No. 21-19042

IN THE
Supreme Court of the United States

STUART IVANHOE, SECRETARY OF THE INTERIOR, ET AL.,
Petitioner,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit.

BRIEF FOR RESPONDENT

Team 6

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QUESTIONS PRESENTED

I. BY FORCING STATE AND TRIBAL EMPLOYEES TO CONFORM TO FEDERAL LEGISTLATION REGARDING INDIAN CHILDREN, DOES THE PLACEMENT PREFERENCE AND RECORDKEEPING PROVISIONS OF THE INDIAN CHILD WELFARE ACT EXCEED CONGRESS' ARTICLE I AUTHORITY OR VIOLATE THE ANTI-COMMANDEERING DOCTRINE UNDER THE TENTH AMENDMENT; AND

II. BY USING LINEAGE AND BLOOD QUANTUM REQURIEMENTS AS OPPOSED TO ACTUAL TRIBAL MEMBERSHIP, DOES THE INDIAN CHILD WELFARE ACT CREATE A RACIAL CLASSIFICATION THAT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AND FORTHEENTH AMENDMENT?

IN THE
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No. 21-19042

STUART IVANHOE, SECRETARY OF THE INTERIOR, ET AL.,
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BRIEF FOR RESPONDENT

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 2021. The petition for a writ of certiorari was granted on August 5, 2022. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Procedural History

On 29 June 2020, the two private parties, Mr. and Mrs. Donahue, filed suit alongside the State of West Dakota against the United States of America, the United States Department of the Interior and its Secretary, Stuart Ivanhoe, in his official capacity. R. at 2. The Indian Child Welfare Act (ICWA) §§ 1913(d), 1914, and 1915(a)–(b) violate the Equal Protection Clause of the Fifth and Fourteenth Amendments. *Id*. In addition, ICWA §§ 1912(a) and (d)–(f), 1915(a)–(b) and (e), and 1951 exceeds Congress' Article I power and commandeer the states in violation of the Tenth Amendment. *Id*. Shortly after the suit was filed, the Quinault Nation and the Cherokee Nation filed a Motion to Intervene, which was granted. R at 4. On 3 September 2020 both parties filed cross Motions for Summary Judgment, and the Plaintiff's motion was denied. *Id*. However, on appeal, the Appellate Court reversed and remanded the trial court decision for a judgment in favor of the Plaintiff. The Defendants appealed, and The Supreme Court granted certiorari on 5 August 2022. R at 17.

II. Factual Background

A. Baby C

The Donahues are foster parents – they take in children that can no longer be cared for by their biological parents, and they provide a loving home for the child. R at 2. The Donahues received an Indian[1] baby ("Baby C"). Baby C's parents were unable to care for her, so she was placed in the custody of her maternal aunt after she was born. *Id*. However, on numerous occasions, Baby C was left by herself for long periods of time, making her vulnerable and unsafe. *Id*. Child

[1] Indian is a term of art in the ICWA statutes; therefore, the word Indian will be used for purposes of this brief rather than the culturally appropriate terms of Native American or Indigenous People.

Protective Services (CPS) took Baby C out of her aunt's care and placed her in the loving arms of the Donahues. *Id*. Once Baby C was safe with the Donahues, CPS notified both of Baby C's tribes, the Quinault Nation and the Cherokee Nation, as is required by the ICWA. *Id*. West Dakota then terminated the parental rights of Baby C's biological family, and in September 2019, the Donahues filed to adopt Baby C. R. at 3. However, the Quinault nation notified the Donahues that they had found a new home for Baby C – a stranger in another state with no familial or tribal ties to the child. Fortunately for the Donahues, the new placement fell through, and the Donahues were able to successfully adopt Baby C as their own child. *Id*.

B. Baby S

Baby S is a baby boy, whose mother was a part of the Quinault Nation. *Id.* However, due in part to his mother's drug addiction, he lived with his paternal grandmother during the first part of his life. *Id*. In February 2020, his biological mother died from a drug overdose, and, unfortunately, Baby S's grandmother's health was rapidly declining, so she could no longer care for Baby S. *Id*. In April 2020, Baby S was taken out of his grandmother's care by CPS and was given to the Donahues as a foster child. *Id.* CPS notified the tribe as required by the ICWA. *Id*. In May of 2020, with the consent of the grandmother, the Donahues filed for adoption of Baby S. *Id*. However, the Quinault Nation opposed this adoption, and came forward stating they had two potential adoptive parents within the Quinault Nation but in a different state. *Id*. These potential adoptive parents were not relatives of Baby S, nor had they ever met him. The Donahues and the State of West Dakota then filed suit. *Id*.

