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BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES

"The History of the Indian Child Welfare Act and its Significance for *Haaland v. Brackeen*"

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Chairman Bruce Westerman, Ranking Member Grijalva, and Members of the House Committee on Natural Resources, thank you for the opportunity to offer my remarks today. My name is Maggie Blackhawk, and I am Fond du Lac Band Ojibwe and a Professor of Law at New York University School of Law, where I teach constitutional law and federal Indian law. I also serve as faculty co-director of the NYU-Yale American Indian Sovereignty Project and, in that capacity, I drafted the first amicus brief submitted on behalf of the Organization of American Historians and the American Historical Association in a federal Indian law case before the Supreme Court. That case is *Haaland v. Brackeen*, a consolidated set of constitutional challenges to the Indian Child Welfare Act ("ICWA") currently pending before the Court. I am here today to speak to the history of ICWA and the significance of this history for *Brackeen*. My remarks draw upon the historical research completed for our historians' brief.

In *Brackeen*, the Supreme Court is asked to resolve whether ICWA reaches beyond the power of Congress to enact, whether ICWA unconstitutionally commandeers state governments in violation of reserved powers under the Tenth Amendment, and whether ICWA unconstitutionally discriminates on the basis of "race" in violation of the equal protection component of the Due Process Clause of the Fifth Amendment.

The questions presented in *Brackeen* require the Supreme Court to consider the "historical understanding and practice" of federal and state power over Indian affairs and the welfare of Native children,[1] as well as the historical context leading to and surrounding the enactment of ICWA. Based on the established research of professional historians, ICWA is constitutional. It is simply the latest instance of Congress—exercising plenary and constitutionally granted authority over Indian affairs—legislating for the welfare of Native families and children.

I. The Federal Government Has Exercised Authority Over Native Children Since the Founding.

Native nations exercise a sovereignty over their lands, peoples, and children that predates the U.S. Constitution.[2] But "[u]nder our Constitution, treaties, and laws, Congress too bears vital responsibilities in the field of tribal affairs."[3] The federal government has exercised authority over

[1] *Printz v. United States*, 521 U.S. 898, 905 (1997).
[2] See *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory[.]"); *Talton v. Mayes*, 163 U.S. 376, 384 (1896) ("[T]he powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution[.]").
[3] *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1934 (2022).

Native people through its treaty, foreign affairs, commerce, and spending powers since the founding. Indeed, the federal government's power over tribal affairs has been described as "plenary."[4]

Native nations were recognized as foreign governments with which the United States would form treaties, and the citizens of Native nations were regarded as foreign nationals.[5] Many of these treaties contained provisions that obligated the federal government to provide for the general protection of Native people, as well as for the specific care and education of Native children.[6] The same was true of legislation that Congress enacted in the early nineteenth century, in fulfillment of the federal government's responsibilities to Native tribes.[7] What began in 1802 with the appropriation of funds to private entities to provide education to Native children on reservations soon grew into a nationwide program under which the federal government established and ran boarding schools.[8]

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[4] *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974); *see, e.g.*, *United States v. Curtiss Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936) (discussing "plenary" foreign affairs power).

[5] *See, e.g.*, COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON 1 (2018) (documenting George Washington recognizing ambassadors from multiple Native nations in earliest days of Republic). It is unsurprising that treaties served as the primary vehicle for regulating the relationship between the United States and Native nations and peoples. *See United States v. Lara*, 541 U.S. 193, 200- 201 (2004); FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 44-49 (1962). In fact, the majority of treaties signed and ratified in the first hundred years of the Republic were with Native nations. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1831-1832 (2019). The very first U.S. treaty was made with the Delaware Nation to construct a fort to protect Native children. Treaty of Fort Pitt with the Delaware Nation, art. III, Sept. 17, 1778, 7 Stat. 13.

Although Congress purported to end the process of Native treatymaking with an appropriations rider in 1871, Congress continues to ratify sovereign-to-sovereign agreements with Native nations by statute—similar to executive-congressional agreements ratified with other sovereign nations. *See, e.g.*, Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785; Connecticut Indian Land Claims Settlement Act of 1983, 25 U.S.C. §§ 1751-1760.

[6] *See* Appendix A, *infra*. Those provisions allowed Native nations to rebuild from the devastation of warfare and colonization, and therefore were central to preserving peace and rewarding allies. For example, a 1794 treaty provided the Oneida, Tuscarora, and Stockbridge Nations with new industries and required the United States to train the Nations' youth in running and maintaining those industries. A Treaty Between the United States and the Oneida, Tuscarora, and Stockbridge Indians, Dwelling in the Country of the Oneidas, art. III, Dec. 2, 1794, 7 Stat. 47.

Similarly, during the "removal era" of federal Indian policy (~1828-1849), treaties formed with the Creek, Delaware, and Choctaw Nations obligated the United States to provide schools, annual educational support, and welfare support for orphans. *See, e.g.*, Articles of Agreement with the Creeks, Nov. 15, 1827, 7 Stat. 307; Treaty with the Delawares, supp. art., Sept. 24, 1829, 7 Stat. 327; Treaty with the Choctaw, arts. XIX & XX, Sept. 27, 1830, 7 Stat. 333. The United States offered those provisions in exchange for Native land cessions, and certain treaties required that land sale proceeds be used to fund educational support for Native children. *See* Treaty with the Delawares, supp. art., *supra*.

[7] In the early nineteenth century, Congress began to exercise its foreign affairs power and to fulfill its treaty responsibilities by enacting legislation. *See Neely v. Henkel*, 180 U.S. 109, 121 (1901) (holding that treaties followed by congressional acts offer more capacious power for Congress generally); *see also* Curtiss-Wright Exp., 299 U.S. at 314-322 (holding powers of national government over foreign affairs and all "international" matters within territorial borders of United States as plenary and pre-constitutional powers never held by states). Those legislative actions regularly dealt with Native children.

