

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, Cross-Respondents,

v.

CHAD EVERET BRACKEEN, ET AL.,

Respondents, Cross-Petitioners.

**On Writ of Certiorari to the
United States Court of Appeals for the Fifth
Circuit**

**BRIEF OF THE AMERICAN PSYCHOLOGICAL
ASSOCIATION, SOCIETY OF INDIAN
PSYCHOLOGISTS, INDIANA
PSYCHOLOGICAL ASSOCIATION, LOUISIANA
PSYCHOLOGICAL ASSOCIATION, AND TEXAS
PSYCHOLOGICAL ASSOCIATION AS *AMICI
CURIAE* IN SUPPORT OF THE FEDERAL AND
TRIBAL PETITIONERS**

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CHAD EVERET BRACKEEN, ET AL.,

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TEXAS,

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INTERESTS OF *AMICI CURIAE*¹

The American Psychological Association is the leading association of psychologists in the United States. A non-profit scientific and professional organization, the Association has more than 133,000 members and affiliates. The Association has an institutional interest in increasing and disseminating knowledge regarding human behavior, and fostering the application of psychological learning to important human concerns.

In cases where psychological learning and research may assist the court, the Association regularly files amicus briefs before this Court and courts throughout the nation. The association has filed almost 200 such briefs since 1962. In turn, this and other courts regularly rely upon the Association's expertise. *See, e.g., Perry v. New Hampshire*, 565 U.S. 228, 244-45 (2012); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Washington v. Harper*, 494 U.S. 210, 226 n.9, 230, 234 n.13 (1990).

The Association and its members have a distinct interest in safeguarding childhood mental and behavioral health—which is “essential to health and

¹ No party or counsel for any party authored any part of this brief nor made a monetary contribution intended to fund the preparation or submission of this brief. The parties have provided consent to the filing of this *amicus* brief.

well-being across the lifespan.”² The Association has adopted resolutions calling for “the use of evidence-based research and knowledge to support and advocate for policy efforts . . . that address[] structural determinants of mental and behavioral health burden among all children and youth.”³ The Indian Child Welfare Act and its placement preferences, which promote the physical and mental well-being of Indian children, are such policy efforts.

The Society of Indian Psychologists (“SIP”) is an organization that advocates for the psychological well-being of American Indian, Alaska Native, and Native Hawaiian people and to advance knowledge pertaining to Indigenous psychology. SIP supports a community of members who are professionals in academia, practitioners, researchers, and students who seek to disseminate knowledge and new information relevant to Native people.

The Indiana Psychological Association (“IPA”) is the organization representing scientific and professional psychology in Indiana. The purpose of the IPA is to advance psychology as a science, as a profession, and as a means of promoting public welfare. To achieve this purpose, IPA promotes and disseminates evidence-based information related to social justice issues and public welfare, demonstrates a commitment to valuing multicultural competence,

² Am. Psychological Ass’n, *APA Resolution on Child and Adolescent Mental and Behavioral Health*, 1 (2019), <https://perma.cc/EMC5-9FXF>.

³ *Id.* at 2.

and encourages programs that benefit the public, while upholding high standards of professional ethics.

The Louisiana Psychological Association (“LPA”), founded in 1948, is the largest professional organization for psychologists in the State of Louisiana. LPA’s mission is to “support and advance psychology as a science, as a profession, and as a means of promoting health, education, and human welfare.” That mission has been enhanced and strengthened throughout LPA’s history, by its contributions to scientific knowledge; dissemination of this knowledge through education of its members and the general public; promotion of health and human welfare through the application of this knowledge; as well as active membership involvement in professional, legislative, legal, and community endeavors.

