Docket 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

BRIEF FOR RESPONDENTS

Counsel for Respondents
Team 20

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QUESTIONS PRESENTED

I. Do the Indian Child Welfare Act's placement preference and record-keeping provisions exceed Congress's Article I authority, as well as violate the anticommandeering doctrine when Congress uses the Indian Commerce Clause to regulate adoption proceedings and requires West Dakota to implement federal policies and procedures?

II. Does the Indian Child Welfare Act violate the Equal Protection Clause of the Fifth Amendment when ICWA's placement preference provision warrants the removal of Baby C and Baby S from the Donahues' care because of their Indian ancestry?

STATEMENT OF THE CASE

Factual Background

A Congressional Goal. Congress enacted the Indian Child Welfare Act (ICWA) in response to an increase in Indian children adopted by non-Indian families. R. at 4. The Act's preface focused on Congress's belief that state child custody proceedings had failed to recognize cultural standards in Indian families and communities, as well as essential tribal relations. R. at 4–5. Consequently, Congress stated it wanted to remedy this issue by deploying its Indian Commerce Clause powers to create a set of federal regulations governing the adoption of Indian children. R. at 5. Congress presumed these regulations would preserve the unique values of Indian culture by "protect[ing] the best interests of Indian children" and "promot[ing] the stability and security of Indian tribes." R. at 5.

The Indian Child Welfare Act. ICWA regulates all state child custody proceedings involving Indian children, meaning any person under eighteen, unmarried, and the biological child of a tribe member. R. at 5. The Act extends further to children who are either members of an Indian tribe or eligible for membership in any Indian tribe. R. at 5. After following these required criteria and determining that a child falls under this definition, the states must enforce several other provisions of ICWA. R. at 5–7. First, ICWA requires state agencies to enforce specific placement preferences for proceedings involving Indian children under 25 U.S.C. § 1915. R. at 6–7. Initially, the provision gives a preference to the child's extended family; then, it gives a preference to members of the child's tribe. R. at 6. If neither option is available, state agencies must give a preference to any Indian family regardless of their tribe. R. at 6. However, if a tribe intervenes in the proceeding to establish a specific order of preferences, the state is instructed to follow the tribe's order. R. at 7. Second, in addition to the placement mandate, Congress also demands that

the states compile and maintain records of these placements under 25 U.S.C. § 1915(e). R. at 7. Additionally, according to 25 U.S.C. § 1951(a), this information must be readily available at the request of the child's tribe or the Secretary of the Interior. R. at 7. Furthermore, any time a state court enters a final order in an adoptive placement, the state must provide the Secretary with the order and—among other information—the names and addresses of biological and adoptive parents as well as the identities of agencies having any information or files regarding the proceeding. R. at 7.

The Strain on West Dakota. With three Indian tribes located within state borders, many children in West Dakota qualify as Indian children under ICWA. R. at 2. Every year, Indian children represent roughly 12% of the state's child custody proceedings. R. at 2. Because of this high percentage, ICWA's provisions significantly burden West Dakota's state agencies. R. at 2. For example, to ensure proper implementation of ICWA, the West Dakota Child Protection Service (CPS) issues an ICWA Compliance Manual. R. at 2. CPS felt compelled to create this manual outlining its policies and procedures because ICWA's legal burdens are higher as "almost every aspect of the social work and legal case is affected." R. at 2.

A Close Call for Baby C. Baby C is an Indian child whose father is a member of the Cherokee Nation and whose mother is a member of the Quinault Nation. R. at 2. After she was born, Baby C lived with her maternal aunt. R. at 2. However, the aunt frequently left Baby C, an eight-month-old at the time, unattended for long periods. R. at 2. After receiving reports about the aunt's neglect, CPS removed Baby C from her custody and placed her in foster care with the Donahues. R. at 2. After caring for her for two years, the Donahues adopted Baby C. R. at 2–3. As soon as Baby C became eligible for adoption under West Dakota law, the Donahues began the adoption process with the consent of Baby C's parents and aunt. R. at 3. Because this was an

adoptive proceeding involving an Indian child, CPS notified both the Cherokee Nation and the Quinault Nation in compliance with ICWA. R. at 3. Subsequently, Baby C's designated tribe, the Quinault Nation, informed the West Dakota court that it had found an alternative placement for Baby C—an alternative placement of non-relatives in another state. R. at 3. However, the alternative placement fell through for unknown reasons, and the Donahues were permitted to proceed with the adoption. R. at 3. Because no one else sought to adopt Baby C, the Donahues adopted her in January 2020. R. at 3.

The Fate of Baby S. Baby S is another Indian child whose biological mother was a member of the Quinault Nation. R. at 3. After Baby S's mother died of a drug overdose, Baby S resided with his paternal grandmother. R. at 3. Because of his grandmother's failing health, she could not continue caring for Baby S, and the state placed him in foster care with the Donahues. R. at 3. Soon after, the Donahues decided to adopt Baby S. R. at 3. With his grandmother's consent, the Donahues began adoption proceedings. R. at 3. However, once again, the Quinault Nation intervened to oppose the adoption. R. at 3. The Quinault Nation is opposing the adoption by proposing alternative placements for Baby S—alternative placements with strangers in another state. R. at 3; R. at 13. Today, ICWA threatens Baby S with removal from the Donahues—the only family he has ever known. R. at 13.