[8] As early as 1802, Congress appropriated funds of up to $15,000 per year to, among other things, educate Native children on reservations. Act of Mar. 30, 1802, ch. 13, § 13, 2 Stat. 139, 143. Congress also took an early and keen interest in establishing a general framework for the education of Native children nationwide, establishing a fund in 1819 for that purpose. Civilization Fund Act of Mar. 3, 1819, ch. 85, § 2, 3 Stat. 516, 517. The fund initially appropriated $10,000 per year and subsidized schools for Native children run by private associations, mostly religious organizations, until 1873. See Act of Feb. 14, 1873, ch. 138, 17 Stat. 437, 461; S. REP. NO. 91-501, at 147-148 (1969). Given the steady expansion of the United States over this period—a process facilitated by Native nations' land cessions by treaty—Congress envisioned those educational programs as necessary to bring a community of foreign nationals, separated by culture and language, into the polity of the United States. *See* 25 U.S.C. § 271.

II. State and Local Governments were Complicit in the Federal Boarding School Policy.

States and local governments were complicit in the creation and operation of the boarding schools.[9] States and localities sold land upon which boarding schools could be built and supplied police and other services to the schools at federal expense.[10] Thus, early on, states came to see Native children as a source of additional revenues, not as a responsibility.[11] In fact, states historically took the position that the welfare of Native people should be the exclusive purview of the federal government.[12]

Following the escalation of the so-called Indian Wars of the nineteenth century and implementation of the now-repudiated "reservation era" policy, the federal government experimented with direct involvement in Native education. It began by establishing "manual labor" schools—day and boarding schools—on reservations that sought to train Native children in various trade and domestic professions. Denise K. Lajimodiere, *American Indian Boarding Schools in the United States: A Brief History and Their Current Legacy*, in INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING THE TRUTH AND RECONCILIATION PROCESSES 255, 257 (Wilton Littlechild & Elsa Stamatopoulou eds., 2014). In 1879, in an exercise of both foreign affairs and military power, the Departments of the Interior and War authorized the first off-reservation boarding school in an abandoned military barrack in Carlisle, Pennsylvania. All told, between 1819 and 1969, the United States operated and supported 408 boarding schools for Native American, Alaska Native, and Native Hawaiian children across thirty-seven states. U.S. Dep't of Interior, Federal Indian Boarding School Initiative Investigative Report 6 (2022).

[9] Their respective roles shed additional light on the broad scope of federal authority over Native children. As the historical record makes clear, state and local officials—following the lead of the federal government—regularly contributed to the creation and support of the schools and assisted in forcing Native children to attend.

[10] Most notably, the infamous Carlisle Indian School, founded by Lieutenant Richard Henry Pratt, was deeply enmeshed with local governments and their services. First built on former army land, the Carlisle School expanded thanks to the Pennsylvania Legislature, which passed an act in 1901 allowing the federal government to purchase additional land. Letter from George D. Thorn, Chief Clerk, Off. of Penn. Sec'y to Comm'r of Indian Affs. (Feb. 15, 1901) (on file with National Archives).

In addition, officials at the Carlisle School, including Pratt himself, regularly called on police from a variety of jurisdictions to capture and return runaway school children. In 1896, Pratt requested assistance from the Pittsburgh Department of Safety in capturing two runaway students, Letter from J.O. Brown, Dir. of Dep't of Pub. Safety to Sec'y of War (Nov. 27, 1896) (on file with National Archives), and thereafter made similar requests to local law enforcement in Maryland, Pennsylvania, and New Jersey, Letter from H. Pratt, Superintendent, Dep't of Interior, Indian Sch. Serv. to Comm'r of Indian Affs. (July 24, 1897) (on file with National Archives); Letter from H. Pratt, Superintendent to Comm'r (Sept. 16, 1897) (on file with National Archives); Letter from Dep't of Interior, United States Indian Sch. to Comm'r of Indian Affs. (June 29, 1910) (on file with National Archives). Pratt also tasked the Carlisle town police with arresting students who did not have permission from the boarding school to be off school grounds. Letter from O.H. Lipps, Supervisor in Charge, Dep't of Interior, U.S. Indian Sch. to Hon. Cato Sells, Comm'r of Indian Affs. 2-3 (May 12, 1915) (on file with National Archives). Police forces, in turn, requested and received federal reimbursement for expenses.

Across the country, states had similarly complex and intertwined relationships with federal boarding schools near or in their jurisdictions. By 1902, twenty-five off-reservation federal boarding schools operated throughout the United States, THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 138 (2015), and the federal government compensated states for the lands on which these schools were built.

[11] In Oregon, for example, the BIA's Chemawa Indian School was founded on land purchased from the Oregon legislature. SuAnn M. Reddick, *The Evolution of Chemawa Indian School: From Red River to Salem, 1825-1885*, 101 OR. HIST. Q. 444, 461 (2000). Oregon's support for the school also manifested in other ways. State officials, such as the President of the University of Oregon, advocated for and praised the school's "outing" system, which sent the school's students into the homes of families throughout the state and provided cheap labor that bolstered local economies. *Education of Indians: How Can They be Brought to Equal Citizenship?*, THE MORNING OREGONIAN, Aug. 16, 1900, at 5. Thus, Oregon (and other states) openly embraced the federal government's regulation of Native children.

[12] Certain states with large populations of Native children eventually accepted responsibility for and jurisdiction over their education and welfare. But contrary challengers in *Brackeen*'s arguments that the care of Native children has

III. Congress Attempted to Remedy the Failures of its Boarding School Policy By Funding State Welfare Programs, Which Accelerated the Removal of Native Children.

By the mid-twentieth century, Congress recognized that the boarding schools represented a failed federal policy.[13] Although state educational and general welfare programs grew rapidly during that period, states consistently refused to provide benefits to Native families and children.[14] States

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traditionally fallen to states, states did not see the care of non-citizen Native children as their responsibility—at least until much later. Quite the opposite, states were adamant that Native families and children be excluded from state programs.