The Texas Psychological Association (“TPA”) is the professional organization for psychologists in the State of Texas. Founded in 1947, TPA’s mission is to represent and enhance the profession of psychology in Texas, while promoting human health and welfare through education, science, and practice.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1978, Congress enacted the Indian Child Welfare Act (“ICWA”) “to promote the best interests of Indian children” as well as the vitality of Indian Tribes. Pub. L. No. 95-608, § 3, 92 Stat. 3069 (1978)

(codified at 25 U.S.C. §§ 1901-63).⁴ Congress did this, in part, through providing for preferences to govern placement of Indian children in adoptive, preadoptive, and foster care—namely, those children who are members of an Indian Tribe, or are eligible for membership and the child of a member. *See* 25 U.S.C. §§ 1903(4), 1915. ICWA requires that, in the absence of good cause to the contrary, an Indian child should be placed with the child’s extended family, members of the child’s Tribe, or another Indian family. 25 U.S.C. § 1915(a)(1)–(3); *see also id.* § 1915(b)(1)–(4).

On the evidentiary record before it in 1978, Congress determined that—all other things being equal—it was in the best interests of an Indian child to be raised by family or in a home where he or she could develop a strong sense of identity as a member of the Indian community. Congress also acted based on evidence demonstrating that, in the absence of ICWA’s placement preferences, the vast majority of

⁴ This brief uses the term “Indian” in keeping with the relevant statute’s repeated use of that term. *See, e.g.*, 25 U.S.C. § 1903(1)–(12). This brief also uses the term “Indian” in light of its longstanding association in the law with those peoples comprising “distinct, independent political communities” holding the status of “separate sovereigns pre-existing the Constitution.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (Marshall, C.J.)).

The term “Indian” is intended to be inclusive of the indigenous peoples of the continental United States, Alaska, Hawaii, and the United States Territories. These groups are also referred to as Native American, Alaska Native, and Native, and by many aboriginal/traditional specific names. As the First Peoples of this land, many prefer to be recognized by the names of their pre-colonial Pueblos, Tribes, and nations.

fostered and adopted Indian children were living in non-Indian homes. *See* H.R. Rep. No. 95-1386, at 9 (1978) (noting that a 16-State survey had shown approximately 85% of Indian children placed in foster care resided in non-Indian homes).

In the intervening decades, psychological research has confirmed Congress's determination that Indian children generally do best when they are placed with Indian families. Researchers have found that the formation of an Indian identity through enculturation—i.e., the process of learning about and adopting features of one's cultural heritage—provides Indian children with substantial mental health benefits, including increased self-esteem and resilience. Resilience, in turn, is the capacity to achieve good outcomes despite serious threats to an individual's development. Research also confirms that Indian children realize these benefits more readily when they are raised by Indian parents. By contrast, Indian children who lose their traditional cultural identity (or never adequately form such an identity) often suffer worse outcomes, tending to lose resilience, resorting to risk-taking behaviors as coping mechanisms, and experiencing significant emotional distress.

This research demonstrates that ICWA's placement preferences further the best interests of Indian children, and therefore—consistent with due process and equal protection principles—are, at a minimum, “rationally related to a legitimate state interest,” *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976); *see also Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (law subject to rational basis

review is generally “valid if there is a plausible policy reason for the classification”). As detailed below, research confirms that ICWA’s placement preferences directly advance the government’s strong “interest in safeguarding the physical and psychological well-being of a minor,” *Osborne v. Ohio*, 495 U.S. 103, 109 (1990), by facilitating the development of Indian children and their associations with the broader Indian community. Because ICWA’s design “can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians,” its “legislative judgments [should] not be disturbed.” *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

ARGUMENT

I. Congress Enacted ICWA Based on Evidence Establishing that Indian Children Benefit When They Are Placed with Indian Families.

In enacting ICWA, Congress identified two primary objects of its exercise of legislative authority: *first*, “to protect the best interests of Indian children,” and *second*, “to promote the stability and security of Indian tribes and families.” 25 U.S.C. § 1902. In determining that ICWA’s placement provisions promote the best interests of Indian children, Congress developed a significant evidentiary record that Indian children benefit from placement with Indian parents.

