No. 18-11479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,
Plaintiffs – Appellees

v.

DAVID BERNHARDT, in his official capacity as Acting Secretary of the United States Department of the Interior; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, in his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants – Appellants

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,
Intervenor Defendants – Appellants

On Appeal from the United States District Court
for the Northern District of Texas, No. 4:17-CV-00868

BRIEF OF AMICUS CURIAE CHRISTIAN ALLIANCE FOR INDIAN CHILD WELFARE IN SUPPORT OF APPELLEES AND AFFIRMANCE

Krystal B. Swendsboe
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
Phone: (202) 719-4197
kswendsboe@wileyrein.com

Counsel for Amicus Curiae Christian Alliance for Indian Child Welfare

Dated: February 6, 2019

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, Christian Alliance for Indian Child Welfare provides this supplemental statement of interested persons in order to fully disclose all those with an interest in this brief. The undersigned counsel of record certifies that the following supplemental list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. *Amicus Curiae*: Christian Alliance for Indian Child Welfare. The Alliance certifies that it is a nonprofit organization. It has no corporate parent and is not owned in whole or in part by any publicly held corporation.
2. Counsel for *Amicus Curiae*: Wiley Rein LLP (Krystal B. Swendsboe)

Dated: February 6, 2019

s/ *Krystal B. Swendsboe*
Krystal B. Swendsboe
Counsel for Amicus Curiae Christian Alliance for Indian Child Welfare

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INTERESTS OF *AMICUS CURIAE*[1]

Christian Alliance for Indian Child Welfare ("Alliance") is a North Dakota nonprofit corporation with members in thirty-five states, including Texas and Indiana. Alliance was formed, in part, to (1) promote human rights for all United States citizens and residents; (2) educate the public about Indian rights, laws, and issues; and (3) encourage accountability of governments, particularly the federal government, to families with Indian ancestry.

Alliance promotes the civil and constitutional rights of all Americans, especially those of Native American ancestry, through education, outreach, and legal advocacy. One area of constitutional concern for Alliance is the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 ("ICWA"). Congress enacted the ICWA pursuant to the "Indian Commerce Clause" in Article I of the Constitution, which grants Congress the power to "[t]o regulate Commerce . . . with the Indian Tribes." Const., Art. I, § 8. The constitutional scope of this power, however, is disputed, and neither this Court, nor the Supreme Court, have fully analyzed the meaning of breadth of the Indian Commerce Clause. Alliance believes that the

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel contributed money that was intended to fund the preparation or submission of this brief.

ICWA is an unconstitutional expansion of congressional power pursuant to this clause. The ICWA is a broad and far-reaching law that has little or nothing to do with commerce. And it affects individuals that have no connection to, or have actively chosen to avoid entanglement with, tribal government.

Alliance is particularly concerned for families with members of Indian ancestry who have been denied the full range of rights and protections of federal and state constitutions when subjected to tribal jurisdiction under the ICWA. This case raises particularly significant issues for Alliance because its members are birth parents, birth relatives, foster parents, and adoptive parents of children with varying amounts of Indian ancestry, as well as tribal members, individuals with tribal heritage, or former ICWA children, all of whom have seen or experienced the tragic consequences of applying the racial distinctions imbedded in the ICWA.

SUMMARY OF ARGUMENT

The District Court correctly held that the ICWA is unconstitutional. The most fundamental constitutional flaw, however, and one that has not been fully analyzed by the parties, is the ICWA's unconstitutional expansion of Congress's power under the Indian Commerce Clause. The Indian Commerce Clause is a narrow grant of power to the United States to regulate "commerce"—not all affairs—with Indian Tribes. The ICWA goes far beyond that constitutional grant.

