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 PETITIONERS

Team 28

COUNSEL FOR PETITIONERS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES:

UNITED STATES CIRCUIT COURT CASES:

STATE COURT CASES:

UNITED STATES CONSTITUTIONAL PROVISIONS:

STATUTES:

FEDERAL RULES:

LAW REVIEW ARTICLES:

QUESTIONS PRESENTED

I. Whether the Indian Commerce Clause grants Congress the power to enact the ICWA's placement preference and recordkeeping provisions, and whether those provisions preempt state law in Indian child welfare proceedings.

II. Whether the ICWA's classifications protecting Indian children, families, and tribes violates the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This appeal arises from constitutional challenges to the Indian Child Welfare Act of 1978 ("ICWA"). R. at 1. Congress implemented ICWA due to reports that an increasing number of Indian children were being removed from their families and tribes and placed in non-Indian homes during adoption or foster care placements and proceedings. R. at 4. Through ICWA, Congress sought to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ." R. at 5. Thus, ICWA imposes minimum Federal standards that the moving party must meet before the removal of Indian children from their families and tribes occurs. R. at 5.

Adoption of Baby C. The Donahues sought to, and successfully adopted, Baby C, an Indian child. R. at 2. Baby C's mother was an enrolled member of the Quinault Nation, and her father was an enrolled member of the Cherokee Nation. *Id.* Upon Baby C's birth, she resided with her maternal aunt. *Id.* However, Baby C was removed from her aunt's custody and placed in foster care with the Donahues. *Id.* Pursuant to the ICWA's standards, CPS informed the Cherokee Nation and Quinault Nation of Baby C's placement with the Donahues. *Id.* A West Dakota state court then terminated the parental rights of Baby C's biological parents, making her eligible for adoption. R. at 3. With the consent of both the biological parents and maternal aunt, the Donahues began adoption proceedings. *Id.* Again, in compliance with ICWA, the Cherokee and Quinault Nations were notified. *Id.* During the proceedings, the Quinault Nation informed the court it had identified a potential alternate placement for Baby C. *Id.* However, the placement fell through. *Id.* Because no further interventions in the adoption proceeding occurred, the Donahues entered into an agreement that ICWA's preferences would not apply because no one else sought

to adopt the baby. *Id.* Following this settlement, the court finalized the Donahues' adoption of Baby C. *Id.*

Adoption of Baby S. Baby S was born in January 2020 to his mother, a member of the Quinault Nation. *Id.* A month later, upon his mother's death and his father's unknown identity, Baby S was placed in his grandmother's custody. *Id.* By April 2020, due to his grandmother's failing health, Baby S was placed in foster care with the Donahues. *Id.* The Donahues then filed a petition for the adoption of Baby S. *Id.* While his grandmother consented to the adoption, the Quinault Nation opposed the adoption. *Id.* Instead, the Quinault Nation identified two potential adoptive families for Baby S in a Quinault Tribe in another state. *Id.*

II. PROCEDURAL HISTORY

The District Court. Following the Quinault Nation's opposition to the Donahues' adoption of Baby S, the Donahues and West Dakota sued the United States of America, the Interior, and Ivanhoe. R. at 4. Shortly after the Donahues and West Dakota filed the claim, the Court granted the Cherokee Nation and the Quinault Nation's ("Tribal Defendants") unopposed motion to intervene. R. at 2. The plaintiffs' complaint alleged two theories which came before the Court on cross-motions for summary judgment. R. at 1. First, the Donahues and West Dakota claimed that ICWA §§ 1912(a) and (d)–(f), 1915(a)–(b) and (e), and 1951 commandeer the states in violation of the Tenth Amendment. R. at 4. The district court concluded that the claim was meritless because Congress had the authority to enact ICWA under the Indian Commerce Clause and none of ICWA's provisions commandeered the West Dakota Agencies. R. at 8, 12. Second, the Donahues and West Dakota claimed that ICWA §§ 1913(d), 1914, and 1915(a)–(b) violate the Equal Protection Clause of the Fourteenth Amendment. R. at 4. The district court concluded that ICWA did not violate the Equal Protection Clause because ICWA's classification is politically

based and passes rational basis review. R. at 11–12. For these reasons, the district court denied the plaintiffs' motion and granted the defendant's summary judgment motion. R. at 12.

The Court of Appeals. The United States Court of Appeals for the Thirteenth Circuit reversed the district court's grant of summary judgment for the defendants and remanded for an entry of judgment for the plaintiffs. R. at 17. The majority concluded that ICWA violated the Tenth Amendment's anticommandeering doctrine because the statute regulated states and their officials instead of individuals. R. at 16. Because of the Tenth Amendment violation, the majority did not analyze the equal protection issue. R. at 16–17. Chief Judge Tower wrote a concurrence stating that the Thirteenth Circuit Court of Appeals reached the correct decision, but for a different reason. R. at 17. Judge Tower stated the district court had properly analyzed the Tenth Amendment and Preemption issues but erred and should be reversed on the Equal Protection grounds. *Id.* Judge Tower believed that ICWA's classifications were racial. R. at 18. Thus, the classifications subjected ICWA to a strict scrutiny review, which it failed. *Id.*

This Court. The defendants appealed. R. at 20. This Court granted review over two specific issues: the Tenth Amendment anticommandeering issue and the Fifth Amendment Equal Protection issue. *Id.*

SUMMARY OF THE ARGUMENT

This case presents issues threatening the stability and security of Indian tribes throughout the nation. The Indian Child Welfare Act establishes minimum federal standards to protect Indian tribes from the unwarranted removal of Indian children from their families. Because the appellate court's holding erodes this essential protection, this Court should reverse its findings.

I.

