Nos. 21-376, 21-377, 21-378, 21-380

IN THE

Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.,
v.
CHAD EVERET BRACKEEN, ET AL.,

CHEROKEE NATION, ET AL.
v.
CHAD EVERT BRACKEEN

STATE OF TEXAS,
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

CHAD EVERET BRACKEEN, ET AL.
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE SUPPORTING NO PARTY

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INTEREST OF THE *AMICUS CURIAE*

The Citizen Equal Rights Foundation ("CERF") was established by the Citizens Equal Rights Alliance ("CERA"). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. CERF is primarily writing this *amicus curiae* brief to explain how political accountability federalism relies on the 14th Amendment applying to the United States to use the structure of the Constitution to limit the territorial war powers of the 1871 Indian policy. This *amicus* brief continues the analysis begun in CERF's *amicus* in *Oklahoma v. Castro-Huerta*, Docket No. 21-429. CERF in working with one of the attorneys of the Goldwater Institute, requested the inclusion of the anti-commandeering cause of action against the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963. CERF and CERA developed anti-commandeering to be a new cause of action to confront the continuing use of the 1871 Indian policy as applied to all Indians still being "wards" of the United States. CERA has been involved in several custody situations involving ICWA. All have been more complicated than regular custody cases by the inclusion of the tribal interest over the child. CERA and CERF have always argued that a child's heritage should be a significant factor in the child's placement. CERF has

always believed that the child's parents and relatives should be the ones to raise the heritage issues of the child.[1] CERF submits this *amicus curiae* brief to explain how federalism can protect not only State court jurisdiction but can empower individual rights and liberty of Native Americans by requiring all State citizens to be treated equally by the State and National governments.

SUMMARY OF THE ARGUMENT

The Indian Child Welfare Act is a cruel law in which Congress has set special provisions to assert its interest in preserving tribal governments and Indians as federal "wards" perpetually. Petitioners State of Texas and the adoptive parents have attempted to end this unacceptable federal interference in state court custody proceedings that harms countless children of Native American descent and implicates the rights and liberties of every American that can suddenly find themselves having all their assumed rights and liberties displaced in state court custody proceedings. While CERF applauds these parents and the State of Texas for stepping up to confront this bad law, the argument

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief. Both Petitioners have filed blanket consents for all *amicus* briefs. Respondent Secretary Haaland has consented by letter of the Solicitor General to the filing of this *amicus curiae* brief. Both the Navajo Nation and Cherokee Nation as intervenors have consented by letter to the filing of this *amicus* brief.

made in this brief may or may not directly support their arguments.

Amicus has been arguing for more than twenty-five years that federal Indian law is schizophrenic and that two sets of conflicting laws over Native Americans have existed since the Civil War. This brief continues the discussion from how this mess was created in the proceeding *Castro-Huerta amicus* into how political accountability federalism was designed to confront the specific holdings in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) that are still governing federal Indian law today through the provisions of the 1871 Indian policy. The first part of the *amicus* will explain how ICWA is based on the 1871 Indian policy to continue treating the Native Americans as "wards" or less than full American citizens. The second section of this brief explains how the 14th Amendment reinforces the constitutional structure to prevent domestic use of territorial war powers to change the status of citizens in States to territorial residents. It finally explains how these changes in law will result in protecting not only Native Americans but all persons subject to the jurisdiction of the United States from being treated as less than competent adults capable of making their own decisions in all court and administrative proceedings.

ARGUMENT

The structure of the Constitution was designed to require federal territorial lands to be made into States to ensure that the territorial war powers of British law that had prevented the American colonists from ever becoming equal to English citizens residing in Great Britain would not interfere with the right of self-governance of the People in our new republic. This

policy was incorporated into the Northwest Ordinance and Ordinance of 1787. These first laws were struck down as unconstitutional in the *Dred Scott* decision. *Dred Scott,* 60 U.S. at 432. As explained in detail in CERF's *Castro-Huerta amicus* brief, the 1871 Indian policy was created by Secretary of War Edwin Stanton to intentionally preserve the territorial war powers unleashed by the Southern desire to indefinitely preserve slavery. President Lincoln was aware that Stanton disagreed with him by placing punishment of the South for the Civil War ahead of restoring the Union and improving the constitutional structure. President Lincoln won the fight for the freed blacks by getting the 13th Amendment passed and the 14th Amendment into full discussion before his death, but he effectively lost the fight with Stanton over the Indians with the adoption of the 1871 Indian policy. This split victory is the basis for the schizophrenia in federal Indian policy today.