[13] By the mid-1920s the federal government came to recognize "frankly and unequivocally" that the boarding schools were "grossly inadequate." MERIAM REPORT: THE PROBLEM OF INDIAN ADMINISTRATION 11 (1928). As a result, it began directing policy "away from the boarding school for [Native] children and toward the public schools and [on-reservation] day schools" run by state and local governments. *Id.* That shift reflected a broader view in the federal government that welfare programs meant to assist Native families were better administered directly at the state and local level. That shift also coincided with a period of dramatic change for education and welfare nationwide. By 1916, most states had passed mandatory school attendance laws and developed a network of public schools across each state. TRACY L. STEFFES, SCHOOL, SOCIETY, & STATE: A NEW EDUCATION TO GOVERN MODERN AMERICA, 1890-1940, at 4 (2012). By 1940, education "was the largest expenditure of state and local governments[]," and schools became central sites for the welfare support of children. *Id.* at 7. During the same period, federal subsidies flooded into state programs for families and children with the signing of the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935), which "created the foundation for . . . states to develop and implement" child foster care programs, Meredith L. Alexander, *Harming Vulnerable Children: The Injustice of California's Kinship Foster Care Policy*, 7 HASTINGS RACE & POVERTY L.J. 381, 398 (2010) (citing KASIA O'NEIL MURRAY & SARAH FESIRIECH, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM 2 (2004)).

[14] Even the passage of the Social Security Act, with its general grant programs, was insufficient to convince states that they needed to support Native families and children through their general welfare and foster care programs. In particular, the Aid to Families with Dependent Children program compensated states for one-third of their costs to provide services for families living in poverty—specifically to allow children to remain with their own families. Shortly after the SSA's passage, the Department of Interior's Solicitor issued an opinion making clear that the SSA was applicable to Native people. *Mem. Op. re: Applicability of the Social Security Act to the Indians* (Apr. 22, 1936), in OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATIVE TO INDIAN AFFAIRS 1917-1974, at 626 (2003). Yet over the next eleven years, states continued to decline benefits applications from Native people. *See* Arizona Board of Welfare Resolution of June 29, 1948, at 2 (on file with the Arizona State Library, Archives and Public Records) ("Reservation Indians will not be accepted for categorical aid under . . . three [SSA] programs . . . until a final determination of the status of Reservation Indians has been made by a court of competent jurisdiction or through congressional action.").

In response, Native advocacy organizations, led by Felix Cohen, filed a series of lawsuits in state and federal courts challenging the refusals on a state-bystate basis. *E.g.*, Compl. ¶ 11, *Mapatis v. Ewing*, Civ. No. 3882-48 (D.D.C. filed Sept. 21, 1948) (alleging that failure to provide benefits to Native families and children by Arizona and New Mexico had led to deaths of eighty-two Native people over preceding five years). The Federal Security Agency (the predecessor to the Social Security Administration) also began proceedings to determine whether states excluding Native people from welfare benefits would be barred from receiving all federal funds. *Arizona v. Hobby*, 221 F.2d 498 (D.C. Cir. 1954). Still, despite risking millions of dollars in federal funding for their programs per year, states continued their campaign of "Starvation without Representation" against Native families. Will Rogers, Jr., *Starvation Without Representation*, LOOK MAG., Feb. 3, 1948, at 36.

Many of those lawsuits were settled out of court after the federal government agreed to increase its SSA matching funds to pay for 90% of states' cost to include Native people in certain welfare programs. Letter from Alanson Willcox, Gen. Counsel, Fed. Sec. Agency to Oscar Ewing, Admin. (May 13, 1949) (on file with National Archives). But those settlements provided little assurance that states would actually extend benefits to Native families and children. *See* Karen Tani, *States' Rights, Welfare Rights, and the "Indian Problem": Negotiating Citizenship and Sovereignty*, 1935-1954, 33 LAW & HIST. REV. 1, 33 (2015) (describing further challenges by Arizona to additional SSA programs for children based on legal arguments that Native children enjoyed a "peculiar and privileged status" with federal government). Given states' steadfast resistance, it is unsurprising that, as late as 1955, only two states (California and

argued that they not only lacked regulatory authority over reservations and tribal members, but also were unable to tax Native lands and raise the revenues needed to service communities living in poverty—especially in light of inadequate federal subsidies for general welfare programs.[15] In response, the federal government focused on funding particular state welfare programs for Native children—the prime example being foster care—through piecemeal contracts with individual states.[16] Although those state-federal contracts prompted states to become more involved in the care of Native children, the contracts contained a variety of notable terms, including those that

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Florida) had accepted full general welfare responsibility for Native families and children, including family economic and domestic support. Letter from Robert W. Beasley, Chief, Bureau of Indian Affs. Branch of Welfare to J.P.B. Ostrander, Superintendent of Welfare, Bureau of Indian Affs. Branch of Relocation (Apr. 5, 1955) (on file with National Archives).

[15] States justified their refusal to support Native families and children through their general welfare and education programs on the ground that they had no regulatory jurisdiction. While states often cited reservation boundaries, *see* Current Policy of the Montana Department of Public Welfare Relating to State Child Welfare Services on Indian Reservations 2 (Jan. 27, 1957) (on file with Mudd Manuscript Library, Princeton University, Association on American Indian Affairs Records) ("The major problem here is whether or not the County Department of Public Welfare and the State Department of Public Welfare have any jurisdiction in servicing such cases."), they further argued that, as "ward Indians . . . of the federal government," Native people on or off reservation were not entitled to benefits because they were "the exclusive responsibility of the federal government," Letter from Lewis & Clark Cnty. Welfare Bd. to Hon. Lee Metcalf, House Rep. (Jan. 28, 1957) (on file with Mudd Manuscript Library, Princeton University, Association on American Indian Affairs Records) (emphasis added); see REPORT OF THE SENATE INTERIM COMMITTEE ON INDIAN AFFAIR TO THE 1953 SESSION OF THE MINNESOTA LEGISLATURE 72 (1953) ("If, and when, the federal government relinquishes its control over the Indian, they will become citizens of the state[.]").