The United States Court of Appeals for the Thirteenth Circuit erroneously held that ICWA's placement preference and record keeping provisions violated Congress's Article I authority and the Tenth Amendment. The Constitution provides Congress with an enumerated power to enact ICWA, and to the extent its provisions conflict with state law, they merely preempt state law. When tasked with interpreting the Indian Commerce Clause, this Court has repeatedly identified an exclusive grant of congressional authority to legislate in Indian affairs. Therefore, the appellate court erred when it improperly restricted the power of the Indian Commerce Clause by comparing its power to that granted by the Interstate Commerce Clause. Additionally, to the extent such authority is questioned, the Necessary and Proper Clause further extends and supports Congress's ability to enact and enforce ICWA. Thus, Congress passed ICWA according to its enumerated power under the Indian Commerce Clause, and authority over the placement of Indian children was never a power of the states.

Given that the placement of Indian children was never within the state's power, to the extent ICWA's provisions conflict with state law, ICWA permissibly preempts state law. ICWA's provisions do not impermissibly regulate states and their officials. Instead, ICWA confers rights to Indian children, families, and tribes. Thus, the appellate court erred when it concluded that ICWA's placement preference and record keeping provisions violate the Tenth Amendment's anticommandeering doctrine. Therefore, this Court should reverse the decision of the United States Court of Appeals for the Thirteenth Circuit and rule in favor of the federal defendants.

II.

The United States District Court for the District of West Dakota properly granted the defendant's motion for summary judgment based on equal protection because ICWA's provisions contain political classifications, subject to and withstanding a rational basis review. Taking into consideration the long-standing existence of a special relationship between the federal government and Indian tribes, the district court correctly concluded that the challenged provisions of ICWA contain only political classifications. Given this determination, the district court properly concluded that the provisions are subject to a rational basis review. Congress recognizes its unique obligation to protect the stability and security of Indian tribes. And ICWA's provisions function to protect against the unwarranted removal of Indian children from their families and tribes. Thus, the district court properly concluded that ICWA's provisions are rationally linked to Congress's obligation and therefore survive a rational basis review. This Court should conclude its analysis of the equal protection issue upon completion of a rational basis review. This Court should not deviate from its long-standing precedent.

Nevertheless, should the plaintiffs urge this Court to find that ICWA's provisions contain race-based classifications subject to strict scrutiny, ICWA will withstand such review. ICWA's provisions will survive this level of scrutiny because Congress has narrowly tailored ICWA to further its unique relationship with Indian tribes. Specifically, ICWA's classifications were established and tailored to further Congress's dual policy to protect the best interests of Indian children and promote the stability and security of Indian families and tribes. ICWA's provisions will survive regardless the level of scrutiny applied. Thus, this Court should reverse the judgment from the United States Court of Appeals for the Thirteenth Circuit and affirm the judgment of the United States District Court for the District of West Dakota.

ARGUMENT AND AUTHORITIES

Standard of Review. The district court resolved this case by granting summary judgment. R. at 12. The appellate court then reversed the judgment and determined the Plaintiffs were entitled to summary judgment. R. at 17. Summary judgment is proper only when "the movant shows 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). This Court reviews grants of summary judgment de novo. *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir. 1994).

I. THE PLACEMENT PREFERENCES AND RECORDKEEPING PROVISIONS OF THE INDIAN CHILD WELFARE ACT COMPORT WITH CONGRESS'S ARTICLE I AUTHORITY AND THE TENTH AMENDMENT TO THE CONSTITUTION.

Plaintiffs first challenge the constitutionality of ICWA §§ 1915(a)–(b) and 1951. Plaintiffs claim ICWA improperly violates the Tenth Amendment because its provisions command states to modify existing state law claims by incorporating federal statutes. Specifically, plaintiffs argue the imposition of such provisions improperly violates the anticommandeering doctrine by regulating states and their officials. This assertion is misplaced because the application of ICWA's placement preference and recordkeeping provisions involves no more than an application of federal rights that states must recognize despite any conflict. *New York v. United States*, 505 U.S. 144, 178 (1992). According to Congress, ICWA is a congressional regulation of private individuals. The district court properly concluded that ICWA's placement preferences and recordkeeping provisions do not violate the Tenth Amendment. Congress had the power to regulate Indian domestic relations under the Indian Commerce Clause. Thus, to the extent ICWA conflicts with state law, ICWA's provisions do not commandeer states but instead permissibly preempt state law under the Supremacy Clause. Here, the United States Court of Appeals for the Thirteenth Circuit improperly reversed the district court's analysis regarding the constitutionality

of ICWA's placement preferences and recordkeeping provisions. Thus, this Court should affirm the findings of the District Court of West Dakota.

A. Congress Has the Constitutional Authority Under the Indian Commerce Clause to Enact the Indian Child Welfare Act.

The district court's finding that Congress has exclusive and supreme authority to regulate Indian affairs is proper because Congress has plenary power to legislate in Indian affairs outside of commerce. *Antoine v. Washington*, 420 U.S. 194, 203 (1975). The Indian Commerce Clause grants Congress the power to "regulate commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Indian Commerce Clause also grants Congress plenary and exclusive powers to regulate tribal affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982). This Court has recognized that Congress's plenary power to deal with Indian affairs is drawn "explicitly" from the Indian Commerce Clause. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Years of precedent have continued to reaffirm this constitutional grant of power to Congress. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020); *see also United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("Congress . . . has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) ("Congress' authority over Indian matters is extraordinarily broad . . . ."); *Cully v. Mitchell*, 37 F.2d 493, 494 (10th Cir. 1930) ("[P]ower of the government over Indian lands is plenary . . . ."). As the plaintiffs claim, the Indian Commerce Clause does grant Congress the power to regulate commerce within Indian tribes. *See United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417 (1866) (upholding federal statute restricting sale of liquor to Indians as a valid regulation of commerce under the Indian Commerce Clause). But contrary to the plaintiffs' claim, Congress's power under the Indian Commerce Clause is not limited strictly to commerce. *See Mancari*, 417 U.S. at

551 (upholding federal statute granting an employment preference for qualified Indians in the BIA as a valid exercise of Congressional authority under the Indian Commerce Clause).