Following reports in the 1970s that “an alarmingly high percentage of Indian children were being separated from their natural parents permanently through the actions of nontribal government agencies and, in most cases, placed with non-Indian families,”

the Senate held oversight hearings in 1974. *Indian Child Welfare Act: Hearings Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 2d Sess. 31 (1978) (“1978 House Hearings”) (describing history of Act). Those hearings confirmed the reports and “pointed out that serious emotional problems often occur as a result of placing Indian children in homes which do not reflect their special cultural needs.” *Id.*; see also *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs on Problems that American Indian Families Face in Raising Their Children and How these Problems Are Affected by Federal Action or Inaction*, 93d Cong., 2d Sess. 45 (1974) (“1974 Senate Oversight Hearings”).

The year following these hearings, Congress created the American Indian Policy Review Commission “to conduct a comprehensive review” of federal Indian policy. Pub. L. No. 93-580, 88 Stat. 1910 (1975). That Commission issued findings “support[ing] the comments made by child welfare experts and Indian people at the 1974 hearings.” 1978 House Hearings at 32. Both houses of Congress continued to develop evidence supporting ICWA during the 95th Congress. See generally 1978 House Hearings; *Indian Child Welfare Act of 1977, Hearing Before the S. Select Comm. on Indian Affairs*, 95th Cong. 1st Sess. (1977).

At the conclusion of this legislative process, Congress enacted ICWA against a compelling evidentiary backdrop demonstrating that, all other

things being equal, Indian children benefit when they are parented by adults who are also Indian.

For example, Dr. Joseph Westermeyer, a social psychiatrist at the University of Minnesota's Department of Psychiatry, testified before Congress based on his experience treating 120 Indian patients, approximately half of whom had been placed in either foster or adoptive homes with non-Indian families. *See* 1974 Senate Oversight Hearings at 45. He explained that, as a result, the patients largely developed non-Indian cultural identities, and came to suffer from severe identity confusion upon reaching adolescence when they experienced various sorts of discrimination—including derogatory name-calling, denial of job applications, and social ostracization—due to the fact that they were Indian. *See id.* at 45–46. These problems were exacerbated by the fact that the Indian children placed in non-Indian homes did not “hav[e] around them other Indians” who could “support them through this difficult stage.” *Id.* at 49. It was “extremely common” for Indian children in these circumstances to experience suicide, drug usage, truancy, and other adverse consequences. *Id.* at 46.

Dr. Alan Gurwitt, associate clinical professor in child psychiatry, and Dr. Carl Mindell, child psychiatrist on the faculty of the Department of Psychiatry at Albany Medical College, gave similar testimony before Congress. Both advised that, “as a general rule . . . it is advisable not” to place Indian children in non-Indian homes. *Id.* at 61. Dr. Gurwitt presented evidence that children in such circumstances experience “a pervasive sense of abandonment, a sense of depression, and a sense of

having been neglected.” *Id.* at 56. In joint written testimony, the doctors further explained that placing Indian children in homes away from the Indian community may “severely affect” their development, leading “to ethnic confusion and a pervasive sense of abandonment with its attendant multiple roots and ramifications.” *Id.* at 63.

Leaders of several prominent nonprofit associations provided Congress with similar testimony, and proffered a broad range of research. For instance, Esther Mays, member of the Board of Directors of the Native American Child Protection Council, testified that various investigations revealed that non-Indian parents were often “unable to relate to [an] Indian child because of a lack of adequate knowledge of the child’s background,” causing “confusion” and “conflict . . . in the Indian child’s mind as he attempts to relate to the custom, tradition, values and the ways of a non-Indian world.” *Id.* at 159–60. And William Byler, executive director of the Association on American Indian Affairs, discussed a report addressing the relationship between the removal of Indian children from Indian homes and suicide levels. *See id.* at 6 (citing National Institute of Mental Health, *Suicide, Homicide, and Alcoholism Among American Indians: Guidelines for Help* (1973)). The “social characteristics” that increased the risk of suicide included whether the child “lived with a number of ineffective or inappropriate parental substitutes because of family disruption,” and whether “he has spent time in boarding schools and has been moved from one to another.” *Id.*

Congress also took into account the fact that Indian children—as defined by ICWA to include those enrolled in a Tribe, or both eligible for enrollment and the child of a Tribe member—must inevitably make difficult decisions about their “tribal and Indian identity,” including their political relationship to the Tribe. H.R. Rep. No. 95-1386, at 17 (1978). Given that Indian children “because of their minority, cannot make a reasoned decision” on their own about whether to “become enrolled in [their] tribe,” *id.*, a relationship to a tribal member may aid the child’s deliberations and thereby benefit the child.