Relatedly, states also argued that they should not be responsible for the welfare and education of Native children because Native lands fell outside their state legislative authority to tax. *See* REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF INTERIOR 3-4 (1922) (discussing examples in which federal subsidies for state public schools were sought due to inability to tax Native people); U.S. Dep't of Interior, Office of the Solicitor, Opinion Letter on Availability of Social Security Benefits to Indians (Apr. 20, 1949) (noting that states had denied social security benefits to Native people to date). States simply balked at the cost of taking on responsibility for the support of communities where poverty was prevalent. U.S. Dep't of Interior, United States Indian Service, Federal Indian Service 4 (1949) ("Since Indian lands were tax exempt so long as trusteeship was exercised over the lands, the state governments were unwilling or unable to assume this burden of welfare costs.").

[16] Unable to convince states that their growing general welfare programs should serve Native families and children, the federal government resorted to offering full funding for separate and discrete programs that states could administer. It also took steps to ensure the amelioration of financial burdens that, according to states, prevented them from accepting responsibility and jurisdiction over Native children—especially as federal boarding schools were shut down. Wisconsin Div. for Children & Youth State Dep't of Pub. Welfare, Basic Plan for Child Welfare, Federal Plan 52 (1960). In 1934, Congress had passed the Johnson O'Malley Act to establish a funding program whereby the federal government could contract with states to provide education and other welfare funds for Native people who were "so intermixed with that of the general health of the community that it is difficult to separate the two." S. REP. NO. 73-511, at 1-2 (1934); *see* Johnson-O'Malley Act of 1934, Pub. L. No. 73-167, 48 Stat. 596 (codified as amended at 25 U.S.C. §§ 5342-5348). But the BIA initially restricted its contracts narrowly to educational funds. It was not until 1949 that the Department of the Interior authorized the use of Johnson-O'Malley funds to contract with states for federal welfare subsidies. U.S. Dep't of Interior, Office of the Solicitor, Opinion Letter on Availability of Social Security Benefits to Indians, *supra.*

State governments began to lobby the BIA for greater federal subsidies to help care for Native children—leading to the formation of numerous welfare contracts over the next two decades. *See*, e.g., Glenn L. Emmons, Bureau of Indian Affairs, 1955 ANN. REP. COMM'R OFF. INDIAN AFF. SEC'Y INTERIOR 231, 246 (1955) ("Contracts with the States of Minnesota, Wisconsin, and Nevada for foster care of Indian children were continued, and State legislative action made possible a limited contract with South Dakota."). Consistent with the BIA's broader interpretation of the Johnson-O'Malley Act, those contracts extended for the first time to areas like foster care, which would largely take the place of boarding schools. Minnesota, for example, approached the Senate Committee on Organization for the Department of the Interior in 1957 for a renewal of its Johnson-O'Malley contract and for federal funds to establish a foster care program for Native children. During a hearing, Minnesota described the funding for foster care as part of a general plan to close the Pipestone Indian School. Minnesota Legislative Committee, Statement 3, Mar. 1957 (on file with United Way).

mandated heavy federal oversight: federal appointment and funding of state child welfare staff; definitions of an "Indian child"; substantive standards of removal; federal inspection of all records and homes without notice; and federal requirements for reporting to the Bureau of Indian Affairs ("BIA").[17]

Over time, as states assumed more responsibility for the welfare of Native children, they began removing those children from their homes at unprecedented levels.[18] States were explicit that

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[17] Notably, as part of contract negotiations, Minnesota (like other states) offered an explicit removal standard for Native children for congressional and BIA approval to ensure "that funds invested in the Indian foster care program will be used in the best interests of Indian children." Minnesota Legislative Committee, Statement, *supra*, at 3. Such standards included, *inter alia*, a requirement that removal would occur only with parental consent or a full hearing, including casework support; licensing of foster home placements; a preference for a home placement setting over an institutional setting, unless a showing is made otherwise; and continuing casework support for children and parents following removal. *Id.* at 3-4. Removal standards set during negotiations were, at times, included as terms in state-federal contracts. These terms foreshadowed text later drafted into ICWA:

> The potential and actual values in Indian home life shall at all times be particularly recognized, and efforts shall be directed to the improvement of the family and community life, rather than separation of children from their relatives, except where the child's welfare is threatened by failure to remove him.

E.g., Contract No. I-i-Ind. 18692 Between U.S. Dep't of the Interior, Off. of Indian Affs. and State Dir. of Pub. Welfare, Wisc., art. II, ¶ 2 (July 1, 1945) (on file with National Archives). Even when negotiations ended, the state-federal foster care contracts required heavy federal involvement in state foster care programs for Native children. Some contracts codified arrangements under which social workers paid for and appointed by the federal government worked under the supervision of state welfare branches, while also being available for "work which may be referred by *** the Indian office." TWENTY-THIRD BIENNIAL REPORT OF THE STATE BOARD OF CONTROL OF WISCONSIN 76-78 (1936); see Wisconsin Div. of Pub. Assistance, The Wisconsin Indian and Public Assistance, 25-26 (1949) (describing how this arrangement continued until 1947). In some states, the BIA entered into individual contracts with foster homes supervised by state child welfare agencies. SOUTH DAKOTA DEPARTMENT OF PUBLIC WELFARE ANNUAL REPORT 10-11 (1954).