Procedural Background

District of West Dakota. Following the Quinault Nation's opposition to the adoption, the Donahues and the state of West Dakota sued the federal defendants to challenge the constitutionality of ICWA. R. at 4. As a result, both parties filed cross-motions for summary judgment. R. at 4. Upon consideration, the district court denied summary judgment for respondents

by holding that ICWA did not violate the anticommandeering doctrine or the Equal Protection Clause. R. at 13.

Thirteenth Circuit. The Donahues and the state of West Dakota appealed. R. at 13. Writing for the majority, the Honorable Judge Surrey reversed the district court's grant of summary judgment for petitioners, holding that ICWA is unconstitutional because the Act "runs afoul of the Tenth Amendment anticommandeering doctrine." R. at 16. Furthermore, Chief Judge Tower concurred with the judgment, stating that the court should reverse the district court's holding solely on Equal Protection grounds. R. at 17–19. Subsequently, the federal defendants filed a petition for a writ of certiorari in this Court, which it granted. R. at 20.

SUMMARY OF THE ARGUMENT

We respectfully ask this Court to affirm the Thirteenth Circuit's holding that ICWA is unconstitutional. To preserve the principle of dual sovereignty, Congress can only enact federal regulations pursuant to a constitutionally conferred power and cannot use these federal regulations to commandeer the states in violation of the anticommandeering doctrine. ICWA defies both of these constitutional limitations. First, ICWA's placement preference and record-keeping provisions exceed the scope of Congress's Article I authority by circumventing the Tenth Amendment. Through ICWA, Congress is attempting to use its Indian Commerce Clause powers to encroach on West Dakota's adoptive proceedings—an area reserved for the states by the Tenth Amendment. Second, Congress has violated the anticommandeering doctrine by requiring West Dakota to enforce ICWA's placement preference and record-keeping provisions. By compelling the states to implement these provisions, Congress is shifting the costs and burdens of federal regulation to the state of West Dakota. Furthermore, contrary to the district court's holding, ICWA

fails to evenhandedly regulate state and private activity because the placement preference and record-keeping provisions explicitly and exclusively command action on behalf of West Dakota.

Moreover, this Court should also affirm the Thirteenth Circuit's holding because ICWA's "Indian child" classification violates the Equal Protection Clause of the Fifth Amendment. To ensure the federal government treats citizens as individuals rather than as components of a larger class, the Equal Protection Clause only permits government classifications that are reasonable in light of their purpose. We agree with Chief Judge Tower's concurrence that ICWA's "Indian child" classification fails strict scrutiny review. Because ICWA's definition of Indian children is premised on the child's ancestry or whether they are the biological child of a tribe member, the Court should analyze this classification under strict scrutiny. Applying strict scrutiny, ICWA violates the Equal Protection Clause because the placement preference provision fails to give individualized consideration to each child's tribe affiliation. Thus, Congress has not narrowly tailored the placement preference provision to maintaining children's relationships with their tribes. Alternatively, if the Court determines that ICWA classifies by tribe, ICWA's "Indian child" classification fails rational basis review. The district court's holding that Congress rationally linked the placement preference to promoting the child's relationship is flawed because Congress is irrationally conflating all Indian tribes. Furthermore, the relationship between the placement preference provision and Congress's goal of preserving Indian culture is irrational because ICWA is placing Indian children—specifically Baby C and Baby S—at a disadvantage by overriding the best interests of the children and their families' wishes.

STANDARD OF REVIEW

Whether ICWA's placement preference and record-keeping provisions exceed Congress's Article I authority and violate the anticommandeering doctrine is a question of law reviewed de novo. *See Brackeen v. Haaland*, 994 F.3d 249, 368 (5th Cir. 2021) (noting the legal standard for reviewing the constitutionality of a federal statute is de novo). Likewise, the de novo standard applies in determining whether ICWA's Indian classifications violate the Equal Protection Clause of the Fifth Amendment. *See id*. De novo review allows the Court to consider the matter anew to ensure the lower court correctly applied the governing constitutional rule. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 485 (1984).

ARGUMENT

I. This Court should uphold the Thirteenth Circuit's decision because the placement preference and record-keeping provisions of the Indian Child Welfare Act (ICWA) contravene the constitutional limitations on Congress.

The drafters intended for the Constitution to create a national government built on distinct, enumerated powers rather than one of general and unlimited powers. *See United States v. Butler*, 297 U.S. 1, 66 (1936). Adhering to this principle, Article I of the Constitution grants Congress certain distinct and enumerated powers, such as "regulat[ing] commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. However, the Constitution constrains this power with the Tenth Amendment, which states, "[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. This limitation ensures that Congress does not undermine the states' status as independent sovereigns. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (explaining that state sovereignty is crucial to protecting individual liberty).

Because of the existence of two sovereigns, there is always a possibility that state and federal policies will conflict. *See Arizona v. United States*, 567 U.S. 387, 398–99 (2012). Therefore, if the federal government seeks to further its own policies, Congress must act pursuant to a constitutionally conferred power, and the legislation must obey the anticommandeering doctrine by regulating individuals, not states. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018). Because ICWA's placement preference and record-keeping provisions exceed Congress's Indian Commerce Clause powers and exclusively command the states to enforce federal policy, Respondents urge this Court to uphold the decision of the Thirteenth Circuit. *See Brackeen*, 994 F.3d at 373; R. at 15–16.

