No. 22-386

IN THE

Supreme Court of the United States

October Term 2022

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

Petitioners,

v.

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

Respondents.

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

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QUESTIONS PRESENTED

I. Do the ICWA's placement preference and recordkeeping provisions comply with the anticommandeering doctrine by conferring federal rights on Indian private actors within the scope of the Federal Trust Doctrine?

II. Do the ICWA's tribal affiliation-based classifications violate the Equal Protection Clause of the Fifth Amendment when they pass all levels of constitutional scrutiny?

STATEMENT OF THE CASE

i. LEGAL HISTORY

Congress passed the Indian Child Welfare Act of 1978 ("ICWA") in response to "an alarmingly high percentage of Indian[1] families [being] broken up by the removal, often unwarranted, of their children . . . by nontribal public and private agencies." 25 U.S.C. § 1901(4) Congressional studies indicated that between twenty-five and thirty-five percent of all Indian children had been separated from their families at the time of the ICWA's passage. H.R. Rep. No. 95-1386 at 17 (1978). Approximately ninety percent of subsequent child welfare placements were in non-Indian homes, severing the child's connection to past and future generations of their native tribe and endangering "the continued existence and integrity of the Indian tribes."[2]

This was not a novel trend; both State and Federal Governments alike historically realized policy objectives for the Indian people through their children. Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 11.01[2] (Nell Jessup Newton ed. 2012). From the early days of the republic through the nineteenth century, the United States carried out an "assimilation and civilization policy" intended to integrate Indians into white society. *Id.* at § 1.04. Indian children bore the brunt of this policy through forced removals from their reservations en-masse for re-education at boarding schools with a singular goal: "Kill the Indian and Save the Man."[3]

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[1] The term "Indian" is used in this brief rather than "Native American" or "American Indian" to be consistent with the statutory language of the ICWA. The Bureau of Indian Affairs currently recognizes 567 tribes as partly separate sovereigns. *See* Indian Entities Recognized and Eligible to Receive Servs. from the U.S. Bureau of Indian Affs., 81 Fed. Reg. 5,019 (Jan. 29, 2016).

[2] 25 U.S.C. § 1901(3); *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affs. of the Senate Comm. on Interior and Insular Affs.*, 93d Cong., 2d Sess., 75–83 (1974) [hereinafter "1974 Hearings"].

[3] *Id.* For an investigative study of the Indian boarding school experience with interviews of Indian attendees who detail the physical, sexual, and psychological abuse they suffered while displaced s*ee* Stephen Colmant et al., *Constructing Meaning to the Indian Boarding School Experience*, 43 J. Am. Indian Educ., 22, 27–33 (2004).

Subsequently, in the mid-twentieth century, the Federal Government briefly experimented with the "termination" of its supervisory responsibilities for Indian tribes, which permitted states to enact regulation facilitating the removal of Indian children to non-Indian homes. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 30 (1989). In Senate hearings, one witness described the results from this shift in power as "the most tragic aspect of Indian life, . . . a wholesale removal of Indian children." *Id.* at 33. States "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). For example, many social workers misunderstood "the role of the extended family in Indian society" – treating the decision to leave children "with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." *Holyfield*, 490 U.S. at 35 n.4 (internal citations omitted).

The creation of the ICWA served as a response to this crisis by constructing two sets of minimum federal standards that work in tandem to protect Indian children, families, and tribes. First, the regulation establishes minimum standards preventing state courts from ordering "the removal of Indian children from their families" without first making several findings regarding the child's present and future well-being. 25 U.S.C. § 1902; *see id.* §§ 1912(d)–(f). Second, the ICWA creates an additional set of minimum standards preventing "the placement of [Indian] children in foster or adoptive homes" before first giving preference to the child's extended family, tribe, or members of another tribe. *Id.* § 1902; *see id.* § 1915.

Current Secretary of the Interior Deb Haaland has said: "If we are to truly support Tribal self-determination, we cannot be afraid to review and correct actions of the past that were

designed to create obstacles for Tribal nations."[4] While our nation's relationship with tribes has historically been saturated in misguided humanitarian efforts and brutal violence, the ICWA represents federal acknowledgement of the autonomy that native families and tribes deserve.

ii. FACTUAL HISTORY

The following facts are undisputed. R. at 4, 14. Baby S is an Indian child born in January 2020 to a member of the Quinault Nation. *Id.* at 3. His mother passed away from an overdose one month later and the identity of his father is unknown. *Id.* For the first four months of his life, Baby S remained in the custody of his paternal grandmother, who cared for him despite her ailing health. *Id.* In April 2020, the West Dakota Child Protection Service ("CPS") moved Baby S into foster care with James and Glenys Donahue. *Id.* Shortly thereafter, the Donahues filed a petition to adopt Baby S in May 2020. *Id.*

In line with their federal right to set preferred placement of Indian children, the Quinault Nation identified two Quinault families that could raise Baby S and meaningfully connect Baby S to their ancestral roots. 25 U.S.C. § 1915(a); R. at 3. Subsequently, the Quinault Nation exercised its federal right to exclusive jurisdiction over Indian child custody proceedings and formally opposed the Donahues' adoption of Baby S. R. at 3; 25 U.S.C. § 1911(a). Upon learning of the Quinault Nation's opposition, the Donahues initiated the present challenge to the constitutionality of the ICWA. R. at 4.

iii. PROCEDURAL HISTORY

On June 29, 2020, James and Glenys Donahue joined the State of West Dakota (collectively, "Respondents") to file suit in the United States District Court for the District of

[4] Press Release, Department of the Interior, Secretary Haaland Takes Action to Restore Tribal Authority to Adopt Water Laws (Apr. 7, 2022), https://www.doi.gov/pressreleases/secretary-haaland-takes-action-restore-tribal-authority-adopt-water-laws.

West Dakota against the United States Department of the Interior ("Interior") and its Secretary, Stuart Ivanhoe, in his official capacity. R. at 1–2, 4. Both the Cherokee and Quinault Nations (collectively with Interior and Mr. Ivanhoe, "Petitioners") filed a motion to intervene, which was granted by the district court. *Id.* at 2. Seeking both injunctive and declaratory relief, Respondents alleged that: (1) Sections 1912(a), (d)–(f), 1915(a)–(b), (e), and 1951 commandeer the states in violation of the Tenth Amendment, and (2) Sections 1913(d), 1914, and 1915(a)–(b) violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 4.