C. West Dakota

The State of West Dakota has three Indian tribes within its borders, and approximately twelve percent of West Dakota's adoption proceedings involve Indian children. R. at 2. West

Dakota CPS distributes a compliance manual that states that "almost every aspect of the social work and legal case is affected." *Id*. This imposes a higher legal burden of proof for the removal of an Indian child from the custody of his or her biological parents; termination of parental rights, and restrictions on custody for parents. *Id*.

SUMMARY OF THE ARGUMENT

First, ICWA exceeds Congress' Article I authority, violates the anti-commandeering doctrine of the Tenth Amendment, and violates the Equal Protection Clause of the Fifth and Fourteenth Amendments. Congress' Article I authority allows Congress to regulate interstate commerce as well as plenary power over regulating Indian commerce. However, plenary power over Indian Commerce Clause goes against what the Framers of the Constitution intended when drafting the Commerce Clause. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (J. Thomas Concurring). Furthermore, regardless of Congress's supposed plenary power, ICWA exceeds the Interstate Commerce Clause because it still regulates the states, and it does not regulate interstate commerce. *New York v. United States*, 505 U.S. 144 (1992). ICWA deals with Indian children, and even under the broadest contemplation of the Interstate Commerce Clause in *Wickard*, children do not constitute commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942). In addition, the Tenth Amendment anti-commandeering doctrine prohibits the federal government from forcing the state governments to adopt or enforce federal policies, and it withholds from Congress the power to issue orders directly to the States. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). However, ICWA does require states to comply and enforce it; therefore, it is in direct violation of the Anti-Commandeering Doctrine.

Second, the Fourteenth Amendment states, "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the Equal Protection of the laws." U.S. Const.

amend. XIV. ICWA classifications discriminate on the basis of race, and therefore, are subject to strict scrutiny. *Grutter v. Bollinger,* 539 U.S. 306, 326 (2003). ICWA fails strict scrutiny because it is not narrowly tailored to a compelling governmental interest – under ICWA it is preferable to subject a child to an entirely different culture instead of taking steps to maintain proximity to his or her home tribe, and that erroneously equates all Indian tribes while building barriers between Indian children and their home tribes.

Therefore, ICWA is unconstitutional because it exceeds Congress' Article I authority; it violates the Tenth Amendment; and it violates the Equal Protection clauses of the Fifth and Fourteenth Amendments. This Court should uphold the appellate court's decision, finding in favor of the respondent, and overturn ICWA.

ARGUMENT

I. The Indian Child Welfare Act Exceeds Congress's Article I Authority, and it Unconstitutionally Violates the Anti-Commandeering Doctrine.

The placement preference provisions, 25 U.S.C. § 1915(a), and the recordkeeping provision, 25 U.S.C § 1915(e), of the ICWA exceed Congress's Article I authority and if applied violate the anti-commandeering doctrine under the Tenth Amendment.

There are two provisions of ICWA at issue: the placement preference provision and the recordkeeping provision. Under the adoptive placement preference provision of ICWA, "any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C § 1915(a).

Under 25 U.S. § 1915(e), the recordkeeping provision of the ICWA states,

> "a record of each such placement, under State law, of an Indian child shall be maintained by the state in which the placement was made evidencing the efforts to comply with the order of preference specified in this section. Such record will be made available at any time upon the request of the Secretary or the Indian child's tribe."

These provisions cannot be justified under the Indian Commerce Clause or the Interstate Commerce Clause because ICWA exceeds Congress's plenary power to regulate Indian tribes, and ICWA cannot be justified under the interstate Commerce Clause because it regulates children – not commerce.

Congress enacted ICWA in response to "an alarmingly high percentage" of Indian families being broken up by the "often unwarranted" removal of their children by "nontribal public and private agencies." 25 U.S.C § 1901 (4). This Court should not uphold the placement preference provision or the recordkeeping provision of ICWA because they exceed the powers delegated to Congress by the Indian Commerce Clause, which Congress relied on to pass ICWA. 25 U.S.C. § 1901(1).

A. Under the Indian Commerce Clause, Congress does not have plenary power over the Indian tribes, as it is limited by regulating commerce.

Congress stated that its authority to regulate the adoption of Indian children came from the Indian Commerce Clause and "other constitutional authority." *Id*. § 1901(1). The Constitution grants Congress the power to regulate commerce with foreign nations and among the states, and with the Indian tribes. U.S. Const. art. I, § 8, cl. 3. ICWA regulates "child custody proceedings" that involve an "Indian child." *Id*. § 1903. Under ICWA custody proceedings include foster care placement, termination of parental rights, pre adoptive placement, and adoptive placement. *Id*. § 1903(1). An Indian child is defined as "any unmarried person who is under 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). These definitions are the core of the

placement preference mandates under ICWA, and the recordkeeping provision. *Id*. §§ 1915(a),(b),(e).