Political accountability federalism is traditional federalism that has simply added the concept of holding the governments and their officials accountable to the Constitution's structural protections. It is designed to confront the fact that the territorial war powers continue to affect the ultimate right of the People to self-governance. It is the territorial war power that allows the United States to treat States through federally mandated laws as federal territories. Even bigger than the problem this creates with state versus federal jurisdiction, is the problem created by applying the territorial war power to individuals. Whenever Congress applies a federal mandate treating a State as a Territory it claims the power to change the nature of the personal rights and liberty interests of individuals affected by the federally mandated law. It is undeniable

that ICWA contains several sections that are based on this unconstitutional territorial authority. It is also undeniable that Congress has altered the rights of the parents of the child by giving an interest in the child to the Indian tribe, and it also altered the rights of any person wanting to foster or adopt that child. The effect on the rights of individuals subjected to a federally mandated law like ICWA is insidious and runs much deeper than this Court has ever discussed.

I. ICWA IS BASED ON THE PERPETUAL EXERCISE AND ENFORCEMENT OF THE TERRITORIAL WAR POWERS AS ALLOWED BY THE PLENARY AUTHORITY OVER INDIANS

To be absolutely clear, ICWA is a federally mandated law that is not primarily based on the Spending/General Welfare Clause as was assumed in *New York v. United States*, 505 U.S. 144 (1992). Congress's power to create ICWA derives directly from the *Dred Scott* decision upholding a perpetual federal right to preserve designated property interests on territorial lands (federal public domain) of the United States as explained in CERF's *amicus* in *Castro-Huerta*. While *Dred Scott* upheld the right to slaves as property, the greater problem was the general activation of the territorial war power as a domestic sovereign authority of Congress in *United States v. Winans*, 198 U.S. 371 (1905), which made this unlimited power a federal reserved right. This sovereign authority the Framers of our Constitution tried so hard to keep contained was unleashed as a general extra-constitutional power that could be used in

any law. Amazingly, this unlimited power was not greatly abused until Richard Nixon and Robert Kennedy agreed to use it in 1965. Since then it has been destroying our government processes and civil rights and liberties. Now, the political parties want the majority control so they can control this extra-constitutional power and make extreme laws that appeal to their more radical members. Neither side wants to compromise or find middle ground as was required to pass a law before this unlimited power was unleashed. This unlimited power will destroy our constitutional self-governance if not corrected.

A. ICWA treats States as Federal Indian country not as full separate sovereigns making them Perpetual Federal Territories.

Before the Civil War, this Court determined that Congress had plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories become States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). As inherited from the law of Great Britain, constitutional government was not considered applicable in the wilderness. Until basic forms of government were in place, the King and Parliament exercised unlimited authority with all of the war powers conceivable under British law. The territorial war powers of Great Britain also included the powers designated by the Pope of the Catholic Church to the Sovereign under the Roman law doctrine of conquest. The Framers of our Constitution fought the Revolutionary War to free themselves from the permanent territorial war powers of Great Britain

usually exercised as a right reserved in the sovereign. They intentionally tried to create a new system for domesticating new land areas by applying the principles of the Enlightenment Era. Because constitutional law does not apply in a territory the Framers required that Congress "dispose of the territories." Property/Territory Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States known as the Equal Footing Doctrine was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent the United States from being able to use the territorial war powers in domestic law against the States and individuals after statehood. Since this Court has recently negated the Equal Footing Doctrine, it is imperative that a new equal protection standard be developed to prevent the regular domestic use of the territorial war powers in federally mandated laws like ICWA. *See* CERF *amicus* in *Washington v. United States*, Dkt. No. 17-269, at 6-7, 13 (discussing this Court's need to exercise its equitable jurisdiction to reassert the inviolable principle of equal protection to prevent the federal government's use of territorial war powers against States and individuals).

It is not difficult to find where ICWA applies Indian country to all of the States. Section 1901(1) openly says that "Congress has plenary power over Indian Affairs." Section 1903(10) of ICWA defines "reservation" as Indian country under 18 U.S.C. § 1151. Section 1901(5) says "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, 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 this section, Congress has stated the reason to assert its reserved right territorial power against the States. In section 1902 Congress officially asserts its plenary authority to protect its special interest over Indians as was opined in *Dred Scott* to protect slavery. *See Dred Scott*, 60 U.S. at 410. Essentially, this assertion of the federal reserved right over Indians allows the federal government to treat any State anywhere as Indian country or as if it is still a federal territory.

As the Court held in *Winans*, "At the time the treaty was made, the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands, and to define rights outside of them." 198 U.S. at 379. The opinion continues by quoting the lower court ruling and the basis of the decision as applying the treaty as a concession of tribal rights. But then it turns, ruling that: "In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *Id.* at 381. The Court's ostensible recognition of reserved tribal rights actually created a permanent right of conquest authority in the United States to the territorial lands analogous to that enjoyed by George III as declared in the Proclamation of 1763. *See Worcester v. Georgia*, 31 U.S. 515, 548 (1832). *See also* CERF *amicus* in *Oklahoma v. Castro-Huerta*, Dkt. No. 21-429, at 10 (discussing how the King used the 1763 Proclamation to acknowledge Indian land title in the Indian tribes and to limit the persons able to negotiate treaties with the Indian tribes).