On September 3, 2020, both parties filed cross-motions for summary judgment. *Id*. at 4. The district court denied Respondents' motion and granted Petitioners'. *Id.* at 1. On the first issue, the court found that "[n]one of ICWA's provisions violate the anticommandeering doctrine because they do nothing more than . . . confer[] minimum federal protections on Indian children, parents, and tribes in state child custody proceedings." *Id.* at 10. On the Equal Protection issue, the court found that the "ICWA's protections are based on the political classification of the Indian Tribes" rather than racial classification, and "need only satisfy rational basis review" as established in *Morton v. Mancari*. *Id.* at 10–11. The district court reasoned that Congress could rationally conclude the ICWA would "promote the stability and security of the Indian tribes," adding that it is "not the role of the judiciary to second guess these legislative judgments." *Id.* at 12. Respondents appealed. *Id.* at 13.

The United States Court of Appeals for the Thirteenth Circuit reversed the district court's holding on anticommandeering grounds without reaching the issues of Equal Protection or Congress's authority to enact ICWA. *Id.* at 16. Contrary to the lower court, the majority determined that "[t]hrough ICWA, Congress regulates States and their officials, not individuals." *Id.* Chief Judge Tower's concurrence expressed that the district court correctly analyzed the

anticommandeering and preemption issues but erred on Equal Protection grounds. *Id.* at 17. Judge Tower reasoned that in "deferring to tribal membership eligibility standards based on ancestry, rather than tribal affiliation, [the ICWA] uses ancestry as a proxy for race." *Id.* at 18. Petitioners timely petitioned this Court for a Writ of Certiorari. *Id.* at 20.

This Court granted a Writ of Certiorari on August 5, 2022, and thus has jurisdiction under 28 U.S.C. 1254(1). *Id.* Argument was limited to: (1) whether ICWA's placement preference or recordkeeping provisions in Sections 1915 and 1951(a) violate the anticommandeering doctrine; and (2) whether ICWA's Indian classifications violate the Equal Protection Clause. *Id.*

iv. STANDARD OF REVIEW

Summary judgment rulings and any related conclusions of law are reviewed de novo. *West Dakota v. United States*, 497 F.3d 346, 350 (13th Cir. 2007). Summary judgment should be granted when there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Here, all parties "have conceded that the relevant facts are undisputed and that the issues before the court are ripe for disposition as a matter of law." R. at 14; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

SUMMARY OF THE ARGUMENT

This Court must determine whether federal policy that has existed to protect the Indian Nations for nearly half a century should be overturned in favor of granting States unchecked authority over Indian children and tribal cultural longevity. This Court should defer to Congress regarding Indian affairs and REVERSE the Thirteenth Circuit's holding.

I.

The ICWA is a valid preemption of state law. Under *Murphy v. NCAA*, congressional regulation does not commandeer state sovereignty if it (1) draws authority from the Constitution,

and (2) is best read as regulating private actors. First, Congress's plenary authority to regulate Indian affairs originates in the Constitution and has been unflinchingly re-affirmed by this Court over all subject matter reasonably related to domestic Indian relations. Second, the ICWA regulates by protecting the right of private actors to access, understand, and preserve their Indian heritage. It does so by restricting the removal and placement of Indian children through conditions that must be respected evenhandedly by private and state actors alike. Therefore, it cannot be read as a targeted command to the States. Because the ICWA passes the *Murphy* test, the Supremacy Clause dictates that it must preempt conflicting West Dakota state law.

II.

Under the Equal Protection Clause of the Fifth Amendment, the fundamental concern of challenges to the ICWA's constitutionality is whether the term "Indian child" should be interpreted as either a political or racial classification. Under *Morton v. Mancari*, the first classification compels only rational basis review, whereas the latter must satisfy strict scrutiny. In light of the existing preferential Federal Indian law and the historical political relationship between federally recognized tribes and the United States Government, a political classification of the ICWA's provisions is the correct designation. This Court should reverse the Thirteenth Circuit's judgment and uphold the constitutionality of the ICWA under the Equal Protection Clause because its classifications pass all levels of constitutional scrutiny.

ARGUMENT

I. UNDER *MURPHY*, THE ICWA'S PLACEMENT PREFERENCE AND RECORDKEEPING PROVISIONS CONSTITUTE VALID PREEMPTIONS OF WEST DAKOTA STATE LAW.

Contrary to the Thirteenth Circuit's erroneous holding, the ICWA complies with the Tenth Amendment's anticommandeering doctrine because it directly regulates Indian child

welfare proceedings through the conferral of individual rights instead of compelling States to regulate on Congress's behalf. *See New York v. United States*, 505 U.S. 144, 178 (1992); Jay B. Sykes, Cong. Rsch. Serv., LSB10133, *The Supreme Court Bets Against Commandeering:* Murphy v. NCAA*, Sports Gambling, and Federalism* 1 (2018). In *Murphy v. NCAA*, this Court established a two-part test to determine whether federal legislation prevails as valid preemption of state law or fails as impermissible commandeering. 138 S.Ct. 1461, 1479–80 (2018). A legitimate preemption must: (1) draw authority from the Constitution, and (2) directly regulate private actors by conferring federal rights or imposing federal restrictions. *Id.* The Supremacy Clause dictates that congressional regulation that passes this test "shall be the supreme Law of the Land; and *the judges in every state shall be bound thereby*." U.S. Const. art. VI, cl. 2 (emphasis added); *see, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (state courts must apply federal regulatory standards to state law tort claims stemming from medical devices approved by the Food and Drug Administration); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347 (2000) (congressional legislation regarding federal highway safety preempts state tort actions in their entirety when based on adequate warning).

