at 54. Under the outing system, boarding schools such as Carlisle sent hundreds of children to live with non-Indian families, believing that this method would help students more quickly “become civilized by mixing with civilization.” *Id.* at 53-54. Pratt’s ultimate vision was that the outing system “should be extended until every Indian child was in a white home.” Fletcher & Singel, *supra*, at 943.

By the mid-1880s, federal policymakers, many of whom had studied Pratt’s efforts at the Carlisle Indian Industrial School, “were clearly committed to the idea that some sort of boarding school experience was essential.” Adams, *supra*, at 58. Based on the Carlisle model, the government began establishing off-reservation boarding schools throughout the Western United States, including in Oregon, Oklahoma, New Mexico, Nebraska, and Kansas. *Id.* at 56. By 1900, some 21,000 Indian children – over *half* of all Indian children in the United States – attended federally run Indian schools. *Id.*

The rise of federally run Indian boarding schools coincided with broader federal attempts to systematize and extend federal education to all tribes. In the Appropriations Act of 1870, Congress significantly expanded Indian education

appropriations by approving federal discretionary funding for schools for non-treaty tribes. Act of July 15, 1870, ch. 269, 16 Stat. 335, 359. This funding grew dramatically over the next several decades. In 1877, Congress appropriated \$20,000 for Indian education. By 1900, the annual Indian education appropriation had reached almost \$3,000,000. Adams, *supra*, at 26-27 n.55.

By the mid-1890s, the United States had established a formal federal system for educating Indian children, marked by “a more centralized, hierarchical, and self-monitoring bureaucratic structure.” *Id.* at 70. This system was not only compulsory but also coercive in nature. BIA officials made regular use of agency police to conduct the “annual fall roundup” of schoolchildren, forcibly separating them from their parents and locking “the most intractable” parents in the agency guardhouse. *Id.* at 210-11.³

In 1891, Congress officially gave the Commissioner of Indian Affairs the statutory authority to “make and enforce by proper means such rules and regulations” to ensure compulsory school attendance for all school-age Indian

³ In 1882, the BIA created a position, eventually named the Superintendent of Indian Schools, to inspect Indian schools and plan for the implementation of education related treaty obligations. Jackson & Galli, *supra*, at 82. By 1890, the Superintendent supervised a growing BIA unit, the Indian School Service, which was charged with “administer[ing] the schools” and developing regulations and the duties of school employees. *Id.*; see also Office of Indian Affairs, *Rules for the Indian School Service* 13, 28 (1898).

children. Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1014. Two years later, Congress authorized the Commissioner to “prevent the issuing of rations or the furnishing of subsistence either in money or in kind” to parents whose children did not attend school. Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 628. Although an 1894 statute limited the enforcement of compulsory school attendance to the Indian child’s home state, Act of Aug. 15, ch. 290, 28 Stat. 286, 313 (codified as amended at 25 U.S.C. § 286), the ration-withholding law was still intermittently enforced. It remains, unrepealed, within the federal code to this day. 25 U.S.C. § 283.

The federal government’s late nineteenth-century experiment in Indian education reflected its distinctive role and authority over Indian affairs. Federal officials sought to fulfill the government’s trust responsibility by offering Indian children an education that they believed was on equal footing with other children in the United States: “an Indian high school should be substantially what any other high school should be,” one late-nineteenth-century commissioner of Indian affairs wrote. Adams, *supra*, at 62. Yet federal policymakers were hampered by an ethnocentric vision of what that education should accomplish, seeking to transform the nation’s Indigenous residents into “Americans” by coercively eradicating their culture.

F. The Education of Havasupai Children up to the Twentieth Century.

The Havasupai have lived along the Colorado River basin since as early as the fourteenth century, occupying and possessing a vast landscape to support a complex agricultural system. Stephen Hirst, *Havsuw 'Baaja: People of the Blue Green Water* 39-41 (1985). Their reservation was created in 1880, when President Hayes set aside thousands of acres of land for the Havasupai. June 8, 1880 Executive Order, *reprinted in* Office of Indian Affairs, Department of the Interior, *Annual Reports of the Commissioner of Indian Affairs Department of the Interior for the Year 1882*, at 246 (1882), <https://www.doi.gov/sites/doi.gov/files/T-21917.pdf> (2006) (hereinafter “*Annual Reports of the Commissioner of Indian Affairs 1882*”); Hirst, *supra*, at 47. Yet, their reservation was later reduced to a mere 518 acres due to the mistake of military surveyors. March 31, 1882 Executive Order, *reprinted in Annual Reports of the Commissioner of Indian Affairs 1882*; Hirst, *supra*, at 40. The Havasupai immediately felt the consequences of white encroachment as three years later in 1885, an Arizona Territory’s congressional delegate wrote that encroachment had rendered their land “useless” and that the “time has come when the United States must extend some assistance to this tribe.” *Id.* at 54.