The ICWA placement preference and recordkeeping provisions are beyond the reach of any regulation of "commerce" with "Indian tribes." U.S. Const. art. I, § 8, cl. 3. The placement preference provision mandates an order of preference for an Indian child's adoptive placement. 25 U.S.C. §1915(a). The placement system speaks solely to an Indian child but there is no link to commerce present. Likewise, the recordkeeping provision requires that a record of any adoption or placement, under State law, "of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section." 25 U.S.C § 1915(e). This section additionally requires that such records are to be "available at any time upon request by the Secretary or the Indian child's tribe." *Id*.

Congress has been referred to as having plenary power over Indian commerce, meaning full control, without limitation, to regulate the Indian tribes. *Morton v. Mancari*, 417 U.S. 535 (1974). Furthermore, in *Cotton Petroleum Corp. v. New Mexico*, the Court held that it would be inappropriate to use the Interstate Commerce Clause and all its developed case law against the Indian tribes, as it is not "among" the "states" since an Indian tribe is not a state at all. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). However, this was not what the Framers of the Constitution intended when creating the coextensive Interstate Commerce Clause and the Indian Commerce Clause. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (J. Thomas Concurring). "The Indian Commerce Clause gives Congress authority "[t]o regulate *Commerce* . . . with the Indian tribes." Art. I, §8, cl. 3 (emphasis added). The Framers of the Constitution wanted Congress to be able to regulate trade with the Indian tribes, "(but only trade) through the Commerce Clause." Robert G. Natelson, *ARTICLE: The Original Understanding of*

the Indian Commerce Clause, 85 Denv. U.L. Rev. 201, 243. Furthermore, at the time of the ratification of the Constitution, the framers were discussing regulating *commerce* – not "noneconomic activity such as adoption of children." *Adoptive Couple*, 570 U.S. at 659. "It did not purport to be exclusive, and it covered only commercial transactions with Indian tribes rather than all affairs with all Indians." Natelson, *supra*. The Court in *United States. v. Holiday*, states that the Indian commerce clause regulates the power to regulate the individuals composing of the tribes. *United States. V. Holiday*, 70 U.S. 407, 417 (1865). However, the text of the Indian Commerce Clause does not state that it can regulate Indian people, but instead it can regulate commerce with the Indian tribes. *Adoptive Couple*, 570 U.S. at 659. Therefore, the text, on its face, would read that Congress *only* has the power to regulate *commerce* with the Indian *tribes*. "That power is far from 'plenary.'" *Id*. at 660.

This Court has declined to extend Congress's plenary authority under the Indian Commerce Clause where federal legislation exceeded the commerce power. *See, e.g*., *United States v. Morrison,* 529 U.S. 598, 617 (2000) (holding that Congress lacked the authority under the Commerce Clause to enact a civil remedy provision of VAWA, because the provision was not a regulation of activity that substantially affected interstate commerce; and such crimes were not economic activity). *United States v. Lopez,* 514 U.S. 549, 558 (1995) (Invalidating a law that prohibited possessing a firearm within 1,000 feet of a school, because the law by its terms had nothing to do with commerce or any sort of economic activity). Therefore, because the ICWA exceeds the scope of Congress under the Commerce Clause, and there is no enumerated power for Congress to govern over all Indian affairs, plenary power cannot be extended to justify the non-economic provisions of ICWA. ICWA regulates not only the Indian tribes but also the states themselves.

B. ICWA Cannot be Justified Under the Interstate Commerce Clause because it Regulates Adoption Proceedings for Indian Children – Not Commerce

Regardless of whether Congress has plenary power over Indian commerce, Congress is limited to regulating only *commerce* when it comes to the states. *United States v. Dewitt*, 76 U.S. 41, 44 (1869)(emphasis added). The Constitution confers upon Congress "not all governmental powers, but only discrete, enumerated ones," *Printz*, 521 U.S.521 U.S. 898, 919 (1997), including the considerable authority that is granted to Congress by the Interstate Commerce Clause, but the provisions of ICWA go far beyond the scope of Congress's power under the Interstate Commerce Clause. This "express grant of power to regulate commerce among the states has always been understood as limited by its terms." *Dewitt*, 76 U.S. at 44. This power has also been understood as a "virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested." *Id*. at 44.

As this Court has recognized, states "possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Accordingly, this "express grant of power to regulate commerce among the States has always been understood as limited by its terms." *Dewitt*, 76 U.S. at 44. It is not disputed that Congress has the authority to "regulate commerce," but the recordkeeping and placement preference provisions of ICWA do not address or regulate commerce, and therefore cannot be supported by the Interstate Commerce Clause.

