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No. 98003-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Dependency of Z.L.G. and M.G., minor children

STATE OF WASHINGTON, DSHS

Respondent,

v.

SCOTT JAMES GREER,

Appellant.

BRIEF OF AMICI CURIAE AMERICAN INDIAN LAW PROFESSORS, CENTER FOR INDIAN LAW & POLICY, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici curiae are set forth in the motion for leave to file brief of amicus curiae, filed contemporaneously with this brief.

INTRODUCTION

Amici respectfully ask the court to reverse the decision below on the grounds that requiring notice to affected Indian tribes even where a parent who is eligible for tribal member cannot prove their own tribal membership fulfills one of the critical purposes of the Indian Child Welfare Act. Amici will further show that requiring notice in those situations is constitutionally valid. If a state or federal definition of "Indian" is rationally related to the federal government's trust responsibility, that definition meets constitutional guidelines.

Amici provides historical context explaining why the notice requirements of ICWA are so fundamental to the proper enforcement and implementation of the statute. Amici believes that this historical context is crucial for this Court to understand fully the need for this Court to address and determine the need for notice in these situations.

ARGUMENT

I. A Broad Application of the Notice Provisions of the Indian Child Welfare Act is Required to Fulfill the Purposes of the Law.

The improper removal of Indian children from their homes without notice is a core justification for the enactment of the Indian Child Welfare Act. Before Congress, the leader of the Mississippi Band of Choctaw Indians, Chief Calvin Isaac, testified that state officials "generally" removed Indian children "without notice to or consultation with responsible tribal authorities." *Indian Child Welfare Act of 1977*, Hearing before the Senate Committee on Indian Affairs, 95th Cong., 1st Sess. at 156 (Aug. 4, 1977) [*1977 Hearing*] (Written Statement of the National Tribal Chairmen's Association). Lack of notice by states on tribal parties, Indian parents, and Indian grandparents contributed to some of the "grossest violations of due process," which were sadly "quite commonplace when . . . dealing with Indian parents and Indian children." *Indian Child Welfare Program*, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs at 67 (April 8 & 9, 1974) [*1974 Hearings*] (Testimony of Bertram Hirsch, Association on American Indian Affairs). The State of Washington was not immune from these types of due process violations. Colville Confederated Tribes leader and National Congress of American Indians

president Mel Tonasket testified that state workers would show up on the reservation without a court order and demand Colville families turn over their children. *Id.* at 224 (Statement of Mel Tonasket). Some Colville children as young as 10 ended up in jail after running away from foster homes, all without notice to the tribe or to the Indian parents. *Id.* Tonasket lamented that "all [a state official] seems to have to do is to walk in[] and get a ward of the court paper filled out, because that's the only thing that we can find is a recommendation by the juvenile officer to make these children wards of the court." *Id.*

Lack of understanding of – and bias against – Indian childrearing practices and culture made the lack of notice to Indian tribes worse. Congress found that "States . . . often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). State workers seeing Indian children "left for long times with extended family members" often labeled them neglected, not understanding that "the community considered it necessary for the child to be raised by many relatives, so she would learn the skills, stories, and specializations each family member held." KATHRYN E. FORT, AMERICAN INDIAN CHILDREN AND THE LAW: CASES AND MATERIALS 6 (2019) (citing H.R. Rep. No. 95-1386, at 20 (July 24, 1978)).

In Washington state, the problem was acute. In 1976, there were more than 13 times more Indians children in foster and adoptive care than non-Indian kids in the State. American Indian Policy Review Commission, Task Force Four Final Report 180 (1976) [*1976 Report*]. *See also id*. at 181 (finding more than nine times Indian kids in foster care); *id*. at 237 (finding more than 19 times more Indian kids in adoptive placements). Mel Tonasket testified that the State of Washington subjected even successful Indian families to supervision and possible removal: "We talked about families that are so large in size, maybe 20 people in a household. That is the reason that the family is so large because they bring in the children who need a roof, and need food. And, yet, we find ourselves fighting head to head with the State of Washington. . . . It's a lot simpler [for the State] to take these children and move them away from us." *1974 Hearings*, *supra*, at 225. The State of Washington made "over 80 percent of Indian foster placements in non-Indian homes." *1976 Report*, *supra*, at 106. Lack of notice to the tribes, and the ensuing lack of participation by the tribes in child welfare matters, unfortunately allowed state officials to remove Indian children without tribal input.