This claimed power is completely extra-constitutional as it is based on the Roman doctrine of conquest. Applying this conquest power as a reserved right allows any law asserting an overriding federal authority protecting Indian tribes to cancel our individual constitutional rights and liberties, whether it comes from Congress the courts, or a federal bureaucrat. It enables a federal treaty or statute to completely displace state jurisdiction and the constitutional citizenship rights that were supposed to vest at statehood. Designating any special rights for Indians in a law is enough to make an area within any State "Indian country" activating the territorial war powers against that State and all persons within that State. Essentially, this Court has allowed the United States to break the whole structural process of turning territorial lands into States.

With the reserved right created in the Indian country, the United States Department of Justice ("USDOJ") also needed to prevent any change to the legal status of the Indians. In *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-566 (1903), USDOJ persuaded the Court "that Congress's plenary power over Indians "has always been deemed a political one, not subject to be controlled by the judicial department of the government," and that "it was never doubted that the *power* to abrogate (Indian treaties) existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy." (emphasis in original). And then, in *Choctaw Nation v. United States*, 318 U.S. 423 (1943), the Court ruled that changes to Indian treaties were prohibited. "But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the

parties." 318 U.S. at 432 (citing *United States v. Choctaw and Chickasaw Nations*, 179 U.S. 494, 531 (1900)). The federal reserved right over the Indians creates absolute federal power over all of their rights and interests in perpetuity. ICWA is an excellent example of how Congress asserts the authority using the territorial war powers to change[2] one of the most fundamental rights and greatest of liberty interests-the right to parent your own children.[3]

B. ICWA changes the rights of the Indian child and fundamental parental rights to the detriment of the child.

Most of ICWA's sections apply to change the rights of parents in state court custody proceedings when a child may be an Indian child as boldly asserted in section 1902. Section 1903(4) defines an Indian child

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[2] Like ICWA, the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§1301-1305, purportedly creates special Indian rights against tribal governments. But as this Court knows well, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), it adopted USDOJ's argument that the ICRA should be interpreted to cut off all Indian rights not brought through 25 U.S.C. § 1303 (habeas petition) ending any chance of the Indians being treated as equals without substantial overruling of precedent. *See also Cross v. Fox*, 497 F. Supp. 3d 432, 438-439 (D.N.D. 2020) (discussing ICRA's attenuated and abridged due process and equal protection rights).

[3] *See Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (holding "[t]he liberty interest…of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court," and that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

as a child that either can become a member of an Indian tribe or is the biological child of a tribal member. Obviously, this is a race-based definition completely dependent on the child's racial biology even when the percentage of Indian heritage is very low. *See Adoptive Couple v. Baby Girl*, 569 U.S. 902 (2013). Congress in ICWA creates its own definition of what is in the best interests of the Indian child depriving these children of the very worked out best interest tests that have evolved in the state courts. 25 U.S.C. § 1902. Two provisions of ICWA stand out for creating real potential harm to Indian children. Section 1912 gives an Indian tribe a direct interest in the child custody proceedings in state court. This adds another party to what are usually already difficult proceedings. But the Indian tribe is actually given more rights over that child than the Indian parent has and free counsel to help enforce the tribal interest. A non-tribal parent almost becomes a non-entity in these proceedings. Admittedly, this Court's decision in *Adoptive Couple*, *supra* has removed some of the blatant favoritism toward tribal interests, but most parents cannot afford to fight an entity that has free government counsel. The Robert's Court seems to have completely forgotten that more than half of the people in the United States do not have the financial means to hire counsel to protect their rights against an asserted federal interest like this one in ICWA.

The ICWA section that creates the most harm is section 1914 that allows an Indian parent to consent to termination of their parental rights and then change their mind even years later and reopen custody proceedings. The uncertainty created by this provision is just plain cruel in what it does to prevent a child from feeling secure. If Congress was attempting to dissuade

non-Indian parents from fostering or adopting an Indian child, it certainly achieved its objective.