In addition, many state-federal foster care contracts explicitly defined who was a Native child, and required states to identify Native children and provide that information to the BIA. OFFICE OF INDIAN AFFAIRS, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF INTERIOR 241 (1954); OFFICE OF INDIAN AFFAIRS, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF INTERIOR 246 (1955); Negotiated Contract Between U.S. Dep't of the Interior, Bureau of Indian Affs. and Minn. Dep't of Pub. Welfare (Apr. 28, 1972); Contract No. 14-20-350-6 Between U.S. Dep't of the Interior, Off. of Indian Affs. and Minn. Div. of Soc. Welfare, in Interior Department Appropriations for 1954, Part 4: Testimony of Members of Congress, Interested Organizations, and Individuals: Hearing on H.R. 4828 Before the Subcomm. on Interior & the H. Comm. on Appropriations, 83d Cong. 146-147 (1953). The contracts also required states to keep records, provide monthly or annual reports to the BIA, and allow BIA officials to review all "records relating to Indian children covered by this contract" and to "have access to [state welfare] facilities at any time in order to observe and evaluate the services provided under this contract." Negotiated Contract, *supra*, at 209; see Wisconsin Pub. Welfare Dep't, Relief to Indians 35 (Apr. 1937); Contract No. 14-20-350-6, *supra*. Accordingly, even as states became more involved in providing for the welfare of Native children—albeit using federal funds—the federal government maintained oversight.

[18] The growth of state-administered foster care programs for Native children had swift and dramatic consequences for the removal of Native children from their families. By the late 1960s, it is estimated that state governments removed a startling 25-35% of all Indian children from their families and placed them into foster homes, adoptive homes, or institutions. Association on American Indian Affairs, Inc., Indian Family Defense, Vol. No. 1, 1974, at 1. Rates of removal for Native children were also very high compared to the removal rates for non-Native children during the same period. Native children in New Mexico, for example, were separated from their families at a rate of seventy-four times that of non-Indian children. Association on American Indian Affairs, Inc., Indian Family Defense, Vol. No. 6, 1976, at 5. The plaintiffs in *Brackeen* pluck statements from ICWA's hearings to mischaracterize the reasons for removal during this period as "xenophobic child-custody practices" that were borne of a longstanding federal policy of assimilation and racism. Pet. Tex. Br. 2-3. Decades of research conducted by professional historians reveals that Plaintiffs' interpretation

privatizing support for Native children would further reduce welfare costs and fill remaining federal funding gaps, because Native children required far fewer welfare dollars when placed in the home of a middleclass or wealthy foster or adoptive family than in the home of a Native family living in poverty.[19] The federal government acceded. In only a few years, a terrifying national picture emerged: Native nations were losing their children to state welfare systems at extraordinary rates. State governments separated over 100,000 of the estimated 400,000 Native children from their parents and placed those children in homes with no political, cultural, or linguistic connection to their nations.[20]

IV. Congress Enacted ICWA to Reverse Course on its Failed Native Child Welfare Policy.

ICWA must be viewed against this historical record.[21] Having failed in its effort to enlist states in overseeing the welfare of Native children, and having realized the devastating harms that rampant removal visited on Native populations, Congress enacted ICWA to strengthen the longstanding (but often overlooked) authority of tribal governments.[22] The plaintiffs in *Brackeen* challenge ICWA as

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is too simplistic. States were plainly trying to protect their bottom lines as well, as they faced the high costs of caring for a population of Native children without additional tax revenue. Although federal subsidies under the Johnson-O'Malley Act defrayed states' costs to some extent, the subsidies defrayed costs only for particular programs, like foster care, and not for the full array of services required to keep Native children with their families and communities.

[19] The historical record is replete with states acting explicitly on fiscal concerns. As described, states repeatedly refused any general welfare responsibility for Native children. But as states were forced to grapple with the closure of boarding schools and came to accept targeted federal funds to provide for Native children through specific programs, state officials turned to the foster care and adoption systems as the cheapest way to provide services. Middle-class foster and adoptive families were far less expensive to support, and state welfare systems turned to those families en masse while removing thousands of Native children from their homes. Poverty quickly became the touchstone of the removal effort. *See* 124 Cong. Rec. H38102 (daily ed. Oct. 14, 1978) (statement of Rep. Udall) ("[P]overty is used by State welfare agencies and officials as prima facia evidence to take children from their families."). Examples abound in which state social workers and courts cited poverty as a basis for displacing Native children. In 1974, the Texas Welfare Department obtained a court order placing a healthy Native child in temporary foster care. MARGARET D. JACOBS, A GENERATION REMOVED 69-70 (2014). The justification was that the working-class parents had not yet purchased diapers and a crib—ignoring the fact that the baby had come early, the mother worked outside the home, and the father traveled regularly for work. Association on American Indian Affairs, Indian Family Defense, Vol. No. 3, 1975, at 7.

Similarly, in 1977, a Texas court terminated the parental rights of Bernadine Brokenleg, in part because there was a year when she failed to send payments for her daughter's support while the daughter was in the care of grandparents who lived off the reservation. *Brokenleg v. Butts*, 559 S.W.2d 853, 854-855 (Tex. App. 1977). After years of litigation, in which Bernadine's tribal government (the Rosebud Sioux Nation) became involved, the Texas Court of Appeals reversed the termination. *Id.* at 858. Yet even in doing so, the court focused on financial assistance—noting that Bernadine never had the financial means to send payments, while ignoring that the child had been well supported. *Id.*

[20] Association on American Indian Affairs, Inc., Indian Family Defense, Vol. No. 1, 1974, at 1.

[21] The plaintiffs in *Brackeen* challenge ICWA as unconstitutional "race-based" legislation that seeks to favor "Indians" at the expense of others. Pet. Tex. Br. 41. But a review of ICWA's legislative scheme and history reveals a much different and more complex understanding. ICWA represents the Congress's latest effort to use its plenary and deeply rooted authority to regulate for the welfare of Indian children, but in a more constructive direction. In particular, when viewed against the historical record, ICWA must be seen as a concerted effort to reverse the damage done to Native children by state and local governments administering federally funded foster care and other welfare programs, while also strengthening the longstanding but often disrespected power of tribal governments.