State officials admitted in the years before the enactment of 25 U.S.C. § 1912(a) that the State of Washington and its subdivisions were keeping tribes and tribal courts in the dark: "Tribal courts and social

service resources have been kept out of the picture by state and county court and agency staff, and by policies and manuals." *1977 Hearing*, *supra*, at 355 (Written Statement of Don Milligan, Indian Desk, State of Washington Dept. of Health and Social Services). This lack of communication and cooperation led directly to the unnecessary removal of Indian children from their homes:

> Non-Indian caseworkers and court workers are delivering the services to Indian children and families but are unable to understand and communicate with the Indian clients, and therefore are unable to deliver relevant social services. In many instances, this communication and attitudinal problem on the part of non-Indian staff has resulted in numerous inappropriate deprivations, adoptions, foster home placements and other disruptions of Indian family and tribal life.

Id. Indian advocates in Washington state argued in 1977 that before ICWA, "white social workers [made] judgements on the basis of middle class, white viewpoints, with no regard to Indian ways, traditions and culture." Associated Press, *Indians May Win Old Role of Child Care from State*, SEMI-WEEKLY SPOKANE REVIEW, Dec. 14, 1977, at 5. *See also id*. ("'This is a problem of two cultures,' Mike Ryan, an Irish-born social worker employed by the Seattle Indian Center, commented. 'Too often the price the Indian has had to pay has been acceptance of the white culture or lose his child.'"). This was exactly the concern Congress articulated in enacting ICWA in 1978. 25 U.S.C. § 1901(5) (finding that "the States . . .

have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families").

In the 21st century, state agencies still tend to favor termination of Indian parental rights even though most Indian child welfare cases involve allegations of neglect, and not physical or sexual abuse. Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence so Children Can Thrive* 75 (Nov. 2014); *see also id*. at 87 ("Of all maltreatment victims, 89.3 percent of [Indian] children were involved in the child welfare system because of a disposition of neglect compared to 78.3 percent of all children nationwide."). Indian families are uniquely vulnerable to intrusive government intervention. *Id*. ("Cultural bias, racism, and a misunderstanding of poverty reflected in legal definitions and workers' decisions to substantiate allegations of neglect make [Indian] families susceptible to biased treatment in child welfare systems."). Governments remove Indian children from their homes "disproportionately." *Id*. at 87 ("Even though the primary reason for child welfare involvement is neglect, [Indian] children are disproportionately removed from their homes and placed in foster care."). ICWA's notice requirement is designed to involve tribes earlier in the process to help avoid unnecessary

removals.

Even after Congress mandated notice to Indian tribes in cases where the court "has reason to know that an Indian child is involved," 25 U.S.C. § 1912(a), many state courts improperly continued to hold that a given child was not an Indian child. Some courts improperly held that a child was not an Indian under the statute because they did not speak the tribal language, did not practice the tribal religion, attended public school, or did not live on the reservation. *E.g.*, *Rye v. Weasel*, 934 S.W.2d 257, 264 (Ky. 1996) (language, religion, non-Indian school); *S.A. v. E.J.P.*, 571 So.2d 1187, 1189 (Ala. Ct. Civ. App. 1990) (immersion in non-Indian culture); *In re A.W.*, 741 N.W.2d 793, 799 (Iowa 2007) (residency). The 2016 regulations reconfirmed that state courts must ask the question, must do so at the commencement of the proceedings on the record, and must instruct the participants to update the court if new information is received. 25 C.F.R. § 23.107(a). The Department of the Interior explained that notice to tribes is proper to assist the court in determining whether a child is eligible for membership in a federally recognized tribe: "The determination of whether a child is an Indian child turns on Tribal citizenship or eligibility for citizenship. [T]hese determinations are ones that Tribes make in their sovereign capacity and requires courts to defer to those determinations." 81 Fed. Reg. 38,778, 38,803 (June 14, 2016). *See*

also UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, art. 33, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 2007) ("Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.").