Contrary to the original meaning of the Indian Commerce Clause, the ICWA imposes sweeping regulations that are at best marginally related to commerce. The ICWA also intrudes on a quintessential area of state law: family and domestic matters. This intrusion obliterates the bedrock constitutional distinction between federal and local power, effectively allowing the federal government free reign to regulate however, and whatever, it wishes simply by invoking the Indian Commerce Clause. The ICWA, therefore, is an unconstitutional exercise of Congress's authority under the Indian Commerce Clause.

ARGUMENT

Article I of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Const., Art. I, § 8. Even though the term "commerce" is applied in three distinct scenarios, "commerce," is a limited term that means economic trade,

exchange, or intercourse. At the time of the Constitution's ratification, the term "commerce" was used to describe specific economic activities. Thus, by its plain terms, the Indian Commerce Clause does not grant Congress near-unlimited power to regulate all Indian affairs. Instead, the Indian Commerce Clause is a limited grant of power to Congress to regulate trade and economic exchange with the Indian Tribes. The ICWA transgresses this limited grant of power by regulating entirely noncommercial matters. Moreover, the ICWA imposes its regulations on matters that are particularly within the states' purview, effectively bypassing the important constitutional distinction between federal and state authority.

I. THE INDIAN COMMERCE CLAUSE GRANTS CONGRESS THE LIMITED POWER TO REGULATE "COMMERCE."

The Constitution provides to Congress a limited grant of power and, to properly understand what that limited grant entails, the Court should consider what the words in the Constitution meant to its authors and to the general public at the time of the ratification. Specifically, to understand the scope of power granted to Congress in the Indian Commerce Clause, the Court should begin by analyzing the term "commerce" in light of the meaning ascribed to that term when the Constitution was ratified.[2] This includes reviewing the use of the term "commerce" within the

[2] The importance of giving words the meaning they had when the text was adopted cannot be understated. This is a familiar canon of interpretation, and has been actively applied in interpreting constitutional provisions. *See District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) ("In interpreting this text, we are guided by

pertinent text, contemporaneous dictionaries, common discussion, as well as legal and non-legal publications related to the ratification of the Constitution. *See Heller*, 554 U.S. 581-95; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 107-08 (2001) [hereinafter Barnett, *Original Meaning*]. A review of these materials reveals that the expansive power claimed by Congress in the name of the Indian Commerce Clause marks a significant departure from the common understanding afforded to the term "commerce" in the eighteenth century.

A. The Term "Commerce," As Used in the Constitution, Means Trade or Similar Economic Exchange.

The term "commerce," as it was used in eighteenth century dictionaries, contemporaneous lay and legal discourse, and by the founders during debate, drafting, and ratification of the Constitution, almost exclusively referred to trade or similar economic exchange.[3]

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the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." (internal citations omitted)).

[3] Interpretation of a term typically begins with an analysis of the pertinent term as it is used in the text. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004); *Texas Educ. Agency v. U.S. Dep't of Educ.*, 908 F.3d 127, 132 (5th Cir. 2018). However, as several scholars have already noted, the term "commerce," as it is used in the Constitution, "does not tell us in which sense, narrow or broad, the word 'commerce' is being used in the Commerce Clause, and we must look elsewhere for guidance." Barnett, *Original Meaning*, at 113.

Prominent legal dictionaries dating to the time of ratification define commerce narrowly as "Commerce, (Commercium) Traffick, Trade or Merchandise in Buying and Selling of Goods. See *Merchant*," Giles Jacob, *A New Law-Dictionary* (8th ed. 1762), or "[i]ntercourse; exchange of one thing for another; interchange of any thing; trade; traffick," Samuel Johnson, 1 *A Dictionary of the English Language* (J.F. Rivington, *et al.* 6th ed. 1785). These definitions demonstrate the close relationship between "commerce" and the *Lex Mercatoria*, merchant law, reflecting the inherently commercial or economic character of the term. *See* Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789, 817–18 (2006) [hereinafter Natelson, *Legal Meaning of "Commerce"*] (analyzing the dictionary definitions of commerce and noting the distinct connection between commerce and the *Lex Mercatoria*).