Despite the BIA’s construction of a stone schoolhouse for the Havasupai around 1895, *id.* at 57-58, in the eighteenth and nineteenth centuries Havasupai

children – like Indian children across the United States – were sent to off-reservation boarding schools. Because of the Havasupais’ location in the “almost inaccessible canyon ... where the children do not come in contact with white people, and who ... have no further occasion to speak the English language,” the government believed the children should be removed “from this canyon as rapidly as possible and placed in schools.” Office of Indian Affairs, Department of the Interior, *Report of the Superintendent of Indian Schools 1900*, at 9 (1900); Office of Indian Affairs, Department of the Interior, *Report of the Superintendent of Indian Schools 1902*, at 7 (1902).

As early as 1901, Havasupai children were sent to the Rice Station Boarding School located near the San Carlos Agency and the Truxton boarding school in Valentine, Arizona, which operated from 1903 to 1937. *Id.*; National Park Service, *Schoolhouse at Truxton Canyon Training School*, https://www.nps.gov/nr/travel/route66/schoolhouse_truxton_canyon_training_school_valentine.html (last visited July 1, 2021). Life at these schools was traumatic for the children as they were separated from their families, abused and bullied, forced to perform manual labor, exposed to measles and tuberculosis, and suffered from malnutrition. *Id.*; Donald L. Parman and Lewis Meriam, *Lewis Meriam’s Letters during the Survey of Indian Affairs 1926-1927*, 24 *Arizona and the West* 3, at 263 (1982).

Given the negative effects of the boarding schools on their children, in 1901, the Havasupai Tribe met with an Indian Service Supervisor to ask “that they be given some increased school facilities in the cañon so that their children will not have to be sent away” to the off-reservation boarding schools. Hirst, *supra*, at 61. The BIA declined the Tribe’s 1901 request to expand the existing school at Havasupai. But when a 1912 flash flood destroyed the stone schoolhouse, the government rebuilt it within the year. *Id.* at 76.

II. The Federal Government’s Neglect of Indian Education in the Twentieth Century.

A. The Federal Government’s Shift to Vocational Training.

At the turn of the twentieth century, the BIA abandoned the nineteenth century system of general education and created a new curriculum for Indian children focused on training students to perform manual labor. Cathleen D. Cahill, *Federal Fathers and Mothers: The United States Indian Service, 1869-1933*, at 224 (2011). Under the BIA’s 1916 curriculum, primary schools taught “rudimentary English and industrial work,” prevocational schools introduced trade-based skills along with “specific lessons in such areas as geography and hygiene,” and vocational schools taught students only trade-based skills for their final four years of education. Frederick E. Hoxie, *Redefining Indian Education: Thomas J. Morgan’s Program in Disarray, 24 Arizona and the West* 1, at 17 (1982).

B. The Crisis in Federal Government Boarding Schools.

Early in the Twentieth Century, it became widely recognized that the government's Indian boarding schools suffered from abysmal physical and educational conditions. A 1908 survey exposed dangerous health conditions leading to "exceedingly high rates" of tuberculosis. Cahill, *supra*, at 222. Teachers were frequently untrained and often lacked the basic educational skills required to teach in the state public school system. Students were assigned manual labor for hours every day. David H. DeJong, *Promises of the Past: A History of Indian Education in the United States* 117, 139, 149 (1993).

C. The Indian New Deal and Indian Education Reform in the 1930s.

In the 1920s, increased public criticism of the federal government's Indian boarding school policies created pressure for reform. Margaret D. Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia, 1880-1940*, at 404 (2011). In response to growing pressure John Collier, BIA Commissioner under President Franklin Roosevelt, embarked on a program of improvements to Indian education which included a shift in federal policy towards opening new day schools and moving away from the boarding school policy. *Id.* at 169. The Snyder Act of 1921, part of these reforms, provided broad authorization of Indian programs, including education, and a change in day school curriculum to incorporate Indian languages, history, and culture. Pub. L. No. 67-85, 42 Stat. 208.

