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
FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

Brief for Respondents

Team #9
Counsel for Respondents
Dated October 10, 2022

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QUESTIONS PRESENTED

I. Can the Indian Child Welfare Act's placement and recordkeeping provisions be found constitutional when the Indian Commerce Clause does not provide Congress the enumerated power to enact a law merely because it involves an Indian child, and the enactment of such provisions commandeer states to implement a federal scheme in violation of the Tenth Amendment?

II. Is the definition of "Indian child" and use of "Indian family" in the Indian Child Welfare Act based on a suspect racial classification that violates the Equal Protection guarantees of the Fifth Amendment?

STATEMENT OF THE CASE

I. Statement of the Facts

In September 2019, James and Glenys Donahue ("The Donahues") aspired to change their lives forever by adopting Baby C, an Indian Child. R. at 3. Baby C, who had lived with her maternal aunt since birth, was often left unattended for long periods while her aunt worked. R. at 2. At eight months old, Baby C was removed from her aunt's custody and placed into foster care with the Donahues, whom she lived with for two years before her adoption. *Id*. Baby C's biological mother was a member of the Quinault Nation, and her birth father was a member of the Cherokee Nation, two of the three Indian tribes present within West Dakota's borders. *Id*. As such, West Dakota's Child Protection Service ("CPS") notified both the Quinault and Cherokee Nations as required by The Indian Child Welfare Act ("ICWA").

ICWA, enacted by Congress due to growing concerns about Indian Children being separated from their tribes through adoption or foster care placement in non-Indian homes, governs state court child-custody proceedings involving an Indian child. 25 U.S.C. § 1901 (1); R. at 3-4. Upon notification from CPS, both the Quinault Nation and Cherokee Nation agreed that the Quinault Nation would be Baby C's tribe for ICWA's application and state proceedings. R at 3. In August 2019, A West Dakota state court voluntarily terminated the parental rights of Baby C's biological parents, making her eligible for adoption. *Id.* Although the Quinault Nation found a potential alternative placement for Baby C, the placement fell through for undisclosed reasons. *Id.* Accordingly, CPS found that ICWA's placement preferences did not apply because no one else wished to adopt Baby C. *Id.* In January 2020, Baby C was officially adopted by the Donahues, changing their lives forever. *Id.*

In April 2020, the Donahues wanted to adopt Baby S, another Indian child. *Id.* Baby S's biological mother was a member of the Quinault Nation but died of a drug overdose shortly after

his birth in February 2020. *Id.* As Baby S's biological father was unknown, he lived with his paternal grandmother from birth until April 2020, when his grandmother's failing health interfered with his care. *Id.* In May 2020, with the consent of Baby S's grandmother, the Donahues filed a petition to adopt Baby S. This time, the Quinault Nation opposed the adoption pursuant to ICWA's placement preferences, stating they had found two potential adoptive families who were members of the Quinault tribe in another state. *Id.*

II. Procedural History

After learning of the Quinault Nation's opposition to the adoption of Baby S, the Donahues and the State of West Dakota ("Respondents") filed a suit against the United States District Court for the District of West Dakota against the United States of America, the United States Department of the Interior, and its Secretary, Stuart Ivanhoe ("Petitioners"). R at 4. After the suit was filed, the Cherokee Nation and the Quinault Nation filed an unopposed motion to intervene, which the court granted. R. at 2. The District Court denied Respondents Motion for Summary Judgement and granted Petitioners Motion, finding that Congress had the authority to enact ICWA and that ICWA's provisions did not violate the anticommandeering doctrine R at 8. Further, the District Court found that the ICWA classifies persons according to their political status, passing muster under rational basis review. R. at 11.

Petitioners appealed to the Thirteenth Circuit Court of Appeals. R. at 12. The majority reversed the District Court's holding on the Tenth Amendment issue alone, finding that ICWA provisions unconstitutionally commandeer states. R at 16 In the concurring opinion, Chief Judge Tower agreed with the majority opinion, but believed the District Court's decision should have been reversed on Equal Protection grounds, asserting that ICWA's classifications are racial rather than political. R at 17. Petitioners filed a writ for certiorari, which was granted by the Supreme Court. R. at 20.

SUMMARY OF THE ARGUMENT

Congress exceeded its authority under Article 1 of the Constitution when enacting ICWA. ICWA does not involve commerce with Indian tribes, nor does the regulation of child-custody proceedings affect commerce. This interference with state court child-custody proceedings is unjustified and an expansion of Congress' power. Further, ICWA violates our Nation's history of dual sovereignty by creating a federal regulatory scheme consisting of placement and recordkeeping provisions that unconstitutionally conscript states in violation of the anticommandeering doctrine of the Tenth Amendment.

Prior case law, which holds classifications of Indians as political, does not apply to ICWA because the provisions reach beyond tribal members. The classifications of "Indian child" and "Indian family" in ICWA use ancestral identity as a proxy for race and are thus subject to strict scrutiny under the Equal Protection doctrine. ICWA, while addressing a compelling government interest, is not narrowly tailored to further the government's interest in ensuring Indian children remain connected to their tribes. Thus, this court should affirm the decision in the Court of Appeals and find that ICWA's provisions are unconstitutional.

ARGUMENT

I. CONGRESS EXCEEDED ITS ARTICLE 1 AUTHORITY WHEN ENACTING ICWA AND SUBSEQUENTLY VIOLATED THE ANTICOMMANDEERING DOCTRINE UNDER THE TENTH AMENDMENT BY COMPELLING STATES TO IMPLEMENT THE PLACEMENT AND RECORDKEEPING PROVISIONS IN STATE CHILD-CUSTODY PROCEEDINGS.