Both provisions at issue here pass the *Murphy* test and therefore must preempt West Dakota state law. The ICWA holistically satisfies the first element because "Congress has plenary power over Indian affairs" through the Indian Commerce Clause "and other constitutional authority." 25 U.S.C. § 1901(1). The provisions also individually meet the second element because they "protect the best interests of Indian children and families" by conferring federally recognized rights upon Indian individuals and tribes. 25 U.S.C. § 1902. Although States are held to minimum federal standards to ensure these rights are upheld, neither the ICWA's placement preference nor recordkeeping provisions assert control over the State's power to

regulate as sovereign. *Id.* Therefore, these provisions must be read first as a conferral of rights on private actors and second as an imposition of duties upon the State in support of those rights.

A. The ICWA Is a Legitimate Exercise of Congress's Constitutional Power Within the Scope of the Federal Trust Doctrine.

"The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974). These 'special problems' comprise a significant portion of the Federal Trust Doctrine, a concept first articulated by Chief Justice John Marshall in *Cherokee Nation v. Georgia*. 30 U.S. 1, 10 (1831). Marshall conceived of tribes as "domestic dependent nations . . . in a state of pupilage" under the Federal Government; their relationship akin to "that of a ward to his guardian." *Id.* He formalized this relationship in *Worcester v. Georgia*, holding that Georgia's regulation of the Cherokee "interfere[d] forcibly with the relations established between the United States and the Cherokee [N]ation, the regulation of which, *according to settled principles of our constitution*, are committed *exclusively* to the government of the union." 31 U.S. 515, 520 (1832) (emphasis added).

The ICWA is a statutory articulation of Marshall's concept of Congress as a crucial intermediary between tribal self-sovereignty and unbridled state interests. This Court should re-affirm Congress's constitutional duty to protect and preserve Indian tribes with the ICWA, a direct regulation of the resource most "vital to the continued existence and integrity of Indian tribes"—Indian children. 25 U.S.C. § 1901(2)–(3).

1. The Constitution explicitly and implicitly vests plenary authority over Indian affairs in Congress.

Since *Worcester*, this Court has passed down "an unbroken current of judicial decisions" affirming and re-affirming Congress's plenary authority over Indian affairs. *United States v.*

Sandoval, 231 U.S. 28, 46 (1913); *see also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470–71 (1978); *Board of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 716 (1943); *United States v. Ramsey*, 271 U.S. 467, 469 (1938); *Lone Wolf v. Hitchcock* 187 U.S. 553, 556–58 (1903); *Choctaw Nation v. United States*, 119 U.S. 1, 27 (1886). Traditionally, this Court has designated the Indian Commerce and Treaty Clauses as the primary sources of that power. *Lara*, 541 U.S. at 200; U.S. Const., art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2. This Court's steadfast precedent coupled with our tumultuous history with the Indian Nations, *see supra* Legal History at p. 1–3, leaves no doubt that Indian affairs are "exclusively a matter of federal law." *Cnty. of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 241 (1985).

The Framers passed the Indian Commerce Clause as a safeguard against "state encroachments" on the Federal Government's broad ability to regulate Indian affairs. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1155 (1995). The Articles of Confederation already vested Congress with exclusive powers to regulate Indian affairs under two conditions: regulations must not: (1) target "members of any of the states," or (2) violate "the legislative right of any State." Articles of Confederation and Perpetual Union, art. IX, para. 4 (1777). James Madison commented in *Federalist No. 42* that these limitations "render[d] the provision obscure and contradictory" because Indian state membership was unsettled at the time, and many Anti-Federalists saw regulation of Indian affairs as regulation of state citizens. *The Federalist No. 42*, at 217 (James Madison) (Yale University Press ed., 2009). Madison "properly unfettered" Congress of these limitations, drafting the Indian Commerce Clause as a streamlined alternative that granted Congress the exclusive power to "regulate

Commerce . . . with the Indian Tribes." *Id.*; U.S. Const. art. I, § 8, cl. 3. The provisions only differed in that the "shackles imposed on [the] power . . . [had been] discarded," vesting Congress with even broader authority under the Constitution. *Worcester*, 31 U.S. at 559. The "unshackled" Indian Commerce Clause passed the convention with little debate and no controversy. *Id.*; *see* Clinton, *supra*, at 1155–57.

The Framers did not intend for the Indian Commerce Clause to be "arguably coextensive" with the Interstate Commerce Clause and subject to the same limitations, as the Thirteenth Circuit erroneously suggests. R. at 16. "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996). Critical decisions regarding the Interstate Commerce Clause like *United States v. Lopez* and *Gibbons v. Ogden*, 514 U.S. 549, 559–60 (1995); 22 U.S. 1, 189–90 (1824), do not apply to the Indian Commerce Clause because it is "well established that the [two provisions] have very different applications." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The Thirteenth Circuit accurately concluded that Congress could not pass the ICWA under the Interstate Commerce Clause because Indian children do not have an aggregate impact on commerce generally. R. at 16. However, the ICWA was passed under the Indian Commerce Clause which, by contrast, has always been understood to permit regulation of *intercourse* in addition to solely *commerce*. *See United States v. Holliday*, 70 U.S. 407, 417–18 (1865).

Beyond the Indian Commerce Clause, Congress's plenary authority over Indian affairs can also be implied from "the exercise of the war and treaty powers" which left the Indian Nations "a dependent people needing protection." *Seber*, 318 U.S. at 715; *see* U.S. Const. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 2. In *United States v. Kagama*, this Court invoked the Necessary and

Proper Clause, holding that the Federal Government's duty of protection exists as a matter of trust and "*must* exist in that government, because it never has existed anywhere else . . . and because *it alone* can enforce its laws on all the tribes." 118 U.S. 375, 384–85 (1886) (emphasis added); *see* U.S. Const. art. I, § 8, cl. 18. The "weakness and helplessness" of Indian tribes exists predominantly because of their dealings with the Federal Government "and the treaties in which [protection] has been promised." *Seber*, 318 U.S. at 715. Thus, in exchange for their unwilling forfeiture of full sovereignty, the Indian Nations earned the Federal Government's protection and Congress assumed "the authority to do all that [is] required to perform that obligation." *Id.*

When Congress regulates Indian affairs, it explicitly and implicitly fulfills its duties under the Constitution and, more broadly, the Federal Trust Doctrine. The Framers intended the Constitution to bestow plenary and exclusive power to Congress in this area, and this Court has consistently maintained that intention throughout the centuries. To decide otherwise here would be to upset the established "special relationship" with the Indian Nations. *See Mancari*, 417 U.S. at 555; *supra* Legal History at p. 1–3.

