REGENT UNIVERSITY SCHOOL OF LAW

22nd ANNUAL LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW MOOT COURT COMPETITION

No. 22-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

STUART IVANHOE, SECRETARY OF THE INTERIOR, *et al.*,

Petitioners,

v.

JAMES AND GLENYS DONAHUE, AND THE STATE OF WEST DAKOTA,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WEST DAKOTA

JAMES AND GLENYS DONAHUE, AND THE STATE OF WEST DAKOTA, *Plaintiffs* v. STUART IVANHOE, SECRETARY OF THE INTERIOR, ET AL., *Defendants*.	**Case No. 20-cv-113**

MEMORANDUM OPINION AND ORDER

Before Marcus Bray, District Judge:

This case comes before the Court on Cross-Motions for Summary Judgment arising out of constitutional challenges to the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq*. For the reasons set forth below, Plaintiffs' motion is DENIED and Defendants' motion is GRANTED.

I. The Parties and Background

Plaintiffs are one state, West Dakota, and two individuals, James and Glenys Donahue ("Plaintiffs").[1] Defendants are the United States of America, the United States Department of the Interior (the "Interior") and its Secretary, Stuart Ivanhoe ("Ivanhoe"), in his official capacity

[1] Defendants concede that Plaintiffs have standing to bring the claims in this case.

("Federal Defendants"). Shortly after suit was filed, the Cherokee Nation and the Quinault Nation ("Tribal Defendants") filed an unopposed motion to intervene, which the Court granted.

A. State Plaintiff

West Dakota has three Indian tribes within its borders and brings this suit in its capacity as a sovereign state. Indian children constitute approximately twelve percent of West Dakota's child custody proceedings, including foster care and adoptions, annually. West Dakota alleges ICWA abridges its sovereignty by regulating child custody proceedings and managing child welfare services. It thereby contends ICWA usurps the lawful authority of state agencies charged with protecting child welfare. West Dakota asserts further that implementation of ICWA's provisions imposes significant burdens on its state agencies and courts. The West Dakota Child Protection Service ("CPS") publishes and distributes an ICWA Compliance Manual setting forth CPS's policies and procedures for implementing ICWA. The CPS Manual states that if an Indian child is taken into CPS custody, "almost every aspect of the social work and legal case is affected." If ICWA applies, the legal burden of proof for removal, obtaining a final order terminating parental rights, and restricting a parent's custody rights is higher.

B. Private Plaintiffs

The Donahues sought to adopt Indian Child Baby C. Baby C's biological mother is an enrolled member of the Quinault Nation, and her biological father is an enrolled member of the Cherokee Nation. After her birth, Baby C resided with her maternal aunt. Upon receiving reports that Baby C, then eight months old, was often left unattended for long periods while her aunt worked, CPS removed Baby C from her maternal aunt's custody and subsequently placed her in foster care with the Donahues. CPS notified both the Quinault Nation and the Cherokee Nation as required by ICWA. Baby C lived with the Donahues for two years.

In August 2019, a West Dakota state court, in voluntary proceedings, terminated the parental rights of Baby C's biological parents, making her eligible for adoption under West Dakota law. In September 2019, the Donahues began adoption proceedings with the consent of both biological parents and the maternal aunt. The Cherokee Nation and Quinault Nation were notified in compliance with ICWA. On October 24, 2019, the Quinault Nation notified the state court that it had located a potential alternative placement for Baby C with non-relatives in Nebraska. For reasons not disclosed in the record, the placement fell through. The Quinault Nation and the Cherokee Nation reached an agreement whereby the Quinault Nation was designated as Baby C's tribe for purposes of ICWA's application in the state proceedings. No one intervened in the West Dakota adoption proceeding or otherwise formally sought to adopt Baby C. The Donahues entered into a settlement agreement with CPS and Baby C's guardian ad litem stipulating that ICWA's placement preferences did not apply because no one else sought to adopt Baby C. In January 2020, the Donahues' adoption of Baby C was finalized in West Dakota state court.