This Court has previously applied a narrow view of the Interstate Commerce Clause by holding that it did not allow Congress to regulate manufacturing. *United States v. E.C. Knight Co*., 156 U.S. 1, 13-14 (1895). However, this Court greatly expanded the Interstate Commerce Clause

in *Wickard*, holding that Congress may regulate virtually any activity if there is a rational belief that, in the aggregate, the activity has a non-trivial impact on commerce. *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

United States v. Lopez set forth a three-part categorical analysis that is used as the test to determine whether a federal statute exceeds the scope of Congress's Interstate Commerce Clause authority. *Lopez*, 514 U.S. at 558. Under this three-part categorical analysis: "First, Congress may regulate the use of the channels of interstate commerce." *Id*. "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities" *Id*. "Finally, Congress possesses the constitutional authority to regulate 'activities that substantially affect interstate commerce.'" *Id*. at 514. Even under an expansive reading of the categories set forth in *Lopez*, the portions of ICWA at issue do not fall under any of them.

Under the first category, Congress may regulate the traditional channels of interstate commerce and the movement of materials or goods crossing through state lines. In *Pierce*, the Court upheld a federal statute that protected certain highway safety information as a valid exercise of Congress's power under the Interstate Commerce Clause. *Pierce Cnty., Wash. v. Guillen*, 537 U.S. 129, 147 (2003). The Court stated that since the "legislation was aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce" the federal statute fell within the Congress's article I authority. *Id*. at 732.

Under the second category, Congress can regulate and protect three different subcategories; instrumentalities of interstate commerce, and persons or things in interstate commerce. *United States v. Faasse*, 265 F.3d 475, 490 (6th Cir. 2001). In *Faasse*, the court held that subjecting an individual to criminal liability for failing to pay child support was an appropriate exercise of

Congress's Interstate Commerce Clause power as a "regulation of a 'thing' in interstate commerce.'" *Id*. at 481. The court stated that Congress may "freely regulate the interstate court-ordered child support payment" since it is an obligation that is the functional equivalent of an interstate contract. *Id*. at 489.

Under the third category, Congress has the authority to regulate activities that "substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. This final category is the most unsettled one where the proper test "requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Lopez*, 514 U.S. at 559. Furthermore, the congressional acts that have been upheld under the third category show a pattern. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez* at 559-60.

Children do not fall under any category contemplated in *Lopez*, and not even the broadest interpretation of the Interstate Commerce Clause could be read to include Indian children. Children are not channels of commerce, so they do not fall under the first category. Furthermore, as mentioned in *Faasse* child-support payments, are "things." They are an obligation that is the functional equivalent of an interstate contract which is a form of economic activity. However, an Indian child is not a thing in interstate commerce. Even the most broadly interpreted application of the Interstate Commerce Clause, found in *Wickard*, still involved economic activity. Here, the portions of ICWA at issue do not regulate commerce with either states or Indian tribes. These provisions instead deal with Indian children and children that are non-tribal members, but are eligible for tribal membership. 25 U.S.C § 1915.

There is another textual limitation found within the Interstate Commerce Clause – the term "commerce," itself. Although this Court has expanded "commerce" to cover more than regular

trade or channels of trade, it has also previously directly limited the Commerce Clause by stating that, "goods are the subject of commerce, the persons are not." *Mayor, Aldermen & Commonalty of City of New York v. Miln*, 36 U.S. 102, 136 (1837). This limitation parallels the previous decisions of the Court, as those cases contained direct economic activity or an aggregate impact on commerce. *See Wickard*, 317 U.S. 111 (1942). Because of the limitations imposed upon the Commerce Clause by this Court, the ICWA unconstitutionally exceeds Congress's power.

C. The placement preference and recordkeeping provisions of ICWA violate the anti-commandeering doctrine of the Tenth Amendment.

Assuming *arguendo* that the ICWA provisions at issue were supported under the Commerce Clause, the provisions would still violate the anti-commandeering doctrine of the Tenth Amendment. The anti-commandeering doctrine derives from the "fundamental structure" of the Constitution, which "withholds from Congress the power to issue orders directly to the States" and all legislative power not granted to Congress is reserved for the states in the Tenth Amendment. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018).

The anti-commandeering Doctrine generally prohibits the federal government from requiring states to adopt or enforce federal policies; "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the states to regulate." *New York v. United States*, 505 U.S. 144, 178, 112 S. Ct. 2408, 2429, 120 L. Ed. 2d 120 (1992). Furthermore, Congress cannot circumvent that prohibition by conscripting the State's officers directly. *Printz v. United States*, 521 U.S. at 935. In applying the anti-commandeering doctrine this Court has held that Congress cannot require states to enforce or implement federal policies, even when the relevant legislation simply requires state officials to perform "discrete, ministerial tasks." *Id*. at 929. In *Printz*, the Court articulated a separate rationale for the anti-

commandeering Doctrine stating that by "forcing state governments to absorb the financial burden of implementing a federal regulatory program." Congress could take credit for "solving problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Id*. at 930. Even if the states were given financial support to adopt and enforce the federal regulatory program, then they would be placed in a position of "taking the blame for its burdensomeness and for its defects." *Id*.