In 1934, Congress enacted the Indian Reorganization Act (“IRA”), the key piece of legislation in a dramatic transformation of federal Indian policy that is referred to as the Indian New Deal. The IRA recognized certain self-government rights for tribes and shifted federal policy to focus on day schools rather than boarding schools. Jacobs, *White Mother to a Dark Race*, *supra*, at 169. Although the IRA marked a major shift in federal Indian education policy, the transition away from the coercive boarding school model was remarkably slow. For example, as late as 1974, ninety percent of K-12 students on the Navajo Reservation, the largest reservation in the United States, were attending federally run boarding schools. Margaret D. Jacobs, *A Generation Removed The Fostering and Adoption of Indigenous Children in the Postwar World* 13 (2014).

D. The Education of Havasupai Children in the Twentieth Century.

In 1931, while considering enactment of the IRA, the Senate Committee on Indian Affairs met with the Havasupai at Grand Canyon Village. 17 *Survey of Conditions of the Indians in the United States: Hearings Before a Subcommittee of the Committee on Indian Affairs, 73rd Cong., 8733-8754 (1931)* (hereinafter “*Survey*”); Hirst, *supra*, at 149. During that meeting, the BIA Superintendent assigned to the Havasupai tried to persuade the visiting Senators that the day school should be closed, since it operated at great cost with “little to no results obtained.” *Survey, supra*, at 8744. But two tribal leaders spoke in opposition,

reiterating the Havasupai’s longstanding request for more local grades stating, “[w]hen they send them away, they go through the higher school and they die, lots of them, and we do not want them to do that.” *Id.* at 8750. Senator Lynn J. Frazier responded, “I think they should be kept here too,” and expressed shock that the day school taught “only three grades,” with just a single teacher and nine pupils enrolled in a schoolhouse that could easily hold 30. *Id.* at 8734, 8750. The Senator sharply criticized the Superintendent for failing to expand the school and wanting to send “even the tiniest little people” to boarding school hundreds of miles away. *Id.* at 8734.

In 1955, during the time of the federal Indian policy of “termination,” the BIA succeeded in closing the Havasupai day school—sending children as young as five years old over 350 miles to the boarding school at Fort Apache. Hirst, *supra*, at 181.⁴ The Havasupai requested federal funding for a new school (as the BIA had proposed in 1917) but their request was denied. *Id.* at 182. As a result, some children simply did not go to school at all and those who did often were abused and bullied. *Id.* at 182-83. In 1964, the BIA reopened a two-grade day school at

⁴ In the early 1950s, the federal government’s Indian policy was to “terminate” the federal-tribal relationship with tribes, in an effort to discontinue tribal sovereignty and end or reduce tribal landholdings. A companion policy of “relocation” moved Indians off reservations and into urban areas. Fletcher & Singel, *supra*, at 954. These policies were “an unmitigated disaster from the point of view of both tribes and the federal government.” Jacobs, *A Generation Removed*, *supra*, at 8.

Havasupai, but the nine-year boarding school experience “left lasting scars on the Havasupai by uprooting and embittering a whole generation of their young people.” *Id.* at 185.

III. The Federal Government’s Renewed Attention to Indian Education in the Late Twentieth Century to the Present.

A. Congressional Confirmation That Indian Education is a Federal Trust Responsibility.

Beginning in the 1960s, the federal government came to “the fullest realization of [its] trust obligations, that is, the duty of protection as theorized in the early decades of the United States” and enabled tribes to self-govern once again. Fletcher & Singel, *supra*, at 958.

Shifts in federal Indian policy coincided with changes in federal education law and policy generally, as reflected in the enactment of the 1965 Elementary and Secondary Education Act (“ESEA”). The ESEA was a first step in the government’s renewed commitment to provide equal access to quality education.

Catherine A. Paul, *Elementary and Secondary Education Act of 1965*, VCU Libraries Social Welfare History Project (2016), <https://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965>.