Moreover, the definition of "commerce" stands in stark contrast to other, broader terms. For example, the term "affairs" has a much broader definition, indicating a key difference in the meaning and use of the terms "commerce" and "affairs." In contrast to Samuel Johnson's definition of "commerce," noted above, the term "affair" meant "[b]usiness; something to be managed or transacted." Samuel Johnson, 1 *A Dictionary of the English Language* (J.F. Rivington, *et al.* 6th ed. 1785); *see* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201, 217 (2007) [hereinafter Natelson,

Indian Commerce Clause] (comparing historical dictionary definitions of "commerce" and "affairs"). In short, the term "affairs"—as it was defined at the time of the Constitution's ratification—is "a much broader category than trade or commerce."[4] Natelson, *Indian Commerce Clause*, at 217. The use of the word "commerce"—rather than "affairs"—in the Indian Commerce Clause therefore cannot be read to grant Congress broad authority to regulate all "Indian affairs." *See id.* at 241; *see id.* at 241 n.301 (listing support).

Both lay and legal discourse in the eighteenth century support the narrow dictionary definition of "commerce" as economic exchange, traffic, or intercourse.[5] When used in the economic context, the term commerce "referred to mercantile activities: buying, selling, and certain closely-related conduct, such as navigation and commercial finance." Natelson, *Legal Meaning of "Commerce,"* at 805-06.

[4] Similarly, the term "commerce" was defined in a distinctly different fashion from "manufacture" or "agriculture." Barnett, *Original Meaning*, at 113-14 (discussing the contrast between the definitions of "commerce," "agriculture," and "manufacture"). Commerce, therefore, was also understood to be distinct from agriculture and manufacture.

[5] Eighteenth century legal commentaries similarly use the term "commerce" to mean trade. Professor Robert Natelson, has engaged in careful review of the use of the term "commerce" in Blackstone's Commentaries, explaining that "by far Blackstone's most common use of "commerce" was to mean mercantile exchange and its incidents. . . . As far as I can find, Blackstone never unambiguously employed 'commerce' to mean 'general economic activity.'" Natelson, *Legal Meaning of "Commerce,"* at 821-22.

The term commerce was rarely used in a non-economic sense. *See* Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 Mich. L. Rev. First Impressions 55, 56 (2010) [hereinafter Natelson & Kopel, *Response*] ("The social, religious, and sexual meanings of 'commerce,' while sometimes employed, were figurative or metaphorical, derived from the mercantile meaning."). Indeed, Professor Robert G. Natelson consulted all reported English court cases from the sixteenth through eighteenth centuries; all available American cases before 1790; all of the leading English legal abridgments and digests; prominent legal treatises; popular legal dictionaries; and pamphlets written by prominent American and British attorneys, to come to the simple conclusion: "the word 'commerce' nearly always has an economic meaning." Natelson, *Legal Meaning of "Commerce,"* at 845 (2006); *see* Natelson, *Indian Commerce Clause*, at 214-15 (discussing the results of several studies that examined how the word "commerce" was employed in lay and legal contexts); *see also* Natelson & Kopel, *Response*, at 56.

Finally, use of the term "commerce" during the Constitutional Convention and related state conventions was almost entirely limited to trade or related economic matters. At least one scholar has concluded that "if anyone in the Constitutional Convention or the state ratification conventions used the term 'commerce' to refer to something more comprehensive than 'trade' or 'exchange,' they either failed to

make explicit that meaning or their comments were not recorded for posterity." Barnett, *Original Meaning*, at 124; *see also* Natelson, *Legal Meaning of "Commerce,"* at 839-41. Indeed, James Madison tellingly observed later in life (specifically discussing the Foreign Commerce Clause) that "(i)f, in citing the Constitution, the word trade was put in the place of commerce, the word foreign made it synonymous with commerce. Trade and commerce are, in fact, used indiscriminately, both in books and in conversation." James Madison, Letter to Professor Davis--not sent (1832), in Galliard Hunt, ed., 4 *Letters and Other Writings of James Madison* 232, 233 (J.B. Lippincott ed. 1865); *see Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring) ("[W]hen Federalists and Anti–Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably." (internal citations omitted)).