In April 2020, the Donahues became foster parents and planned to adopt Baby S, an Indian Child. Baby S's biological mother was a member of the Quinault Nation but died of a drug overdose in February 2020. The identity of Baby S's father is unknown. From his birth in January 2020 until April 2020, Baby S was in the custody of his paternal grandmother. She was unable to continue caring for him due to her failing health, and Baby S was moved into foster care with the Donahues. The Donahues filed a petition for adoption of Baby S in May 2020. The grandmother consented to the Donahues' adoption of Baby S, but the Quinault Nation opposed the adoption. The Quinault Nation informed CPS that it had identified two potential adoptive families for Baby S in a Quinault Tribe located in another state.

C. Procedural History

After learning of the Quinault Nation's opposition, the Donahues and West Dakota filed suit against the Federal Defendants on June 29, 2020. Plaintiffs allege certain provisions of ICWA are unconstitutional and seek injunctive and declaratory relief. Specifically, Plaintiffs claim that ICWA §§ 1913(d), 1914, and 1915(a)–(b) violate the Equal Protection Clause of the Fourteenth Amendment. They further allege ICWA §§ 1912(a) and (d)–(f), 1915(a)–(b) and (e), and 1951 commandeer the states in violation of the Tenth Amendment. The parties filed cross-motions for summary judgment on September 3, 2020.

D. Standard of Review

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The parties concede that no genuine dispute as to any material fact exists. Thus, the motions are ripe for disposition. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

II. Discussion

A. The Indian Child Welfare Act

Congress enacted ICWA in response to reports of increasing numbers of Indian children being separated from their families and tribes through adoption or foster care placement in non-Indian homes. 25 U.S.C. § 1901. Congress's authority to regulate the adoption of Indian children arises under the Indian Commerce Clause and other constitutional authority. *Id*. § 1901(1).

Congress prefaced the Act with the following findings:

> [T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children…. [A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.… 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.

Id. § 1901(3)–(5).

To remedy these problems, Congress intended ICWA

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Id. § 1902.

1. Covered Children—Section 1903

ICWA governs state court child custody proceedings involving an "Indian child," defined as any unmarried person under eighteen who is the biological child of a member of an Indian tribe and either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe. *Id.* § 1903(4). States are responsible to determine whether a child is an Indian child subject to ICWA's requirements. *Id.* § 1903(5).

2. Intervention Rights—Sections 1911 and 1912

The Indian custodian of the child and the Indian child's tribe have the right to intervene at any point in state proceedings for the foster care placement or termination of parental rights of an Indian child. *Id.* § 1911(c). Where such proceedings are involuntary, ICWA requires that the parent, the Indian custodian, the child's tribe, or the Secretary of the United States Department of the Interior be notified of the pending proceedings and of their right to intervene. *Id.* § 1912(a). Section 1912(d) requires any party seeking a foster care placement of an Indian child or termination of parental rights under State law to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of

the Indian family and that these efforts have proved unsuccessful." The party must also offer evidence, "including testimony of qualified expert witnesses," that the parent's continued custody will likely cause the child "serious emotional or physical damage." *Id.* § 1912(e)–(f). Proof must be by "clear and convincing evidence" for foster placement, *Id.* § 1912(e), and "beyond a reasonable doubt" for termination. *Id.* § 1912(f).

3. The Right to Withdraw Consent—Section 1913

In voluntary proceedings, the parent can withdraw consent for any reason before entry of a final decree of adoption or termination, and the child must be returned to the parent. *Id.* § 1913(c). If consent was obtained through fraud or duress, a parent may petition to withdraw consent within two years after the final decree of adoption and, upon a showing of fraud or duress, the court must vacate the decree and return the child to the parent. *Id.* § 1913(d).

4. The Right to Petition to Invalidate a Decree—Section 1914

An Indian child, a parent or Indian custodian from whose custody the Indian child was removed, or the child's tribe may file a petition in any court of competent jurisdiction to invalidate an action in state court for foster care placement or termination of parental rights if the action violated any provision of §§ 1911–13. *Id.* § 1914.

5. Placement Preferences—Section 1915

ICWA mandates placement preferences for Indian Child foster care, pre-adoptive placements, and adoptive proceedings:

> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

Id. § 1915(a).

Similar standards govern foster care or pre-adoptive placements. *Id.* § 1915(b). If a tribe establishes by resolution a different order of preferences, the state court or agency effecting the placement "shall follow [the tribe's] order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* § 1915(c).