Congress has no authority under the Commerce Clause, Indian Commerce Clause, or the Spending/General Welfare Clause to change the most fundamental rights of children and parents in state court custody proceedings. *See Troxel*, 530 U.S. at 65-66. The power to change the status of every person is by far the most insidious part of the federal reserved right power, and it must be stopped either by applying the anti-commandeering doctrine to make these laws unconstitutional or by creating a new equal protection standard that applies to prevent Congress from treating citizens differently.[4] Whether this Court decides to activate more of the Equal Protection Clause of the 14th Amendment against the United States through the Due Process Clause of the 5th Amendment as it first did in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) to enforce political accountability federalism against racial preferences in federal contracting, or decides to expand on the anti-commandeering doctrine as established in *Murphy v. Nat'l Collegiate Athletic Ass'n ("NCAA")* 138 S.Ct. 1461 (2018), by setting an equal protection standard for its use, it must restore the natural individual rights of parents. Anti-commandeering is the right of a person to enforce their equal rights to both due process

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[4] It was no accident that the primary author of this *amicus* brief who was directly affected by ICWA being applied to her custody proceeding through a federal demonstration project that applied ICWA to all child custody proceedings in Bernalillo County, New Mexico, developed the anti-commandeering doctrine as the offensive arm of political accountability federalism.

procedures and to being treated equally with all other state and national citizens. The choice of how to articulate the new standard really depends on how it can be set to allow an equal protection standard to evolve over time and not create immediate legal chaos. This will be further discussed in the last section of this brief after the next section explains what must be done to limit the territorial war power.

II. THIS COURT CREATED THE EQUAL FOOTING DOCTRINE BECAUSE SLAVERY PREVENTED CREATING AN EQUAL PROTECTION STANDARD

The Declaration of Independence set the abstract standards for what our new republic was reaching for in developing a new political system of self-governance. The Declaration boldly asserts that "all men are created equal and endowed by their Creator with certain inalienable rights…" It does not say to place all States on an equal footing. Our early Founders set the principle of equal protection as the ultimate standard although they knew that in their time slavery was legal and persons who were not white were considered lesser human beings in general not only in the government laws but also in the religious laws. In analyzing their own situation under the yoke of British rule from a country over two thousand miles away, they realized they were being discriminated against by the exact same powers being used to enforce the slave trade and that the Spanish King was using to brutally "civilize" all non-Catholics. While England had not enforced this overriding imperial law we now refer to as the territorial war powers as drastically as the Spanish were doing with the Inquisition, there was no

doubt that the British King had the same power over conquered territory and the persons residing in that territory.

The territorial war powers are plenary because they contain the right to redefine the land status and all of the circumstances of every person residing in that land area while it is a territory. British King George III, known to be mentally unstable and unpredictable, had an army to enforce any crazy order he issued against the American colonists, who lacked the right to protest or to access any designated court procedures if arrested. The King could order every American killed or all their property seized on any pretext--real or imagined. The Framers, to succeed in creating a new form of government, had to find a way to prevent these same territorial war powers that were necessary to add land to the existing colonies from usurping any form of written constitutional governance.

A. Returning to the natural rights doctrine is the way to reset federal sovereign authority.

As explained in CERF's *Castro-Huerta amicus*, the Framers limited the territorial war powers by requiring that States be created out of territorial lands pursuant to the Territory Clause, Art. IV, Sec. III, Cl. 2 and other clauses in Article IV to ensure that these territorial war powers could only be used on a temporary and not a permanent basis. They knew from their discussions that the property side was easier to confine than was the personal rights side of this essentially unlimited power that could turn a freeman into a serf, slave or dead man without any due process of law. Because this power did not derive from British

common law, there was no individual right to any process of law as had been developed in protecting rights to property in Britain. This required a new solution.

By 1776, the American colonists had been subject to these unlimited British territorial war powers for over one hundred years and different Colonies had tried various ideas for asserting local self-governance. The most developed opposition to British rule was in Virginia where the House of Burgesses in Williamsburg had gone so far as to issue a Declaration of Rights based on the theory of natural rights of human beings to oppose the total lack of any guarantied human rights by the King under the doctrine of discovery. As a matter of legal principle, some legal basis had to be developed to displace the absolute right of the British King as recognized by the Pope. The concept of natural rights is that God gives every person the same rights simply because they are human beings, cutting out the Pope and the King from the creation of legal rights. Using the principle of natural rights the People designate their own rights and concomitantly, their own form of government to protect and enforce those rights. It is this principle of natural rights that is asserted in the Declaration of Independence and becomes the legal principle to overcome the plenary territorial authority.[5]

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[5] Many documents could be cited for the Framers view of natural rights but a new book by Akhil Reed Amar has made a true study of this founding theory and what it meant. *See* The Words That Made Us, America's Constitutional Conversation, 1760-1840 (Basic Books, © Akhil Reed Amar 2021). <https://www.amazon.com/gp/product/0465096352?ie=UTF8&tag=thewaspos0920&camp=178

The principle of natural rights was a radical departure from the top-down laws of Rome and from the hierarchical system of rights of the British aristocracy. Slavery, however, presented an obvious major impediment to applying equal protection immediately to the new United States. But it was more than slavery that stood in the way of actually applying natural rights principles. Ordinary Americans in all the States had to accept that freed Blacks and Native Americans were to be treated equally to white persons. White society was a long way from accepting freed Blacks as equals. But there was some hope in Americans accepting Native Americans at least as possible citizens in the future.