II. Psychological Research Confirms that Indian Children Develop a More Stable Sense of Identity and More Positive Life Outcomes When Parented by Indian Adults.

Subsequent to Congress’s enactment of ICWA, psychological research repeatedly has borne out the statute’s basic premise. Continued research confirms that it is generally in the best interests of Indian children to be raised in Indian homes. As a general matter, Indian caregivers are better able to transmit shared norms, values, and cultural knowledge to Indian children. Over decades, researchers have established that Indian children benefit from the formation of an Indian identity through the process of enculturation—a process that involves engaging with one’s own heritage and applying those traditional norms to everyday living. Enculturation contributes to the resiliency of Indian children, allowing them to better withstand difficult life events and reducing the prevalence of negative health outcomes—including depression, substance use, and suicide—that

Congress intended to prevent by enacting ICWA's placement provisions. For Indian children, the chance to be raised by Indian parents, be they family, members of the child's own Tribe, or members of another Tribe, is a vital opportunity for enculturation.

A. Research Confirms that Enculturation and the Formation of an Indian Identity Build Resiliency and Self-Esteem Among Indian Children.

It is well-established that members of the Indian community disproportionately experience “traumatic stressors” related to “discrimination, lifetime trauma, [and] historical trauma.”⁵ Those stressors are “associated with negative health outcomes, including substance use problems and depression.”⁶ Indeed, data confirm that various types of trauma among Indians are significant factors contributing to high rates of substance abuse, traumatic depression, and PTSD.⁷ Those conditions have in turn “been shown to have direct detrimental effects on physiology relevant to obesity, diabetes, and cardiovascular disease.”⁸

⁵ Victoria M. O’Keefe et al., *Understanding Indigenous Suicide Through a Theoretical Lens: A Review of General, Culturally-Based, and Indigenous Frameworks*, 55 *Transcultural Psychiatry* 775, 783 (2018).

⁶ *Id.*

⁷ Karina L. Walters & Jane M. Simoni, *Reconceptualizing Native Women’s Health: An “Indigenist” Stress-Coping Model*, *Am. J. Pub. Health* 520, 522–23 (2002).

⁸ Christopher Wolsko et al., *Stress, Coping, and Well-Being Among the Yupik of the Yukon-Kuskokwim Delta: The Role of*

Discrimination directed towards Indians has also been shown to weaken resilience—i.e., “the capacity to face challenges and to become somehow more capable despite adverse experiences.”⁹ For example, one study measured the effect of perceived discrimination against Indians on the resilience of Indian children in the fifth through eighth grades.¹⁰ In the study, “[p]erceived discrimination was measured with a 10-item . . . scale designed to tap a range of potential types and sources of discrimination for youth.”¹¹ The study found that “[p]erceived discrimination was a significant risk factor for lower resilience. . . . Resilience declined by approximately 40% for each increment in perceived discrimination.”¹² The findings “reinforce[d] recent research that documents the pervasive impacts of discrimination on adolescent and adult American Indian depression and substance use.”¹³

Notably, however, research establishes that the detrimental effects of discrimination and other stressors are buffered through enculturation, *i.e.*, a “process where individuals learn about and identify

Enculturation and Acculturation, 66 Int’l J. Circumpolar Health 51, 52 (2007).

⁹ See Teresa D. LaFromboise et al., *Family, Community, and School Influences on Resilience Among American Indian Adolescents in the Upper Midwest*, 34 J. Cmty. Psych. 193, 194 (2006).