Tribal membership criteria, enrollment procedures, classifications of tribal membership status, and the interpretation of tribal membership laws are unique to each tribe, and often incredibly complicated. While tribes use a blood quantum requirement for enrollment, others use a lineal descendancy requirement. Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L.J. 323, 323 (2014). Some tribes bar enrollment of persons with requisite ancestry unless the petitioner's parent is enrolled. *E.g.*, *Cooke v. Yurok Tribe*, 7 NICS App. 78 (Yurok Tribal Ct. App. 2005). Some tribes have adopted waiting periods before a petitioner can enroll. *E.g.*, *Loy v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 132 (Grand Ronde Ct. App. 2003). Some tribes have different classifications of tribal membership rooted in that tribe's history. *E.g.*, *In re White*, 15 Am. Tribal Law 7 (Cherokee Nation S. Ct. 2017). Further, each tribe has exclusive jurisdiction to make membership decisions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). None of these enrollment matters are to be reviewed by a state or federal court.

A state court's interpretation of tribal law about tribal membership status runs directly afoul of Congress's considered judgment on which children are protected by the Indian Child Welfare Act and the exclusive authority of tribes to determine membership.

Improper state court or agency interpretation of tribal law can lead to significant consequences for Indian children. Sadly, the State of Washington has a poor history of ignoring tribal interests in Indian child welfare matters that led to the repeated theft of trust account funds of Indian children by non-Indian adoptive and foster parents. *1974 Hearings*, *supra*, at 118 ("When adoptive parents become aware that the [Yakama] Indian child has money deposited in their [federal trust] account, they start seeking a method to get it.") (Statement of Mel Sampson); *id.* at 226 (Statement of Mel Tonasket) (referencing the same circumstance at Colville). *Cf. 1976 Report*, *supra*, at 106 ("One witness described case histories of four children from one family taken under State jurisdiction from the Colville Indian Reservation, while in foster care, over $12,500 of these children's money was turned over to the State of Washington by the Bureau of Indian Affairs."). At Colville, the tribal council found a way to bar non-Indian parents from accessing the Indian children's trust accounts. Tonasket testified, "[w]hen we cut off the child's money to the foster or adoptive parent, her own money from the tribe, there was a decrease of

non-Indians who wanted to adopt or take any children into their foster homes." *Id*. at 228. Notice to Indian tribes of child welfare proceedings has great benefit to Indian children.

In summary, the tribal notice requirement of § 1912(a) brings Indian tribes with a legal interest into an Indian child welfare proceeding, benefitting the parties in at least two ways. The tribe's participation can help in lessening any cultural bias once it is clear the child is an Indian child. But even before that stage, the tribe's participation is necessary in determining whether the child is an Indian child at all. Only tribes can interpret tribal law.

II. State Laws that Provide Greater Protections to Indian Families Fulfill the Purposes of ICWA and Therefore Are Constitutional.

The State's concern about the constitutionality of applying notice broadly to those children who may be eligible for enrollment but whose parents are not enrolled is misplaced. Neither ICWA nor WICWA prevents the broad application of notice. In fact, broadly interpreting the notice requirement better fulfills their purposes. State laws like those in Washington that go above and beyond the minimum baseline protections of the Indian Child Welfare Act are perfectly constitutional. The test is whether the state law is in furtherance of the federal government's trust responsibility to Indians and Indian tribes. WICWA meets this test.