In addition to the ESEA, two major studies on federal Indian education moved the government to statutorily reconfirm its obligations to Indian students: the 1928 Meriam Report and the 1969 Kennedy Report. The Meriam Report

exposed severe problems with the physical conditions and curriculum in boarding schools, stressed the need for a relevant instructional curriculum adapted to the individual needs of Indian students, and chided schools for failing to consider or adopt the language of the child. Lewis Meriam, Inst. For Gov't Research, *The Problem of Indian Administration* 16 (1928). The Kennedy Report, issued by the Senate Committee on Labor and Public Welfare through its Special Subcommittee on Indian Education, called for a “comprehensive Indian education act to meet the special education needs of Indians,” finding that the BIA had “severe bureaucratic malaise” and was rife with “organizational defects.” *Indian Education: A National Tragedy – A National Challenge*, S. Rep. No. 91-501, 17, 110, 117 (1969). The Kennedy Report asserted that the BIA should be held accountable for its educational programs and expenditures on the same level as states under the ESEA, as at the time there was no reporting requirement imposed on the BIA, in contrast to the states which were required to file an annual report detailing where federal funds were being directed and the success of those programs. *Id.* at 136. As a result of these and other efforts, Congress adopted, and the President signed two major pieces of Indian education legislation: the Indian Self-Determination and Education Assistance Act (“ISDEAA”) of 1975 and the Indian Education Amendments Act of 1978.

B. The Indian Self-Determination and Education Assistance Act of 1975.

In January 1975, Congress enacted the ISDEAA confirming the federal obligation to provide education to Indian children. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended 25 U.S.C. § 5301 *et seq.*). The ISDEAA declares a “major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.” 25 U.S.C. § 5302(c).

Reversing its efforts to sever treaty relationships and financial obligations to Indian tribes, for the first time in history the ISDEAA allowed Indian tribes to take responsibility for control and operation of several important services, including education. This stood in stark contrast to the historical lived experience of Indian people who were cut off from government resources if they did not comply with federal policies such as compulsory attendance. Margaret Connell Szasz, *Education and the American Indian: The Road to Self-Determination 1928-1973*, at 112-14, 171-74 (1974).

C. The 1978 Indian Education Amendments Act.

In 1978 Congress passed the Education Amendments Act, Pub. L. No. 95-561, 92 Stat. 2143 (codified as amended 25 U.S.C. § 2000 *et seq.*). The 1978

Amendments added Title XI to the ESEA, which addresses Indian Education. *Id.* § 1101, 2313. Title XI directed the Secretary of the Interior to develop “minimum academic standards for the basic education of Indian children” that shall apply to Bureau schools, and required the Secretary to submit a plan to Congress on how to bring the level of all Bureau schools up to these minimum standards. *Id.* § 1121(b), (f), 2317-18. If a tribal governing body considers the academic standards to be “inappropriate” or “ill-conceived,” it has authority to revise the standards to take into account the specific needs of the tribe’s children and the Secretary has an obligation to establish such standards. *Id.* § 1121(d).

The 1978 Amendments marked a change in the BIA’s administrative structure, mandating that the BIA “facilitate Indian control of Indian affairs in all matters relating to education.” *Id.* § 1130, 2321 (codified at 25 U.S.C. § 2011(a) and 25 C.F.R. § 32.5). This was done by requiring the BIA to actively consult with tribes in a government-to-government relationship, vesting in the Assistant Secretary for Indian Affairs all Indian education functions, requiring uniformity of procedures and practices for BIA education program operations, and consolidating all responsibility for Bureau schools within the Office of Indian Education Programs (“OIEP”). *Id.* §§ 1126, 1133-1134, 2319-20, 2327; 25 C.F.R. § 32.5 (stating all Indian education functions of the BIA shall be directed and supervised by the Director of the OIEP who is required to develop guidelines for evaluating

all functions and programmatic responsibilities, be responsible for line direction and management of all education functions, and provide assistance with personnel and curriculum). The change in administrative structure was significant because administration of Bureau schools had been scattered among various Indian Affairs offices, resulting in management instability and lack of clear roles and responsibilities.

BIA regulations implementing the 1978 Amendments fully incorporate the “responsibility and goal of the Federal Government to provide comprehensive education programs and services for Indians ... [a]s acknowledged ... in the Federal Government’s protection and preservation of Indian Tribes ... and [because] the Federal Government has a direct interest, as trustee, in protecting Indian and Alaska Native children, including their education.” 25 C.F.R. § 32.3; 25 C.F.R. 32.1 (stating “policies to be followed by all schools and education programs under the jurisdiction of the [BIA]”).

D. Subsequent Amendments to the 1978 Indian Education Amendments Confirm and Clarify the Federal Government’s Trust Obligations to Indian Children.