The decision to create a national policy of assimilation of the Native Americans was no accident. A national policy of Indian assimilation to become full citizens was needed to begin the application of the natural rights principles. This Indian assimilation policy had to be a national responsibility if we were to ensure equal protection by the national government. This was not necessary under the Articles of Confederation which denied to the national government any territorial war powers. When it became apparent that a loose confederation of States was not going to ever create a functional national government, the Constitution's Framers had to find a way to start making all persons equal before the law and the Native Americans were ready made for the experiment.

Beginning the experiment to assimilate the Native Americans to become full and equal citizens and

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the structural limitations to keep the territorial war powers temporary was still not enough to prevent the national government from abusing the territorial war powers to alter a person's status. This issue led to the discussion to require a Bill of Rights to specifically protect the rights of the People from these territorial war powers being abused by the national government. Again, because of slavery there is no way to create a true equal protection requirement in the Bill of Rights. Most of the other rights necessary to eventually create equal protection were included and some specifically against the territorial war power of Britain were also included like the right to bear arms and the prohibition against quartering soldiers in people's homes. A strong Due Process requirement was created but could not be extended into equal protection. It was the 10th Amendment reserving all undesignated powers not specifically granted to the federal government in the Constitution to the States and to the People, respectively, that was supposed to be the ultimate protection against the domestic use of the territorial war powers by the national government. Any time George III wanted to assert a new territorial war power against the colonists he claimed it was a reserved power in the British Crown. Since there was no way to predict what all the newly discovered territorial war powers might be, James Madison instead made all potentially reserved powers belong to the States and the People in the 10th and final amendment of the Bill of Rights.

Even with all of the ways cited above to limit the territorial war powers, it was not enough to prevent the national government from trying to retain the beds and the banks of the rivers and lakes to extend its control beyond the direct regulation of commerce on

waterways. The Public Trust doctrine developed in Britain was not applicable here where the States and federal government shared power over the people. The concepts of the British Public Trust doctrine had to be adapted to our federalism system. In *Pollard's Lessee*, *supra*, this Court split the main parts of the Public Trust Doctrine between the States and federal government and created the Equal Footing Doctrine as the explanation for preventing the federal government from retaining ownership of the beds and banks of a navigable river after statehood. The Equal Footing doctrine placed a trust responsibility on the federal government to protect the interest of the future state.

The Equal Footing Doctrine, however, proved to be a poor substitute for equal protection. While it served as a temporary limitation on the territorial war powers to protect federalism interests, it did not reach far enough to directly protect the individual natural rights of the People to be treated equally in all the different States when formed. Consequently, this Court was able to easily dismiss it in *Winans*, 198 U.S. at 382-384.

In *Winans*, this Court reinterpreted the Indian Treaty fishing right contemporary with its time of execution "when the Federal power was in full control" (*Id.* at 374) and the United States "rightfully acquired the Territories, and being the only Government which can impose laws upon them, ha[d] the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain[ed] in a territorial condition." *Id.* at 383. In other words, it construed the tribal treaty right as a reserved right in the United States vesting Congress with the same plenary power asserted by George III to mistreat the American Colonies.

And in *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), this Court recognized that the right over Territories previously acquired "by discovery and occupation" is precisely the same "'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do," that vested in the United States "[a]s a result of the separation from Great Britain." 299 U.S. at 316-318. But, in *Curtiss-Wright Corp.*, this Court carefully distinguished the extent of the "external sovereignty" manifesting "the powers of the federal government in respect of foreign or external affairs," from "those in respect of domestic or internal affairs." *Id.* at 315-319. It first noted that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory, **unless in respect of our own citizens**." (emphasis added). *Id* at 319. And in deference to the individual natural rights-based structural federalism our Constitution embodies, it then emphasized that, "in respect of internal affairs [...] the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers," recognizing that "the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states." (emphasis in original). *Id.* at 315-316. *See also Somerset v. Stewart* (KB 1772) 87 ER 499 (distinguishing the legal treatment of slavery in England and the American Colonies).