Statutes rationally related to the fulfillment of the federal government's trust responsibility to Indians and Indian tribes do not violate equal protection. *Morton v. Mancari*, 417 U.S. 535, 555, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process [under the Fifth Amendment]."). Even in the state family law context *before* the enactment of § 1912(a), the Supreme Court held in *Fisher v. District Court*, 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976), that the denial of Indians domiciled on an Indian reservation access to state courts in a child adoption proceeding did not violate equal protection:

> [W]e reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.

Id. at 390-91 (citing *Mancari*, 417 U.S. at 551-55). Congress in passing the Indian Child Welfare Act specifically approved of *Fisher*. H.R. Rep. No. 95-1386, at 36-37 (July 24, 1978). Section 1912(a) does nothing that the Supreme Court hadn't already approved prior to its enactment by Congress.

Federal statutes applying a law to Indian people who are not tribal members is constitutional, so long as that law is rationally related to the fulfillment of the federal government's trust responsibility. For example, Indian country criminal jurisdiction is based on Indian status rather than purely tribal membership. The Major Crimes Act, 18 U.S.C. § 1153, which extended federal criminal jurisdiction over serious felonies committed by "Indians" inside Indian country, is constitutional. *United States v. Antelope*, 430 U.S. 641, 646, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977). The Indian Civil Rights Act, which acknowledges tribal criminal jurisdiction over "nonmember Indians," 25 U.S.C. § 1301(4), survived an equal protection challenge. *United States v. Lara*, 541 U.S. 193, 209, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004). Lest one worry that federal Indian affairs statutes are exclusively race-based, know that the judiciary requires some indicia of governmental or political recognition of an Indian person in order for a federal Indian affairs classification to apply. *Cf. United States v. Sandoval*, 231 U.S. 28, 46, 34 S. Ct. 1, 58 L. Ed. 107 (1913)

(Congress may acknowledge Indian tribes so long as it does not act arbitrarily); *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc) (applying the rule to the Major Crimes Act's definition of "Indian").

A state statute applying a law to Indian people who are not tribal members, or not yet enrolled tribal members, is constitutional, so long as that law is rationally related to the fulfillment of the federal government's trust responsibility. In *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979), the United States Supreme Court held that state laws that are "rationally related to the Government's 'unique obligation toward the Indians'" do not violate "equal protection principles." *Id.* at 673 n. 20 (citing *Mancari*, 417 U.S. at 555). State laws "enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians" are valid. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501, 99 S. Ct. 749, 58 L. Ed. 2d 740 (1979) (citing *Mancari*). *See also* RESTATEMENT OF THE LAW OF AMERICAN INDIANS (TENT. DRAFT NO. 1) § 9, *cmt*. b & Reporters' Notes (April 22, 2015) (collecting cases affirming constitutionality of state laws creating classifications based on Indian status). *Yakima* involved Public Law 280, which like ICWA involved the adjustment of tribal and

state jurisdiction.

The State of Washington was an early adopter of rules designed to protect Indian children, including those enrolled in federally recognized tribes and those not enrolled. The State established special programs to benefit Indian children even before the enactment of ICWA. Mel Tonasket testified that the tribe successfully lobbied the state agencies to establish "Indian desks" to focus on protecting Indian children's rights:

> We went back to our State capital, Olympia, a number of times to try to educate the top level people in social services. We set up, or were instrumental in getting Indian desks set up in the department of social and health services to make sure that policies and procedures and directions of the department that affected Indians in any way, that their trust rights, their lands and their relationship with their tribe would be protected.

1974 Hearings, *supra*, at 227 (Statement of Mel Tonasket). The establishment of these offices seems to have directly contributed to state officials learning first-hand about the abuses involving Indian children by the state child welfare system.