The Federal Government holds certain enumerated powers granted by the United States Constitution and can only exercise those powers granted to it. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Article 1 of the Constitution gives Congress the authority to "regulate Commerce…with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. ("Indian Commerce Clause"). However, based on the original and historical understanding of the Indian Commerce Clause, Congress does not possess plenary power over all Indian affairs to warrant the invasion into state law. ICWA does not involve commerce with Indian tribes, and the Constitution provides no basis for such an assertion of authority. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 666 (2013). As ICWA falls outside of Congress' Constitutional powers, such actions are limited by Tenth Amendment, which provides the powers not granted to Congress "by the Constitution, nor prohibited by it to the States, are reserved to the States...." U.S. Const. amend. X. ICWA directly orders states to fulfill hierarchical placement preferences and adhere to extensive recordkeeping provisions, violating the anticommandeering doctrine of the Tenth Amendment. *Murphy v. NCAA*, 138 S. Ct. 1461, 1465 (2018).

A. ICWA is unconstitutional because the Indian Commerce Clause does not give Congress broad plenary power to regulate state child-custody proceedings concerning Indian children.

The Indian Commerce Clause gives Congress the authority to regulate Commerce with Indian Tribes, but that power is far from plenary, as evidenced by the Clause's text. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 660 (2013). Congress's enumerated power under the Clause does not permit an expansion of control over all matters simply because an Indian child is

involved. In *Adoptive Couple,* the court looked strictly to the Clause's text, which confirmed that Congress could only regulate commercial transactions amongst established Indian tribes. *Id*. at 659.

Here, Congress is not regulating Indian tribes but individuals. ICWA applies regardless of whether a tribe is involved, as the provisions define an Indian child as one who is a member or eligible for membership of an Indian tribe. R. at 5. As ICWA reaches both tribal and non-tribal members, Congress' power to "legislate with respect to Indian tribes" would not be implicated in this case. *United States v. Lara*, 541 U.S. 193, 200 (2004). *See* Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Neb. L. Rev. 121, 137 (2006) ("As a matter of federal constitutional law, the Indian Commerce Clause grants Congress the only explicit constitutional authority to deal with Indian tribes.") ICWA's attempt to broaden the application of Congress' power would effectively change the meaning of the Constitution.

Further, Congress' assertion of plenary power over Indian affairs is inconsistent with the history of the Indian Commerce Clause. *Adoptive Couple*, 570 U.S. 637 at 660. During the creation of the Articles of Confederation, Benjamin Franklin viewed central control over Indian affairs as overriding State trade with Indian tribes. *Id.* at 661. Additionally, during the Constitutional Convention, the Framers' draft history shows how limited they intended the Indian Commerce Clause. *Id.* The first draft of the Commerce Clause did not include any provision concerning Indian affairs. *Id.* Several subsequent drafts had words such as "with Indians, within the Limits of any State," and eventually, the Framers adopted the Commerce Clause used today. *Id.* at 663. During the ratification debates, the Federalists and Anti-Federalists understood the Clause "to confer a relatively modest power on Congress- namely, the power to regulate trade

with Indian Tribes." *Id.* at 664. Thus, based on a historical understanding of the Indian Commerce Clause, it is clear that Congress' power was not plenary.

Even if Congress has plenary power over all Indian affairs, "regulation of domestic relations has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (finding states have an absolute right to prescribe conditions upon marriage relations, including child custody, between its citizens.); *see also Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (discussing problems with federal divorce standards); *see also In re Burrus*, 136 U.S. 586, 594 (1890) (explaining the subject of domestic relations between parent and Child belongs to the laws of the states and not the laws of the United States). As such, Congress's power is not plenary as "no enumerated power could even arguably support Congress' intrusion into this area of traditional state authority." *Adoptive Couple*, 570 U.S. 637 at 658. By controlling child-custody proceedings, Congress will acquire police power, which "the Founders denied the National Government and reposed in the States." *United States v. Morrison*, 529 U.S. 598, 618 (2000).

B. Congress did not have Article 1 authority to enact ICWA because children and child-custody proceedings are not considered commerce under the commerce clause.

Modern Commerce Clause jurisprudence permits Congress to regulate channels, instrumentalities, or activities that substantially relate to interstate commerce. *Id.* at 609. ICWA governs child-custody proceedings and does not fall into these categories, as children are not channels or instrumentalities of commerce. R. at 5. Additionally, children are not persons of commerce because, as historically understood, commerce with Indian tribes meant "buying, selling, and exchanging commodities." *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 413 (1866). ICWA involves the placement of children, not the buying, selling, or exchanging of

them. Any expansion of Congress' power in this regard is inconsistent with the Commerce Clause.

Additionally, child custody cases do not substantially affect commerce, irrespective of whether an Indian child is involved. *United States v. Lopez*, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.") In *Lopez,* the court found that the Gun-Free School Zones Act was not regulating an economic activity or a commercial transaction which substantially affected interstate commerce. Although the petitioners argued that possession of firearms near schools could lead to violent crimes, reduce individuals' ability to travel, and thus have an adverse effect on the economy, the majority found these arguments too attenuated. *Id.* at 564. Therefore, the court found that enacting this legislation exceeded Congress' Commerce Power.