Given that this Court has found that the Indian Commerce Clause applies outside of commerce regulations, it is unlikely a different finding would apply here. Thus, the plaintiffs' claim that the Indian Commerce Clause only confers power to regulate commerce with individuals composing tribes is misplaced. ICWA's placement preference and recordkeeping provisions apply when an Indian child is the subject of a state child custody proceeding. In other words, the provisions apply when a matter of Indian affairs is at issue. As previously determined by this Court, issues of legislation on Indian affairs fall directly within the plenary and exclusive power of Congress under the Indian Commerce Clause. Thus, there can be no doubt that Congress had the constitutional power to enact ICWA. Provided the extensive judicial history backing this power, the plaintiffs' claim that Congress lacks the power to regulate Indian affairs outside commerce is meritless.

1. The appellate court improperly concluded that the Indian Commerce Clause is arguably coextensive with the Interstate Commerce Clause.

The appellate court asserts that the Indian Commerce Clause is arguably indistinguishable from the Interstate Commerce Clause. In its opinion, the court relies on *Lopez* to support the conclusion that Congress did not have the power to enact ICWA because the regulation of child custody is not regulation of commerce. R. at 6; *United States v. Lopez*, 514 U.S. 549, 564 (1995). In *Lopez*, this Court invalidated the Gun-Free School Zones Act of 1990, holding that Congress was acting beyond its power under the Commerce Clause because the Act had nothing to do with commerce or economic activity. 514 U.S. at 551. In its analysis of Congress's power under the Commerce Clause, this Court suggested that the regulation of child custody is not a regulation of

commerce and thus violates the Commerce Clause. *Id.* at 564. But the appellate court's reliance on *Lopez* to discredit Congress's authority to enact ICWA is misplaced.

The appellate court's conclusion rests upon a mere suggestion. In the *Lopez* opinion, this Court was not analyzing the power of Congress under the Commerce Clause to enact a child custody regulation. The Court merely made this one suggestion in a multi-step analysis of a separate federal regulation. Relying on this suggestion to restrict Congress's Commerce Clause power would undermine years of precedent suggesting otherwise. And even if such a conclusion were more than a suggestion, the appellate court's argument is still flawed because it turns on the conclusion that the Indian and Interstate Commerce Clauses are indistinguishable.

In *Cotton Petroleum Corp.*, this Court affirmed the well-established principle that the Interstate Commerce and Indian Commerce Clauses require a "very different application[]." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Specifically, the Interstate Commerce Clause's purpose focuses on maintaining free trade among the states, while the purpose of the Indian Commerce Clause is to provide Congress with plenary power to legislate on matters of Indian affairs. *Id.* Additionally, case law developed under the Interstate Commerce Clause is based upon the structural understanding of state's unique roles within the constitutional system. *Id.* In contrast, case law involving the Indian Commerce Clause contains no such basis. *Id.*

In years of precedent, this Court has established many distinguishable traits in each of the Indian and Interstate Commerce Clauses. As this Court found in *Cotton Petroleum*, each Clause operates for a very distinct purpose. Thus, under the Interstate Commerce Clause, a court may conclude child custody regulations exceed Congress's authority. But a court may not reach the same conclusion when considering Congress's authority under the Indian Commerce Clause.

Additionally, the interpretation of each Clause has created drastically different case law. Analysis under the Interstate Commerce Clause case law that relies heavily on the state's unique role in the constitutional system will produce one conclusion. Whereas an analysis under the Indian Commerce Clause, which does not consider this role, will produce a different result. Thus, it was improper of the appellate court to assume that Interstate Commerce Clause precedent would restrict Congress's power under the Indian Commerce Clause.

2. The Necessary and Proper Clause expands and supports Congress's enumerated power in the Indian Commerce Clause to enact ICWA.

The Necessary and Proper Clause functions to expand Congress's enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819). *McCulloch v. Maryland* interpreted the implied constitutional power of Congress to create the Bank of the United States. *Id.* at 401. This Court determined that Congress had the power under the Constitution to create the bank. *Id.* at 420. Ultimately, Congress derived this power from the Constitution's grant of power to collect taxes and pay debts. U.S. Const. art. I, § 8, cl. 1; *McCulloch*, 17 U.S. (4 Wheat.) at 407. Additionally, the Constitution granted Congress general powers under the Necessary and Proper Clause, which authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States . . . ." U.S. Const. art. I, § 8, cl. 18; *McCulloch*, 17 U.S. (4 Wheat.) at 414. The term "necessary" is a general standard, meaning that the need for power must be convenient or useful, not an absolute necessity. *McCulloch*, 17 U.S. (4 Wheat.) at 413. Congress had the power and responsibility to raise funds, collect taxes, and pay debts. *Id.* at 407. Thus, the creation of the bank was a necessary and proper method for Congress to carry out this power. *Id.* at 424.