2. Child custody proceedings are within the scope of the Federal Trust Doctrine because their regulation is essential to the protection of the Indian people.

Congress has always utilized its wide discretion under the Trust Doctrine to prevent the breakup of Indian communities. For example, Section 4 of Congress's first major Indian legislation under the Constitution prohibited the conveyance of Indian land to "any person" or "any state" without federal approval. An Act to Regulate Trade and Intercourse With the Indian Tribes, Ch. 33, 1 Stat. 137 (1790). The first Congress observed that tribes were at risk because of aggressive land speculation from States and private citizens. *Cnty. of Oneida*, 470 U.S. at 231–

32. In response, it regulated domestic intercourse with tribes through federal standards governing how and when Indian land may be conveyed to States or private actors. § 4, 1 Stat. 137.

This Court has limited Congress's ability to regulate domestic Indian affairs in only one regard: regulation may not overreach what is "reasonably essential" to the protection of the Indian Nations such that its exercise becomes "purely arbitrary." *Perrin v. United States*, 232 U.S. 478, 486 (1914). The *Perrin* Court upheld a federal ban on alcohol sales originating from a cession agreement with the Yankton Sioux Tribe, despite the 625 square mile parcel having passed largely into private ownership and only "upwards of 1,500" Indians remaining.[5] The Court reasoned that Congress had not "exceeded the limits of its discretion in applying the prohibition" to the entirety of the land because the Indian communities within were widely spread, severely vulnerable, and in need of federal protection. *Id.* at 486. A prohibition extending across "an entire state . . . [with] only a few Indian wards" would fail this test and "be condemned as arbitrary." *Id.* However, the Court concluded that Congress had discretion to ban alcohol sales on the entire 625 square mile parcel to protect the remaining tribes. *Id.*; *see also United States v. Mazurie*, 419 U.S. 544, 554–56 (1975); *Mancari*, 417 U.S. at 555.

Similar to the Trade and Intercourse Act of 1790, the ICWA operates by identifying and establishing minimum federal standards that combat an existential threat to Indian communities rooted in their intercourse with States and private actors. 1 Stat. 137; 25 U.S.C. §§ 1901–02. The only difference is that Congress has shifted from protecting against the undue breakup of Indian land to the undue breakup of Indian families. *Id.* Congress's findings show that the ICWA's federal minimum standards are indispensable in protecting the best interests of the Indian people.

[5] *Id.* at 480, 486. For context, 625 square miles is slightly less than half the size of Rhode Island. Lemons, J. Stanley, *Rhode Island*, Brittanica, https://www.britannica.com/place/Rhode-Island-state (last visited Oct. 9, 2022).

25 U.S.C. § 1901(3). Striking down the ICWA would herald a return of "alarmingly high percentage[s] of Indian families . . . broken up by the removal, often unwarranted, of their children." 25 U.S.C. § 1901(5). The Indian Nations have entrusted the Federal Government with their well-being for hundreds of years; the only "purely arbitrary" decision under *Perrin* would be to overturn the ICWA and leave them to the mercy of state interests. 232 U.S. at 486.

B. The ICWA Confers an Individual Right to Preserve Indian Heritage Protected by Minimum Standards That Restrict Rather Than Commandeer State Action.

The *Murphy* test's second element reflects the Court's conclusion that "every form of preemption" originates in "a federal law that regulates the conduct of *private actors, not the States*." 138 S.Ct. at 1481 (emphasis added). The Court evaluated a federal provision prohibiting State authorization of sports gambling and concluded that it was "not a preemption provision because there [was] no way in which [it could] be understood as a regulation of private actors." *Id.* Because a prohibition would neither confer federal rights nor impose federal restrictions upon private actors, it must be read as "a direct command to the States" in conflict with the anticommandeering doctrine. *Id.*

The ICWA does not suffer the same fatal defects that plagued *Murphy*'s regulation. In sharp contrast to a blanket mandate directed at state legislatures, the ICWA "affords rights to the Indian child, the child's parents, and the child's tribe" by constructing "a statutory scheme to prevent states from improperly removing Indian children." Cohen, *supra*, § 11.01[1]; *see* 25 U.S.C. §§ 1902–03. Furthermore, the ICWA prevails because it is a law of general application: one that evenhandedly imposes duties upon every participant in an activity without targeting private or state parties. *Id.* § 1912(d); *see Murphy*, 138 S.Ct. at 1478. Therefore, the ICWA must be read as a crucial support for tribal sovereignty rather than an attack upon that of the States.

Federal regulation may restrict participation in a state activity without commandeering state officials. *See Reno v. Condon*, 528 U.S. 141, 150–51 (2000) (upholding federal regulation restricting the distribution of confidential information despite requiring State employees "to learn and apply the Act's substantive restrictions"); *South Carolina v. Baker*, 485 U.S. 505, 514 (1988) (upholding federal regulation restricting a tax exemption on long-term state bonds despite States being "effectively prohibit[ed from] issuing unregistered bonds"). Although *Reno*'s regulation had an outsized effect on state actors versus private, the Court acknowledged that States must often "take administrative and sometimes legislative action to comply with federal standards regulating an activity" in order to participate in that activity. 528 U.S. at 151 (*citing Baker*, 485 U.S. at 515). Such restrictions on participation are "commonplace" and "present[] no constitutional defect." *Id.*

Likewise, the ICWA restricts access to court-ordered removal of an Indian child without mandating any change of state regulation. 25 U.S.C. §§ 1912–13. State and private agencies must comply with baseline standards and complete minor administrative duties before they may take part in the restricted activity. *Id.* § 1902. Nowhere in the ICWA are affected parties affirmatively ordered to seek the removal of an Indian child; such a provision would undoubtedly violate the anticommandeering doctrine. *See Baker*, 485 U.S. at 514–15. Like *Baker's* regulation, the ICWA presents only a prerequisite to participation in the regulated activity. *Id.* at 513; 25 U.S.C. § 1915. Claiming that the ICWA mandates state action is akin to claiming that *Baker's* regulation mandated participation in the bond market. *See Baker*, 485 U.S. at 513. A State is not *required* to participate in an activity simply because it is *desirous* to do so. *Id.*