1. The Indian Education Amendments of 1984.

The Indian Education Amendments of 1984, Pub L. No. 98-511, 98 Stat. 2391, sought to “foster[] better education services for Indian students.” *Indian Education Amendments of 1984: Hearing on H.R. 5190 Before the Subcommittee*

on Elementary, Secondary, and Vocational Education of the Committee on Education and Labor House of Representatives, 98th Cong. 1-2 (1984) (statement of Dale Kildee, Representative of Michigan). Congressman Dale Kildee, a former teacher, introduced the Amendments of 1984. Congressman Kildee stressed that the purpose and intent of the 1984 Amendments were to “strengthen the Bureau’s administrative support of education” and meet the federal government’s “particular obligation in the field of education” that arose in treaties signed between the United States and Indian nations. *Id.* (“This very often became the quid pro quo in the treaties we signed with Indian nations. They gave up tremendous rights, gave up vast tracts of land, and the one thing that they were promised in return was education, and that promise was made by the U.S. Government.”).

Expanding on the 1978 Amendments, the 1984 Amendments further specified the functions and expectations of the BIA and OIEP by requiring the Director of the OIEP to supervise all Bureau education facilities and contract functions “relating to education” and report directly and solely to the Assistant Secretary for Indian Affairs. Pub L. No. 98-511, sec. 504(a)-(c), § 1126(b)-(d), 98 Stat. 2391, 2393-94. The Amendments required all Bureau schools to comply with prescribed minimum academic standards set by the 1978 Amendments within two years of the initial contract for educational services under the ISDEAA. *Id.* sec. 502(b), § 1121(e), 2391-92. Further, and in response to constant concerns

regarding the conditions of Bureau schools, a facilities division within the OIEP was established for the physical maintenance of all educational facilities operated or funded by the BIA. *Id.* sec. 504(d), § 1126(d)-(e), 2393-94.

Prior to adoption of the 1984 Amendments, the Department of Interior abruptly closed some BIA schools, claiming they were underused and had high costs. The sudden closure of these schools left hundreds of Indian children without education and was inconsistent with the government's renewed commitment to Indian education. As a result, tribes turned to the courts and were successful in obtaining injunctions preventing the Department of Interior from closing schools. *See generally Omaha Tribe of Nebraska v. Watt*, Civ. No. 82-1451 (D.D.C. 1982) (granting injunction to prohibit BIA and Interior Department from closing the Wahpeton School); *Cheyenne-Arapaho Tribe v. Watt*, 9 Indian L. Rep. 3053 (D.D.C. 1982) (granting injunction at request of Cheyenne-Arapaho Tribe to prohibit closure of Concho Indian School).

To prevent the BIA from breaching the federal promise to provide education to Indian children, the 1984 Amendments required the Secretary of Interior to promulgate standards and procedures for closing or consolidating any BIA school. The Amendments also called for the Secretary to “ensure a study of each child’s educational and social needs and guarantee adequate alternative services,” and to

make a “full report to Congress describing the plans made.” Pub L. No. 98-511, sec. 502(e), § 1121(g)-(h), 98 Stat. 2391, 2393.

2. The Indian Education Amendments of 1988.

The Indian Education Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 363, sought to improve Indian educational opportunities by expanding BIA schools to include schools for tribes that had not previously had one, requiring that all actions under the Act be done with active consultation with tribes, and by providing grants and technical assistance to tribes for the development and operation of tribal education departments. *Id.* sec. 5104, § 1121, sec. 5111, § 1130, sec. 5119, § 1142, 365, 376, 383. Building off the 1984 Amendments, the 1988 Act provided that a Bureau school can be terminated, transferred, consolidated, or substantially curtailed “only if the tribal governing body approves such action.” *Id.* sec. 5102, § 1121, 363.

3. The Native American Education Improvement Act of 2001.

The Native American Education Improvement Act (“NAEI”) contained in the No Child Left Behind Act of 2001 reiterates “the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children . . . [and the] goal of ensuring that the programs of the Bureau of Indian Affairs-funded school system are of the highest quality.” Pub. L. No. 107-110, sec. 1042, § 1120, 115 Stat. 2007. NAEI once again

confirms that “the Federal Government has the sole responsibility for the operation and financial support of the [BIA] funded school system that it has established on or near Indian reservations and Indian trust lands throughout the Nation for Indian children.” *Id.* The NAEI established an accreditation for the basic education of Indian children in BIA schools “to ensure that Indian students” at a BIA school “are provided with educational opportunities that equal or exceed those for all other students in the United States.” *Id.* sec. 1042, § 1121, 2007-08. The NAEI provides a 24-month period for a BIA school to be accredited. *Id.* If the school fails to be accredited, the NAEI requires corrective actions for the school and directs the Secretary to provide assistance to the school, to consult with the tribe to determine the causes for lack of accreditation, set aside funds for the school to obtain accreditation, or appoint a receiver or trustee to operate and administer the school until the school is accredited. *Id.* at 2010-12.