In *Murphy*, this Court reaffirmed that the constitution "withholds from Congress the power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475. Furthermore, the exception to the anti-commandeering doctrine requires that Congress "evenhandedly" regulate an activity in which both private actors and the states engage. *Id*. at 1478. Thus, Congress cannot pass laws requiring or prohibiting certain acts, "even where Congress has the authority under the Constitution," it lacks the "power to directly compel the states to require or prohibit those acts." *New York*, 505 U.S.at 166.

Congress is not allowed to shift the financial costs to the states for implementing a "federal regulatory program." *Printz*, 521 U.S. at 930. Both of the provisions at issue unconstitutionally require state courts to apply federal standards and directives to state – created claims. As established above, Congress may not directly compel the states to apply the placement preference provision of ICWA. *New York*, 505 U.S. at 166. Therefore, ICWA unconstitutionally "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.*. at 176.

Additionally, in the placement preference provision, Congress is forcing state courts to set aside state laws in state causes of action to instead implement Congress's preference mandate. This

directly defies the previous holdings of this Court, which clearly established that "Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Printz*, 521 U.S. at 935.

By forcing State courts to enforce the ICWA provisions Congress is forcing states to follow federal orders directly in violation of the anti-commandeering doctrine. This goes beyond merely requiring state officials to perform "discrete, ministerial tasks." *Id*. at 929. State and federal courts can share concurrent jurisdiction in various legal matters, but Congress has to create a private federal cause of action in order to provide for concurrent jurisdiction, since where a state court can hear a comparable state law claim, it must also hear a federal law claim. *Mims v. Arrow Fin. Ser., LLC*, 556 U.S. 368 (2012); *Testa v. Katt*, 330 U.S. 386 (1947). Yet, there is no private federal cause of action here, and as such it cannot be adjudicated in a federal forum. This leaves no other alternative than for state courts to bear the burden of enforcing the provisions of ICWA.

Although the Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020) argued that the plenary power was all-encompassing because "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history," this referred to the power of Indian tribal governments to regulate criminal conduct within the tribes. It did not restrict this power within all realms of the law, it only delegated criminal jurisdiction to tribal courts in certain circumstances. However, ICWA proceedings are currently held in state courts, under the jurisdiction of the state and the federal government, with the tribe acting in an advisory capacity. Therefore, tribal power could be increased by allowing state and tribal governments to work in harmony without interference from the federal government.

In passing ICWA, Congress intended to promote the sovereignty of Indian tribes, and to preserve Indian culture by limiting the removal of Indian children from their homes. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989). When ICWA was passed in 1978,

approximately 75-80% of families living on reservations lost a child to the state foster care system, which was run by non-Indian public and private agencies, and they placed the children with non-Indian families. *ICWA History and Purpose*, Montana Department of Public Health and Human Services, https://dphhs.mt.gov/index. These agencies "were often ignorant, indifferent of or insensitive to cultural differences in child rearing and parenting practices and, as a result, many unnecessary, and unwarranted, foster and adoptive placements were made." *Id*. However, this legislative intent can be satisfied by state legislatures – especially given the cultural competency levels that are present in modern-day society, as opposed to the ignorance of Indian culture that was prevalent in 1978 when ICWA was enacted. This legislative intent can be achieved without violating the Constitution.

In conclusion, ICWA exceeds Congress' Article I authority because the Indian commerce clause does not grant Congress plenary power over Indian affairs, only commerce. Furthermore, ICWA controls not only the Indian tribes, but also the states. In addition, ICWA regulates Indian children, and even in the broadest reading of the Interstate Commerce Clause under *Wickard*, 17 U.S. at 111, Indian children are not commerce. *Adoptive Couple*, 570 U.S. at 659. Furthermore, ICWA violates the Tenth Amendment's anti-commandeering doctrine because ICWA forces states to enforce federal policies. Thus, ICWA is unconstitutional.

II. The ICWA Violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the Equal Protection of the laws." U.S. Const. amend. XIV. Equal protection rights are inherent in the Due Process clause of the Fifth Amendment, which applies to actions of the federal government.

Bolling v. Sharpe, 347 U.S. 497 (1954). Therefore, under the Constitution and subsequent case law, both federal and state governmental entities are prohibited from denying "any person within its jurisdiction the Equal Protection of the laws," including Indian children and non-Indian adoptive parents. U.S. Const. amend. XIV.