The Thirteenth Circuit and Respondents rely on an overly broad reading of *New York* and *Printz v. United States* that conflates state respect for federal rights under the Supremacy Clause

with direct orders to confer the rights themselves. *See* 505 U.S. at 178; 521 U.S. 898, 935 (1997). Contrary to the regulation at issue in *Printz*, the ICWA establishes restrictions on the removal and placement of Indian children as opposed to "commanding state and local law enforcement officers to conduct background checks on prospective handgun buyers." *Printz*, 521 U.S. at 902; *see* 25 U.S.C. §§ 1912–13, 15. Similarly, where the regulation in *New York* offered a binary choice between accepting radioactive waste or regulating according to the wishes of Congress, the ICWA offers no such coercive choices. 505 U.S. at 176. The only decision presented to States by the ICWA is whether or not they wish to involve themselves in the removal of an Indian child with federal restrictions in place. 25 U.S.C. §§ 1912–13, 15.

The ICWA also complies with the anticommandeering doctrine under both *Printz* and *New York* because it applies evenhandedly to private and public actors. *See* 521 U.S. at 935; 505 U.S. at 167; *see also Murphy*, 138 S.Ct. at 1478. While the expectation may be that private actors do not participate in the removal of Indian children, the most recent challenge to the ICWA–*Adoptive Couple v. Baby Girl*–was filed by a private couple seeking termination of an Indian father's parental rights. 570 U.S. 637, 644 (2013). Private individuals are restricted by the ICWA in the same manner as States, meaning that the regulation cannot violate the anticommandeering doctrine. *Id.*; *see Murphy*, 138 S.Ct. at 1478.

The Thirteenth Circuit also mistakenly conflate valid federal regulation effectuated by state judges with invalid commandeering. R. at 15. The Supremacy Clause explicitly dictates that "the Laws of the United States . . . shall be the supreme Law of the Land; and the *judges in every state shall be bound thereby*." U.S. Const. art. VI, cl. 2 (emphasis added). Even in *New York*, this Court acknowledged "the well-established power of Congress to pass laws enforceable in state courts." 505 U.S. at 178. Justice Antonin Scalia also preserved this carveout in *Printz*: "the

Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." 521 U.S. at 899 (emphasis omitted); *see, e.g., Hillman v. Maretta*, 569 U.S. 483, 493–94 (2013) (upholding a federal order of precedence for spousal inheritance that preempted related state causes of action); *Jinks v. Richland County*, 538 U.S. 456, 456 (2000) (upholding a federal statute altering a state law limitations period while a supplemental claim was pending in federal court).

Under this precedent of *Reno* and *Baker* as distinguished from *New York* and *Printz*, the ICWA must be read holistically as regulating private actors. Both provisions at issue here–placement preference and recordkeeping–do require action from state judges like many federal regulations operating through state courts. But such "prescriptions," as per *Printz*, are closely "related to matters appropriate for the judicial power." 521 U.S. at 899 (emphasis omitted).

1. The ICWA's placement preferences are best read as ensuring the right for Indian children to remain with families that preserve community ties.

The first provision at issue, Section 1915, establishes default preferences for the placement of Indian children. 25 U.S.C. §§ 1902, 15. Section 1915(a) establishes an order of preferences for adoption of Indian children: (1) extended family members, then (2) tribe members, and finally (3) other Indian families. Section 1915(b) creates similar preferences for foster care and pre-adoptive placements. Even if an eligible party is available, their preferred status can be disregarded if any party shows "good cause to the contrary." *Id.* § 1915(a)–(b).

This Court has determined that Section 1915 neither transfers the costs of federal regulation to the States nor commandeers state judges. In *Holyfield*, this Court determined that it instead confers "the rights of the Indian child" and "the rights of the Indian community in retaining its children" according to the placements Congress has determined will "protect their

best interests." 490 U.S. at 37 (internal citation omitted); 25 U.S.C. § 1902. This Court's recent holding in *Adoptive Couple* further explains that Section 1915's preferences are "inapplicable" unless a "party that is eligible to be preferred" comes forward. 570 U.S. at 654.

Under this framework, Section 1915 can result in only three possible outcomes: (1) an eligible party fails to appear, and the provision is inapplicable; (2) an eligible party appears, another party shows good cause why the placement is improper, and the judge disregards the preference; or (3) an eligible party appears, no party shows good cause to oppose the placement, and the judge is required to apply the federal standard. 25 U.S.C. § 1915(a). Nowhere in this structure does Section 1915 mandate that agencies, courts – or anyone for that matter – must preemptively search for a "good cause" to deviate from the established preferences. *Id.* Similarly, should an eligible party fail to appear, the now "inapplicable" Section 1915(a) cannot be read as an order to expend state time and resources in the search for such a party. *Adoptive Couple*, 570 U.S. at 654; *Id.* As established in *New York*, "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them" but such judicial prescriptions are "mandated by the text of the Supremacy Clause." 505 U.S. 144, 178–79; *see also Printz*, 521 U.S. at 899; *Jinks*, 538 U.S. at 456; *Hillman*, 569 U.S. at 493–94.

2. The ICWA's recordkeeping provisions are best read as securing the right to learn of tribal affiliation and heritage through court records.

Sections 1915(e) and 1951 comprise the ICWA's recordkeeping provisions. Section 1915(e) imposes two minor obligations on state judges which, though supplementary and administrative in nature, are appropriate for the judicial power and necessary to support rights the ICWA was created to confer. *See Printz*, 521 U.S. at 899. First, Section 1915(e) requires state courts to maintain a "record of each [Indian child] placement . . . evincing the efforts to comply with the order of preference specified in this section." Second, 1915(e) necessitates that courts

keep the record "available at any time upon request of the Secretary or the Indian child's tribe." Section 1951(a) adds that States entering a "final decree or order in any Indian child adoptive placement" must provide the Secretary of the Interior with a copy of that order along with "other such information as may be necessary to show" details like tribal affiliation, biological parentage, and the location of data related to the placement. Section 1951(b) then requires the Secretary of the Interior to disclose this information "as may be necessary for the enrollment of an Indian child into [their] tribe . . . or for determining any rights or benefits associated with that membership."