Under current federal law, every treaty interest approved of by this Court deprives all persons located near that interest from every constitutional right. While Justice Sotomayor may rightfully decry the inequality of Puerto Ricans in *United States v. Vaello Madero*, Dkt. No. 20-303 (Apr. 21, 2022), (Sotomayor, J. dissent. op. at 33), she needs to wake up and realize that her majority opinion in *Herrera v. Wyoming*, 139 S.Ct. 1686 (2019) extending Indian treaty rights to a few Indians could deprive millions of Americans of their rights to use the public lands for all recreational purposes under the federal reserved rights doctrine.

In his concurring opinion in *Vaello Madero*, Justice Gorsuch emphasized how, in *Downes v. Bidwell*, 182 U.S. 244 (1901), the Court had incorrectly treated Puerto Rico as if it was an "unincorporated Territory" that "remained 'foreign to the United States' because, unlike Territories in the American West, Congress had not done enough to indicate its intention to 'incorporate' the island." *Vaello Madero*, (Gorsuch, J. concur. op., Slip op. at 25-26 (quoting *Downes*, 182 U.S. at 341-342 (1901)). He also noted how the Court later held that "very few constitutional limits on the power of the federal government could be relied upon in the newly acquired Territories absent a clear congressional statement" of its plenary authority over the Territories and its inhabitants. *Vaello Madero*, (Gorsuch, J. concur. op., Slip op. at 26-27 (citing *Hawaii v. Mankichi*, 190 U.S. 197, 215-216 (1903)). As counsels have previously argued before this Court, it is now clear that a Madisonian faction of USDOJ attorneys similarly managed to ensure that, under 'Indian country' (18 U.S.C. § 1151-1152) status, Indians and non-Indians alike could remain racially 'foreign' to and separate from the United States within land areas of existing

States perpetually treated as Territories. ICWA, as USDOJ argues, expresses Congress's plenary authority over Indians and territorial land areas and uses this authority to commandeer state court custody proceedings. *See supra;* CERF *amicus* in *United States v. Washington*, Dkt. No. 17-269, at 28-30.

In *Vaello Madero*, Justice Gorsuch expresses his frustration that, "instead of confronting their errors directly, this Court has devised [] workaround[s] employing "specious logic" and legal "fictions" that merely 'kick the can down the road,' "leav[ing] the Insular Cases [and the Indian cases] on the books." *Vaello Madero*, (Gorsuch, J. concur. op., Slip op. at 29). This serves to perpetuate the territorial war powers, unconstitutional racial discrimination, and the federal government-driven factionalism about which the Founders were so concerned. The Court's approach to problem-solving also has left the lower courts without sufficient guidance in applying the anticommandeering doctrine to address federal assertions of plenary authority in these unincorporated and fictional Territories to ensure federalism and the protection of individual natural rights. *Id.* (citing *Fitisemanu v. United States*, 1 F4th 862, 873 (10th Cir. Jun. 15, 2021) (ultimately holding the Constitution's Citizenship Clause (Amendt. 14, Sec. 1) applies against the federal government in the unincorporated Territory of American Samoa)). 1 F4th at 907-908.

It is not coincidental that Justice Gorsuch, like Justice Thomas *infra*, invokes, in *Vaello Madero*, the words of former Justice Harlan. He understood the federal government's manipulation of racial discrimination and the need to squarely address this Court's constitutional errors – ""no question can be settled until settled right."" *Id.*, Slip op. at 31. (citations

omitted). Justice Harlan also correctly recognized that "our Nation's government 'has no existence except by virtue of the Constitution,'" and consequently, "it may not ignore that charter in the Territories any more than it may in the States." *Id.*, Slip op. at 28 (quoting *Downes*, 182 U.S. at 382 (Harlan, J. dissent. op.)). The Roberts Court knows better.[6]

While CERF greatly praises this Court for trying to reel in the overbroad interpretation of the Territory Clause in the recent decisions regarding the territory of Puerto Rico, this territorial war power genie cannot be stuffed back into its lamp or bottle without activating the equal protection clause against Congress to prevent the changing of individual rights and liberties. CERF also agrees that broadly activating the equal protection clause against Congress to terminate all of the territorial war powers at once would "usher in potentially far-reaching consequences." *See Vaello Madero*, Slip op. at 6.

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[6] Indeed, since the Chief Justice represented the State of Hawaii in *Rice v. Cayetano*, 528 U.S. 495, 517-518, 523 (2000), he knows better. In *Rice* this Court rejected "the *Mancari* case and the [congressional enactments, Indian treaty interpretation maxims, and tribal trust self-governance] theory upon which it rests," which the State relied on to sustain electoral qualifications based on tribal ancestry. This Court correctly held that, "[u]nder the Fifteenth Amendment, voters are treated not as members of a distinct race, but as members of the whole citizenry."

B. Abraham Lincoln understood what was required to completely limit the territorial war powers and set up the changes at the end of the Civil War to allow us to reach for the fulfillment of the Framers goal of equality as set in the Declaration of Independence.