The Equal Protection clause is implicated by laws or governmental actions that improperly impose special burdens on or grant special benefits to certain factions of people. When considering whether governmental action violates this clause, the Court must determine the level of scrutiny to apply. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The levels of scrutiny are: Strict scrutiny, intermediate scrutiny, and rational basis scrutiny. *Id.* Rational basis scrutiny applies to non-suspect classifications. *Id.* To satisfy rational basis scrutiny, the government must have a legitimate purpose and means must be rationally-related to that purpose. *Id.* A heightened level of scrutiny, strict scrutiny, is applied to discrimination on the basis of race, national origin, religion, or alienage. *Id.* To survive strict scrutiny, the government must establish that there is a compelling purpose for the classification, and that the action is narrowly tailored, meaning that there are no less discriminatory means to achieve that purpose. *Grutter v. Bollinger* 539 U.S. 306, 326 (2003).

Under ICWA, an "Indian child" is defined as "any unmarried person who is under 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." 25 U.S.C. § 1903(4). A "parent," under ICWA is described as a "biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9).

Although a plain reading of the statute may indicate that the classification of a child as "Indian," under ICWA is merely a determination of political tribal status, this plain reading is inconsistent with case law interpretations of "race," and it ignores the ancestral, racial requirements for membership in many tribes. These racial requirements, often referred to as "blood quantum requirements," designate a person as "Indian," based on the amount of "Indian blood," that a person has. Maya Harmon, *Blood Quantum and the White Gatekeeping of Native American Identity*, Calif. L. Rev. Online (Apr. 2021), https://www.californialawreview.org /blood-quantum-and-the-white-gatekeeping-of-native -american-identity. These blood quantum requirements are utilized by both the Bureau of Indian Affairs (BIA) and a number of tribes to determine tribal eligibility and eligibility for federal social services. *Id.* The BIA must approve tribal enrollment requirements, and although the BIA favors blood quantum requirements, a number of tribes have rejected these requirements in favor of lineal descent analysis, where eligibility is determined by a person's ancestral history. *Id.* However, both the blood quantum requirements and the lineal descent analysis are racial classifications, as "'[r]acial discrimination' is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" *Rice v. Cayetano*, 528 U.S. 495, 515 (2000) (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)).

A. The Classifications Based on Ancestral History and Lineage Within ICWA Violate the Equal Protection Clause Because They Discriminate on the Basis of Race.

ICWA's classifications violate the Equal Protection clause because Indians are classified based on their race, lineage, and based on the amount of "Indian blood," that they possess. Indian tribal membership is a racial classification because it is based on blood quantum requirements and lineage requirements. Moreover, children under ICWA are not required to be a tribal member –

they are only required to be "eligible for membership in an Indian tribe." 25 U.S.C. § 1903(4). Eligibility for membership in an Indian tribe is based on race. ICWA does not apply to tribal members – it applies to Indians who receive that label based on their ancestry. Because of this method of racial classification, ICWA unconstitutionally discriminates on the basis of race.

Strict scrutiny was first applied to race in *Loving v. Virginia*, where the Court addressed the legality of interracial marriage. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). In recognizing the equality of the races under the law, the Court stated that "[o]ver the years, this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* at 11 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

The race-based classification system in ICWA mirrors the race-based classification in *Rice*, because it is based on ancestral history and paternity – not a political designation. In *Rice*, certain voting rights were restricted to only Native Hawaiians, defined by statute as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Rice,* 528 U.S at 509. The Court evaluated the statute under the Fifteenth Amendment, which established the "fundamental principle," that the government may not "deny or abridge the right to vote on account of race." *Id.* at 511-12. The Court held that the statute that restricted voting to Native Hawaiians was unconstitutional because it discriminated on the basis of race. *Id.* at 499.

In concluding that the statute's classification was based on race, as opposed to a political designation, the *Rice* Court addressed the use of ancestral history in classification systems, including the use of grandfather clauses to racially discriminate against black citizens. *Id.* at 513-14. Ancestral history and race often intermingle, and "[a]ncestry can be a proxy for race." *Id.* at

514. Although the intent of the legislature was to provide a platform for Hawaiian citizens who had been subjected to the annexation of Hawaii by the United States, the Court held that the statute constituted racial discrimination. In defining racial discrimination, the Court stated that "'[r]acial discrimination' is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" *Id.* at 515 (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)).

The racial, ancestral classifications within *Rice v. Cayetano* mirror the classification of Indian children based on their lineage and ancestral history. In *Rice*, the statute limited voting to "any descendant of the aboriginal peoples. . . ." The Court held that this classification was both ancestral and racial, as it conferred specific rights based on one's lineage. Similarly, in ICWA, a child is defined as "Indian," as a "biological child of a member of an Indian tribe." Because a child is designated as Indian based on lineage and ancestry, this serves as a "proxy for race," under the Equal Protection Clause.