Holyfield also contemplated the ICWA's recordkeeping provisions, determining that they directly confer a "right to obtain records" upon the Indian tribes. 90 U.S. at 50. This right can be exercised under Sections 1917 and 1951(b), for example, which permit adopted Indians over eighteen to access the court records created under Section 1915(e). These records detail tribal affiliation and biological parentage as well as "such other information as may be necessary to protect any rights flowing from the individual's tribal relationship." 25 U.S.C. § 1917. In concert with the remainder of the ICWA, the recordkeeping provisions confer on adopted Indian children a right to full knowledge of their ancestry and heritage in pursuit of "stability and security of the Indian tribes." *Id.* § 1902. The only way to ensure the security of this right is to require state courts to maintain their records and communicate the information to the Secretary of the Interior. *Id.* §§ 1915(e), 51. Furthermore, the evidence courts must maintain requires no additional judicial recordkeeping beyond that which courts traditionally perform in preservation of materials related to a removal or placement determination. *Id.* § 1915(e).

The intention and effects of the ICWA deeply parallel those of the preemptive regulations detailed in *Reno* and *Baker*: restrictions on participation in an activity that apply evenhandedly to

both States and private actors. *See* 528 U.S. at 150–51; 485 U.S. 505, 514. Even actions the court must take alone are minor commitments that can only be accomplished by the judicial power. *See id*. § 1915(e), 52. Therefore, the ICWA's two provisions at issue must be read as regulation of private actors and, consequently, valid preemptions of West Dakota law.

II. THE ICWA'S CLASSIFICATIONS ARE POLITICAL, SUBJECT TO RATIONAL BASIS REVIEW.

Under the Equal Protection Clause of the Fifth Amendment, the Constitution guarantees the "right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). When a statute confers a benefit on one class of persons to the exclusion of another, a classification exists, and the Equal Protection Clause applies. *See, e.g*., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973). Where that classification does not "involv[e] fundamental rights [nor proceed] along suspect lines" it will survive an equal protection challenge if "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993); *see also Romer v. Evans*, 517 U.S. 620, 631 (1996). So long as the classification is not "wholly irrelevant to the achievement of [any legitimate governmental] objective," it will survive. *Harris*, 448 U.S. at 322.

The ICWA's classifications manifests the government's long-standing commitment to protect tribal self-determination by reaffirming their political status. This Court has repeatedly held that the Fifth Amendment does not interfere with "the 'powers of local self-government enjoyed' by the [federally recognized] tribes." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (*quoting Talton v. Mayes*, 163 U.S. 376, 384 (1896)). The United States Government

continues to uphold this "unique Nation-to-Nation relationship . . . and desire to strengthen Tribal sovereignty and advance Tribal self-determination."[6]

In view of this "unique legal status of Indian tribes under federal law" this Court should reverse the Thirteenth Circuit's decision because the ICWA's protections are based on the political classification of the Indian Tribes, subject only to rational basis review. *Mancari*, 417 U.S. at 551. The ICWA recognizes a fundamental connection to the integrity of tribal sovereignty: the welfare of a tribe is contingent on the welfare of the Indian child. 25 U.S.C. § 1903. To read tribal sovereignty out of the ICWA is to overlook the well-established political history of tribes, existing federal Indian jurisprudence, and Congress's broad interest in tribal welfare.

A. The ICWA's Classifications Are Political, Not Racial.

Congress's plenary authority over federally recognized Indian tribes has been a "power that has always been deemed a political one." *Lone Wolf*, 187 U.S. at 565; *see also supra* Legal History at p. 1–3. The ICWA's classifications in Sections 1913, 1914, and 1915(a), are politically based for two reasons: (1) like the hiring preference in *Mancari*, the ICWA's placement preference applies only to federally recognized tribes and this "preference is political rather than racial in nature;" (2) the ICWA's definition of "Indian child"[7] does not mirror the

[6] Press Release, The White House, Fact Sheet: Building A New Era of Nation-to-Nation Engagement (Nov. 15, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-building-a-new-era-of-nation-to-nation-engagement/ ("President Biden issued an executive order advancing education equity, excellence and economic opportunity for Native Americans, pledging to expand opportunities for students to learn their Native languages, histories, and cultural practices."); *see also supra*, Legal History at 1–3.

[7] "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)

impermissible racial classifications in *Rice v. Cayetano*. 417. U.S. at 554 n.24; 528 U.S. 495, 522, 524 (2000).

1. This Court should reach the same conclusion as it did in Mancari *and find the ICWA's classifications are political.*

Under *Mancari*, the ICWA's placement preference is politically based because the ICWA is concerned with the special status of tribes and their membership. The *Mancari* Court upheld an Indian employment preference legislation as political, even though the challenged statute's "Indian" definition was partially based on blood quantum. 417 U.S. at 553–54, 559. Critical to that finding was the recognition of "the unique legal status of Indian tribes under federal law" and "the plenary powers of congress . . . to legislate on behalf of federally recognized Indian tribes." *Id*. at 551. Further, the employment preference was political in nature because it *only* applied to members of federally recognized tribes. *Id*. at 553 n.24. Therefore, any resulting relationships between the Federal Government and tribes or its members, ought to be viewed as fundamentally political.

The ICWA's purpose parallels the self-determination goals of *Mancari's* hiring preference because it "protect[s] the best interests of Indian children *and* . . . promote[s] the stability . . . of Indian tribes." *Id*. at 553–54; 25 U.S.C. §1902 (emphasis added). The ICWA does not inherently turn on race merely because its definition of "Indian child" includes those who have a biological parent with a tribal affiliation. 25 U.S.C. § 1903(4). Rather, it turns on criteria set by tribes as a present-day political sovereign, just as the United States and other sovereigns are entitled to choose their own qualifications for citizenship.[8]

[8] *See, e.g.,* The Law of the Republic of Armenia on the Citizenship of the Republic of Armenia, RA Law No. 75-N (Nov. 6, 1995) (amended Feb. 26, 2017) (Arm.); Irish Nationality and Citizenship Act, Act No. 15/2001 (Ir.).