A. ICWA's placement preference and record-keeping provisions exceed Congress's Indian Commerce Clause authority by regulating child custody proceedings—an area reserved for West Dakota by the Tenth Amendment.

Although Congress can use its Indian Commerce Clause power to promote tribe sovereignty, it cannot use this power to circumvent the Tenth Amendment. *See Fisher v. Dist. Ct.*, 424 U.S. 382, 386–87 (1976); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996). Article I of the Constitution confers onto Congress the power to "regulate commerce . . . with the Indian tribes," meaning Congress may regulate certain affairs among the individuals within these tribes. U.S. Const. art. I, § 8, cl. 3; *see United States v. Holliday*, 70 U.S. 407, 417 (1865). Although this clause grants Congress plenary authority over Indian affairs, this power is not absolute. *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 73–74 (1977); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946); *United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935). Instead, Congress's authority over Indian affairs is constrained by other constitutional provisions, specifically the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 156 (1992) (explaining that the Tenth Amendment restrains Congressional authority).

Congress may use its Indian Commerce Clause powers to promote tribe sovereignty. *See Fisher*, 424 U.S. at 386–87. For example, in *Fisher v. District Court*, the Court upheld the Indian Reorganization Act of 1934, which prohibited states from exercising jurisdiction over adoption proceedings on Indian reservations. *Id.* at 390–91. Specifically, the Indian Reorganization Act authorized a tribal ordinance that granted the Northern Cheyenne tribal court exclusive jurisdiction over adoption proceedings among tribe members. *Id.* at 383–84. The Court reasoned that Congress acted constitutionally because the Act promoted tribe sovereignty by *excluding* states from adoption proceedings that only involved residents of the Northern Cheyenne Indian Reservation.

Id. at 386–87 ("The right of the Northern Cheyenne Tribe to govern itself independently of state law has been consistently protected by federal statute.").

Conversely, Congress cannot use its Indian Commerce Clause authority to circumvent other constitutional limitations. *See Seminole Tribe*, 517 U.S. at 72–73. In *Seminole Tribe of Florida v. Florida*, the Court held that the Eleventh Amendment barred Congress from allowing Indian tribes to file lawsuits against the states for failure to enforce federal legislation. *Id.* at 53. In 1988, Congress utilized its Indian Commerce Clause powers to enact the Indian Gaming Regulatory Act, allowing the Indian tribes to conduct specific gaming activities under a valid tribal-state compact. *Id.* at 48–49. However, the Act required the states to negotiate in good faith with the tribes to create a valid compact. *See id.* at 49–50. If a tribe believed a state did not negotiate in good faith, the Act authorized the tribes to sue the states in federal court. *Id.* at 49. Because of this authorization, the Court struck down the Indian Gaming Regulatory Act, reasoning that Congress cannot use its Indian Commerce Clause authority to "circumvent the constitutional limitations" placed on Congress. *Id.* at 72–73 (explaining that Congress's Article I powers are not strong enough to overcome the background principle of state sovereignty).

Unlike *Fisher*, ICWA fails to promote tribe sovereignty for the Cherokee Nation and the Quinault Nation. *See Fisher*, 424 U.S. at 386–87; R. at 6–7. In *Fisher*, the Court *only* deemed Congress's actions constitutional because the Indian Reorganization Act promoted tribe sovereignty by excluding the states from adoptive proceedings among tribe members. *Fisher,* 424 U.S. at 386–87. Here, ICWA thwarts tribe sovereignty by compelling West Dakota to intervene in these adoptions to enforce federal policies and procedures. R. at 6–7; R. at 15. This compulsion directly contradicts the federal government's objective of leaving the tribes free from a state's

jurisdiction. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2476 (2020); *United States v. Kagama*, 118 U.S. 375, 384 (1886).

However, like *Seminole Tribe*, Congress is using the Indian Commerce Clause to defy its constitutional limitations. *See Seminole Tribe*, 517 U.S. at 72; R. at 4–7; R. at 15–16. In *Seminole Tribe*, the Indian Gaming Regulatory Act was unconstitutional because it authorized tribes to sue the states in violation of the Eleventh Amendment. *Seminole Tribe*, 517 U.S. at 53. Here, the Court should hold ICWA unconstitutional because Congress is attempting to regulate an area reserved for the states in violation of the Tenth Amendment. R. at 4–7; *Brackeen*, 994 F.3d at 376 ("No Supreme Court decision even hints that Congress's Indian affairs power trumps state sovereignty."). By regulating West Dakota's child custody proceedings, Congress is entering the field of domestic relations, an area this Court has long held is a "virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (explaining that protecting the interests of children is a state duty of high importance). Furthermore, Congress cannot use its Indian Commerce Clause powers to claim it has special jurisdiction over these proceedings because "[t]he whole subject of . . . domestic relations . . . belongs to the laws of the states." *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890). To allow Congress to claim this special jurisdiction "would mark 'a radical change[] in tribal status.'" *Brackeen*, 994 F.3d at 373 (quoting *United States v. Lara*, 541 U.S. 193, 205 (2004)). Therefore, Congress cannot use its Indian Commerce Clause powers to regulate West Dakota's child custody proceedings—an area reserved for West Dakota by the Tenth Amendment. R. at 4–7; *Sosna*, 419 U.S. at 404; *Burrus*, 136 U.S. at 593–94.