6. Record-Keeping Requirements—Sections 1915(e) and 1951(a)

States in which an Indian child's placement was made must maintain records of the placement, and those records must be made available at any time upon request by the Secretary of the Interior or the child's tribe. *Id.* § 1915(e). A state court entering a final decree in an adoptive placement "shall provide the Secretary with a copy of the decree or order" and information as necessary regarding "(1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and addresses of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placement." *Id.* § 1951(a).

B. Tenth Amendment/Anticommandeering Claim and Preemption

The Plaintiffs assert that ICWA §§ 1901–23 and 1951 violate the anticommandeering doctrine by requiring West Dakota executive agencies to apply federal standards to state-created claims. Federal Defendants respond that ICWA preempts conflicting West Dakota law under the Supremacy Clause and does not violate the anticommandeering doctrine because it regulates the conduct of private individuals. Plaintiffs rebut the preemption defense by arguing the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, does not confer power on Congress to regulate domestic relations simply because the beneficiaries of the law are Native Indians. Plaintiffs insist the Indian Commerce Clause only confers power to regulate commerce "with the individuals composing those tribes." *United States v. Holliday*, 70 U.S. 407, 417 (1865).

Congress's Plenary Authority over Indian Affairs. The Indian Commerce Clause empowers Congress "[t]o regulate Commerce . . . with the Indian Tribes." The Supreme Court has long understood the Indian Commerce Clause to confer "plenary power over Indian affairs on Congress." *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from [the Indian Commerce Clause]."). The Framers entrusted exclusive and supreme authority to the federal government over Indian affairs, including the power to prevent states from interfering with federal policy towards the Indians. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history."). It would be manifestly wrong to vitiate Congress's authority in a field in which it wields plenary power. Plaintiffs' claim that Congress lacked the power to enact ICWA is therefore meritless.

ICWA preempts conflicting state laws. The Supremacy Clause provides that federal law is the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Although there are three categories of preemption, the only relevant category here is conflict preemption which occurs when "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and, therefore, the federal law takes precedence and the state law is preempted." *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018). Conflict preemption requires that the challenged provision of the federal law "represent the exercise of a power conferred on Congress by the Constitution" and "must be best read as one that regulates private actors" by imposing restrictions or conferring rights. *Id.* at 1479–80.

Congress enacted ICWA to "establish[] minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902. The law furthers Congress's dual policy to protect the best interests of Indian children and promote the stability and security of Indian families and tribes. Moreover, ICWA clearly regulates private individuals. Each of the challenged provisions applies within the context of state court proceedings involving Indian children, and the private individuals who seek to foster or adopt them. The Supremacy Clause therefore compels the West Dakota courts to enforce ICWA's provisions. Plaintiffs' claim that various ICWA provisions unconstitutionally commandeer state agencies is a closer call but ultimately fails.

Anticommandeering Doctrine. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The anticommandeering doctrine derives from the Tenth Amendment and reflects the Founders' structural decision to withhold from Congress the power to issue orders directly to the states. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that a federal law requiring state chief law enforcement officers to conduct background checks on handgun purchasers "conscript[ed] the State's officers directly" and violated the anticommandeering doctrine). The doctrine reflects the distinction between a law that unconstitutionally "conscript[s] state governments as [the federal government's] agents" and a law that establishes federal rights or obligations that the states must honor despite any conflict with state law. *New York v. United States*, 505 U.S. 144, 178 (1992). Congress does not violate the anticommandeering doctrine when it enacts a law that "imposes restrictions or confers rights on private actors." *Murphy*, 138 S. Ct. at 1480.

None of ICWA's provisions violate the anticommandeering doctrine because they do nothing more than confer rights on Indian children and families. Each provision governs both state agencies and private parties and therefore "evenhandedly regulates an activity in which both States and private actors engage." *Id.* at 1478. Section 1912(d)'s "active efforts" requirement, for example, does not command state agencies "to enact or refrain from enacting" any laws or regulations, *id.*, while at the same time not mandating that private actors do the same. Rather, § 1912(d) requires both private and governmental parties

> seeking to affect a foster care placement of, or termination of parental rights to, an Indian child under State law [to] satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

This provision simply confers minimum federal protections on Indian children, parents, and tribes in state child custody proceedings. The source of regulation under section 1912 is thus federal, not state. In sum, none of ICWA's provisions commandeer West Dakota agencies.

For these reasons, Plaintiffs' Tenth Amendment claims are meritless.

C. Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. Where a law draws classifications based on race, the law must satisfy strict scrutiny. But where the classification is political, rational basis review applies. *See Morton v. Mancari*, 417 U.S. 535, 555 (1974). Plaintiffs assert that ICWA §§ 1913, 1914, and 1915(a) and (b) contain race-based classifications that fail strict scrutiny. Defendants contend that these provisions contain political classifications subject only to rational basis review.

ICWA's Classification is Politically, not Racially, Based. ICWA's protections are based on the political classification of the Indian Tribes. *Mancari* rejected a challenge to a law affording

qualified Indian applicants[2] a hiring preference over non-Indians for employment within the Bureau of Indian Affairs ("BIA"). *Id.* at 555. Central to the Court's holding was "the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes" and "the unique legal status of Indian tribes under federal law." *Id.* at 551. The BIA's hiring preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. The preference was thus a non-racial "employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 553–54; *see also United States v. Antelope*, 430 U.S. 641, 645 (1977) ("[F]ederal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications."). Given that ICWA's classification is politically and not racially based, it need only satisfy rational basis review. *See Mancari*, 417 U.S. at 555.

ICWA Passes Rational Basis Review. Because ICWA's beneficiaries are classified according to their political status, ICWA's provisions will be upheld so long as their "special treatment of Indian children and families is rationally linked to the fulfillment of Congress's unique obligation toward the Indians." *Id.* It was eminently rational for Congress to believe its goal, stated in section 1902, of "promot[ing] the stability and security of Indian tribes" would be furthered by ensuring that an Indian child is raised in a household that respects Indian values and traditions. Having a tribe raise the child conceivably increases the likelihood that the child will eventually join a tribe. Moreover, because many tribes descended from larger historical bands and continue to share close relationships and linguistic, cultural, and religious traditions, placing a child with an Indian family could promote maintaining ties between the child and the child's tribe

[2] Defined as those having one-fourth or more degree Indian blood with membership in a federally recognized tribe. *See* 417 U.S. at 554.

and culture. *See, e.g.*, Greg O'Brien, *Chickasaws*: *The Unconquerable People,* Mississippi History Now (Sept. 23, 2020, 9:20 AM), https://mshistorynow.mdah.state.ms.us/articles/8/chickasaws-the-unconquerable-people.

Given that the current social, cultural, and political standards of an Indian community may transcend tribal lines, Congress could rationally conclude that § 1915(a) and (b) would foster an Indian child's connection to those aspects of his tribe. Congress also could rationally conclude that placing Indian children with families that are part of another tribe, where they would be more likely to be surrounded by others who had given serious consideration to maintaining a connection with their own tribe—even if not members of the child's tribe—will promote the stability and security of Indian tribes. It is not the role of the judiciary to second guess these legislative judgments.

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment is DENIED, and Defendants' Motion for Summary Judgment is GRANTED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 21-19042

JAMES AND GLENYS DONAHUE, AND THE STATE OF WEST DAKOTA,

Appellants,

v.

STUART IVANHOE, SECRETARY OF THE INTERIOR, et al.,

Appellees.

Appeal from the United States District
Court for the District of West Dakota
Marcus Bray, District Judge, Presiding

Argued and Submitted December 28, 2021
Before Elijah Tower, Chief Judge, and Anna Ursidae, and Alexa Surrey, Circuit Judges

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OPINION

Surrey, Circuit Judge:

Two children, Baby C and Baby S, found loving adoptive parents who seek to provide for them. Because of certain provisions of the Indian Child Welfare Act of 1978 (ICWA), however, the children face the threat of removal from the only family they know and placement in another state with strangers. Plaintiffs are the state of West Dakota and a married couple, the Donahues, who have adopted Baby C and seek to adopt Baby S. Defendants are the United States of America and two intervening Indian tribes. The district court granted summary judgment in favor of Defendants, rejecting Plaintiffs' claims that ICWA violated the Tenth Amendment and the Equal Protection Clause. Plaintiffs appealed. For the reasons below, we REVERSE.

I. THE INDIAN CHILD WELFARE ACT (ICWA)

Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 et seq., to address rising concerns over "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). The opinion below, which we adopt by reference here, provides a thorough and accurate summary of the relevant provisions of ICWA.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *See West Dakota v. United States*, 497 F.3d 346, 350 (13th Cir. 2007). Summary judgment is appropriate when the movant has demonstrated "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As noted by the court below, both parties have conceded that the relevant facts are undisputed and that the issues before the court are ripe for disposition as a matter of law.