B. Limited Use of the Term "Commerce" in Other Contexts Does Not Change the Commonly Understood Meaning.

Despite the strong evidence demonstrating that the term "commerce" means trade, some have argued to expand the word's meaning beyond this ordinary, commonly understood definition. *See* Jack M. Balkin, *Commerce*, 109 Mich. L. Rev. 1, 5 (2010) (arguing that the term "commerce" meant social "intercourse," or "interaction and exchange between persons or peoples"); Barnett, *Original Meaning*, at 130 (describing a portion of the dispute); Natelson, *Legal Meaning of*

"Commerce," at 790 n.2 (listing articles). The fact that other uses of the term "commerce" existed at the time of the ratification, however, does not change the word's generally accepted meaning. *See* Barnett, *Original Meaning*, at 108; Natelson, *Legal Meaning of "Commerce,"* at 835-36. As set out above, the definition of commerce as trade was oft-repeated, and "must have been burned into the minds of every founding-era lawyer who had a passing interest in the subject." Natelson, *Legal Meaning of "Commerce,"* at 806. This accepted general meaning must inform our understanding of the term, not any outlier uses.

C. At the Very Least, the Term "Commerce" Should Be Interpreted Consistently Between the Foreign, Interstate, and Indian Commerce Clauses.

This Court should interpret the term "commerce" consistently within the Constitution. "In the absence of some indication to the contrary, we interpret words or phrases that appear repeatedly in a statute to have the same meaning." *Vielma v. Eureka Co.*, 218 F.3d 458, 464–65 (5th Cir. 2000) (citation omitted); *see Clark v. Martinez,* 543 U.S. 371, 378 (2005) ("To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one."). The term "commerce," therefore, should be interpreted to mean the same thing with respect to Congress's power to regulate commerce with "foreign Nations, and among the several States, and with the Indian Tribes." Const., Art. I, § 8. That is, the term

"commerce" should be no broader in the Indian Commerce Clause than it is in the Interstate Commerce Clause.

The term "commerce" as it used in the Interstate Commerce Clause is understood generally to mean economic activity. *See Taylor v. United States*, 136 S. Ct. 2074, 2079-80 (2016) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." (quoting *United States v. Morrison,* 529 U.S. 598, 613 (2000))); *United States v. Lopez*, 514 U.S. 549, 560 (1995). Indeed, there is very little "clear evidence from the Founding Era that users of English varied the meaning of 'commerce' among the Indian, interstate, and foreign contexts." Natelson, *Indian Commerce Clause*, at 216. So too here, the term "commerce" must be limited to trade and similar economic exchanges.

D. The Indian Commerce Clause Does Not Grant Congress Plenary Jurisdiction Over All Indian Affairs.

Based on the limited meaning of the term "commerce," the Court should find that the Indian Commerce Clause grants to Congress a limited and specific power to regulate trade and similar economic interactions with the Indian Tribes. This limited power does not grant Congress plenary jurisdiction over all Indian affairs.[6] Indeed,

[6] The Supreme Court has never fully analyzed this question, and an assertion of plenary power conflicts with prior Supreme Court precedent. *See United States v. Kagama*, 118 U.S. 375, 378 (1886) (rejecting the argument that the Indian Commerce Clause granted Congress the power to create a federal criminal code for