In 1976, again before the enactment of ICWA, the State of Washington amended its administrative code to provide special protections for Indian families. Until amendment in 2016, the code provided for notice to affected tribes and to urban Indian organizations. Administrative Order 1167 (Oct. 27, 1976), codified at WAC 388-70-093

(“Documented efforts shall be made to avoid separating the Indian child from his or her parents, relatives, tribe or cultural heritage. Consequently . . . (2) [i]n the case of Indian children being placed in foster care by the department or for whom the department has supervisory responsibility, the local Indian child welfare advisory committee, predesignated by a tribal council, or appropriate urban Indian organization shall be contacted. . . .”). Given that so many Indian people live in urban areas, often due to the federal government’s program of urban relocation, even notice to urban Indian organizations is rationally related to the trust responsibility. *See* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 954-54 (2016) (describing urban relocation).

The incredibly complex patchwork of state, federal, and tribal jurisdiction arising from Washington’s partial adoption of Public Law 280 undermined state social services. *1976 Report*, *supra*, at 25 (“The adoption by the State of Washington of a complex jurisdictional scheme based on land ownership patterns, and specific subject areas has brought much confusion.”) (footnotes omitted); Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 937-44 (2012) (describing how the State’s Public Law 280 jurisdiction is “confusing and inconsistent with

the consent paradigm"). By 1976, state officials had conceded that Indian tribes in Washington state had begun to establish their own child welfare departments due to disappointment with the State's efforts. *1976 Report*, *supra*, at 20 (quoting testimony of a state representative that Quinault, Colville, and Yakama "tribal members seem pretty dissatisfied with [state social services]"). The State's requirement that officials reach out early to tribal officials was, and is, a rational decision given the State's poor history with Indian child welfare matters, and given the jurisdictional complexity arising from the State's partial implementation of Public Law 280.

The State's inclusion of the children of non-federally recognized tribes is also valid. Washington is home to several tribes that only recently received acknowledgment as federally recognized tribes (Cowlitz, Samish, Nooksack) and is home to others that are treaty signatories that potentially soon will be acknowledged (Chinook, Duwamish). The government was notorious for removing Indian children regardless of the status of their tribes. *E.g.*, JON D. DAENKE, CHINOOK RESILIENCE: HERITAGE AND CULTURAL REVITALIZATION ON THE LOWER COLUMBIA RIVER 52-54 (2017) (describing Chinook children taken to boarding school); *Federal Acknowledgment Process*, Hearing before the Select Committee on Indian Affairs, United States Senate, 100th Cong. 2d Sess. 146 (May 26, 1988)

(finding Snohomish children taken prior to federal recognition) (Testimony of Snohomish Tribe); *id*. at 132 (describing Samish children taken to boarding school prior to federal recognition) (Testimony of Samish Indian Tribe). It was rational in 1976 to include Indian children who were not members of federally recognized tribes, and it is rational now.

To the extent the State speculates that an expansive notice requirement might invite future constitutional challenge, *see* Supplemental Brief of Department of Children, Youth, and Families at 13-14, those worries should not justify the exclusion of Indian children from the protections of ICWA. To so do would "legitimize continued injustice in Indian affairs" relating to Indian children and parents who are victims of history. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 546 (2020). ICWA's critical purpose is to reunite Indian families whenever possible. Lack of enrollment status of Indian parents and children is often caused by historical disruptions and racial animus. Broadening notice has potential of bringing people back into contact with their families and tribes, thus further fulfilling the purposes of the statute.

Even if there is a worry that too many children and their families will be protected by ICWA, the United States has already determined that

the worry is misplaced. As the Department of the Interior explained, "the early application of ICWA's requirements—which are designed to keep children, when possible, with their parents, family, or Tribal community—should benefit children regardless of whether it turns out that they are Indian children." 81 Fed. Reg. at 38,803. In short, there is no harm to noticing a Tribe when their children may be eligible, regardless of their parent's enrollment status at the time of removal.

CONCLUSION

The Court of Appeals' holding that excludes Indian children whose parents are not enrolled needlessly creates harmful results. For this reason, amici recommend that the Supreme Court reverse the lower court.

DATED: May 29, 2020

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on May 29, 2020, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 29th day of May, 2020.

/s/ Brooke Pinkham
Brooke Pinkham
Counsel for Amici Curiae

SEATTLE UNIVERSITY SCHOOL OF LAW

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