[22] That shift in the federal government's approach to regulating Native children is evident throughout ICWA. The very first section of Title I of the enacted legislation affirms that tribal governments, not states, exercise exclusive jurisdiction over Native children on reservation lands. 25 U.S.C. § 1911(a). It also provides a means to transfer child custody cases brought in state courts into tribal courts. *Id.* § 1911(b). Title I also reverses longstanding state policies that undermined the rights of Native parents and families living in poverty: indigent parents receive court-appointed counsel funded

unconstitutional "race-based" legislation[23] that transgresses the limits of Congress's authority.[24] But placed in proper historical context, ICWA reflects the federal government's effort to chart a new course for federal policy in an area where it had acted for two centuries. ICWA built on that past experience by affirming tribal jurisdiction, according full faith and credit to tribal law and tribal court decisions, and establishing minimum standards for the removal of Native children from their families and for the placement of such children.[25]

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either by the state or federal government. 25 U.S.C. § 1912(b). Moreover, any proceeding seeking a foster care placement or termination of parental rights requires a showing that "active efforts have been made to provide remedial services and rehabilitative programs" designed to prevent family separation. Id. § 1912(d). With these federal guardrails, states are no longer able to deny Native families general welfare support and then use that poverty as a basis to separate children from their parents.

Although hardly addressed in the *Brackeen* litigation, Title II of ICWA represents yet another effort by Congress to reverse course. ICWA redirected the prior state-federal contracting scheme to the governments best suited to protect Native children and most likely to assist in upholding the federal government's treaty and trust responsibilities: tribal governments. Under Title II, tribal governments can contract with the federal government to build child welfare programs and license foster care homes on reservations—where states had previously refused to act on a claim of lack of jurisdiction. *See* 25 U.S.C. §§ 1931-1933. Title II also authorizes contract funds to be used as matching funds for the SSA programs that states had long denied to Native families and children. *See, e.g.*, Arizona Board of Welfare Resolution of June 29, 1948, *supra*; Current Policy of the Montana Department of Public Welfare Relating to State Child Welfare Services on Indian Reservations, *supra*.

[23] The fact that ICWA contains a specific definition of "Indian child," 25 U.S.C. § 1903, is equally grounded in past experience—in particular, decades of state-federal contracting under the Johnson-O'Malley Act. Those contracts often required states to identify Native children under specialized definitions like that in ICWA, and to keep records of those children as part of their welfare systems. *See, e.g.*, Negotiated Contract, *supra*. But many states also identified Native children and families independent of federal intervention so that states could exclude those children and families from general welfare support. As such, ICWA's recordkeeping and oversight provisions did not foist new administrative responsibilities on states; on the contrary, ICWA's requirements are equivalent to those states had taken on willingly before the statute was passed.

[24] The plaintiffs challenging ICWA much of the placement and recordkeeping requirements of ICWA. Pet. Tex. Br. 16, 18, 19, 39, 63; see 25 U.S.C. § 1915. But those provisions must be seen within the context of state practices that preceded them—namely, the widespread removal of Native children from their families and reservations, and placement into middleclass homes that represented the states' lowest-cost option for care. ICWA's placement preference for foster homes or institutional settings licensed by tribal governments reflects an effort to shift placement back into those previously excluded homes and towards child welfare programs built by tribal governments. ICWA empowers tribal governments to change those placement preferences through tribal law, and state courts are required to prefer the family of the child and to place the child in foster care and adoptive homes recognized as adequate by the tribal government through tribal law. 25 U.S.C. § 1915(c).

[25] The hearings on ICWA had revealed that states, motivated by economics to remove Native children into wealthier homes, ran roughshod over tribal governments and ignored tribal court orders. Indian Child Welfare Act of 1977: Hearing Before the S. Select Comm. on Indian Affs., 95th Cong., 63-65, 150, 175, 317, 355, 402 (1977); Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affs. of the S. Comm. on Interior and Insular Affs., 93rd Cong., 1, 4, 6-7, 19-33, 35, 52-53, 141-142, 501 (1974). Tribal judges believed they had no independent power to overturn the aggressive removal actions of state governments. Indian Family Defense, Vol. No. 1, 1974, *supra*, at 3. ICWA responds directly to those concerns by strengthening the authority of tribal governments. Beyond the exclusive jurisdiction and transfer provisions already mentioned, section 1911 provides the child's guardian or nation a right of intervention and requires that full faith and credit be given to tribal court proceedings in state court. 25 U.S.C. § 1911. Other provisions ensure that tribal governments receive notice of proceedings involving a possible Native child in state court and an opportunity to participate meaningfully in the proceedings. *Id.* § 1912(a).

V. ICWA is Best Understood as Analogous to Contemporaneous Laws that Protect Foreign National Children in State Courts.

The federal government's approach in ICWA is not unique to Native children either. Just five years before holding its first hearings on ICWA, the United States signed and ratified the Vienna Convention on Consular Relations, and it began implementing the Vienna Convention over the same period. Like ICWA, the Vienna Convention recognized the responsibility of the United States to "safeguard . . . the interests of minors . . . who are nationals of [another] State, particularly where any guardianship or trusteeship is required."[26] Specifically, both ICWA and the Vienna Convention require that state courts: identify children subject to the respective law, even when those children are dual citizens; notify the child's potential other nation and keep records of that notice; collaborate with the representative of the child's nation; and provide a guardian.[27] In short, ICWA is analogous to contemporaneous laws enacted to strengthen the authority of foreign governments over foreign national children in state courts.[28] States have no constitutional qualms with implementing the Vienna Convention, and ICWA should be no different.[29]

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[26] In addition to drawing upon historical practice specific to Native children, ICWA built upon federal policy innovations for child welfare more broadly. During the five years Congress held hearings on ICWA, the United States signed and began to implement the Vienna Convention on Consular Relations. Multilateral Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 500 U.N.T.S. 95 (hereinafter "Vienna Convention"); see Kelly Trainer, The Vienna Convention on Consular Relations in the United States Courts, 13 GLOB. BUS. & DEV. L.J. 227, 235 (2000). Both ICWA and the Vienna Convention seek to protect the children of another sovereign by recognizing not only that the ongoing existence of the nation-state depends on its children, but also that cultural and linguistic differences cause difficulty in court proceedings involving foreign children. *See, e.g.*, 25 U.S.C. § 1901(3), (5).