as Justice Thomas has explained, "'neither the text nor the original understanding of the [Indian Commerce] Clause supports Congress' claim to such 'plenary' power.' . . . Instead, . . . the Clause extends only to 'regulat[ing] trade with Indian tribes—that is, Indians who had not been incorporated into the body-politic of any State.'" *Upstate Citizens for Equal., Inc. v. United States*, 199 L. Ed. 2d 372 (Nov. 27, 2017) (Thomas, J., dissenting from denial of cert.) (citations omitted); *see Adoptive Couple*, 570 U.S. at 659. Even *amicus* in support of Appellants has agreed that the Indian Commerce Clause cannot support Congress's claim to plenary power over all Indian affairs. *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1017 (2015) [hereinafter Ablavsky, *Beyond*] ("[T]he history of the Indian Commerce Clause's drafting, ratification, and early interpretation does not support either 'exclusive' or 'plenary' federal power over Indians. In short, Justice Thomas is right: Indian law's current doctrinal foundation in the [Indian Commerce] Clause is historically untenable.").[7] Thus, Congress may not regulate

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Indian land because it would result in a "very strained construction" of the clause); Nathan Speed, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. Rev. 467, 470–71 (2007) ("[W]hen Congress eventually began asserting plenary power over Indian tribes, the Supreme Court expressly rejected the assertion that the Indian Commerce Clause provided a basis for such a power. This evidence supports a narrow interpretation of the power to 'regulate Commerce,' and in turn, a narrow interpretation of both the Indian Commerce Clause and the Interstate Commerce Clause.").

[7] Professor Ablavsky, however, differs regarding interpretation of the term "commerce." Professor Ablavsky claims that, despite the presumption that a single

Indian affairs, in the name of the Indian Commerce Clause, that fall outside the limited scope of authority granted to it by the Indian Commerce Clause.

II. THE ICWA GOES FAR BEYOND THE LIMITED SCOPE OF AUTHORITY GRANTED BY THE INDIAN COMMERCE CLAUSE.

Having established that the term "commerce" means trade or, at the very least, economic activity, it is clear that the ICWA exceeds the limited power granted to Congress in the Indian Commerce Clause. The constitutional grant of power to regulate "commerce" does "not include economic activity such as 'manufacturing and agriculture,' let alone noneconomic activity such as adoption of children." *Adoptive Couple* 570 U.S. at 659 (Thomas, J., concurring) (citations omitted). Further, the ICWA treads on matters that are typically reserved to the states, bypassing the firm constitutional distinction between federal and local authority. The ICWA, therefore, is an unconstitutional exercise of Congress's authority to "regulate Commerce . . . with the Indian Tribes." Const., Art. I, § 8.

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word in a document does not change its meaning and should be interpreted in a consistent fashion, he can divine a different meaning of the Indian Commerce Clause using "alternate" interpretative methods that he describes as "heterodox." Ablavsky, *Beyond*, at 1017. Such methods should be rejected by this Court. The Court is bound by the accepted methods of interpreting the Constitution, including those relied on by the Supreme Court. The Court is not free to employ "heterodox" methods of interpretation.

A. Family and Child Custody Matters Do Not Affect Commerce with Indian Tribes.

The ICWA is, at bottom, a federal regulation of child custody proceedings and adoption. *See* ROA.4011 (describing the ICWA). The ICWA was enacted in response to the "rising concern in the mid–1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Adoptive Couple*, 570 U.S. at 642 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). The ICWA has no relationship to commerce or economic activity, and, indeed, it does not purport to have any connection to commerce. *See* 25 U.S.C. § 1901.

The Supreme Court has repeatedly held that statutes passed pursuant to Congress's authority under the Commerce Clause, must have a proper relationship to commerce. Topics that do not involve commerce—or, do not have a sufficient relationship to commerce—fall outside the scope of things that Congress can properly regulate under the Commerce Clause. For example, in *United States v. Lopez*, the Supreme Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), exceeded the authority of Congress under the Interstate Commerce Clause, because the Act "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."