Like *Lopez, the* petitioner's attempt to connect state custody proceedings to commerce is too attenuated. ICWA does not regulate economic activities or commercial transactions but adoptions and foster care proceedings, which are solely non-economic and non-commercial. Congress enacted ICWA because they found a high percentage of Indian families were broken up by the removal of children. R. at 5. This problem, however, has nothing to do with commerce. *Adoptive Couple*, 570 U.S. 637 at 665. Thus, the connection between placing Indian children in homes and commerce is too attenuated. *Lopez,* 514 U.S. 549 at 560. The only way ICWA would be upheld under the Commerce Clause is if it affected an area of modern commerce jurisprudence, which it does not. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 253 (1964) (finding evidence that racial discrimination had an effect of discouraging travel which implicated a channel of commerce.) Furthermore, in *United States v. Lopez,* the majority rejected the petitioner's "national productivity scheme" because it would have permitted Congress to

regulate any activity such as child custody without any limitation on Congressional power. 514 U.S. 549 at 564.

Thus, as children and child-custody proceedings are not commerce, Congress should not be permitted to regulate in this capacity. Although ensuring that Indian children have stable homes may be desirable, ICWA is unconstitutional because it creates too broad and potentially limitless Congressional power.

C. ICWA's placement and recordkeeping provisions offend our nation's dual system of sovereignty and direct states in violation of the anticommandeering doctrine of the tenth amendment.

The Framers of the Constitution created a dual system of government "designed in large part to protect the States from overreaching by Congress." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). However, Congress exceeded its authority when enacting ICWA, as it requires states to implement a federal regulatory scheme consisting of placement and recordkeeping provisions. These provisions dictate how states must enforce child-custody proceedings, infringing upon the state sovereignty. *Printz v. United States*, 521 U.S. 898, 928 (1997). Further, ICWA commandeers states by issuing direct orders, violating the Tenth Amendment. *Murphy* 138 S. Ct. 1461 at 1465. Preemption does not apply, as ICWA is not "best read" as regulating private actors; thus, ICWA is unconstitutional. *Id.*

1. *Congress may not force states to comply with a federally regulatory scheme because doing so would violate the constitutionally mandated federal system of government.*

The constitutionally mandated balance of power between states and the Federal Government prevents excessive power accumulation, reduces the risk of tyranny, and protects individuals. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Framers specifically adopted the concept of dual sovereignty to ensure the people's fundamental rights such that "the different governments will control each other, at the same time that each will be controlled by itself." The

Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison). To uphold the constitutional obligation of federalism, the Constitution must be followed by understanding what powers the Federal Government has been given, not what powers they ought to have. *United States v. Butler*, 297 U.S. 1 (1936).

Under the Articles of Confederation, Congress did not possess the authority to govern the people directly. *New York v. United States*, 505 U.S. 144, 163 (1992). However, the Framers noted that this system was inadequate because it was too *"federal." ARTICLE: Of Sovereignty and Federalism.*, 96 Yale L.J. 1425, 1449 (1987). To remedy this, the Constitutional Convention opted for a Constitution in which Congress had legislative authority directly over individuals rather than states. *Id.* at 165. Accordingly, through the structure of the Federal Government and the Tenth Amendment, states retain substantial sovereign authority. *Gregory*, 501 U.S. 452 at 455. This sovereign power is essential for states to remain independent and autonomous. *Printz v.*, 521 U.S. 898 at 928.

ICWA undermines our Nation's history of federalism because it forces states to apply placement and recordkeeping provisions. ICWA's direct orders to states contradict the Framer's intentional choice to only grant Congress "the power to regulate individuals." *New York*, 505 U.S. at 166. Although Congress may possess a strong federal interest in the child-custody proceedings of Indian children, "the Constitution simply does not give Congress the authority to require the States to regulate" that interest for them. *Id.* at 144. Instead, the Constitution requires Congress to legislate the issue directly. *Id.* at 178.

By forcing states to enforce a federal regulatory program, Congress remains in the background, creating the illusion that states are responsible for the policies, ultimately blurring the responsibility of blame. *Murphy*, 138 S. Ct. 1461 at 1489 (explaining that adherence to the

anticommandeering doctrine promotes political accountability.) Congress' diversion from the Constitutional obligation of federalism creates an opportunity for Congress to become exceptionally dangerous by holding too much central power. *Lopez,* 514 U.S. 549 at 578. Thus, as historically demonstrated by the Framers, Congress is not permitted to intrude on the sovereignty of states even though Indian children are involved.

2. *ICWA's hierarchical placement preferences violate the anticommandeering doctrine because it compels states to act according to Congress' instructions.*

Congress may not commandeer states by directly compelling them to apply federal law within their borders. *Id.* at 149 (holding Congress's Low-Level Radioactive Waste Policy, which directed states to take the title of radioactive waste, compelled States to implement congressional legislation.) In *New York,* the court held that the Constitution gives Congress substantial power to encourage actions, but compelling states to act violates the anticommandeering doctrine. 505 U.S. at 166

Like *New York*, ICWA compels states to implement a federal child-custody program. ICWA mandates placement preferences for Indian child foster care, pre-adoptive placements, and adoptive proceedings:

> In any adoptive placement of an Indian Child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the Child's extended family; (2) other member of the Indian Child's tribe; or (3) other Indian families. 25 U.S.C. § 1915(a).

For foster care and adoptive placements, the state court or agency affecting the placement "shall follow [the tribe's] order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* ICWA orders states to apply Congress's hierarchical placement preferences to state law proceedings, making them "puppets of a ventriloquist Congress," which the Constitution prohibits. *Printz*, 521 U.S. at 928.