¹⁰ *Id.* at 193.

¹¹ *Id.* at 199.

¹² *Id.* at 202.

¹³ *Id.* at 203.

with their ethnic minority culture.”¹⁴ Enculturation means engaging with “one’s traditional cultural norms,” and incorporating those values into everyday living.¹⁵ Developing a firm sense of identity through enculturation has been shown to carry many mental health benefits.¹⁶ Such “[c]ultural buffers . . . weaken the impact of the traumatic stressors while strengthening mental health outcomes.”¹⁷ This phenomenon is illustrated by the “stress-coping model,” which “posits that the effect of life stressors . . . on health is moderated by cultural factors such as identity attitudes that function as buffers, strengthening psychological and emotional health and mitigating the effects of stressors.”¹⁸

Substantial data support this understanding. For example, in a study of 488 Yup’ik participants from 6 rural villages in the Yukon-Kuskokwim Delta in Alaska, participants were surveyed to “assess[] a variety of psychosocial characteristics.”¹⁹ The results showed that “participants who reported identifying more with the traditional Yup’ik way of life reported greater happiness, using religion and spirituality

¹⁴ Wolsko, *supra* note 8, at 52.

¹⁵ *Id.*

¹⁶ See, e.g., Teresa D. LaFromboise et al., *Psychological Impact of Biculturalism: Evidence and Theory*, 114 *Psychological Bulletin* 395, 403 (1993) (“The more integrated the individual’s identity, the better he or she will be able to exhibit healthy coping patterns.”).

¹⁷ O’Keefe, *supra* note 5, at 783.

¹⁸ Walters & Simoni, *supra* note 7, at 521.

¹⁹ Wolsko, *supra* note 8, at 54.

more to cope with stress, and using drugs and alcohol less to cope with stress.”²⁰ These findings remained reliable after controlling for variables like age and gender.²¹ By contrast, participants who reported less enculturation “experienc[ed] greater psychosocial stress and greater use of drugs and alcohol to cope with stress.”²²

Enculturation also has been shown to bolster resilience among Indian children and protect against the adverse effects of discrimination. For example, in the previously mentioned study that found perceived discrimination was associated with decreased resilience, enculturation proved to be a buffer to discrimination’s adverse effects, and actually increased resilience in Indian children. In that study, “[e]nculturation was measured by a set of 20 items that included three basic overlapping elements: (a) participation in traditional activities, (b) identification with American Indian culture, and (c) traditional spiritual involvement.”²³ The study revealed that “[t]he strongest predictor of higher levels of resilience was enculturation”: “For each increment in enculturation, the youth were 1.8 times more likely to be resilient.”²⁴

²⁰ *Id.* at 58.

²¹ *Ibid.*

²² *Id.*

²³ LaFromboise, *Family, Community, and School Influences on Resilience*, *supra* note 9, at 198.

²⁴ *Id.* at 203–04.

A qualitative study of providers who serve indigenous youth found that similar principles apply when treating childhood trauma.²⁵ The providers reported that “utiliz[ing] community connections and traditional values when treating indigenous children” may “assist their clients in coping with trauma.”²⁶

Another longitudinal study of nearly 5,000 school-aged children, including more than 1,300 Indian children, found similar effects.²⁷ This study determined that a strong sense of “ethnic identity was inversely associated with depressive symptoms[] and externalizing behavior,” such as getting in fights and “break[ing] rules at home, school, or elsewhere.”²⁸ Ethnic identity likewise “was associated significantly with increased levels of self-esteem and future optimism” among the children included in the study.²⁹

Indian communities with tools to promote enculturation may be able to reduce one of the worst outcomes for Indian children—suicide. In a 2006 study, researchers in Canada analyzed a database of youth suicide rates spanning 14 years and 196

²⁵ Shanley Nicolai & Merete Saus, *Acknowledging the Past While Looking to the Future: Conceptualizing Indigenous Child Trauma*, 92 *J. Child Welfare* 55, 61 (2013).