III. DISCUSSION

The District Court rejected Plaintiffs' claims that various ICWA provisions commandeer the States in violation of the Tenth Amendment. The court held that Congress passed ICWA pursuant to its enumerated powers, and thus authority over Indian children was never reserved to the States. The court reasoned that to the extent ICWA conflicts with state law, ICWA preempts state law under the Supremacy Clause. The court further held that ICWA's provisions do not violate the anticommandeering doctrine because they merely confer rights on Indian children and families.

We disagree. ICWA unconstitutionally requires state courts and executive agencies to apply federal standards and directives to state-created claims. The anticommandeering doctrine forbids Congress from issuing orders directly to the states. *Murphy v. NCAA*, 138 S. Ct. 1470, 1475 (2018). To be sure, state and federal courts share concurrent jurisdiction in many legal matters. *Mims v. Arrow Fin. Ser., LLC,* 565 U.S. 368 (2012). Where a state court would hear a comparable state law claim, it must also hear a federal claim. *Testa v. Katt*, 330 U.S. 386 (1947). Thus, Congress may create a private federal cause of action and authorize concurrent jurisdiction in state courts. When it does so, state courts must hear the federal claim. The controversy here, however, does not involve a federal cause of action that may be adjudicated in either a state or federal forum. *See* 25 U.S.C. § 1915(a). Instead, ICWA commands that states modify existing state law claims by incorporating federal standards. *Id.*

While ICWA does confer rights on private parties, that is not the end of the matter. ICWA also dictates what states must do and imposes on them the costs and burdens of enforcing a federal policy. *See Murphy*, 138 S. Ct. at 1477 (anticommandeering "prevents Congress from shifting the costs of regulation to the States"). The following ICWA provisions commandeer state agencies and officials to implement the federal program: (1) the placement preferences in § 1915(a) and (b); (2) the placement-record requirement in § 1915(e); (3) the notice requirement in § 1912(a); (4) the expert witness requirements in § 1912(e) and (f); and (5) the recordkeeping requirement in § 1951(a). For instance, ICWA's active-efforts requirement demands extensive action by state and local agencies as a condition to fulfilling their obligations to Indian children. *See, e.g.*, *Doty-Jabbaar v. Dallas County Child Protective Services*, 19 S.W.3d 870, 875-76 (Tex. App. 2000) (holding that county agency failed ICWA's active-efforts requirement before terminating a birth mother's rights).

We reach the same conclusion as to the "expert witness" requirements in § 1912(e) and (f). These provisions prohibit placement or termination absent "evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." As a result, state agencies must present the testimony of expert witnesses, with specific qualifications, when they seek to place an Indian child in foster care or terminate parental rights.

Through ICWA, Congress regulates States and their officials, not individuals. The Constitution does not grant Congress that power. We reject Federal Defendants' argument that the Indian Commerce Clause saves ICWA's mandate to the states. Regardless of the Indian Commerce Clause's reach, no provision in the Constitution grants Congress the right to "issue direct orders to the governments of the States." *Murphy*, 138 S. Ct. at 1478.

Because we hold that ICWA violates the Tenth Amendment's anticommandeering doctrine, we do not find it necessary to reach the issue of whether Congress had authority to enact ICWA. We note, however, that this authority is far from clear. We doubt the Indian Commerce Clause, which is arguably coextensive with the Interstate Commerce Clause, confers on Congress the power to regulate child custody cases when children are not persons in commerce, nor do such cases have any impact on commerce with Indian Tribes. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 564 (1995) (holding that the regulation of "child custody" is not the regulation of "commerce"); *Gibbons v. Ogden*, 22 U.S. 9 (Wheat.) 1, 189 (1824) (holding "goods are the subject of commerce" but "persons are not").

In sum, we conclude that ICWA is unconstitutional because it runs afoul of the Tenth Amendment anticommandeering doctrine. Because we hold that ICWA violates the Tenth

Amendment, we need not reach the equal protection issue. We REVERSE the district court's grant of summary judgment for Defendants and REMAND for entry of judgment in favor of Plaintiffs.

Tower, Chief Judge, Concurring:

I agree with the result the majority reaches, but for a different reason. The District Court properly analyzed the Tenth Amendment and Preemption issues; however, it erred, and should be reversed, on Equal Protection grounds.