B. Congress violated the anticommandeering doctrine by commanding the state of West Dakota to enforce ICWA's placement preference and record-keeping provisions.

The Constitution's division of authority between the federal government and the states protects the integrity of the individual sovereigns and the people, "from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). The Constitution observes this division of power through the Tenth Amendment, which states 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. Embedded in the Tenth Amendment is the anticommandeering doctrine, which creates the principle that if Congress wishes to further a federal policy, it must do so directly without conscripting the states as its agents. *See New York*, 505 U.S. at 178. Therefore, Congress violated the anticommandeering doctrine by conscripting West Dakota as its agent to enforce ICWA's placement preference and record-keeping provisions. R. at 15–16.

1. Congress is imposing the costs and burdens of enforcing ICWA on West Dakota by compelling the state to implement the placement preference and record-keeping provisions.

Congress has violated the anticommandeering doctrine by commanding West Dakota to enforce ICWA's placement preference and record-keeping provisions, thus, shifting the costs and burdens of federal legislation to the state. R. at 15. Though the Constitution allows Congress to encourage the states to act in a particular way, this Court has never interpreted the Consitution as granting Congress the power to compel the states to act according to its instructions. *See New York*, 505 U.S. at 162. Because of this principle, this Court has consistently struck down federal legislation that commandeers states or state agencies for federal purposes. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 577.

Congress cannot require the states to enforce federal legislation. *Printz v. United States*, 521 U.S. 898, 933 (1997). This principle is apparent in *Printz v. United States*, in which the Court struck down a Brady Handgun Violence Protection Act provision for violating the anticommandeering doctrine. *Id.* at 933–34. The Brady Handgun Violence Prevention Act contained a provision that required state law enforcement officers to implement a national background check system for prospective handgun purchasers. *Id.* at 902. The Court concluded that Congress could not require state law enforcement officers to enforce the federal background check system. *Id.* at 926, 933 (explaining that Supreme Court opinions have made it clear that Congress cannot compel the states to implement federal policy). In reaching this conclusion, the Court recognized the threat that national commandeering poses to state sovereignty. *See id.* at 929–31. For instance, federal commandeering can inhibit state sovereignty by compelling the states "to absorb the financial burden of implementing a federal regulatory program." *Id.* at 929–30.

Likewise, Congress cannot issue direct orders to the states. *Murphy*, 138 S. Ct. at 1476. For example, the Court deemed the Professional Amateur Sports Act unconstitutional for violating the anticommandeering doctrine in *Murphy v. National Collegiate Athletic Ass'n*. *Id.* at 1484–85. In *Murphy*, the Professional Amateur Sports Act made it illegal for a state to authorize any gambling associated with competitive sports. *Id.* at 1468. The Court held that the Act violated the anticommandeering doctrine because prohibiting state authorization of sports gambling "unequivocally dictates what a state . . . may and may not do." *Id.* at 1478. To reach this holding, the Court—once again—revisited its prior jurisprudence to explain the importance of adherence to the anticommandeering rule. *Id.* at 1477. The Court explained that the anticommandeering doctrine prevents Congress from dodging the costs of regulation by imposing this obligation on

the states. *Id.* Specifically, this constraint on Congress serves to protect the states from bearing the costs and burdens of enforcing federal laws. *Id.*

Like *Printz*, Congress requires West Dakota to enforce ICWA's placement preference provisions. R. at 15–16; *Printz*, 521 U.S. at 902. ICWA's placement preference provision outlines specific standards which give preferences to certain people when locating a placement for an Indian child. R. at 6–7. Moreover, this provision does not suggest or encourage West Dakota to apply these placement preferences; instead, "ICWA *mandates* placement preferences for Indian Child foster care, pre-adoptive placements, and adoptive proceedings." R. at 6 (emphasis added). Because of this mandate, Congress is imposing the burdens of federal regulation onto West Dakota's CPS agency by requiring them to "searchingly inquire" about the existence of and suitability of preferred placements. *Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs.*, 334 P.3d 165, 178 (Alaska 2014); *see also In re M.D.*, 920 N.W.2d 496, 504 (S.D. 2018) (citing *David S. v. State, Dep't of Health & Soc. Servs.*, 270 P.3d 767, 781 (Alaska 2012)) (illustrating the burdens of the placement preference provision on state agencies). Furthermore, to ensure proper implementation of this provision, CPS had to create and issue an ICWA Compliance Manual to its employees. R. at 2. CPS felt compelled to make this manual because ICWA's legal burdens are higher and affect almost every aspect of the child's case. R. at 2. Overall, by requiring West Dakota to enforce ICWA's placement preference provision, Congress is shifting the burdens of federal regulation to West Dakota's CPS agency. R. at 15.

Furthermore, like *Murphy*, ICWA's record-keeping provisions issue direct orders to West Dakota's courts and agencies. R. at 7; *Murphy*, 138 S. Ct. at 1468. These provisions give a strict order to West Dakota to create, compile, and maintain records of the child's placement, which its courts and agencies must furnish upon request to the child's tribe or the Secretary of the Interior.