²⁶ *Id.* at 70.

²⁷ Paul R. Smokowski et al., *Ethnic Identity and Mental Health in American Indian Youth: Examining Mediation Pathways Through Self-esteem, and Future Optimism*, 43 *J. Youth Adolescence* 343, 347 (2014).

²⁸ *Id.* at 348–49.

²⁹ *Id.* at 350.

indigenous communities.³⁰ The study found that youth suicide rates were “unevenly distributed across [indigenous] communities” in Canada.³¹ The study “consistently observed” that communities with a greater number of markers of cultural continuity—including whether those communities exercised “control over the provision of child and family services”—were “associated with a decrease in the rate of youth suicide.”³² Control over child services alone was associated with a 25% decrease in the rate of youth suicide.³³ Other factors related to cultural continuity had even more pronounced impacts.³⁴

Indian youth who form strong identities and communities through enculturation benefit significantly, as a recent meta-analysis of large numbers of studies confirmed. The analysis—which was published this year—examined 44 studies concerning resilience among indigenous youth in the United States and Canada, and found a wide array of factors related to enculturation that promoted resilience: “[e]ngaging in cultural activities”; “[c]ommunity relationships”; “[p]ositive cultural identity”; and “[p]articipation in community

³⁰ Christopher Lalonde, *Identity Formation and Cultural Resilience in Aboriginal Communities* 59, in *Promoting Resilience in Child Welfare* (Flynn, Dunning, Barber eds., 2006).

³¹ *Id.* at 65.

³² *Id.* at 66–67.

³³ *Ibid.*

³⁴ *Id.* at 66.

program[s],” among others.³⁵ Greater resilience helped Indian children withstand stresses including bullying, poverty, peer suicide, and racism.³⁶

For Indian children who are unable to forge strong ties to their Indian identities and communities, the consequences can be significant. Those who “indirectly acquire knowledge about the ways of [their Tribe]. . . instead of from relatives during childhood” may face rejection of their claims to tribal identity by their peers.³⁷ Researchers have noted that attempts by Indian children to return to their Tribes (after being raised in non-Indian families) can be extraordinarily challenging.³⁸ Such individuals often lack “an understanding of their native language and had no memory or comprehension of tribal history, culture, customs, and strivings.”³⁹

³⁵ Olivia Heid et al., *Indigenous Youth and Resilience in Canada and the USA: A Scoping Review*, 3 *Adversity & Resilience Sci.* 113, 139–40 tbl. 4 (2022).

³⁶ *Id.* at 138–39.

³⁷ Therese DeLeane O’Neill, *Disciplined Hearts: History, Identity, and Depression in an American Indian Community* 62 (1998).

³⁸ Irving N. Berlin, *Anglo Adoptions of Native Americans: Repercussions in Adolescence*, 17 *J. Am. Acad. Child Psychiatry* 387, 388 (1978).

³⁹ *Id.*

B. Placing Indian Children with Extended Family, Tribal Members, or Other Indian Adults Facilitates Their Personal Development and Is Tied to Positive Life Outcomes.

The opportunity for an Indian child to be raised by Indian parents and to learn from their experiences—whether those parents are biological, foster, preadoptive, or adoptive—is a critical means of enculturation for that child.

Many areas across the United States lack a sizeable Indian population, which means that Indian children placed in non-Indian homes will often lack meaningful opportunities to engage with their Indian heritage, culture, and identity. Several States—such as Pennsylvania, Ohio, Illinois, Arkansas, and Georgia—contain no federally-recognized Indian Tribes.⁴⁰ Without Indian parents, Indian children are likely to live in predominantly non-Indian neighborhoods, and to be “isolated” from their Indian heritage, culture, and identity.⁴¹ As a result, “urban American Indian youth may well experience greater stress in daily living” than those who live in Indian

⁴⁰ See 87 Fed. Reg. 4,636, 4,637–41 (Jan. 28, 2022) (listing 347 federally recognized Tribes within the contiguous United States, and no such Tribes in 14 States and the District of Columbia).