ICWA cannot be read as anything but commandeering states. Petitioners may argue that ICWA is analogous to *Hodel v. Va. Surface Mining & Reclamation Ass'n,* which upheld the federal law by finding that States were not compelled to participate or enforce the law. 452 U.S. 264, 268 (1981). Petitioners may also assert that ICWA is like *FERC v. Mississippi,* which also upheld federal law because states were only required to consider enforcing federal standards. 456 U.S. 742, 760 (1982). Unlike *Hodel* and *FERC*, ICWA mandates placement preferences whenever an Indian child is involved. R. at 6.

Petitioner might argue that ICWA's placement preferences create minimum federal rights and must be heard in state court. *Testa v. Katt*, 330 U.S. 386, 387 (1947). However, ICWA does not articulate any federal rights, as the provision's text declares that the preferences apply under state law. R. at 6. Hence, ICWA commands that states implement the hierarchical placement preferences, thereby interrupting state causes of action. By changing how children are placed, states are required to govern according to Congress' instructions, which the Constitution has never been understood as permitting. *See New York*, 505 U.S. at 162.

Further, the placement preferences create a procedural rather than substantive right, which Congress has no authority to prescribe to state courts. *ARTICLE: Federal Regulation of State Court Procedures*, 110 Yale L.J. 947, 952 (2001). A right is procedural if it regulates secondary rather than primary conduct. *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 290 (1994). ICWA's placement preferences ensure the rights of Indian children but do not provide the substantive right of being placed through adoptive proceedings. Therefore, petitioners' argument fails because ICWA's placement preferences do not create or alter the substantive standards in custody proceedings. See 26 Tex. Rev. Law & Pol. 429, 470-471 (finding that the placement preferences are analogous to procedural sentencing guidelines, which creates no federal cause of

action that Congress can require state courts to implement.) As such, there is no federal cause of action or right which would authorize concurrent jurisdiction in state courts. *Testa*, 330 U.S. 386. Thus, Congress's attempt to compel states to impose ICWA's placement preferences violates the anticommandeering doctrine.

3. *ICWA's burdensome recordkeeping requirement violates the anticommandeering doctrine because it conscripts states into complying with Congress' federal regulatory scheme.*

Congress cannot directly conscript state governments into implementing a federal regulatory scheme. *Printz*, 521 U.S. at 902 (explaining that the recordkeeping requirement was invalid because the reasonable effort requirement unconstitutionally required states to enforce federal directives.); *see also Brackeen v. Haaland*, 994 F.3d 249, 419 (5th Cir. 2021) (finding that the recordkeeping obligation directly conscripted states.) In *Printz,* the court found that the recordkeeping requirement did not require state officers to merely report information but to provide information that belongs to the state and is available to them in their official capacity. *Printz*, 521 U.S. at 932. Thus, the court found that the provisions violated the anticommandeering doctrine.

Like *Printz*, ICWA's recordkeeping provision conscripts state officials into complying with a federal child-custody scheme. ICWA requires that states maintain records of the Indian child's placement, which must be available at any time upon request to the Secretary of the Interior or the child's tribe. 25 U.S.C. § 1915(e). A state court that enters a final decree in an adoptive placement "shall provide the Secretary with a copy of the decree or order" and specific information regarding "(1) the name and tribal affiliation of the Child; (2) the names and addresses of the biological parents; (3) the names and addresses of the adoptive parents; (4) the identity of the agency having files or information relating to such adoptive placement." *Id.* §

1951. This provision requires more than just reporting information but demands that states provide the information acquired in their official capacity. *Printz*, 521 U.S. 898 at 932 n.17.

Petitioners may argue that the recordkeeping provision does not add additional requirements because states already maintain records. First, while state courts have previously been required to record and transmit applications to the Secretary of the Interior for citizenship purposes, these conditions only applied to states if they consented. *Id*. at 906. Here, ICWA's extensive recordkeeping requirements govern all state court child-custody proceedings involving an Indian child without requesting consent from the states. 25 U.S.C. § 1903 (5). Further, this argument fails because Congress cannot command state officers no matter how mundane the task is. *Murphy*, 138 S. Ct. 1461 at 1465; *see Printz* 521 U.S. 898 at 929 (explaining that requiring state officers to perform discrete, ministerial tasks specified by Congress violates state sovereignty.) Thus, as states complete ICWA's recordkeeping requirement, this provision substantially interferes with State rights and should be declared unconstitutional.

4. ICWA does not preempt state law because Congress did not have the authority to enact the provisions, and the law is best read as regulating state actors.

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides that where federal and state law conflict, federal law is supreme and will prevail over state law. *Murphy*, 138 S. Ct. at 1465. Based on the Supremacy Clause, preemption does not grant Congress independent legislative power. *Id.* To determine if provisions violate the anticommandeering doctrine or lawfully preempt state law, the court must ascertain whether the law (1) "represent[s] the exercise of a power conferred on Congress by the Constitution "and if the law is (2) "best read as regulating private actors." *Id.* at 1479. ICWA's placement and recordkeeping provisions fail to satisfy this test; thus, the provisions violate the anticommandeering doctrine.