514 U.S. at 551. The Court made clear that the Act was a "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. Similarly, in *United States v. Morrison*, the Supreme Court struck down 42 U.S.C. § 13981, the civil remedy portion of the Violence Against Women Act, finding that Congress lacked constitutional authority under the Interstate Commerce Clause to pass such a measure, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. 598, 613 (2000); *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558-59 (2012) (finding that economic *inactivity* was not sufficiently related to commerce to justify regulation under the Interstate Commerce Clause); *cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (rejecting applicability of federal arson statute, passed pursuant to the Interstate Commerce Clause, because damage to an owner-occupied private residence was not sufficiently related to commerce and infringed on state police power).

Adoption proceedings have no more relationship to commerce than domestic violence or guns near schools. *Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring) (citations omitted) (noting also that adoption proceedings, like the one at issue in the case, also did not involve Indian Tribes). Indeed, by its terms, the ICWA "deals with 'child custody proceedings,' not 'commerce.'" *Id.* at 665 (internal citations omitted). As Justice Thomas has noted, the ICWA "was enacted

in response to concerns that 'an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.' The perceived problem was that many Indian children were 'placed in non-Indian foster and adoptive homes and institutions.' This problem, however, had nothing to do with commerce." *Id.* (internal citations omitted).

B. Regulation of Family and Child Custody Matters Imposes on Authority Reserved to the States.

Adding insult to injury, the ICWA imposes regulation on a quintessential area of state concern that is distinct from the power given to Congress by the Constitution: family law. "The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18 (citation omitted). By regulating truly local matters, the ICWA exceeds the power granted to Congress by the Constitution and obliterates the important distinction between federal and local matters.

The Supreme Court has repeatedly acknowledged that marriage, divorce, child custody, and adoption are outside of Congress's control. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (explaining that domestic relations have "long been regarded as a virtually exclusive province of the states"). Indeed, these matters are distinct and separate from Congress's authority to regulate, as the "Constitution delegated no authority to the Government of the United States on the subject of

marriage and divorce." *United States v. Windsor*, 570 U.S. 744, 766-67 (quotation omitted); *see In re Burrus,* 136 U.S. 586, 593-594 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States").

The Supreme Court has rejected interpretations of the Commerce Clause that would allow Congress to the "regulate any activity that it found was related to the economic productivity of individual citizens[, including] family law ([] marriage, divorce, and child custody)." *Lopez*, 514 U.S. at 564. The Supreme Court explained that, if it were to exercise its power over such matters, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.*; *see Morrison*, 529 U.S. at 616 (rejecting reasoning that may "be applied equally as well to family law and other areas of traditional state regulation"). The ICWA, therefore, exceeds Congress's power to regulate commerce—not only because it has nothing to do with commerce—because it intrudes on subject matter that belongs to the states and eliminates the federalist barrier between the state and federal governments.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

s/ *Krystal B. Swendsboe*

Krystal B. Swendsboe
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
Phone: (202) 719-4197
kswendsboe@wileyrein.com

Dated: February 6, 2019

Counsel for Amicus Curiae Christian Alliance for Indian Child Welfare

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1)(C), I certify the following:

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and Rule 32(a)(7)(B), and Fifth Circuit Rule 32, because this Brief contains 4,052 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1, and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 6, 2019

s/ *Krystal B. Swendsboe*
Krystal B. Swendsboe
Counsel for Amicus Curiae Christian Alliance for Indian Child Welfare

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2019, a true and correct copy of the foregoing was electronically filed with the Clerk of this Court using the CM/ECF system and that a copy has been served through the CM/ECF system upon counsel of record.

Dated: February 6, 2019

s/ *Krystal B. Swendsboe*
Krystal B. Swendsboe
Counsel for Amicus Curiae Christian Alliance for Indian Child Welfare

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 07, 2019

Ms. Krystal Brunner Swendsboe
Wiley Rein, L.L.P.
1776 K Street, N.W.
Washington, DC 20006

No. 18-11479 Chad Brackeen, et al v. David Bernhardt, et al
USDC No. 4:17-CV-868

Dear Ms. Swendsboe,

You must submit the 7 paper copies of your brief required by 5th Cir. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

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Melissa B. Courseault, Deputy Clerk
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