⁴¹ Raven Sinclair, *Identity Lost and Found: Lessons from the Sixties Scoop*, 3 First Peoples Child & Fam. Rev. 65, 71 (2007).

communities “because it is difficult for them to access social support networks.”⁴²

A familial connection to the broader Indian community is particularly important to allow enculturation for an Indian child because extended family and clan relationships are central to Indian identity. As one scholar and social worker explains, “Indian familial systems are based on extended family and clans,” such that “it is virtually impossible to separate the individual from family and family from the community.”⁴³ Indeed, “American Indian families have an extensive lateral structure with both physical and social proximity of aunts, uncles, and cousins related through blood, marriage or adoption.”⁴⁴ Researchers have observed that “[e]xtended family [is] key to the notion of child care, to the point that children might have more than one person they could call ‘mom’ or ‘dad.’”⁴⁵ Whole communities raising children “le[ads] to . . . the children knowing that they [are] connected and fit within that supportive structure.”⁴⁶ Whether they are raised by biological or

⁴² LaFromboise, *Family, Community, and School Influences on Resilience*, *supra* note 9, at 194; *see also* John G. Red Horse et al., *Family Preservation: Concepts in American Indian Communities* 46 (2000) (observing that many Indian people who live away from reservations are “not up to speed about Indian ways”).

⁴³ Red Horse, *supra* note 42, at 13, 63.

⁴⁴ *Id.* at 24.

⁴⁵ Marilyn Poitras & Norman Zlotkin, *An Overview of the Recognition of Customary Adoption in Canada* 25 (2013), <https://perma.cc/Q2LN-REMB>.

⁴⁶ *Id.* at 27.

adoptive Indian parents, “Indian children’s sense of belonging is rooted in an understanding of their place and responsibility within the intricate web of kinship relationships,” where “the value of familial relationship denotes belonging and is paramount to one’s identity.”⁴⁷

These unique aspects of Indian culture, heritage, identity, and experience may explain in part why the adoption of Indian children by non-Indian families tends to result in “negative outcomes,” even when adoptions “in general result in positive outcomes for the adoptee and their adoptive family.”⁴⁸

Indeed, a qualitative study based on personal testimonies solicited from adult Indian adoptees revealed that Indian children “placed in a non-Indian home for either foster care or adoption” suffered psychological damage as adults.⁴⁹ The study determined that there are “unique factors” related to “Indian children being placed in non-Indian homes, that create damaging effects in the later lives of the children.”⁵⁰ Those factors included “the loss of Indian identity,” “the loss of family, culture, heritage, language, spiritual beliefs, tribal affiliation and tribal

⁴⁷ Red Horse, *supra* note 42, at 24 (internal citations and quotation marks omitted).

⁴⁸ Sinclair, *supra* note 21, at 71.

⁴⁹ Carol Locust, *Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children*, 44 Ont. Ass’n Child’s Aid Soc’y 11, 11 (2000).

⁵⁰ *Id.*

ceremonial experiences,” and “the experience of discrimination from [a] dominant culture.”⁵¹

Other qualitative studies catalog the significant effects of adoption and foster care on the well-being of Indian children. In a Canadian study of 18 indigenous adoptees, “[t]he major loss identified by adoptees . . . was identity.”⁵² Every participant in that study described “loss of culture . . . as a factor that created barriers for them.”⁵³ “Not knowing who they were as First Nations people—their customs, language, and traditions—interfered with their link to their birth families, and frustrated and embarrassed them.”⁵⁴ Participants described trying to cope through use of drugs and alcohol, and reported mental and physical health problems that included addiction, anxiety, eating disorders, suicidal ideation, and spiritual confusion.⁵⁵ A later evaluation of the study data concluded that “a causal relationship exists between . . . community and ancestral knowledge[] and health [and that] . . . loss of identity may contribute to impaired physical, spiritual, mental, and emotional health of First Nation adoptees.”⁵⁶

⁵¹ *Id.* at 11–12.