First, ICWA's provisions do not "represent the exercise of a power conferred on Congress by the Constitution." The Indian Commerce Clause provides that Congress can regulate commerce with Indian Tribes. U.S. Const. art. I, § 8, cl. 3. However, ICWA does not regulate commerce with Indian tribes but with Indian people. *Adoptive Couple,* 570 U.S. 637 at 660. Further, regulating child-custody proceedings is not commerce. *Id.* As Congress did not act according to Article 1 authority when enacting ICWA, the law is not supreme and will not preempt state law.

Second, ICWA's placement and recordkeeping provisions are not "best read as regulating private actors." This court in *New York* stated that Congress lacked the power to compel the states to require certain acts directly. *New York*, 505 U.S. at 166. ICWA does not regulate private actors but governs Indian children's placement in foster and adoption proceedings. These placements, completed by state agencies and courts, require court orders, and private entities cannot finalize placements without state authorizations. *ARTICLE: THE FEDERALISM PROBLEMS WITH THE INDIAN CHILD WELFARE ACT*, 26 Tex. Rev. L. & Pol. 429 (2002). Even welfare agencies, which can make temporary placements, must obtain a court order. *Id.* Private parties, such as Indian children, their adoptive families, and biological parents, may be affected; however, ICWA does not direct these parties but directs states on how to handle adoption proceedings involving these parties.

Petitioners will likely argue that ICWA “evenhandedly” regulates an activity which both states and private actors engage because the provisions impact private parties, yet this argument fails. *Murphy*, 138 S. Ct. at 1478; s*ee also Reno v. Condon*, 528 U.S. 141 (2000) (upholding federal law concerning DMV requirements for disclosure of personal information as a condition for driver's licenses because it was evenly applied). In *Reno,* the court found that Congress did

not violate the anticommandeering doctrine when regulating private actors and state agencies because State compliance was an "inevitable consequence of regulating state activity." *Id.* However, to get to this finding, the court first noted that the federal law was a proper exercise of Congress's authority. *Id.* at 148.

Here, Congress did not have the power to enact ICWA, so this argument is immaterial. In *Reno*, the court noted that the federal law at issue did not "require the States in their sovereign capacity to regulate their own citizens" because states participated as suppliers in the market. *Id.* at 143. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("Evenhandedness suggest that, when acting as proprietors, states should similarly share existing freedoms from federal constraints.") Unlike *Reno,* ICWA regulates states as sovereigns in child-custody proceedings to assist Congress in the implementation of the placement and recordkeeping provisions. States are not market participants in child-custody proceedings because children are outside Congressional Commerce jurisprudence.

Further, expanding federal law to apply to state regulated child-custody disputes is not an "inevitable consequence of regulating state activity" but an attempt by Congress to unconstitutionally "control or influence the manner in which States regulate private parties." *S.C. v. Baker*, 485 U.S. 505 (1988). This court should not allow Congress the power to enact ICWA as the laws do not "evenhandedly" apply to both states and private actors. Allowing Congress to do so would create an unfortunate precedent because it would deviate from the Constitution and permit Congress to commandeer states so long as private entities are required to participate. 26 Tex. Rev. Law & Pol. 429, 473.

ICWA does not preempt state law but violates the anticommandeering doctrine because it does not pass the two-part test outlined in *Murphy*. First, Congress did not enact ICWA pursuant

to a valid exercise of a Constitutional power, and the law regulates states, not private actors. Accordingly, ICWA is not "evenhandedly" applied as states are not market participants but required to act as sovereigns to apply Congress' child-custody scheme.

II. THE CLASSIFICATIONS OF "INDIAN CHILD" AND "INDIAN FAMILY" IN ICWA VIOLATES EQUAL PROTECTION GUARANTEES UNDER THE FIFTH AMENDMENT.

The Equal Protection Clause provides that states cannot "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 specifically addresses state government actors, however, this Court has held the equal protection guarantees also exist within the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954), and the equal protection claims against the federal government "have always been precisely the same as…equal protection claims under the Fourteenth Amendment." *Weinberger v. Wisenfeld*, 420 U.S. 636, 638 n.2 (1975).

Equal Protection jurisprudence has held classifications based on race, or ethnic identity are "regarded as suspect," *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978), and must be subjected "to the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1944). The highest level of judicial scrutiny in Equal Protection claims is strict scrutiny, which requires that legislation based on suspect classifications such as race are "narrowly tailored to further [a] compelling [government] interest." *Grutter v. Bollinger*, 539 U.S. 306, 326 (1978). The most relaxed level of judicial scrutiny, rational basis review, is reserved for classifications that are not considered "discrete and insular minorities" that require a stricter level of review. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) n.4. Under rational basis review, legislation is upheld as constitutional if it is "rationally related to a legitimate state interest." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

As discussed below, categorization of ICWA's provisions as political is inappropriate as it misinterprets case law regarding legislation on Indian affairs. Further, ICWA's classifications use ethnic ancestry as a proxy for racial classifications and are thus subject to strict scrutiny. Finally, ICWA does not pass strict scrutiny as its provisions are not narrowly tailored to further a compelling government interest.

A. Application of *Morton v. Mancari* to the Present Case is Incorrect.

The District Court's order held that ICWA's classifications were political and thus only subject to rational basis review. R at 10. The District Court relied on the decision in *Morton v. Mancari*, 417 U.S. 535 (1974), where this Court upheld a hiring preference for Indians within the Bureau of Indian Affairs (BIA), finding that that the employment preferences were not based on Indians as "a discrete racial group, but rather, as members of quasi-sovereign tribal entities", *id.* at 554, and a political classification was proper due to the BIA's unique, *sui generis* relationship to Indians. *Id.* Courts have taken the *Mancari* decision to mean that any legislation concerning Indian affairs should be based on a political classification of Indians. *See U.S. v. Antelope*, 430 U.S. 641, 645 (1977). However, this interpretation misconstrues *Mancari's* reasoning and stretches it beyond its limited and narrow scope.