R. at 7. Additionally, for every adoptive proceeding involving an Indian child, the West Dakota court is directed to provide the Secretary of the Interior with the order or decree and other information about the proceeding. R. at 7. By requiring West Dakota's courts and agencies to follow these record-keeping requirements, Congress is shifting the costs of ICWA's federal regulations to West Dakota. R. at 7; R. at 15. Because there are three Indian tribes located within its borders, many children in West Dakota qualify as Indian children under ICWA; specifically, 12% of West Dakota's child custody proceedings involve Indian children. R. at 2. With this high percentage, Congress is dodging the considerable costs of federal regulation by shifting this burden to West Dakota. R. at 2. Therefore, Congress has violated the anticommandeering doctrine by commanding West Dakota to enforce ICWA's placement preference and record-keeping provisions, thus, shifting the costs and burdens of federal legislation to the state. R. at 15.

2. The district court erred when it held that ICWA evenhandedly regulates state and private activity because the placement preference and record-keeping provisions exclusively regulate West Dakota's courts and agencies.

ICWA fails to regulate state and private activity evenly because the placement preference and record-keeping provisions only apply to West Dakota's courts and agencies. R. at 6–7. When Congress enacts legislation that evenly applies to state and private actors, the anticommandeering rule does not apply. *Murphy*, 138 S. Ct. at 1478. However, the anticommandeering doctrine is applicable when Congress enacts legislation that exclusively directs the states. *See Reno v. Condon*, 528 U.S. 141, 151 (2000).

Congress is evenhandedly regulating state and private activity when it enacts legislation generally applicable to state and private actors. *See South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988). For example, in *South Carolina v. Baker*, the Court upheld a provision of the Internal Revenue Code because it regulated state and private actors similarly. *See id.* at 527. In *Baker*, the

Internal Revenue Code contained a provision that denied a federal tax exemption for interest earned on unregistered state and local bonds. *Id.* at 507–08. The Court held that the Code provision was constitutional because the law generally applied to both state and private actors. *See id.* at 514–15. In reaching this holding, the Court reasoned that although the provision regulated state actors by refusing to grant them the tax exemption on state bonds, it also denied the exemption for private bonds. *See id.*

The Court also held that Congress is evenhandedly regulating when it enacts legislation generally applicable to state and private actors in *Reno v. Condon*. *Reno*, 528 U.S. at 151. In *Reno*, The Driver's Privacy Protection Act prohibited disclosing and reselling drivers' personal information. *Id.* at 143. The Court upheld the Act because it prohibited not only state DMVs from disclosing or reselling personal information but also private individuals. *See id.* at 151. The Court further explained that the Driver's Privacy Protection Act applies evenly to state and private activity because it did not require the states to regulate their citizens, assist in enforcement, or enact any laws or regulations. *Id.*

Unlike *Baker* and *Reno*, ICWA's placement preference provision is not generally applicable to West Dakota and private individuals within the state. *Baker*, 485 U.S. at 507–08; *Reno*, 528 U.S. at 143; R. at 6–7. In both *Baker* and *Reno*, the Court deemed the federal regulations constitutional because Congress directed the legislation at state and private actors. *Baker*, 485 U.S. at 514–15; *Reno*, 528 U.S. at 151. Here, Congress has exclusively directed the placement preference provision at the state of West Dakota. R. at 6–7; R. at 16. Specifically, if a tribe creates a different order of preferences than the order outlined in the statute, "the state court or agency effecting the placement" must follow the tribe's order. R. at 7. Congress used this specific language because only state entities can conduct these foster care, pre-adoptive, and adoptive proceedings.

R. at 6–7. Thus, by explicitly issuing an order to the state of West Dakota, ICWA's placement preference provision is not generally applicable to state and private activity. R. at 6–7; R. at 16.

Furthermore, ICWA's record-keeping provisions are also not generally applicable to West Dakota and private individuals within the state. R. at 7; R. at 16. The first record-keeping requirement declares that the "states in which an Indian child's placement was made" must create and compile records of the child's placement. R. at 7. Additionally, the second record-keeping requirement says that "[a] state court entering a final decree in an adoptive placement" must provide the Secretary of the Interior with the order or decree and other information regarding the proceeding. R. at 7. As previously stated, Congress used this language because only state entities can conduct these types of proceedings. R. at 7. Therefore, Congress is not evenhandedly regulating state and private activity because the record-keeping provision directs orders exclusively to the state of West Dakota. R. at 7; R. at 16.

II. Alternatively, this Court should affirm the Thirteenth Circuit's decision because ICWA's "Indian child" classification violates the Equal Protection Clause of the Fifth Amendment.

The basic premise of the Equal Protection Clause is simple: the government must treat each citizen as an *individual* rather than as a component of a larger class. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). The Constitution evidences this principle through the Fifth Amendment, which states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Although the Fifth Amendment does not explicitly contain an equal protection clause like the Fourteenth Amendment, the concepts of due process and equal protection both stem from the "American ideal of fairness." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see generally* U.S. Const. amend. XIV, § 1 ("No state shall make or enforce any law which . . . den[ies] to any person within its jurisdiction the equal protection of the laws."). Therefore, this Court has

analyzed Fifth Amendment Equal Protection claims precisely the same as Fourteenth Amendment Equal Protection claims. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995).