Congress ultimately derives the power to enact ICWA from the Indian Commerce Clause. As this Court found in *McCulloch*, in addition to this power, Congress has general powers under

the Necessary and Proper Clause. Thus, the Necessary and Proper Clause expands Congress's enumerated power in the Indian Commerce Clause. In an unbroken history of decisions, this Court has continued to recognize the superior duty of Congress to exercise fostering care and protection over all Indian tribes within its borders, including the duty to protect the tribes from other sovereigns, such as the states. *Sandoval*, 231 U.S. at 46; *United States v. Kagama*, 118 U.S. 375, 384 (1886). Congress recognized that States, in their exercise of jurisdiction over child custody proceedings, often failed to recognize the essential cultural and social standards of Indian tribes and families. And that these failures contributed to many unwarranted removals of Indian children from their tribes. When Congress enacted ICWA, it did so to promote the stability and security of Indian tribes and families. Congress thus determined that the creation of ICWA was a necessary and proper method of carrying out their duty to protect Indian tribes and children. Therefore, Congress's authority to enact ICWA under the Indian Commerce Clause is further extended and supported by the Necessary and Proper Clause.

B. To the Extent That ICWA Conflicts with State Law, ICWA Preempts State Law Under the Supremacy Clause.

Plaintiffs next challenge the constitutionality of ICWA's provisions under the Tenth Amendment. Specifically, plaintiffs argue that ICWA's placement preference and recordkeeping provisions violate the anticommandeering doctrine by requiring state executive agencies to apply federal standards to state-created claims. R. at 7. This assertion is misplaced. Instead, these provisions permissibly preempt state law and do not violate the anticommandeering doctrine because the provisions confer rights on private actors.

Under the Supremacy Clause and conflict preemption, ICWA's placement preference and recordkeeping provisions permissibly preempt West Dakota state law because they confer rights to Indian children, families, and tribes. The Supremacy Clause provides that federal law enacted

pursuant to the Constitution is the "supreme Law of the Land . . . and the Judges in every State shall be bound" by such legislation. U.S. Const. art. IV, cl. 2. In other words, all laws are subject to provisions of both a State and Federal Constitution and State Constitutions are subject to provisions of the United States Constitution. *Gray v. Moss*, 156 So. 262, 266 (Fla. 1934). Based on the Supremacy Clause, when a conflict between federal and state law occurs, federal law will be supreme. *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). Federal law's supremacy serves as the basis for preemption. *Id.* at 1479.

Federal law preempts state law when Congress enacts a federal statute regulating private actors and a state law that regulates private actors, conflicts with that federal law. *Id.* at 1480. For a federal law to validly preempt state law, the federal law must satisfy two requirements. *Id.* at 1470. The federal law must "represent the exercise of power conferred on Congress by the Constitution . . . [and] must be best read as one that regulates private actors." *Id.* at 1479. A federal law can "best read" as regulating private actors when the law either confers rights or imposes restrictions on private actors. *Id.* at 1481. Nevertheless, the anticommandeering doctrine is inapplicable to federal statutes when Congress evenly regulates an activity in which state and private actors engage. *Reno v. Condon*, 528 U.S. 141, 151 (2000).

In *Condon*, this Court declared that a federal statute regulating the disclosure of personal information retained by state Departments of Motor Vehicles ("DMV") validly preempted state law. *Id.* at 143. First, Congress had the authority to enact the statute under the Commerce Clause because the DMV sold the personal information it obtained in interstate commerce to various private entities. *Id.* at 148. In the constitutionality analysis, this Court determined that its holding in *South Carolina v. Baker* governed the interpretation of the statute at issue. *Id.* at 150. In *Baker*, this Court found a federal statute validly preempted state law because the statute "'regulated state

activities' rather than 'seeking to control or influence the manner in which States regulate parties.'" *Id.* (citing *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988)). Like in *Baker*, the federal statute did not require states to regulate their citizens. *Condon*, 528 U.S. at 151. Additionally, states were not required to enact additional laws or regulations to comply with the statute. *Id.* Thus, the federal statute properly preempted state law because Congress had the authority to enact the statute under the Commerce Clause. *Id.* And the statute's application evenly regulated an activity in which state and private actors engaged. *Id.*

The United States Court of Appeals for the Thirteenth Circuit concluded that ICWA's provisions violate the anticommandeering doctrine by requiring state courts and executive agencies to apply federal standards and directives to state-created claims. R. at 16. This conclusion was an error, and this Court should reverse. The anticommandeering doctrine represents the Tenth Amendment's limitation on congressional authority. *Murphy*, 138 S. Ct. at 1476. Under the Tenth Amendment, "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. Thus, the anticommandeering doctrine represents the absence of Congress's authority to issue direct orders to state governments. *Murphy*, 138 S. Ct. at 1476. In other words, Congress cannot directly regulate states under the anticommandeering doctrine. *New York v. United States*, 505 U.S. at 176. This Court has recognized that adherence to the doctrine is important because the doctrine provides a structural protection of liberty and maintains a healthy balance between state and federal government. *Printz v. United States*, 521 U.S. 898, 921 (1997); *New York v. United States*, 505 U.S. at 181–82. The policy behind the doctrine is clearly significant; however, such policy arguments are not at issue here because

ICWA's provisions do nothing more than preempt state law by conferring rights to Indian children, families, and tribes.

In *Murphy*, this Court declared that a federal statute prohibiting state authorization of sports gambling violated the anticommandeering doctrine. 138 S. Ct. at 1481. The federal statute directly violated states' sovereignty because it restricted state legislatures from passing laws that would permit sports gambling. *Id.* In other words, instead of permissibly regulating private actors, the provision at issue regulated the ability of what state legislatures could do. *Id.* at 1478. The provision did not confer any federal right on private actors engaged in sports gambling operations. *Id.* at 1481. Nor did the provision impose any restrictions on those private actors. *Id.* The provision of the federal statute at issue was clearly not a valid preemption provision and thus violated the anticommandeering doctrine of the Tenth Amendment. *Id.*

1. Congress enacted ICWA's placement preference provisions under authority from the Indian Commerce Clause, and the provisions confer rights to Indian children, families, and tribes.