1. Mancari is Inapplicable Because ICWA is Not Reserved to a Singular Government Agency Exclusively Dealing in Indian Affairs.

Mancari concerned a singular agency of the federal government established to serve the specific and unique needs of federally-recognized Indian tribes. As this Court noted, Indian tribes' "lives and activities are governed by the BIA in a unique fashion. In the sense that no other group of people is favored in this manner, the legal status of the BIA is truly *sui generis*." *Mancari*, 417 U.S. at 554 (emphasis original). The BIA's mission is "to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives." *U.S. Department of the*

Interior, Bureau of Indian Affairs, https://www.bia.gov/bia (last visited October 8, 2022). The decision further explained that the hiring preference was a narrow exception to civil service requirements for Indians in employment at the BIA but did not create a broad exemption for Indians from all civil service examinations for all federal agencies. *Mancari*, 417 U.S. at 554. This Court acknowledged a law that created the latter exception would raise an "obviously more difficult question." *Id.*

In contrast, ICWA does not concern a singular agency whose sole purpose is the exclusive oversight and management of all Indian affairs like the BIA. ICWA is directed to state courts, responsible for foster care and adoption proceedings for all minor children in their jurisdictions. Thus, state courts are not exclusively dealing with Indian children like the BIA exclusively deals with Indian tribes. Rather, state court proceedings merely implicate Indian children in the same manner as all other minor children within a state. As this Court noted, a different discussion (and possible result) occurs where legislation sets a preference or different standards for Indians for all government agencies or institutions instead of a singular agency specifically created for the exclusive relationship between Indian tribes and the government. ICWA brings forward questions that were not in front of nor contemplated by the *Mancari* court; thus, applying the *Mancari* reasoning to the present case would be unworkable.

2. The Present Case is Also Distinguishable from Mancari Because ICWA is Broader in its Application of Covered Indians.

The hiring preference upheld in *Mancari* was limited to only members of federally recognized Indian tribes. *Mancari*, 417 U.S. at 554, n.24. Thus, individuals who otherwise identified racially as Indian, but were not a member of a federally recognized tribe, could not benefit from the hiring preference and would be treated as any other non-Indian person seeking employment in the BIA. In *United States v. Antelope*, this Court used the *Mancari* decision to

find Indian defendants were subject to federal jurisdiction under the Major Crimes Act because they were enrolled members of a federally recognized tribe. *Antelope*, 430 U.S. at 646, n.7. It was highlighted that the Major Crimes Act, like the hiring preference, was only applicable to enrolled members of federally recognized tribes who committed crimes in Indian country; thus, non-members who were racially identified as Indian were not subject to the act. *Id.* Just like *Mancari*, the Court notes that a different conversation arises when deciding how federal jurisdiction applies to non-enrolled Indians who commit crimes in Indian country. *Id.*

Unlike *Mancari* and *Antelope*, ICWA's definition of "Indian Child" includes not only minors who are members of a federally-recognized Indian tribe but "unmarried persons under eighteen who are merely *eligible* for membership in an Indian tribe and the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (emphasis added). This second definition under §1903(4) allows a broader application of ICWA in contrast to the hiring preference in *Mancari*. Under ICWA, the child never has to become an actual member of an Indian tribe and would still be subject to the provisions merely because of their ancestry or parentage.

ICWA provides a different set of circumstances that were not in front of the court in *Mancari* and *Antelope*; thus, the reasoning in those cases are inapplicable to the present matter. In both cases, this Court addressed the fact that challenged treatment – a hiring preference or jurisdiction for criminal offenses – was narrow in scope and targeted a limited group of individuals on the basis of tribal membership, excluding many other individuals who share the same racial or ethnic identity. ICWA, on the other hand, incorporates ancestry or parentage into its provisions, distinguishing it entirely from the two above cases. The use of a political classification where tribal membership is not the *only* requirement is a precise issue that has not

been considered by this Court and must be examined under current Equal Protection jurisprudence.

B. The ICWA classifications of "Indian Child" and "Indian Family" are suspect because they use ancestry as a proxy for race.

A suspect classification can be based on race or in some cases, ancestry or ethnic history. *See St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) ("classes of person who are subjected to intentional discrimination solely because of their ancestry…is racial discrimination"); *see also Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). In *Rice v. Cayetano*, 528 U.S. 495 (2000), this Court struck down a Hawai'i statute that limited the right to vote for the trustees of the Office of Hawaiian Affairs to only those citizens identified as "native Hawaiians," defined as "descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778". 528 U.S. at 499. The majority found the use of an ancestry requirement as a "proxy for race", *Id.* at 514, stating, "Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Id.* at 1057.

The claims in *Rice* arose under the Fifteenth Amendment, which prohibits any restriction of voting rights by the federal government, or any state based on race; however, the reasoning in that decision as it applies to using ancestry as a proxy for race, applies to the present issue because ICWA's definition of "Indian Child" rests on ancestral relationship to a member of an Indian tribe. As stated above, 25 U.S.C. §1903(4)(b) of ICWA defines an "Indian Child" as an "unmarried person who is under age eighteen and is…eligible for membership in an Indian tribe *and* is the biological child of a member of an Indian tribe." (emphasis added). Thus, an Indian child does not have to be a member of an Indian tribe but is still subject to the provisions of ICWA simply by having an ancestor who is a member of an Indian tribe.