In light of this legal framework, this Court should conclude that the ICWA's Indian preference classifications are political because of *whom* it targets: eligible tribal minors of federally recognized tribes whose parent possess' tribal membership. The case for racial discrimination by the ICWA is even weaker, because unlike the blood quantum provision in *Mancari*, the legislation here is silent on bloodline. 25 U.S.C. § 1903(4); *see* 417 U.S. at 553–54.

2. The ICWA's use of ancestry is not a proxy for race because it is based on criteria set by a present-day political sovereign.

In *Rice,* this Court held that a provision in the Hawaiian Constitution violated the Fifteenth Amendment because it intentionally limited voting rights to only those of "native Hawaiian [descent] . . . *solely* [based on] their ancestry," and used ancestry as a proxy for race. 528 U.S. at 514, 522 (2000) (emphasis added). In reaching this conclusion, this Court reaffirmed *Mancari* and tacitly acknowledged that Indians and native Hawaiians are both legally and factually different. *Id*. Unlike the racial classifications of *Rice*, the classifications in *Mancari* were "not directed toward a 'racial' group consisting of 'Indians,'" but instead, applied "only to members of 'federally recognized' tribes . . . [which are] political rather than racial in nature." *Id*. at 519–20 (*quoting Mancari*, 417 U.S. at 553 n.24).

Here, the ICWA is both legally and factually distinguishable from *Rice* because Native Hawaiians do not possess the same sovereign privileges that members of federally recognized tribes do as political entities. *Rice*, 528 U.S. at 514. Fundamentally, "*Rice* concerned the rights of individuals, not the legal relationship between political entities." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1278 (9th Cir. 2004). *Rice* implicated the Fifteenth Amendment through a voting eligibility law whereas the ICWA is concerned with the Equal Protection Clause under the Fifth Amendment. *Rice*, 528 U.S. at 514. Even if this Court extends *Rice's* holding to implicate the Equal Protection Clause, the ICWA's "Indian child" definition and preference placements are

fundamentally different because "to extend *Mancari* to [voting eligibility laws] would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision making in critical state affairs. The Fifteenth Amendment forbids this result" *Rice*, 528 U.S. at 522, 559. The ICWA, however, is only applicable to federally recognized tribes and those eligible for membership. 25 U.S.C. § 1903.

Moreover, children under the ICWA do not meet its definition merely because they descend from persons with Indian heritage. 25 U.S.C. § 1903(9). Rather, their status is contingent on civic participation: whether at least one parent chooses to enroll in a tribe or maintain tribal membership. *Id.* § 1903(4). In fact, under some tribal membership laws, eligibility extends to children without Indian blood, such as the descendants of adopted white persons or the descendants of former slaves who became members upon freedom. Navajo Nation Code Ann. tit. 1 (2010). For instance, applications to the Navajo Nation will be granted "if the individual has some tangible connection to the Tribe," such as the ability to speak Navajo or time spent living among the Navajo people. *Id.* Simply "[h]aving a biological parent who is an enrolled member is per se evidence of such a connection . . . [but] blood alone is never determinative of ancestry." *Id. See also* Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act* 1–13 (2007).

Rather than imposing its own understanding of Indian identity, Congress's deference to tribal standards on membership eligibility reflects its longstanding commitment to preserving and protecting the political status of tribes. The eligibility language of the ICWA in Section 1903(4) represents Congress's conscious effort to ensure its preference legislation encompasses all children not-yet-formalized with tribal affiliations, regardless of the child's ethnicity. H.R.

Rep. No. 95-1386., 2d Sess. at 17 (a "minor, perhaps infant, Indian does not have the capacity to initiate the formal mechanical procedure necessary to become enrolled").

While it is easier to think of Indian status in racial terms alone, this simplification of race ignores the sovereign identity of federally recognized tribes. As this Court's tribal jurisprudence evinces, Indians possess a unique status as semi-autonomous actors who often receive exceptional levels of deference and preferential treatment to fulfill Congress's general interest in Tribal welfare. To overlook this historical political status of tribes in favor of simple race classifications will undo virtually "every piece of legislation dealing with Indian tribes . . . [that] single[s] out for special treatment a constituency of tribal Indians living on or near reservations." *Mancari*, 417 U.S. at 552. Because precedent has left "no doubt that federal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications.", this court should conclude that the ICWA classifications are political and is subject to only a rational basis review. *United States v. Antelope*, 430 U.S. 641, 645 (1977).

B. The ICWA Passes Rational Basis Review.

The ICWA passes rational basis review because the classifications fulfill the government's purpose to uphold tribal sovereignty and maintain the continuity of tribal heritage. Historically, laws that single out Indian tribes are subject to rational basis review because of their unique political status that permits the enactment of "legislation that might otherwise be constitutionally offensive." *Yakima*, 439 U.S. at 501 (*citing Mancari*, 417 U.S. at 551); *see also Seber*, 318 U.S. at 715; *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 181 (1973); *Simmons*, 384 U.S. at 209. *Williams*, 358 U.S. at 223; *United States v. U.S. Fidelity & Guaranty Co*., 309 U.S. 506, 512–513 (1940).

Preferential legislation will survive rational basis review if "there is a rational relationship between the disparate treatment and some legitimate governmental purpose." *Heller*, 509 U.S. at 320; *see also Romer*, 517 U.S. at 631. A legislature need not "actually articulate" the purpose or rationale supporting the classification at the time it is created. *Heller*, 509 U.S at 320. Instead, "any *reasonable conceivable* state of facts . . . could provide a rational basis for the certification." *Id*. (emphasis added). Further, the party challenging the statute has the burden to negate "every conceivable bias which might support it," and the statute is presumed to be constitutional. *Id*. Here, the rational basis test as historically applied to Indian tribes is best summarized in *Mancari:* "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555.

Congress afforded given strong deference in establishing a rational relationship between the ICWA's classifications and the fulfillment of their unique obligation to tribes. *Mancari*, 417 U.S. at 555. The United States Congress enacted the ICWA in response to national concern over large scale removals of Indian children perpetuated by "nontribal government authorities who … are at best ignorant of [Indian] cultural values, and at worst contemptful" of Indian communities' individual traditions of child rearing. *Holyfield*, 490 U.S. at 34–35 (*citing* 1974 Hearings at 191–92).