Contrary to the appellate court's finding, ICWA's placement provisions do not impermissibly commandeer state courts or exclusive agencies. Upon the removal of an Indian child from his or her family, ICWA's placement provisions will govern the child's placement. 25 U.S.C. § 1915. Section 1915(a) governs the preference order for an Indian child's adoptive placement, while § 1915(b) governs the order for foster care and preadoptive placements. 25 U.S.C. § 1915(a)–(b). Under both § (a) and (b), a court may stray from these preference orders when a moving party can show with good cause that the preferences will not benefit the Indian child. *Id.* Thus, upon the removal of an Indian child from his biological family, § 1915(a) and (b) attempt to keep the child within tribal culture.

For more reasons than one, ICWA's placement preferences are best read as regulating private individuals. First, the provisions do nothing more than conferring rights on Indian children, families, and tribes. Upon the discovery that Indian families were rapidly being driven toward extinction Congress created ICWA to protect the rights of Indian tribes. Peter K. Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 Wm. Mitchell L. Rev. 811, 814 (2000). Thus, the provisions expressly grant an Indian child's right to be able to stay with and grow up in his or her culture. The families and tribes are granted the right to protect against the unwarranted removal of their children, the most "vital resource to the continued existence and integrity of Indian tribes . . . ." 25 U.S.C. § 1901. Specifically, ICWA's placement preference provisions protect Indian parents and custodians from "a moving party's abuse of either voluntary or involuntary placement procedures." *In re Appeal in Pima Cnty. Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981). Additionally, the states do not have to enact additional laws or regulations to comply with these provisions. Thus, the provisions do not seek to control how the states regulate parties. Instead, like the statute in *Condon*, ICWA's placement provisions regulate state activities. Specifically, states involvement in Indian child welfare proceedings. In other words, during an Indian child welfare proceeding, ICWA's placement provisions regulate the states' placement of the Indian child. Moreover, the anticommandeering doctrine is inapplicable to ICWA's placement preferences because, under these provisions, Congress evenly regulates Indian child welfare proceedings, an activity in which state and private actors engage. Thus, ICWA's placement preferences permissibly preempt state law because they are best read as conferring rights to private actors and Congress had the power to enact the provisions under the Indian Commerce Clause.

2. Congress enacted ICWA's recordkeeping provision under authority from the Indian Commerce Clause, and this provision is best read as regulating state activity.

Again, contrary to the appellate court's finding, ICWA's recordkeeping provision does not impermissibly commandeer state courts or exclusive agencies. When a state court enters a final decree or order in the adoptive placement of an Indian child, § 1951(a) requires the court to provide a copy of such decree or order to the Secretary. 25 U.S.C. § 1951(a). Section 1917 provides the reasoning for this recordkeeping provision. Upon reaching age eighteen, an Indian individual who was once the subject of such adoptive placement can request the final decree of placement from the court in which it was issued. 25 U.S.C. § 1917. This final decree will provide the individual with information regarding his or her tribal affiliations, biological parents, and any other information regarding the individual's tribal relationship. *Id.* Thus, § 1951 attempts to reliable record of the placement of Indian children.

Like its placement preferences, ICWA's recordkeeping provisions are best read as a regulation of private actors. Most important is the implicit right conveyed to Indian individuals who were once the subjects of ICWA's adoptive placements. ICWA's recordkeeping provision ensures these individuals the right to a reliable record detailing information about their tribal relationship. In opposition to the statute at issue in *Murphy*, ICWA's recordkeeping provision does not directly violate states' sovereignty. In other words, the provision does not restrict or limit the state legislature's ability to pass laws. Instead, the recordkeeping provision permissibly confers an individual's right to a reliable adoptive placement record. Finally, as this Court declared permissible in *Condon*, ICWA's recordkeeping provision regulates states' activities instead of how states regulate parties. Expressly, § 1951 requires that the state issuing a final decree in an Indian child adoptive placement provide such decree to the Secretary. Therefore,

§ 1951 only regulates the state activity. It does not restrict or limit the state legislatures' ability. ICWA's recordkeeping provision therefore permissibly preempts state law because it is best read as regulating state activity.

II. THE CLASSIFICATIONS IN THE INDIAN CHILD WELFARE ACT COMPORT WITH THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT.

The Donahues and West Dakota next claim they were deprived of equal protection[1] because ICWA §§ 1913(d), 1914, and 1915(a)–(b) contain race-based classifications that fail strict scrutiny. These provisions contain political-based classifications that survive a rational basis review. And even if this Court were to find the ICWA provisions were race-based, the provisions also survive strict scrutiny.

In 1943, this Court recognized the existence of a special relationship between the federal government and Indian tribes. *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). Specifically, it recognized that the federal government assumed the responsibility of protecting Indian tribes and the authority to perform such duty. *Id.* To carry out such duty, every piece of Congress's legislation dealing with Indian tribes has set out special treatment for the tribes. *Mancari*, 417 U.S. at 552. This Court has upheld such legislation on numerous occasions, finding that the legislation's special treatment does not include suspect racial classifications. *Id.* at 554. Here, the District Court for the District of West Dakota correctly found that ICWA's classifications are politically based. R. at 10.

[1] Plaintiffs allege that ICWA violates the Equal Protection Clause of the Fourteenth Amendment, which prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. But ICWA is a federal statute enacted by Congress, so the Fourteenth Amendment's restriction of states will not apply. The concept of liberty in the Due Process Clause of the Fifth Amendment "extends to the full range of conduct which [an] individual is free to pursue." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Thus, a Fifth Amendment Due Process claim incorporates a Fourteenth Amendment Equal Protection claim. *Id.* Therefore, a court will apply the same analysis to an Equal Protection claim under the Fourteenth Amendment and a Fifth Amendment Due Process claim.

A. ICWA's Classifications Are Politically Based Because They Are Aimed at Indians as Members of Federally Recognized Tribes, Not as Members of Discrete Racial Groups.