An Equal Protection Clause analysis evaluates the validity of federal laws that treat specific groups of people differently. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring). Specifically, the Court will first determine what type of classification the government has created; then, the Court assesses whether the classification is "reasonable in light of its purpose." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The classifications based on race or ancestry are subject to strict scrutiny, meaning Congress must narrowly tailor the federal statute to further a compelling governmental interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Alternatively, if the Court determines that Congress did not base the classification on race or ancestry, the law must rationally further a legitimate governmental interest. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 17. Because ICWA's definition of an "Indian child" creates a racial classification that does not survive strict scrutiny, Respondents urge this Court to uphold the decision of the Thirteenth Circuit. R. at 17–19.

A. The district court incorrectly held that ICWA's Indian classifications are politically based because ICWA's definition of an "Indian child" uses ancestry as a proxy for race.

The district court's holding that ICWA creates a political classification is incorrect because Congress premised ICWA's definition of an "Indian child" on the child's ancestry. R. at 10–11; R. at 17–18. When Congress enacts legislation that uses ancestry as a racial definition for a racial purpose, the Court should analyze the law under the most rigid scrutiny. *Rice v. Cayetano*, 528 U.S. 495, 515 (2000); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). The Court applies strict scrutiny because ancestral inquiries create the same grave concerns as classifications based on race. *Rice*,

528 U.S. at 517. Notably, government classifications based solely on ancestry are "by their very nature odious to a free people." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

When Congress creates an Indian classification based on tribe membership, the Court deems the classification to be political. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). For example, in *Morton v. Mancari*, the Court held that the Indian Reorganization Act's hiring preference for Indians created a political class because the preference only applied to members of federally recognized tribes. *Id.* In *Mancari*, The Indian Reorganization Act of 1934 established an employment preference in the Bureau of Indian Affairs for qualified Indians. *Id.* at 537. To qualify for this employment preference, an individual must have at least one-fourth Indian blood and be a member of a federally recognized tribe. *Id.* at 553 n.24. Because of the tribe membership requirement, the Court held that the provision created a political classification that granted hiring preferences to Indians as members of a sovereign tribal entity. *Id.* at 553–54; *see generally United States v. Antelope*, 430 U.S. 641, 646–47 (1977) (illustrating that a classification is politically based only when Congress classifies by tribe membership rather than race). The Court reasoned that the political classification promoted Indian self-governance and allowed the Bureau of Indian Affairs to be "more responsive to the needs of its constituent groups." *Mancari*, 417 U.S. at 553–54.

Conversely, when Congress creates a classification based on ancestry, the federal statute is analyzed under the same standards as statutes that classify based on race. *See Rice*, 528 U.S. at 517. This rule is illustrated in *Rice v. Cayetano*, when the Court affirmed its opposition to laws that utilize ancestral tracing to enable race-based classifications. *United States v. Zepeda*, 792 F.3d 1103, 1120 (9th Cir. 2015) (Ikuta, J., concurring) (citing *Rice*, 528 U.S. at 510, 517, 524). In *Rice*, the state constitution allowed only "Hawaiians" to elect trustees for the Office of Hawaiian Affairs.

Rice, 528 U.S. at 498–99. However, a state law defined "Hawaiians" as only the "descendants of people inhabiting the Hawaiian Islands in 1778." *Id.* at 499. The Court held that Hawaii had violated the Fifteenth Amendment by creating a classification that used ancestry as a proxy for race. *See id.* at 514. In reaching this holding, the Court found that laws that classify based on ancestry use the same mechanisms and cause the same injuries as race-based statutes. *Id.* at 517. Additionally, the Court declined to extend the limited exception of *Mancari* because this would allow a state to fence out entire classes of people from critical state affairs. *Id.* at 522; *see supra* p. 26.

The district court erred by concluding that ICWA creates a political classification because *Mancari* did not establish that all Indian classifications are merely political. R. at 10–11; R. at 17; *see supra* p. 26. In *Mancari*, the Court upheld the hiring preference because it contained a tribe membership requirement that promoted Indian self-governance and furthered the political interests of tribe members. *See Mancari*, 417 U.S. at 554. Unlike *Mancari*, ICWA's definition of an "Indian child" does not create a classification based on tribe membership. R. at 5; R. at 17; *see Mancari*, 417 U.S. at 553 n.24. ICWA's definition of an "Indian child" extends to children that are merely *eligible* for tribe membership. R. at 5; R. at 18. For instance, both Baby C and Baby S fall under ICWA's regulations despite neither of the children being tribe members. R. at 2–3. By including children that are not members of a particular tribe, Congress has failed to create a political classification derived from the quasi-sovereign status of the tribes. R. at 2–3; R. at 5; R. at 18.