Further, the classification of an "Indian" and "Indian tribe" as defined in ICWA" depends on tribal requirements for membership. ICWA defines an "Indian" as "any person who is a member of an Indian tribe", 25 U.S.C. § 1903(3), and defines an "Indian Tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians." 25 U.S.C. § 1903(8). As discussed below, tribal membership is inextricably linked to ancestral history.

While membership requirements vary by tribe, an ancestral link to a member of the tribe is still commonly required. In fact, the federal government has indicated that the two commonly found requirements for membership across the 574 federally-recognized tribes are lineal descent from an individual on the tribe's "base roll" or original list (such as the Dawes Roll) or lineal descent from a tribal member who themselves descends from someone on the tribe's base roll. U.S. Department of Interior, *A Guide to Tracing American Indian & Alaska Native Ancestry*, https://www.bia.gov/sites/default/files/dup/assets/public/pdf/idc-002619.pdf (last visited October 8, 2022). For example, the Cherokee Nation requires "To be eligible for Cherokee Nation citizenship, a person must have one or more direct ancestors listed on Dawes Roll." Cherokee Nation, *Frequently Asked Questions*, https://www.cherokee.org/all-services/tribal-registration/frequently-asked-questions/ (last visited October 9,2022). On the application for membership in the Quinault Nation, prospective members must show proof of parentage, which must be established through genetic testing. Such demands require applicants to complete a family tree to show lineage and/or ancestry. Quinault Nation, *Quinault Indian Nation – Enrollment Application*, https://www.quinaultindiannation.com/documents/Enrollment%20Application%20Amneded.pdf (last visited October 8, 2022).

For federal recognition by the United States Government, petitioning Indian tribes must provide evidence that its members "consists of individuals *who descend from a historical Indian tribe (or from historical Indian tribes* that combined and functioned as a single autonomous political entity)." 25 C.F.R. § 83.11 (2015) (emphasis added). Against this backdrop, it cannot be ignored that ICWA's definition of "Indian Child" is not just based on the child's own tribal membership but the ancestral link between the Indian child and the Indian tribe.

In addition to ICWA's definitions, the placement provisions further indicate a racial classification of "Indian."25 U.S.C. § 1915(a)(iii). This provision prescribes that in foster care, pre-adoptive placements, or adoptive proceedings, if the child cannot be placed with extended family, or another family of the Indian child's tribe, then the Indian child is to be placed with "any Indian family" over any non-Indian family, even if the child is not eligible to be a member of the Indian family's tribe. The preference of any Indian tribe over a non-Indian family suggests that all tribes share some common culture or characteristics such that a child is still better off with an Indian tribe they have no relationship to more than a non-Indian family. The District Court's order explicitly states as much. "Moreover, because many tribes descended from larger historical bands and continue to share close relationships and linguistic, cultural and religious traditions…placing children with families that are part of another tribe…will promote the stability and security of Indian tribes." R. at 11-12. It should be noted that this exact notion of "shared common…characteristics and…common culture" was held by this Court to be analogous to ancestral identity and thus racial classification in *Rice v. Cayetano*. *Rice*, 528 U.S. at 514-15.

C. ICWA's Classifications and Placement Provisions Fail Under Strict Scrutiny Because They Are Not Narrowly Tailored to Further a Compelling Government Interest

Racial classifications are reviewed under strict scrutiny and are only found constitutional where the challenged law is "narrowly tailored to further [a] compelling [government] interest". *Grutter*, 539 U.S. 306 at 326.Strict scrutiny applies to any law that is based on race, even where the law seeks to rectify a prior history of racism and discrimination against races of people. *See Bakke*, 438 U.S. 265 (finding a medical school's affirmative admission program that reserved several admission spots for applicants from minority groups unconstitutional); *see also Richmond v. J. A. Croson Co.,* 488 U.S. 469, 494 (1989) ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification).

This Court's jurisprudence has found that most laws using race-based classifications fail strict scrutiny review not because of the purpose of the legislation, which is usually to remedy prior discrimination, but because the methods are overbroad and not narrowly tailored to effectuate the desired outcome. *See Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995) ("we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact…when race-based action is necessary to further a compelling interest, such action is…constitutional if it satisfies the narrow tailoring test") (internal quotations omitted). ICWA's classifications fail to pass muster under strict scrutiny because they are not narrowly tailored to further the government's interest in maintaining an Indian child's relationship with their tribe.

First, ICWA's definition of "Indian Child" is overbroad and far-reaching. A child of mixed-parentage, with one parent as a member of an Indian Tribe as defined by ICWA and the other non-Indian, would be subject to ICWA, even if they had no intention of being a member of the tribe themselves. The provisions apply if the child does not live on tribal lands or within the

tribal community. Consequently, the law can reach any child in any part of a state based on their ancestry alone and not their actual relationship to the tribe. The Department of Justice foresaw the constitutional issues that could result and raised its concern to Congress in a February 9, 1978 letter, stating "we consider that part [of ICWA] constitutional as applied to tribal members. However, we think [it]…would almost certainly be held to be unconstitutional as applied to non-members". House of Representatives, 95th Congress, *Report No. 1386*, p. 35-38 (1978). The Department reiterated its concerns in a May 23, 1978 letter to Congress, stating "Where custody of the child who is merely eligible for membership is exclusively charged with non-tribal members…we do not think that the blood connection between the child and biological but noncustodial parent is a sufficient basis upon which to deny the present parent is sufficient basis". *Id.* at 38-41.