[27] The similarities between the structure of ICWA and the Vienna Convention are striking. Both require that state courts and welfare agencies identify covered children—even when those children might hold dual-citizenship with the United States. *Compare* Vienna Convention, 500 U.N.T.S. 95, preamble, *with* 25 U.S.C. § 1902. Both require notification of the child's potential other nation and require state officials to keep records of that notice. *Compare* 500 U.N.T.S. 95, art. 37, *with* 25 U.S.C. § 1912(a). And in recognition of the need for additional representation in proceedings involving foreign or dual-national children, both mandate that state officials collaborate with the representative of the child's nation, who supplies integral linguistic and cultural translation for the state court proceedings, and that a guardian be appointed. *Compare* 500 U.N.T.S. 95, art. 5, *with* 25 U.S.C. § 1931(a)(8).

[28] Unlike ICWA, the Vienna Convention does not itself contain specific placement preferences for foreign national children. Over the last few decades, however, many states have strengthened their responsibilities under the Convention by entering into memoranda of understanding (MOUs) with foreign consulates that do contain preferences to place foreign national children back in their home country or with other foreign nationals. *See* Appendix B, *infra*. The Illinois Department of Children and Family Services, for example, states that its policy is designed to "provid[e] the least restrictive placement and supportive services to maintain family ties, ensure appropriate visitation[,] and maintain the child's ethnic, religious and cultural ties." Department of Children and Family Services Policy Guide 2008.02: Mexican Consulate Notification (May 16, 2008) (emphasis added); *see* Memorandum of Understanding Between the State of Illinois Department of Children and Family Services and the Consulate General of Mexico in Chicago Regarding Consular Notification and Access in Cases Involving Minors (Sept. 28, 2011). More broadly, in a 2013 survey, the Department of Health and Human Services found that MOUs commonly require consulates to "facilitate requests for home studies on potential placements in the foreign country (e.g. a relative or deported parent)" and "to facilitate the child's return to his or her country of origin (or to the parent's country of origin) if that is found to be in the child's best interests." Assistant Secretary for Planning and Evaluation Issue Br. 3-4 (Dec. 2013).

[29] The plaintiffs in *Brackeen* paint ICWA as outlier legislation that unconstitutionally "commandeers" state courts to make "race-based" distinctions. Pet. Tex. Br. 62-63. But state courts, including in Texas, have had no issue implementing the Vienna Convention's requirements of notice, recordkeeping, and collaboration in child-custody proceedings. *See* Texas Dep't of Fam. & Protective Servs., Child Protective Services Handbook 6715.1, https://www.dfps.state.tx.us/handbooks/cps/ files/CPS_pg_5700.asp (last visited Aug. 17, 2022); *see also* Attorney Gen. of Tex., Magistrate's Guide to the Vienna Convention on Consular Relations, (Jan. 2006), https://www2.texasattorneygeneral.gov/files/ agency/vienna_guidebook.pdf ("The Office of the Attorney General of

The historical record confirms that the care and education of Native children falls squarely into the constitutional powers of Congress. The constitutional challenges to *Brackeen* are unfounded and could result in the deeply ironic situation where the constitutional values that we have elevated to reckon with other constitutional failures—specifically, the institution of human enslavement and Jim Crown segregation—might be used to further the American colonial project today.

Texas appreciates the assistance of all judicial officials in helping to achieve the[] objectives [of the Vienna Convention].”). To comply with the Vienna Convention—at the federal government’s behest, *see* Child Protective Services Handbook, *supra*, at 6710 (noting that federal law requires determination of citizenship status to comply with federal foster care funding requirements, 42 U.S.C. § 671(a)(27))—the Texas Department of Family and Protective Services requires that its officials determine whether a child is a citizen of another nation or eligible for citizenship. *See Arteaga v. Texas Dep’t of Protective & Regul. Servs.*, 924 S.W.2d 756, 761 n.6 (Tex. App. 1996) (holding that consulate notice is required, emphasizing that notice was “bare minimum of acceptable notice,” and urging state to “provide a definitive documentary record” of consular notice). At bottom, these are precisely the same types of purportedly unconstitutional requirements that ICWA imposes on states.

APPENDICES

APPENDIX A:
TREATIES WITH NATIVE NATIONS PROVIDING EDUCATIONAL AND WELFARE SUPPORT

Treaties ratified with Native nations containing general protection provisions and provisions that the United States would provide educational and welfare support to Native children and youth.

1808 Treaty with the Osage, art. I, Nov. 10, 1808, 7 Stat. 107

1865 Treaty with the Osage, art. X, Sept. 29, 1865, 14 Stat. 687

Agreement with the Sioux Nations of Indians in Dakota, Mar. 2, 1889, 25 Stat. 888, 894

Treaty of Fort Laramie with Sioux, etc., art. III, Sept. 17, 1851, 11 Stat. 749

Treaty with the Arapaho and Cheyenne, Feb. 18, 1861, 12 Stat. 1163

Treaty with the Cherokee, art. III, Nov. 28, 1785, 7 Stat. 18

Treaty with the Cherokee, art. X, Dec. 19, 1835, 7 Stat. 478

Treaty with the Cherokee, art. XXV, July 19, 1866, 14 Stat. 799

Treaty with the Chickasaw, Oct. 22, 1832, 7 Stat. 388

Treaty with the Chickasaw, May 24, 1834, 7 Stat. 540

Treaty with the Chickasaw, art. IV, June 22, 1852, 10 Stat. 974

Treaty with the Chippewa, etc., art. I, July 16, 1859, 12 Stat. 1105

Treaty with the Chippewa of the Mississippi, Mar. 19, 1867, 16 Stat. 719, 720

Treaty with the Chippewa of Saginaw, etc., art. I, Aug. 2, 1855, 11 Stat. 633

Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, art. III, Oct. 18, 1864, 14 Stat. 637