⁵² Jeannine Carriere, *Connectedness and Health for First Nation Adoptees*, 10 *Paediatric Child Health* 545, 547 (2005).

⁵³ *Id.* at 548.

⁵⁴ *Id.*

⁵⁵ *Id.* at 547 tbl. 1, 548.

⁵⁶ Jeannine Carriere, *Maintaining Identities: The Soul Work of Adoption and Aboriginal Children*, 6 *J. Pimatisiwin* 61, 61 (2008).

In Maine, a joint commission of state and tribal leaders from the Wabanaki Indian community collected 159 statements from state employees, tribal leaders, adoptees, and fostered children.⁵⁷ Indian children raised in non-Indian homes expressed regret over cultural loss. One Wabanaki fostered in a non-Indian home explained “I was not allowed to grow up with my culture, and I was made to feel ashamed of my culture.”⁵⁸ Other children described being prohibited from speaking Wabanaki languages or being unable to access opportunities to learn about their tribal heritage and affiliation: “I was never allowed to go to powwows,” one Wabanaki child in foster care told the commission: “There [were] never any trips to the reservation.”⁵⁹ Among its findings, the commission determined that “[m]any tribal people report finding significant strength in returning to traditions, language, arts and other parts of their culture.”⁶⁰

The available data on kinship care—in which a child is adopted or fostered by an adult with whom the child shares a kinship bond—underscore these trends.⁶¹ For Indian children, kin caregivers take

⁵⁷ Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission, *Beyond the Mandate: Continuing the Conversation* 14, 21, 76–80 (2015), <https://perma.cc/NN65-C6EX>.

⁵⁸ *Id.* at 22.

⁵⁹ *Id.* at 22, 45–46.

⁶⁰ *Id.* at 65.

⁶¹ ICWA provides adoptive preference for an Indian child to “(1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” 25 U.S.C.

pride in “the ability to pass on traditional values, culture, and ways of living” and that such caregiving may succeed in part because it “ensure[s] cultural continuity.”⁶² Meta-analysis shows that “kinship care placements result in fewer behavioral and mental health problems, as well as increased . . . maintenance of biological ties.”⁶³ These results may be because “place[ment] with a family that matches . . . [a child’s] cultural dimensions” helps to “reduce[] the trauma of removal.”⁶⁴

Similarly, in an analysis of 102 studies and comprising data from 660,000 children, researchers studied the effect of kinship care on 29 reported outcomes.⁶⁵ The findings of that study were “robust” and confirmed the results of previous studies.⁶⁶ The researchers found that kinship care “enhance[s] the

§ 1915(a). Within the child welfare field, kinship care can have a broader definition, including “the full-time nurturing and protection of children who must be separated from their parents, by relatives, members of their tribes or clans, godparents, stepparents, or other adults who have a kinship bond with a child.” Child Welfare League of America, *Kinship Care: A Natural Bridge* 2 (1994).

⁶² Puneet Chawla Sahota, *Kinship Care for Children who are American Indian/Alaska Native: State of the Evidence*, 97 *Child Welfare* 63, 71, 74 (2019).

⁶³ *Id.* at 66.

⁶⁴ *Id.* at 67.

⁶⁵ Mark Winokur, Amy Holtan & Keri E. Batchelder, *Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment (Review)*, *Cochrane Database of Systematic Reviews* 9–10 (2014).

⁶⁶ *Id.* at 20.

behavioural development, mental health functioning, well-being, and placement stability of children” relative to care by non-kin.⁶⁷

The evidence indicates that, on balance, placing Indian children with Indian parents facilitates their opportunities for enculturation. Because enculturation in turn promotes resilience and self-esteem, and mitigates harmful outcomes, such placements will—all other things being equal—be in the best interests of Indian children.

CONCLUSION

For the foregoing reasons, the Court should rule in favor of the Federal and Tribal Petitioners.

Respectfully submitted,

August 19, 2022

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⁶⁷ *Id.* at 22