In *Mancari*, the appellees, a group of non-Indian Bureau of Indian Affairs ("BIA") employees, challenged the enactment of a statute granting employment preference to qualified Indians. 417 U.S. at 537. Appellees asserted that the enforcement of such statute deprived them of due process of the law, violating their Fifth Amendment right. *Id.* at 539. This Court disagreed with the Appellees' claim in a unanimous opinion. *Id.* at 555. Ultimately, this Court determined the preference was an employment standard reasonably and directly related to a "legitimate nonracially based goal" to further Indian self-government. *Id.* at 554. In reaching this conclusion, this Court heavily relied on the Indian tribes' unique legal status under federal law and Congress's plenary power to legislate on behalf of federally recognized tribes. *Id.* at 551. The preference was permissible because Congress aimed it at Indians, "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id.* at 554. Thus, the preference for Indians did not constitute racial discrimination or even racial preference. *Id.* at 553.

A few years later, this Court further reinforced *Mancari*'s political classification standard and the reasoning for such standard in *Antelope*. The Court in *Antelope* stated that, "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians." *United States v. Antelope*, 430 U.S. 641, 645 (1977). The Court then cited *Mancari*'s political classification standard in *Antelope*, holding that the respondent's enrollment in a federally recognized tribe, not their race, subjected them to federal criminal jurisdiction. *Id.* at 647. Additionally, previous decisions of this Court left no doubt with

the Court that federal legislation concerning Indian tribes is not established on impermissible racial classifications. *Id.* at 645.

The reasoning in both *Mancari* and *Antelope* relies upon Congress's unique relationship with Indian tribes and its authority to enact legislation with preferences for Indians. Therefore, this Court should affirm the district court's interpretation of *Mancari* and *Antelope* as it rests on sound reasoning.

Plaintiffs allege that ICWA §§ 1913(d), 1914, and 1915(a)–(b) deny equal protection of the law because they contain racial classifications which fail strict scrutiny. R. at 10. Section 1913(d) allows "*the parent*" of an Indian child to withdraw consent to the child's adoption if the adoptive party obtained consent through fraud or duress. 25 U.S.C. § 1913(d) (emphasis added). The term parent is not distinctive. Thus, the only classification at issue within § 1913(d) is the classification of an Indian child. ICWA defines an Indian child as "any unmarried person who is under [the] age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4). This Court determined in *Mancari* that preferences granted to Indians because of membership in a quasi-sovereign tribal entity are political classifications. 417 U.S. at 554. Thus, there can be no dispute that in its first prong § 1903(4)'s definition of an Indian child as a "member of an Indian tribe" is a political classification. 25 U.S.C. § 1903(4)(a).

The second prong of § 1903(4) requires the child to be both the biological child of an Indian tribe member and eligible for membership in an Indian tribe. *Id.* § 1903(4)(b). Therefore, the definition in the second prong relies upon the definition of an Indian tribe. As defined in ICWA § 1903(8), an Indian tribe is any tribe, band, nation, or organized group of Indians recognized as eligible for the services provided to Indians. *Id.* § 1903(8). In other words, an

Indian tribe is a federally recognized group of Indians. The requirements of the second prong thus classify Indian children based upon the membership of the child's parent in a federally recognized tribe. In conclusion, Congress grants an Indian child such classification in ICWA because of their connection to or membership in a quasi-sovereign tribal entity. *Mancari*, 417 U.S. at 554. Therefore, ICWA's classification of an Indian child is politically based.

Section 1914 operates similarly to § 1913(d), allowing "any parent or Indian custodian . . . and the Indian child's tribe" to petition the placement or removal of the Indian child upon showing that such action violated any provision of §§ 1911, 1912, and 1913. 25 U.S.C. § 1914. Again, the term parent is not distinctive, leaving only the classifications of an Indian child and the Indian custodian at issue in ICWA § 1914. As previously determined by the *Mancari* standard, ICWA's classification of an Indian child is political. The only remaining classification in § 1914 is the Indian custodian. ICWA defines an Indian custodian as "any Indian person who has legal custody of an Indian child under tribal law." *Id.* § 1903(6). Like ICWA's classification of an Indian child, the classification of an Indian custodian relies solely upon the custodian's membership in a quasi-sovereign tribal entity. Following *Mancari*'s standard, there is no dispute that ICWA's § 1903(6) definition of an Indian custodian is a political classification. *See* 417 U.S. at 554.

The remaining challenged classifications in ICWA's placement preferences are also political. ICWA § 1915(a) and (b) provide placement preferences if a court orders an adoptive or foster care placement of an Indian child. 25 U.S.C. § 1915(a)–(b). Specifically, § 1915(a) controls adoptive placements of Indian children and gives preference to "(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). Section 1915(b) contains similar placement preferences that govern

foster care or pre-adoptive placements. *Id.* § 1915(b). Section 1915(b) gives preference first to (1) the child's extended family members and then to "(2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority[,]" and finally to (4) a children's institution approved by an Indian tribe. *Id.* Section 1915(a) and (b)'s first placement preference to the child's extended family members relies solely on existing familial relationships and thus is not a racial classification. Section 1915(a)'s second and third preferences rely solely upon the potential placement's membership in the child's tribe or another federally recognized tribe. *Id.* § 1915(a). Additionally, § 1915(b)'s second, third, and fourth preferences rely on either the potential placement's membership in a federally recognized tribe or approval of the placement by a federally recognized tribe. *Id.* § 1915(b). Again, as this Court found in *Mancari*, such placement preferences are permissible and political because they are aimed at an Indian individual's membership in a quasi-sovereign tribal entity. *See* 417 U.S. at 554. ICWA's § 1915(a) and (b) placement preferences are thus political classifications.