The ancestral designations in ICWA are dissimilar to the political designations in *Morton v. Mancari* because ICWA classifications are based on ancestry, and not solely on tribal membership *Morton v. Mancari*, 417 U.S. 535 (1974). In *Morton*, the plaintiffs filed suit regarding the Indian Reorganization Act of 1934 (The Act), which established preferential employment treatment for Indians in the Bureau of Indian Affairs (BIA). The plaintiffs, who were non-Indians, alleged that this preference violated the Equal Employment Opportunity Act of 1972, and the Due Process Clause of the Fifth Amendment. *Id.* at 537. The Act stated that, in considering appointments, the provision applied to "various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such

positions." *Id.* at 537-38. The Court stated that "[t]he purpose of these preferences. . . has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." *Id.* at 541-42.

The Court addressed Title VII of the Civil Rights Act of 1964, which prohibits discrimination in private employment on the basis of "race, color, religion, sex, or national origin," but it "explicitly exempted from its coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations." *Id.* at 545-46. The Court recognized the congressional sentiment that "an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination," and that in fact, the preference was not racial at all, but "it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 546-54. The Court compared this preference to the requirement that a city council member live in the city that is governed by the council. *Id.* at 554.

In contrast, the racial classifications in ICWA are not based on tribal membership, but on ancestry, biology, and eligibility for tribal membership. The classification in *Mancari* was based solely on tribal membership – not eligibility for tribal membership or lineage. This benefit was intended to distinguish members of a community, not people who satisfy blood quantum or lineage requirements. This distinction, combined with the intent of the BIA to allow tribal members more liberty and self-government, indicates that while the classification in *Mancari* was political, the differences in classification and intent under ICWA are distinguished as a race-based, ancestral classification.

The reasoning in *Morton v. Mancari* has been extended to cases involving specific preferences to tribes for political purposes. In *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, the Court allowed preferential treatment to extend to Indian tribes regarding the regulation of taxes – wherein non-Indians paid a higher tax on reservations than Indians. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation* 425 U.S. 463 (1976). However, this reasoning has not been extended to statutes governing Indian relations based purely on their ancestral history or race, and not the political benefits that could be conferred to a tribe. *Id*.

This distinction was evident in *Baby Girl,* in which the child was not a member of any tribe, and yet the court stated "[i]t is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law," because her Cherokee ancestry and lineage placed her under ICWA. *Adoptive Couple v. Baby Girl,* 570 U.S. 637, 646 (2013). She was not born on a reservation, she had never been to a reservation, and her father never had physical or legal custody of her prior to the court proceedings. *Id.* at 650.

In *Miss. Band of Choctaw Indians v. Holyfield*, two Indian parents were members of the Choctaw Reservation in Mississippi when they learned that an Indian woman was pregnant with twins. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 38 (1989). The Indian parents intentionally moved 200 miles away from the reservation, where the mother gave birth to twins, and they promptly arranged for the twins' adoption by non-Indians. *Id.* at 38-40. Upon learning of the adoption, the Reservation opposed the adoption and jurisdiction of the state court under ICWA, regardless of the fact that neither of the children had ever "resided on or physically been on the Choctaw Indian Reservation." *Id.* at 39. Nevertheless, the children were classified as Indian children, and the tribe was granted jurisdiction of the adoption against the wishes of the biological parents under the domiciliary technicalities and legislative intent of ICWA. *Id.* at 49-54.

The legislative intent of ICWA is undermined by the adoption and foster care process of Indian children, particularly under the third prong of ICWA, which gives priority to a placement with any Indian family. In addressing the legislative intent, the Court stated "in the words of the House Report accompanying [ICWA], 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'" *Id.* at 37. However, this oversimplifies Native American and Indigenous cultures when addressed alongside the third prong of ICWA, which gives preference to placement with any Indian family, on any reservation in the country.

Under ICWA, even if a placement is available one mile off of the reservation with non-Indians, preference is given to an adoptive family across the country, on a reservation that the child may never be eligible to join based on lineage and blood quantum requirements, and whose tribal culture may be vastly different from the child's home tribe. This preference is reflected in 25 U.S.C. § 1915(b), the portion of ICWA designated for foster care placements, which gives preference to Indian foster homes over proximity to the home tribe. This means that, if an Indian child is temporarily placed into foster care, and a placement is not available with a member of the child's family or a foster home affiliated with the tribe, then a child may be sent across the country with no ability to visit their home tribe. The U.S. recognizes 574 tribes across 48 states. *Federally Recognized Indian Tribes and Resources for Native Americans*, USA.Gov. https://www.usa.gov/tribes#item-37647. Although under ICWA, these tribes are viewed as homogeneous, "each tribal community is, in fact, uniquely different, showcasing a diverse range of traditions, religious practices, economic undertakings, and social standings that have sustained them for centuries." Miguel Douglas, *Native Americans Are Not All the Same: An Exploration of Indigenous Diversity*, American Indian Republic (October 22, 2021),

https://americanindianrepublic.com/native-americans-are-not-all-the-same-an-exploration-of-indigenous-diversity/#:~:text=To%20dispel%20such%20historical%20misconceptions,have%20sustained%20them%20for%20centuries. Under ICWA, it is preferable to subject a child to an entirely different culture instead of taking steps to maintain proximity to his or her home tribe. In this case, Baby C and Baby S were going to be taken away from the Donahues in accordance with ICWA, and placed with non-relatives in a completely different state and tribe that had no relations to the ones they were born into. R at 3.