This Court grappled with this very issue in *Adoptive Couple*, 570 U.S. 637. In *Adoptive Couple*, a baby of mixed heritage was placed for adoption by her non-Indian mother to a couple who provided financial and emotional support to the mother during her pregnancy. The biological father, a member of the Cherokee Nation, had previously relinquished his parental rights, never had custody of the baby, did not financially support the mother, and was absent from the child's life until he received notice of the adoption. The biological father sought to stop the adoption and assume custody, suing under ICWA. State courts found ICWA applied and rescinded the adoption proceedings, giving custody of the baby to the biological father. The adoptive parents appealed.

This Court did not conduct an equal protection review of ICWA, instead finding the law protects Indian parents whose children were removed from their custody but did not apply where an Indian parent <u>never had custody</u> of a child in the first place. However, this Court frequently

hinted during the case about the concerns of ICWA applying to a child who is characterized as "1.2% (3/256) Cherokee." The majority stated the state courts' interpretation of the ICWA would "put certain vulnerable children at a great disadvantage solely because an ancestor — even a remote one — was an Indian" and noted that "such an interpretation would raise equal protection concerns." *Id.* at 655-66. In his concurring opinion, Justice Thomas stated "the notion that Congress can direct state courts to apply different rules of evidence and procedure merely because a person of Indian descent is involved raises absurd possibilities." *Id* at 666.

The present case is similar to that of *Adoptive Couple*. The record states Baby S' biological father is unknown and that his late mother was a member of the Quinault Nation. R at 3. The record also indicates that from his birth until his placement with Respondents when he was three months, Baby S lived with his paternal grandmother. *Id.* Nothing in the record indicates that the biological father or the paternal grandmother were Indians. Nor does the record provide that the paternal grandmother lived on any tribal lands. Should it be discovered that Baby S is of mixed race, applying ICWA discounts one part of his ethnic background in favor of the other. Applying the definition of Indian Child to Baby S or the child in *Adoptive Couple* is reminiscent of the "one-drop rule" prevalent in the 20th century that was used to discriminate against individuals with any amount of Black ancestry. Where an Indian child has been removed from the home of Indian parents, from their Indian community, from their tribal lands, the ICWA arguably does apply. However, in its present iteration, the ICWA's classifications are too broad. They encompass too many individuals who may have no relationship with an Indian tribe, except for a parent or distant ancestor.

In addition, as discussed above, ICWA's placement preference provisions are not narrowly tailored to further the compelling interest of keeping an Indian child's relationship with

their tribe. As a last measure, ICWA requires an Indian Child be placed with any other Indian family over being placed in a non-Indian home. 25 U.S.C. § 1915(b)(iii). There are 574 federally recognized Indian tribes in the United States . *U.S. Department of the Interior, Bureau of Indian Affairs*, https://www.bia.gov/bia (last visited October 8, 2022). Each tribe is unique in its government, customs, and even its requirements for admitting members. If ICWA's purpose is to ensure that the Indian child retains a relationship with their tribe, mandating the child be placed with any tribe is too broad to further that interest. If the Indian child would be raised in a home that is not reflective of the culture, values, and identity of the tribe to which he is eligible for membership, then there is seemingly no difference in placement between an Indian family and a non-Indian family.

ICWA is a law with a noble cause, but as it currently stands, it is overinclusive in its application. Its classifications are based on ancestry and are thus racial in nature and while the federal government may have a compelling interest in ensuring the stability of Indian tribes after hundreds of years of disenfranchisement and discrimination, ICWA's classifications are too broad, encompassing children that do not live in tribal communities and who are not connected to tribes except for their relation to a parent or ancestor who is a member, like Baby S. The placement provisions conflate Indians to a monolithic race, changing the purpose of ICWA from ensuring the relationship between an Indian child and their tribe to ensuring the relationship between an Indian child and any Indian community, regardless of the child's connection to the tribe or their ability to become a member. Based on current Equal Protection jurisprudence, this Court should find the classifications of "Indian Child" and "Indian" within are racial classifications that do not pass strict scrutiny review and are unconstitutional under the equal protections guaranteed by the Fifth Amendment.

CONCLUSION

Congress exceeded its Article 1 authority when enacting ICWA because the original textual and historical understanding of the Indian Commerce Clause does not support this broad application of Congress' power. As ICWA does not regulate trade with Indian tribes but rather child-custody proceedings involving Indian children, Congress' power in this sphere cannot be plenary. Further, ICWA's placement and recordkeeping provisions compel States into enacting a federal child-custody scheme violating the anticommandeering doctrine of the Tenth Amendment.

In addition, ICWA's classifications of "Indian" uses ancestral identity as a proxy for race and is thus subject to the strictest judicial review under Equal Protection guarantees of the Fifth Amendment. The classification of "Indian child" is too broad and encompasses persons like Baby S, who may be of mixed heritage or have no other connection to Indian tribes except being related to a tribe member. Further the classification of "Indian family" in ICWA's placement provisions is not narrowly tailored and conflates all Indian tribes into a ubiquitous racial group.

Therefore, Respondents respectfully request this Court affirm the Court of Appeals decision granting their Motion for Summary Judgment on the Tenth Amendment claim and rule in favor of Respondents on their Equal Protection claim so that the Donahues can move forward in adopting Baby S and make their family complete.

Respectfully submitted,

/s/ Team #9
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