Chief Judge Tower's concurrence misstates that the district court erred in construing *Mancari* as the controlling Supreme Court precedent for this case. In support of his opinion, Chief Judge Tower relies on this Court's decision in *Rice*, where this Court declared the unconstitutionality of a racial classification in voting restrictions. *Rice v. Cayetano*, 528 U.S. 495, 499 (2000). Specifically, the statute restricted the right to vote to only those citizens of Hawaii who were considered Hawaiians. *Id.* As defined by the statute, Hawaiians were individuals "who were descendants of people inhabiting the Hawaiian Islands in 1778." *Id.* The definition and use of Hawaiian within the statute was improper because it used ancestry as a racial definition for a racial purpose. *Id.* at 515. Thus, this Court ultimately decided that the

statute violated Equal Protection because the Fifteenth Amendment granted all individuals regardless of race or ancestry, the right to vote. *Id.* at 511–12.

Nonetheless, the standards outlined in this case differ from the standard in ICWA because the statute in *Rice* defined its classifications based only on ancestry, whereas *Mancari* and ICWA base classifications on present-day affiliation with the tribe. *See* 25 U.S.C. § 1903(4). Additionally, ICWA and the statute at issue in *Rice* serve two different purposes. The statute in *Rice* was an attempt to bar non-Hawaiians from voting in the state election. 528 U.S. at 515. In contrast, Congress used ICWA to grants numerous prerogatives to Indian tribes ensuring the protection of the not only the Indian children, but also the tribes themselves. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49–50 (1989). In other words, unlike the statute in *Rice*, which was intended to restrict involvement, ICWA promotes tribal sovereignty by involving federally recognized tribes in Indian child welfare proceedings. Thus, the statutes are two opposites and applying the limitation of *Rice* to ICWA and the *Mancari* standard is thus improper.

In conclusion, all the above challenged ICWA provisions contain only political classifications because Congress based each classification on membership in a federally recognized tribe. Therefore, to determine the constitutionality of the provision's political classifications, this Court should apply the *Mancari* rational-relationship test. 417 U.S. at 555.

B. ICWA's Political Classifications Are Subject to and Withstand a Rational Basis Review Because the ICWA's Provisions Are Rationally Linked to Congress's Unique Obligation to Protect the Indian Tribes.

The plaintiffs and Chief Judge Tower's concurrence conclude that the challenged ICWA provisions violate the Equal Protection Clause because the classifications fail strict scrutiny. But ICWA's provisions are political classifications. Thus, this Court does not need to consider such

strict analysis. Instead, this Court should analyze ICWA's provisions with the *Mancari* rational-relationship test. *Id.* The rational-relationship test provides that special treatment of Indian tribes by Congress will not be overturned if it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." *Id.* ICWA's provisions meet the rational-relationship standard and thus are constitutional.

After determining the preference was political, the Court in *Mancari* applied a rational relationship test. *Id.* at 541. In its application of the rational-relationship test, the *Mancari* Court found that Congress's classification did not violate due process because it was reasonably and rationally established to further Indian self-government. *Id.* at 555. Essential to this conclusion was the purpose of Congress in establishing such preferences. *Id.* at 541. Legislative history dating back to 1834 provided that Congress created such preferences to encourage Indian self-government, further Indian tribes' trust in the federal government, and reduce the effects of non-Indian administrators affecting Indian tribal life. *Id.* at 541–42. This history allowed the Court to conclude that the special treatment of Indians comported with due process because the preference was reasonably and directly related to a legitimate, non-racial-based goal. *Id.* at 554.

The special treatment of Indians under ICWA comports with the Fifth Amendment because the classifications are rationally linked to the fulfillment of Congress's unique obligation to Indians. Congress has long since assumed the responsibility for protecting and preserving Indian tribes. ICWA's provisions directly correspond to such responsibility. Congress enacted ICWA after finding non-tribal agencies contributed to the split of an astonishingly high number of Indian families. Additionally, Congress found that states exercising jurisdiction over Indian child custody proceedings often failed to recognize relations, culture, and social standards in Indian tribes and families. Thus, it was rational for Congress to believe that minimum federal standards

enacted to minimize the unwarranted removal of Indian children from tribal culture would promote the stability and security of Indian tribes.

When the placement of an Indian child violates the procedures of ICWA, the child's parent, custodian, or tribe can petition such placement. 25 U.S.C. §§ 1913(d), 1914. ICWA's primary purpose is to reduce the unwarranted removal of Indian children. Thus, it was rational for Congress to create §§ 1913(d) and 1914, which prevent the improper placements of children. In the case of an adoptive or foster care placement, ICWA provides placement preferences to keep the Indian child within their own or another Indian tribe. *Id.* § 1915(a)–(b). As states often fail to recognize the relations, culture, and social standards within Indian tribes, these placement preferences can rationally be linked to promoting and protecting tribal stability. By keeping an Indian child within tribal lines, the child is more likely to be surrounded by others who maintain a connection with the relations, culture, and standards of his or her tribe. The preferences in ICWA reflect the unique values in Indian culture. ICWA's special treatment of Indians can be rationally tied to Congress's unique obligation to protect the preservation of Indian tribes. Congress's classification of Indians in ICWA does not violate the Fifth Amendment because they were reasonably and rationally established to protect Indian children and promote stability and security amongst Indian tribes.

C. Even if ICWA's Classifications Were Racially Based and Strict Scrutiny Applied, ICWA Passes Strict Scrutiny Because Congress Narrowly Tailored ICWA to Further Its Unique Relationship with Indian Tribes.