However, we agree with Chief Judge Tower that "ICWA's definition of an 'Indian child' uses ancestry as a proxy for race." R. at 5; R. at 18. Here, ICWA's definition of an "Indian child" is comparable to Hawaii's definition of "Hawaiian" in *Rice*. R. at 5; R. at 18; *Rice*, 528 U.S. at 509. In *Rice*, a statute defined a "Hawaiian" as a descendant of the indigenous peoples of the

Hawaiian Islands. *Rice*, 528 U.S. at 509. Similarly, ICWA defines an "Indian child" as "the biological child of a member of an Indian tribe." R. at 5. Therefore, this definition classifies these children solely based on their blood relation to a tribal ancestor. R. at 5; R. at 18. For instance, Baby C and Baby S are subject to ICWA because they possess a blood relation to a tribe member. R. at 2–3; R. at 18. Thus, because ICWA's definition of an "Indian child" derives from ancestral tracing, Congress has created a racial classification that the Court must examine under strict scrutiny. R. at 5; R. at 18.

B. ICWA's "Indian child" classification fails strict scrutiny because Congress did not narrowly tailor the placement preference provision to maintain the relationship between Indian children and their tribes.

We agree with Chief Judge Tower that ICWA's "Indian child" classification fails strict scrutiny because Congress failed to narrowly tailor the placement preference provision to Congress's goal of maintaining children's relationships with their tribes. R. at 18–19. The purpose of applying strict scrutiny to these classifications is to "smoke out illegitimate uses of race." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (internal quotation marks omitted). Therefore, the first prong of strict scrutiny asks whether a compelling interest justifies the classification. *Palmore*, 466 U.S at 432–33. Then, the second prong determines whether Congress chose means narrowly tailored to accomplish that purpose. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986). A statute fails to be "narrowly tailored" when the classification is overinclusive, meaning Congress burdens more people than necessary to achieve its compelling interest. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993) (Blackmun, J., concurring).

Congress fails to narrowly tailor a statute to further a compelling governmental interest when it creates a classification that treats a group of people as an undifferentiated mass rather than

unique individuals. *See Grutter*, 539 U.S. at 341; *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003). In *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Court distinguished when Congress narrowly tailors the means of achieving a compelling interest and when the means of attaining this interest are overinclusive. *See Grutter*, 539 U.S. at 341; *Gratz*, 539 U.S. at 271. In both cases, colleges attempted to accomplish the compelling governmental interest of promoting diversity at their schools. *Grutter*, 539 U.S. at 328; *Gratz*, 539 U.S. at 275. In *Grutter*, the Court upheld a race-based classification under strict scrutiny because the admissions policy did not give preferences solely based on race; instead, the admissions program used race as a factor in evaluating diversity. *Grutter*, 539 U.S. at 334. Conversely, in *Gratz*, the Court struck down a race-based classification because the admissions policy gave a general preference based on race to minority applicants. *See Gratz*, 539 U.S. at 271–73. The Court reasoned that these cases differed in that the admissions program in *Grutter* was flexible enough for each applicant to receive an individualized diversity evaluation, while the *Gratz* program burdened more people than necessary by making race the defining feature of the individual's application. *See Grutter*, 539 U.S. at 334; *Gratz*, 539 U.S. at 273–74.

ICWA's definition of an "Indian child" fails strict scrutiny because Congress is burdening more children than necessary to further its interest in maintaining Indian children's relationships with their tribes. R. at 5; R. at 18–19. ICWA is comparable to *Gratz*'s admissions policy because Congress has failed to give each Indian child individualized consideration. R. at 6–7; R. at 18–19; *see Gratz*, 539 U.S. at 271–73. For example, ICWA's placement preference provision gives a preference to "other Indian families," meaning a child could be placed with any Indian family regardless of tribe affiliation. R. at 6–7. This portion of the placement preference provision disregards whether the child is even eligible for membership with that tribe. R. at 6–7; R. at 18–

19. As a result, Congress is forcing these children to embrace the unique cultures and values of tribes they have no connection with. R. at 18–19. By failing to give each child individualized consideration, Congress is treating all Indian children and tribes as an undifferentiated mass. R. at 6–7; R. at 18–19; *United States v. Bryant*, 579 U.S. 140, 160–61 (2016) (Thomas, J., concurring). Therefore, we agree with Chief Judge Tower that ICWA's "Indian child" classification does not survive strict scrutiny because Congress has failed to narrowly tailor the placement preference provision to furthering children's relationships with their tribes. R. at 18–19.

C. Even if the Court determines that ICWA classifies by tribe, the "Indian child" classification is irrationally related to Congress's goal of maintaining the child's relationship with their tribe.

ICWA's "Indian child" classification fails to rationally further Congress's goal of maintaining Indian children's relationships with their tribes. R. at 5; R. at 18; *Brackeen*, 994 F.3d at 397. Congress violates the Equal Protection Clause when its statute creates a political classification that cannot survive rational basis review. *See Mancari*, 417 U.S. at 555. Under this standard, Congress must have a rational reason for treating a group of individuals differently to further a legitimate governmental purpose. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). Specifically, Congress cannot employ "a classification whose relationship to an asserted goal is so attenuated as to render the distinction . . . irrational." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). To determine whether ICWA survives rational basis review, the Court should consider the costs to the innocent children who fall under ICWA's definition of an "Indian child." *See Plyler v. Doe*, 457 U.S. 202, 223–24 (1982).