B. ICWA is Not Narrowly Tailored to Further a Compelling Governmental Interest Because it Erroneously Equates All Indian Tribes While Building Barriers Between Indian Children and Their Home Tribes.

ICWA is not narrowly tailored to further a compelling governmental interest because it often severs any ties that a child has to his or her home tribe, and it is not necessary to further a compelling governmental interest. The racial classification in ICWA is subject to strict scrutiny under *Grutter v. Bollinger*, and this classification is "constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326. While maintaining a child's connection to his or her tribe may be considered a compelling government interest, the interest is undermined by the hierarchy established in ICWA because a child can be sent to a tribe thousands of miles away from his or her own culture. By sending these children far away from their roots, the government is severing the ties that they had to their tribe, and in many cases, the child will be ineligible for membership in the adoptive/foster tribe because of Indian laws regarding tribal membership.

Affirmative Action is the primary precedent of the Supreme Court finding an acceptable, narrowly tailored governmental interest. Affirmative Action cases address the Constitutionality of

favoritism shown to racial minorities during the college admissions process. In *Fisher v. Univ. of Tex.*, the Court addressed the implications of race-based distinctions in the context of affirmative actions, but "[t]he analysis and level of scrutiny applied to determine the validity of a racial classification do not vary simply because the objective appears acceptable." *Fisher v. Univ. of Tex.*, 570 U.S. 297, 314 (2013). "While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Id.* at 314 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, n. 9 (1982)). Because the analysis of strict scrutiny does not fluctuate based on the compelling governmental interest, the cases that address racial classifications in Affirmative Action programs are both applicable and binding precedent.

The Court in *Fisher* addressed Affirmative Action, and the Court's efforts to produce a concrete definition of "narrowly tailored," in the context of racial classifications in college admissions. The Court has rarely recognized these classifications as constitutional, as "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and, therefore, are contrary to the United States' traditions and hence constitutionally suspect." *Id.* at 314 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), and *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). Ultimately, under the Affirmative Action cases discussed in *Fisher*, race can be considered in college admissions only as a modest "plus factor." *Id.* at 315. It cannot be considered under a quota system, a system involving racial balancing, or any system that results in applicants being evaluated on the basis of their race, and not on their individual attributes. *Id.* at 309-14. Furthermore, to survive strict scrutiny, using racial classifications must be necessary – meaning that there are "no workable race-neutral alternatives." *Id.* at 312.

There are "workable race-neutral alternatives," to ICWA. The legislature could establish a race-neutral program that was based not on tribal eligibility or lineage, but upon proximity to a

child's domiciliary tribe, or the wishes of the biological parents. Like in this case, the Baby S's parental guardian – his grandmother – gave her consent for the Donahues to adopt Baby S. R at 3. If ICWA had a provision based on the wishes of the parents, then the Donahues would have been able to adopt Baby S and the tribe would not have been able to step in and take Baby S from their care. *Id*. However, currently, under ICWA, the tribal government is conveyed greater power regarding children than the child's biological parents. Thus, ICWA is not "narrowly-tailored," to further a compelling governmental interest because it erroneously equates the cultures of all Indian tribes – under ICWA, it is preferable to subject a child to an entirely different culture instead of taking steps to maintain proximity to his or her home tribe.

Conclusion

The Indian Child Welfare Act is unconstitutional and should be overturned because it exceeds Congress' Article I authority, violates the Tenth Amendment's anti-commandeering doctrine, and violates the Fifth and Fourteenth Amendment's Equal Protection Clause. Congress does not have plenary power over Indian commerce, and even if it did, ICWA does not meet the requirements of the Commerce Clause because it does not regulate economic activity, it regulates children. In addition, it violates the anti-commandeering doctrine of the Tenth Amendment because both the placement preference and recordkeeping provisions of ICWA require state courts to apply federal standards and directives to state-created claims. Furthermore, ICWA violates the Equal Protection clause because it discriminates based on race and is subject to strict scrutiny; however, it fails strict scrutiny because it is not narrowly tailored to a compelling governmental interest because it erroneously equates all Indian tribes while building barriers between Indian children and their home tribes – under ICWA it is preferable to subject a child to an entirely different culture instead of taking steps to maintain proximity to his or her home tribe. Thus, ICWA

is unconstitutional, and this Court should uphold the appellate court's decision, finding in favor of the Respondent therefore, overturning ICWA.

Respectfully Submitted.

Team 6

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