Nonetheless, even if this Court determined that ICWA contained racial classifications and strict scrutiny applied, the challenged classifications would still pass such review. Thus, even if this Court applies strict scrutiny, it should reverse the decision of the appellate court. Chief Judge Tower's concurrence declares ICWA's provisions unconstitutional under a strict scrutiny review

because the provisions are overinclusive and not narrowly tailored. R. at 18–19. This conclusion is misplaced. Under strict scrutiny, racial classifications are constitutional if the government narrowly tailored the classifications to further compelling governmental interests. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Thus, if ICWA's provisions contained racial classifications, such classifications are constitutional because Congress narrowly tailored ICWA to further its unique relationship with Indian tribes.

1. Congress has a compelling interest in protecting the best interest of Indian children and promoting the stability and security of Indian families and tribes.

All governmental uses of race classifications are subject to strict scrutiny, yet not all are invalidated by it. *Id.* at 327. In *Grutter*, this Court affirmed the constitutionality of racial classifications in a law school's admissions policy. *Id.* at 328. The school's admission policy considered many factors, one specific factor being the school's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against . . . ." *Id.* at 316. The petitioner claimed the school's admission policy violated the Fourteenth Amendment by discriminating based on race. *Id.* at 317. The school's admission policy aspired to achieve a level of diversity that would enrich the education experience. *Id.* at 315. The school asserted that using race in admissions created a diverse student body that provided educational benefits that stem only from diversity. *Id.* at 328. Based on this reasoning, this Court found the school indeed had a compelling interest in securing a diverse student body. *Id.*

Like the law school in *Grutter*, Congress had a compelling interest in creating ICWA. In *Grutter*, the law school asserted that the race classification in the admission policy created a diverse student body, providing a benefit to the school's entire educational experience. Thus, the

school had a compelling interest in retaining such benefit. The same kind of compelling interest exists in ICWA. Congress had recognized a high number of Indian children had been unwarrantedly removed from their families and tribes. Further, Congress recognized such removals not only seriously impacted long-term tribal survival but negatively impacted the individual Indian children socially and psychologically. *Miss. Band of Choctaw Indians*, 490 U.S. at 50. Thus, Congress created ICWA in correlation with its responsibility to promote the preservation of Indian tribes. By reducing unwarranted removals and keeping Indian children within Indian tribes and families, ICWA protects the stability and security of the Indian tribes while also promoting tribe preservation. Therefore, Congress's enactment of ICWA had a compelling interest in protecting the integrity of Indian tribes and families.

2. Congress narrowly tailored ICWA's classifications by including fraud, duress, good cause, and wrongfully obtained placement provisions.

A narrowly tailored classification ensures that "the means chosen fit . . . the [government's] compelling goal so closely that there is 'little or no possibility' for illegal racial prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Thus, narrow tailoring based on race requires serious, good faith consideration. *Grutter*, 539 U.S. at 339. In *Grutter*, this Court found the school's admissions program to be the "hallmarks of a narrowly tailored plan." *Id.* at 334. While the school's policy did contain a race classification, it simultaneously provided an individual, holistic review of each applicant. *Id.* at 338. Therefore, the school's policy was flexible enough to evaluate each applicant as an individual under all circumstances, not just the applicant's race or ethnicity. *Id.* at 336. Because the school could provide individualized consideration to applicants of all races, the policy's race classification was specifically aimed at the school's compelling interest in creating a diverse student body. *Id.* at 338. Thus, this Court affirmed the constitutionality of the school's race classification under strict scrutiny. *Id.* at 343.

ICWA's provisions are narrowly tailored to further Congress's compelling interest in the promotion of Indian tribes and protection of Indian children. The race classification in *Grutter* did not violate the Fourteenth Amendment because while racial classification existed, the policy required the school to complete a holistic review of each candidate. Thus, the classification was one of many factors considered, and therefore, there was little to no possibility in any illegal prejudice. ICWA §§ 1913(d), 1914, and 1915(a)–(b) each contain this same kind of limiting factor, narrowly tailoring ICWA to Congress's interest.

Following proper procedures, ICWA allows an Indian child's foster care or adoptive placement to be within an Indian tribe and—if necessary—outside of it. Nevertheless, §§ 1913(d) and 1914 allow an Indian child's parent, custodian, or tribe to petition the child's adoptive or foster care placement upon a showing of fraud, duress, or violation of specific ICWA provisions. Thus, §§ 1913(d) and 1914 work only to remove an Indian child from a wrongfully obtained placement. These provisions would not warrant such removal unless the placement violated the narrow standards of fraud, duress, and violation of §§ 1911, 1912, and 1913. Because the goal of ICWA is to prevent the unwarranted removal of Indian children and promote tribal integrity, Congress narrowly tailored §§ 1913(d) and 1914 to reach such goal. Additionally, § 1915(a) and (b), which dictate placement preferences, contain "good cause" provisions to limit such placements. The provision allows a court to disregard the placement preferences of ICWA upon a showing of "good cause" to the contrary. In other words, if the moving party can illustrate that such preferences would not benefit the Indian child, the court will disregard the preferences. Sections 1915(a) and (b) consider a holistic review of the placement, including showings of good cause that the court should not follow ICWA's preferences. Congress enacted ICWA with the

best interests of Indian children in mind. The "good cause" provisions narrowly tailor § 1915(a) and (b) to promote such interest.

Congress created ICWA to protect the best interest of Indian children and promote the stability and security of Indian tribes. Congress narrowly tailored ICWA's provisions to further these exact compelling interests. Thus, even if this Court were to review ICWA's provisions under strict scrutiny, the challenged provisions would pass such review. Regardless of the level of scrutiny applied, ICWA's provisions comport with the Fifth Amendment and are thus constitutional.

CONCLUSION

This Court should REVERSE the judgment of the United States Court of Appeals for the Thirteenth Circuit in all respects.

Respectfully submitted,

_____

COUNSEL FOR PETITIONERS