A statute violates the Equal Protection Clause when the Court cannot find a rational relationship between the classification and a legitimate governmental interest. *Cleburne Living Ctr.*, 473 U.S. at 440. For example, in *City of Cleburne, Texas v. Cleburne Living Center*, the Court

struck down a zoning ordinance that excluded group homes for certain people. *Id.* at 448. Specifically, the zoning rule denied a special-use permit to Cleburne Living Center for the operation of a group home for people with mental disabilities. *Id.* at 435. The ordinance violated the Equal Protection Clause because the Court could not find any rational basis for believing this group home would threaten the city's legitimate interests. *Id.* at 448. The Court reasoned that although the town put forth multiple reasons for the ordinance—including the protection of people with mental disabilities—these reasons were speculative and rested on irrational prejudices. *See id.* at 450.

Likewise, ICWA's "Indian child" classification will violate the Equal Protection Clause if the Court finds no rational relationship between the placement preferences provision and Congress's purpose of preserving Indian culture. *Brackeen*, 994 F.3d at 397. In *Adoptive Couple v. Baby Girl*, the Court recognized that ICWA could potentially put vulnerable children at a disadvantage because of their Indian ancestry. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655–56 (2013). Here, Baby Girl fell under ICWA's definition of an "Indian child" because her biological father was a member of the Cherokee Nation. *Id.* at 643. Therefore, despite never having contact with Baby Girl, the South Carolina court permitted the father to intervene in the adoptive proceeding to enforce ICWA's placement preference provision. *Id.* at 644–46. However, the Supreme Court held that the father could not intervene in the adoptive proceeding because permitting the state court's reading of the placement preference provision would raise equal protection concerns. *Id.* at 655–56. The Court reasoned that allowing the placement preference provision to override the child's best interest and the mother's decision would cause adoptive parents to "surely pause before adopting any child who might possibly qualify as an Indian under the ICWA." *Id.* at 656.

The District Court erred by concluding that removing Indian children from their homes and placing them with an Indian family—regardless of their tribe—is rationally related to maintaining the child's relationship with their own tribe. R. at 11–12; *Brackeen*, 994 F.3d at 397. Like *Cleburne Living Center*, Congress is speculating that placing a child with any Indian family will still foster the child's relationship with their own tribes because the cultural standards of the Indian community "transcend tribal ties." R. at 12; *see Cleburne Living Ctr.*, 473 U.S. at 450. By disregarding the unique cultures of each tribe, Congress is forcing these children to embrace the language, religion, and culture of a tribe they have no connection with. R. at 6; R. at 19; Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 TEX. REV. L. & POL. 425, 428 (2019) (providing examples of individuals that qualified as Indian children under ICWA despite not having any cultural connections to the tribes). Therefore, by "treating all Indian tribes as an undifferentiated mass," Congress has created a statute that inherently relies on irrational prejudices. *Bryant*, 579 U.S. at 160–61 (Thomas, J., concurring).

Furthermore, ICWA's placement preference provision puts Indian children, specifically Baby C and Baby S, at a disadvantage because of their Indian ancestry. R. at 2–3. Baby C and Baby S both fall under ICWA's definition of an "Indian child" because at least one parent is a member of an Indian tribe. R. at 2–3; R. at 5. As a result of this classification, the Quinault Nation has intervened to oppose the Donahues' adoptions of both Baby C and Baby S. R. at 2–3. Because of the Quinault Nation's intervention, both babies face the same equal protection concerns foreshadowed by *Adoptive Couple*. R. at 2–3; *see supra* p. 31. Here, the Quinault Nation is using the placement preference to override the wishes of the babies' families as well as the best interests of the babies. R. at 2–3. For instance, if the Court upholds ICWA, the placement preference provision would override the wishes of Baby C's biological parents and aunt, in addition to Baby

S's grandmother. R. at 2–3. Finally, and most significant, if ICWA is deemed constitutional, the placement preference provision will disregard the best interests of Baby C and Baby S by removing the children from "the only family they know" and placing them "in another state with strangers." R. at 2–3; R. at 13. Therefore, this Court should affirm the Thirteenth Circuit's decision because ICWA puts Indian children at a disadvantage through a classification irrationally related to Congress's goal of maintaining the children's relationships with their tribes. R. at 2–3.

CONCLUSION

The state of West Dakota and the Donahues have demonstrated that ICWA's placement preference and record-keeping provisions defy the Constitution's limitations on Congress. Particularly, Congress has exceeded the scope of its Article I authority by using its Indian Commerce Clause powers to enter the realm of domestic relations—an area reserved for West Dakota by the Tenth Amendment. Additionally, Congress has violated the anticommandeering doctrine because ICWA's placement preference and record-keeping provisions explicitly and exclusively demand action on behalf of West Dakota's courts and agencies.

Furthermore, ICWA's "Indian child" classification violates the Equal Protection Clause of the Fifth Amendment. The district court incorrectly held that Congress created a political classification that passes rational basis review because ICWA creates a classification based on ancestry. Because ICWA's definition of an "Indian child" is premised on the child's ancestry, the Court should analyze this classification under strict scrutiny. Applying strict scrutiny, ICWA violates the Equal Protection Clause because the placement preference provision fails to give individualized consideration to each child's tribe affiliation. Alternatively, if the Court determines that ICWA classifies by tribe, ICWA's "Indian child" classification fails rational basis review. ICWA's "Indian child" classification fails rational basis review by placing Indian children at a

disadvantage to further the irrational relationship between the placement preference provision and Congress's goal of preserving Indian culture.

For these reasons, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

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Counsel for Respondents