At the time of the ICWA's passage, Congress was concerned about the "non-Indian child welfare workers [failure] to understand the role of the extended family in Indian society" *Holyfield*, 490 U.S. at 35 n. 4. For example, social workers often justified removals because children in Indian families had been left with persons outside of the "nuclear family," a community-based practice prevalent throughout the Indian nations *Id*. (internal citations

omitted). As a result of this prejudice, Indian nations experienced a wholesale removal of Indian children. *Id*.; *see supra* Legal History p. 1–3. In Minnesota, nearly "one in every eight Indian children under 18 years of age [lived] in an adoptive home." *Id*. Further, ninety percent of Indian placements generally were in non-Indian homes. *Holyfield*, 490 U.S. at 33.

These profound adverse actions threaten the existence of tribal nations. As the Chief of the Mississippi Band of Choctaw Indians, Mr. Calvin Isaac, testified before Congress:

> The chances of Indian survival are significantly reduced if our children, the only real means for transmission of tribal heritage are to be raised in non-Indian homes and denied exposure to the ways of their People . . . These practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Holyfield, 490 U.S. at 34.

In light of this devastation, it is clear that "the special treatment of Indian children and families is rationally linked to the fulfillment of Congress's unique obligation." *Mancari*, 417 U.S. at 555. As the District Court correctly pointed out, "[i]t was eminently rational for Congress to believe, its goal . . . would be furthered by ensuring that an Indian child is raised in a household that respects Indian values and traditions." R. at 11. Raising the child as part of the tribe "conceivably increases the likelihood that [they] will eventually join a tribe." *Id*. Furthermore, a placement with another tribe could similarly fulfill Congress's goal because the child would be "surrounded by others who had given serious consideration to maintaining a connection with their own tribe" *Id*. at 11–12.

The Respondent cannot meet this burden in this case. First, they would have to overcome the presumption that the law is constitutional. *Heller*, 509 U.S. at 320. Then, they must prove that *no* rational legislator could conceivably think of a rational reason that the law could fulfill its purpose. *Id*. Here, Congress's findings demonstrate that more than a conceivable rational reason

to enact ICWA existed. The removals of children were real, undisputed, and deserving of a remedy that addressed the issue.

III. EVEN IF THE ICWA'S CLASSIFICATIONS ARE RACIAL, THEY ARE NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENT INTEREST AND THEREFORE SURVIVE STRICT SCRUTINY.

Setting aside the correct political classification under *Mancari*, the ICWA would still survive strict scrutiny because a benign racial classification disfavoring the white majority is necessary to further the government's compelling interest of protecting tribal self-determination. Congress carefully tailored its conferral of benefits to this minority group. Thus, any argument against the ICWA's classifications as constitutional is to ignore the critical issue at stake: tribal sovereignty.

When classifications imposed by the government are racial or ethnic, they must be reviewed by the court under strict scrutiny because they are "contrary to [United States'] traditions and hence constitutionally suspect." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). Classifications under this level of scrutiny are constitutional if they "are narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 327. Strict scrutiny examines whether such classifications are objectionable by testing "the importance and the sincerity of the government's reasons for using race in a particular context." *Grutter*, 539 U.S. at 308. Despite a higher standard of review, several cases before this Court have withstood equal protection challenges, even where race-based classifications were present. *See Grutter*, 539 U.S. at 343; *Korematsu v. United States*, 323 U.S. 214 (1944); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 314–15 (2013). Here, the ICWA is no different because it serves a compelling state interest that is narrowly tailored to that interest.

The ICWA's classifications serve compelling state interest by rectifying historical racial discrimination. A racial classification may be justified by "[p]ressing public necessity," while "racial antagonism never can." *Korematsu v. U.S.*, 323 U.S. at 216. In *United States v. Paradise*, the Court found that "[t]he Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor" in the selection of state troopers, because of the department's extensive history of discrimination against the black community. 480 U.S. 149, 150, 167 (1987). Here, the pervasive and persistent history of disproportionate child removals in the Indian community were based on demonstrated discrimination against native communities.[9] The ICWA serves as a stopgap against further historical wrongs by outlining federal minimum standards that make tribal decision-making a central feature of the child placement process. *See supra*, Legal History p. 1–3.

The ICWA is also narrowly tailored to fit the compelling government interest. Even where the government is permitted to use race as a classification, "[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). The purpose of narrowly tailoring the law is to ensure that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 473 (1989).

In *Grutter*, the Court found that race was merely one in a myriad of factors that determine university admissions. 539 U.S. at 340. Likewise, the ICWA's use of ancestry to link the child to the tribe is only one factor in its definition of an "Indian child." 25 U.S.C. § 1903(4). Specifically, the child may be either "a member of an Indian tribe or . . . eligible for membership

[9] *Holyfield*, 490 U.S. at 34–35 (*citing* 1974 Hearings at 191–92).

in an Indian tribe." *Id.* However, federally recognized tribes make the final determination of its membership eligibility. *See* Lucy Dempsey, *Equity over Equality*, 77 Wash. & Lee L. Rev. 411, 456 (2021). For example, a child of a member with cultural rather than racial ties to that particular tribe could fall under the classification. 25 U.S.C. § 1903. The definition of Indian child is thus narrowly tailored to classify children who have a relationship to a federally recognized tribe as defined by individual tribal determinations of membership.

Narrow tailoring also "does not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 309. It does, however, require "serious, good faith consideration of workable race-neutral alternatives that will achieve the [goal]." *Id.* at 339. Here, the race neutral alternative attempted by the state was the handling of Indian child welfare placements by state child welfare services. *Holyfield*, 490 U.S. at 34–35 (*citing* 1974 Hearings at 191–92). The result of this handling, however, has demonstrated that this resulted in disproportionate child removals from Native communities specifically and perpetuated racial discrimination.

CONCLUSION

This Court should REVERSE the judgment of the United States Court of Appeal for the Thirteenth Circuit regarding Anti-Commandeering and AFFIRM the judgment the United States District Court for the District of West Dakota regarding the Equal Protection Clause.

Respectfully submitted this Monday, the 10th day of October 2022.

/s/ *Team 10*
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