Treaty with the Choctaw, art. XIV, Sept. 27, 1830, 7 Stat. 333

Treaty with the Creeks, Articles of Agreement with the Creeks, Nov. 15, 1827, 7 Stat. 307

Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 366

Treaty with the Creeks, art. I, Feb. 14, 1833, 7 Stat. 417

Treaty with the Creeks, etc., Aug. 7, 1856, 11 Stat. 699

Treaty with the Crows, May 7, 1868, 15 Stat. 649, 651

Treaty with the Delawares, supp. art., Sept. 24, 1829, 7 Stat. 327

Treaty with the Delawares, art. VI, May 6, 1854, 10 Stat. 1048

Treaty with the Florida Tribes of Indians, art. III, Sept. 18, 1823, 7 Stat. 224

Treaty with the Kaskaskia, art. III, Aug. 13, 1803, 7 Stat. 78

Treaty with the Kickapoo, art. IX, July 30, 1819, 7 Stat. 200

Treaty with the Kickapoo, art. II, June 28, 1862, 13 Stat. 623

Treaty with the Menominee, first stip., Feb. 8, 1831, 7 Stat. 342

Treaty with Menominee, Sept. 3, 1836, 7 Stat. 506

Treaty with the Navaho, art. I, Sept. 9, 1849, 9 Stat. 974

Treaty with the Navaho, June 1, 1868, 15 Stat. 667, 669

Treaty with the Nez Perce, art. V, June 11, 1855, 12 Stat. 957

Treaty with the Northern Cheyenne and Northern Arapaho, May 10, 1868, 15 Stat. 655, 657

Treaty with the Ottawa, art. IX, Aug. 30, 1831, 7 Stat. 359

Treaty with the Ottawa, etc., Mar. 28, 1836, 7 Stat. 491

Treaty with the Ottawa and Chippewa, July 31, 1855, 11 Stat. 621

Treaty with the Pawnee, art. III, Sept. 24, 1857, 11 Stat. 729

Treaty with the Potawatomi Nation, art. I, June 17, 1846, 9 Stat. 853

Treaty with the Potawatomi, Nov. 15, 1861, 12 Stat. 1191

Treaty with the Potawatomi, art. VIII, Feb. 27, 1867, 15 Stat. 531

Treaty with the Sauk and Foxes, etc., Mar. 6, 1861, 12 Stat. 1171, 1172-1173

Treaty with the Seminoles, art. III, May 9, 1832, 7 Stat. 368

Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, etc., Feb. 23, 1867, 15 Stat. 513

Treaty with the Shawnee, art. X, Aug. 8, 1831, 7 Stat. 355

Treaty with the Shawnee, art. XIV, May 10, 1854, 10 Stat. 1053

Treaty with the Sioux-Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee-and Arapaho, arts. V-X, Apr. 29, 1868, 15 Stat. 635, 637-638

Treaty with Sioux-Sisseton and Wahpeton Bands, art. IV, July 23, 1851, 10 Stat. 49

Treaty with the Six Nations, preamble, Oct. 22, 1784, 7 Stat. 15

Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 47

Treaty with the Stockbridge and Munsee, preamble, art. III, Feb. 5, 1856, 11 Stat. 663

Treaty with the Winnebago, art. I, Oct. 13, 1846, 9 Stat. 878

Treaty with the Wyandot, Jan. 31, 1855, 10 Stat. 1159

Treaty with the Yankton Sioux, art. IV, Apr. 19, 1858, 11 Stat. 743

APPENDIX B:
MEMORANDA OF UNDERSTANDING WITH FOREIGN CONSULATES REGARDING VIENNA CONVENTION

Memorandum of Understanding Between the Monterey Co. Department of Social and Employment Services and Family and Children Services and the Consulate General of Mexico in San Jose, California Regarding Consular Involvement in Cases Involving Minors (Apr. 17, 2007)

Memorandum of Understanding Between the Consulate General of Mexico in Atlanta, Georgia and the Department of Human Service, Division of Family and Children Services of the State of Georgia of the United States of America Regarding the Consular Notification and Access in Cases Involving Minors (Jan. 2, 2019)

Memorandum of Understanding Between the State of Illinois, Department of Children and Family Services and the Consulate General of Mexico in Chicago Regarding Consular Notification and Access in Cases Involving Minors (Sept. 28, 2011)

Memorandum of Understanding Between the Consulate General of Mexico in El Paso, Texas and the Consulate of Mexico in Albuquerque, New Mexico, and the Children, Youth and family Department of the State of New Mexico of the United States of American Regarding Consular Functions in Certain Proceedings Involving Mexican Minors as well as Mutual Collaboration (Mar. 5, 2009)

Department of Children and Family Services Policy Guide 2008.02 (May 16, 2008)

Memorandum of Understanding Between the State of Illinois Department of Children and Family Services and the Consulate General of Mexico in Chicago Regarding Consular Notification and Access in Cases Involving Minors (Sept. 11, 2011)

Memorandum of Understanding Between Los Angeles County Department of Children and Family Services, United States of America and the Consulate General of Mexico in Los Angeles, California, for the Provision of Permanency and Planning for Mexican Minors involved in Dependency Legal Proceedings (Apr. 18, 2016)

Memorandum of Understanding on Consular Protection of Mexican Nationals Between the County of Riverside Department of Public Social Services, California, and the Consulate of Mexico in San Bernardino, California (2007)