As fully discussed in the CERF *amicus* in *Castro-Huerta*, President Lincoln passed a modernized Indian assimilation policy in 1863. *See* 12 Stat. 792-794. President Lincoln understood that we would never be able to realize the full promise of the Declaration of Independence, Constitution, and Bill of Rights without formally ending slavery, as was achieved in the 13th Amendment, and by adopting an equal protection standard in the 14th Amendment. He knew and argued vehemently that the powers unleashed in the *Dred Scott* decision could destroy all of what the Framers were hoping to achieve with the adoption of the principle of natural rights as the basis for self-governance. By getting his Indian policy passed he tried to prevent the 1871 Indian policy as it was finally named from preserving the territorial war powers. He saw the reality of the whole situation clearly and did his best to prevent the war powers necessary to prosecute the Civil War from becoming permanent authority in Congress. Because Lincoln had almost no formal education it is not clear how he adopted a truly originalist viewpoint of the Constitution, but it is undeniable that he did. As said now *ad nauseam* by CERF, Lincoln may have won the bigger part of this fight in freeing the slaves and getting the equal protection clause passed. But, Edwin Stanton won the other part in making the Indians permanent wards.

Edwin Stanton in arguing for the 1871 Indian policy, created a long term means to preserve the territorial war powers in the Congress and Executive branches. Stanton even argued for the creation of the USDOJ in 1870, and he likely set the goal of making a true federal reserved right through the Indians. Ultimately, this Court is the only part of our government that made a reserved right in the United States over the Indians that allows the Congress and Executive to deny the States and People all Constitutional rights and protections as if we were all still living in federal Indian country in federal territories. And it this Court which has the only means to undo these legal decisions and give the States and People their right of self-governance back.

To give everyone equal protection of the law requires ending the Nixon Indian policy of promoting tribal sovereignty and its greatly expanded federal reserved rights doctrine that is the basis of ICWA and many other insidious laws that now permeate our legal system. One of the first cases that needs to be expressly overruled is *Morton v. Mancari*, 417 U.S. 535 (1974) and its political versus racial deference to the Nixon policy. That it was President Nixon who exploited this virtually unlimited territorial power preserved in the 1871 Indian policy and unleashed it against the rights and liberties of all the People is not going to surprise anyone. The idea that the Supreme Court of the United States could even consider upholding Nixon's greatest scheme and continue allowing it to deprive our rights and liberties is appalling.

It seems incredible that there may still be Justices who actually believe the promotion of tribal sovereignty is actually benefitting the Indian people.

CERF strongly suggests that anyone who believes this is a good policy for the Indian people visit a real old Indian reservation and see the poverty and desperation that exists. The lack of decent housing and the lack of the most basic services for water and electricity are very real and completely reprehensible in the 21st Century. There is no excuse for this no matter how big the federal lies have been. This Court is at its greatest when it protects the People's rights and liberties based on constitutional principles. The more controversial the decision, the more important it is that the decision be based on those principles. Ending the Nixon Indian policy requires explaining why promoting tribal sovereignty is against the fundamental constitutional principle of the equal protection of the laws for all. This does not mean that all of the equality principle must be immediately invoked.

The choice of whether this nation is going to follow the promise of the Framers and Lincoln or to follow the will of the Southern conspirators who wanted to save slavery and Stanton is now before you in the *Castro-Huerta* case and in these consolidated cases. It is now completely before this Court whether the 14th Amendment or the territorial war powers prevail. The last section of this brief suggests a way to extend the application of the 14th Amendment equal protection clause without immediately overruling almost all of federal Indian law.

III. THIS COURT CAN DECLARE THAT A PERMANENT LAND CLASSIFICATION OF INDIAN COUNTRY IS UNCONSTITUTIONAL AND ENFORCE ITS DECISION BY EXPANDING THE APPLICATION OF THE 14TH AMENDMENT AGAINST CONGRESS.

The Framers of the Constitution believed that keeping the territorial war powers separated from the operation of the domestic laws of a constitutional government was crucial to protect individual rights. The Framers had learned that they had to find a way to limit the national government's authority to make a war or national emergency that suspended constitutional governance. An entire constitutional structure separating powers and creating checks and balances was designed to prevent the power of the People from being usurped. We now have a new and powerful tool to fight the government overreach being called the anti- commandeering doctrine. This new right to hold the federal government accountable has now developed into preventing the United States from commandeering those powers deliberately left to states and local governments in the Constitutional structure to make decisions that protect local interests and individual rights. *See Murphy v. NCAA*, *supra*.