Plaintiffs claim that §§ 1913(d), 1914, and 1915(a) and (b) violate the Fifth Amendment's Equal Protection Clause. The District Court rejected Plaintiffs' claims, holding those provisions created political, not racial, classifications. Because it determined that ICWA contains no suspect classifications, the court held the challenged provisions are subject to, and pass, rational basis review. The district court erred because it misconstrued controlling Supreme Court precedent regarding racial classifications.

The district court's reliance on *Morton v. Mancari*, 417 U.S. 535 (1974) is misplaced. *Mancari* did not create a broad rule that all classifications involving Indians are merely political. Rather, the statute in *Mancari* was uniquely tailored to the authority of the Bureau of Indian Affairs, a *sui generis* agency with jurisdiction over various matters related to Indian Tribes and Reservations. The statute contained an employment criterion designed to promote "the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 554. The statute granted a preference "only to members of 'federally recognized' tribes" who lived on or near reservations, and therefore resulted in the exclusion of "many individuals who are racially to be classified as 'Indians.'" *Id.* at 552, 555 n.24. In contrast to the statute in *Mancari*, ICWA's classifications are based on Indian ancestry, not tribal membership.

Rice v. Cayetano, 528 U.S. 495 (2000), which the District Court did not cite, struck down a similar classification and thus should control here. There, the Supreme Court held unconstitutional a Hawaii statute restricting voter eligibility to "native Hawaiians" and positions at a state agency to those with "Hawaiian" ancestry. *Id.* at 519. Hawaii had "used ancestry as a racial definition and for a racial purpose." *Id.* at 517. "Ancestral tracing . . . employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Id.*

ICWA defines an Indian child as one who is a member "of an Indian tribe" as well as those children simply eligible for membership who have a biological Indian parent. *See* 25 U.S.C. § 1903(4). A child is an Indian child if the child is related to a tribal ancestor by blood. By deferring to tribal membership eligibility standards based on ancestry, rather than actual tribal affiliation, ICWA's definition of "Indian children" uses ancestry as a proxy for race. *Id.* ICWA's unequal standards for "Indian children" and "Indian families" violate the Fifth Amendment's equal protection guarantee by failing to rationally link children to tribes. *See Rice*, 528 U.S. at 517. ICWA is therefore subject to strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (stating strict scrutiny applies to "all racial classifications to 'smoke out' illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool").

To survive strict scrutiny review, the classifications must be narrowly tailored to further a compelling governmental interest. *Id.* Federal Defendants cannot make either showing because their defense is solely that ICWA categorizes its beneficiaries by political groups rather than according to race or ancestry. Tribal Defendants argue that ICWA serves the compelling interest of maintaining the Indian child's relationship with the tribe. Even conceding the Tribal Defendants' assertion of a compelling state interest, ICWA's provisions are overinclusive and

therefore not narrowly tailored to achieving that interest. Portions of ICWA preferences are unrelated to specific tribal interests because the statute prioritizes a child's placement with any Indian family, regardless of whether the child is eligible for membership in that person's tribe. *See* 25 U.S.C. § 1915(a). By doing so, ICWA conflates all Indian tribes together. Applying the preference to any Indian, regardless of tribe, is not narrowly tailored to maintaining the Indian child's relationship with his tribe. ICWA's placement preferences fail strict scrutiny review.

I would therefore reverse solely on Equal Protection grounds.

IN THE
SUPREME COURT
OF THE UNITED STATES

No. 22-386

OCTOBER TERM 2022

STUART IVANHOE, SECRETARY OF THE INTERIOR, *et al.,*

Petitioners,

v.

JAMES AND GLENYS DONAHUE, AND THE STATE OF WEST DAKOTA,

Respondents.

ORDER GRANTING WRIT OF CERTIORARI

The Petition for Writ of Certiorari is hereby GRANTED.

IT IS ORDERED that the above captioned cause be set down for argument in the October Term of 2022, limited to the following issues:

I. Do the placement preference and recordkeeping provisions of the Indian Child Welfare Act exceed Congress's Article I authority and violate the anticommandeering doctrine under the Tenth Amendment?

II. Do the Indian Child Welfare Act's Indian classifications violate the Equal Protection Clause of the Fifth Amendment?

Dated: August 5, 2022