Section 1130 of the NAEI provides that “[a]ll actions under [the NAEI] shall be done with active consultation with tribes. The United States acting through the Secretary and tribes shall work in a government-to-government relationship to ensure quality education for all tribal members.” *Id.* § 1131 at 2043-44. It goes on to state that consultation requires:

the open discussion and joint deliberation of all options with respect to potential issues or changes ... interested parties (including tribes and school officials) shall be given an opportunity -- (i) to present issues ... that will be considered for future action by the Secretary; and (ii) to

participate and discuss the options presented, or to present alternatives, with the views and concerns of the interested parties given effect unless the Secretary determines ... there is a substantial reason for another course of action ... The Secretary shall submit to any Member of Congress ... a written explanation of any decision made by the Secretary which is not consistent with the views of the interested parties.

Id.

In passing NAIE, Congress once again, under its special trust responsibility to Indian children, recognized the need to involve tribal governments in promulgating specific programs and policies to address the unique needs of Indian Education.

IV. The Federal Government's Obligations to Havasupai Children.

Education has been a cornerstone in fulfilling the federal government's trust obligation to all tribes since the founding of the United States. Congress has reaffirmed this trust obligation many times, an obligation which federal officials have often carried out incompetently, but always acknowledged.

For the Havasupai, it was not until 1978, the same year as the Education Amendments Act was enacted, that Congress appropriated funds for a new schoolhouse at Havasupai, the first since 1912. Hirst, *supra*, at 233. The school building opened in 1982, and for the first time in the Tribe's history, Havasupai children could attend the eight primary grades in their own community. *Id.*

As explained in this brief, the BIA's Bureau of Indian Education is governed by a series of statutes that require it to provide adequate education to Indian children. Federal laws and regulations identify discrete actions that the BIE must take to provide adequate education, including but not limited to: meeting the "basic elementary and secondary educational needs" of the Havasupai, 25 U.S.C. § 2000; providing instructional materials, school library resources, and innovative compensatory educational programs, 25 C.F.R. § 36.40; and offering instruction in specific content areas including language arts, social studies, physical and health education, and career awareness. 25 C.F.R. §§ 36.20-36.24 ("Minimum Program of Instruction"). Congress has confirmed repeatedly and unequivocally that the BIE is the agency responsible for fulfilling the federal promise of education for Indian children and has designed the BIE's administration structure so that it can meet its statutory responsibilities. The explicit language in these numerous binding and unambiguous statutes and regulations shows Congress's intent to provide Indian tribes a substantive right to adequate education for their children.

As well documented in this case, in its educational offerings to Havasupai children, the BIE has failed to meet its obligations and has frustrated congressional policy. The BIE must comply with the law to satisfy the government's trust obligations as set out, clarified, and confirmed in the statutes and above regulations

and which the BIA itself has acknowledged.⁵

CONCLUSION

Congress's declared federal policy is "to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children." 25 U.S.C. § 2000. This federal policy is the touchstone of the federal government's trust obligation to Indian families and their children. When the BIA (through the BIE) fails to protect the rights of Indian children to "educational opportunities that equal or exceed those for all other students in the United States," courts have a vital role to play. Yet instead of holding the Bureau to account, the district court declined to reach the merits and enforce Congress's clear mandate expressed over centuries of statutory enactments that emanate from Treaties and the Constitution. Appellants should not be denied their day in court. The judgment of the district court should be reversed.

⁵ On June 22, 2021, Secretary of Interior Deb Haaland launched the Federal Indian Boarding School Trust Initiative, which requires a comprehensive review of the history of the United States government's policy of forcing Indian children into federally run boarding schools and directs the Department of the Interior to prepare a report detailing historical records relating to the federal boarding school program. *See* Department of the Interior Secretary Deb Haaland Memorandum to Assistant Secretaries, Principal Deputy Assistant Secretaries, and Heads of Bureaus and Offices, on *Federal Indian Boarding School Initiative* (June 22, 2021).

July 2, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 32(a)(7)(C), I certify that this amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,999 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief complies with the type size and typeface requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6).

July 2, 2021

/s/ *Tierra N. Marks*
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CERTIFICATE OF SERVICE

I certify that on July 2, 2021, I electronically filed the foregoing Brief of *Amici Curiae* Indian Law Scholars with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

July 2, 2021

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