The solution to this case and frankly to the whole jurisdictional mess, is to restore concurrent state jurisdiction over the Indians and their lands in all civil and criminal situations. We need to restore the general jurisdiction of the States over all the people and lands within their borders. This can be done by declaring "Indian country" unconstitutional using the anti-commandeering doctrine. Indian country was a

temporary land designation as created by this Court. Indian country was never intended to be a permanent federal land status as was allowed in *Fellows v. Blacksmith*, 60 U.S. 363 (1857), and more recently by statute. As a permanent land status Indian country violates the express language of the Territory Clause that requires Congress to dispose of the territories commandeering concurrent state jurisdiction. *See Commonwealth of Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016) and *Puerto Rico v. Aurelius Investment LLC, et al.*, 140 S.Ct.1649 (2020).

Using the anti-commandeering doctrine to declare Indian country unconstitutional corrects the constitutional position of the United States by revoking the reserved rights doctrine immediately. As explained above, in discussing *Winans*, it is the perversion of the Indian country definition into claiming a reserved federal interest in the territorial lands subject to Indian treaties that is the source of the unlimited federal power that is nullifying our civil rights and liberties by making the constitution inapplicable. Whether in the Indian cases or the Insular cases the main issue is the same—a perpetual reserved federal interest in the territory with no requirement to dispose of it is nullifying our constitutional rights.

To keep Congress from having the ability to overrule a decision of this Court declaring Indian country unconstitutional requires this Court to further extend the Equal Protection Clause as applying to Congress. Counsel proposes extending the equality of state citizenship as suggested by Justice Thomas in his concurring opinion in *Vaello Madero* , (Thomas, J. concur. op., Slip op. at 19-22) (quoting former Justice Harlan's majority opinion in *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896)) and (quoting *Plessy v. Furguson*,

163 U.S. 537 (1896) (Harlan, J. dissent. op. at 555, 559, 563), but not directly against the Territory Clause or the Indian trust relationship. The equality of citizenship clause must be applied to Congress directly. By activating the equal citizenship clause against Congress you can direct that no new or existing law can treat citizens of the United States unequally. Striking down Indian country for becoming a permanent power exceeding the authority of the Territory Clause restores the temporary nature of the power making the structural correction. Striking down ICWA for commandeering parental rights gets the Court to the 14th Amendment side. Extending on the argument made in *Troxel*, 530 U.S. at 65-66, that parental rights are based in the 14th Amendment Due Process Clause, this Court can make it clear that parental rights must apply equally to all American citizens in every State and arguably territory.

By restoring the original meaning of the Territory Clause and applying the 14th Amendment citizenship clause directly to the parental rights of all without directly touching the Indian trust relationship or racial issue, Congress is given time to create a transition policy for the Native Americans. Also by striking down ICWA, this Court can expound on why the territorial status cannot be allowed to displace state jurisdiction to protect those powers that were deliberately left to the States like the *parens patriae* doctrine, public trust doctrine, and the police powers.

This brief's primary author argued strongly in *Adarand* that the 14th Amendment equal protection clause should be reverse incorporated through the 5th Amendment Due Process Clause. She now wonders if it would not be better to incorporate the equal citizenship clause through the 10th Amendment to forever prevent,

through the structural protection of federalism, any chance of the federal government recreating a federal reserved right.

Alternatively, ICWA can be ruled unconstitutional by holding that Congress commandeered the *parens patriae* doctrine from the States. *See* CERF *amicus* in *Castro-Huerta*, Dkt. No. 21-429, at 28. It is in the Insular cases that the *parens patriae* doctrine is allowed to be an ongoing federal power. But these rulings rely on the Constitution never becoming applicable to the newly acquired territory, meaning that just ruling Indian country unconstitutional clears up the jurisdictional claim of the *parens patriae* belonging to the federal government. No reserved federal territorial power equals no federal *parens patriae* authority in a State.

This Court, in this case, can also rule that Congress cannot command the States to violate the 14th Amendment requirement that the States treat all persons equally. This requires the elimination of Indian country so that the Constitution applies in the whole State. Any of the above solutions prevents a flat out application of equal protection directly against the Indian trust or as a race based challenge. The Indian trust relationship will be substantially shaken but not destroyed by this Court, leaving it to Congress to decide how to integrate the Indian nations if they will do it. At least it will allow a transition by not disrupting everything at once. Ending federal Indian country is the necessary first step to restore constitutional law. By itself this will send a major shock wave through the Indian reservations. This Court can explain why ending Indian country is necessary to make the Constitution apply. This Court can also make it clear that it can protect individual Indian rights but has little ability to

protect tribal sovereignty without Congressional legislation. We all need Congress to again pass legislation that attempts to balance the competing interests.

CONCLUSION

The decision of the Court of Appeals should be affirmed in part and reversed in part.

Respectfully submitted,
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