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 PETITIONER

TEAM NO. 12

Counsel for Petitioner

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QUESTIONS PRESENTED

I. Whether the Indian Child Welfare Act's (ICWA) placement preference and recordkeeping provisions are a constitutional application of Congress's Article I authority under its plenary power with the Indians and governs Indian child custody proceedings in conformance with the Constitution's prohibition against anticommandeering when ICWA confers rights to historically discriminated private parties.

II. Whether ICWA's Indian classifications are constitutional under the Equal Protection Clause of the Fifth Amendment to the United States Constitution when Indian tribes and membership status are political classifications in recognition of Indian tribes' quasi-sovereign status that requires rational basis review.

STATEMENT OF THE CASE

I. Statement of Facts

Plaintiffs James and Glenys Donahue and the State of West Dakota filed suit against the United States, the United States Department of the Interior, and Secretary, Stuart Ivanhoe, to challenge provisions of ICWA. R. at 1. Plaintiffs sued because the Donahues failed to adopt Indian Child Baby S due to the Quinault Nation finding other adoptive families. R. at 3.

The Donahues previously adopted Indian Child Baby C, whose biological mother is an enrolled member of the Quinault Nation and father is an enrolled member of the Cherokee nation; both tribes filed motions to intervene in this case and are collectively referred to as the "Tribal Defendants." R. at 2-3. West Dakota Child Protection Services (CPS) placed Baby C in foster care with the Donahues, notifying both the Quinault and Cherokee Nations pursuant to ICWA. Id. After the Donahues began adoption proceedings for Baby C, Baby C's biological parents terminated their rights and an alternative placement suggested by the Quinault Nation fell through. Id. Ultimately, the Donahues adopted Baby C. Id.

Later, the Donahues became foster parents and sought to adopt Indian Child Baby S, whose biological mother was a member of the Quinault Nation prior to her death. Id. Baby S was originally in the custody of his paternal grandmother, but Baby S's grandmother was unable to care for him due to her own health concerns. Id. The Donahues sought to adopt Baby S and, although the adoption was supported by Baby S's grandmother, the Quinault Nation opposed the adoption and informed CPS that the tribe had identified two potential adoptive families. Id. Plaintiffs filed suit after learning of the Quinault Nation's opposition to the adoption. R. at 4.

II. Procedural History

The District Court. On June 29, 2020, Plaintiffs filed suit against Defendants seeking injunctive and declaratory relief. R. at 4. The Quinault and Cherokee Nations filed an unopposed motion to intervene, which was granted by the United States District Court for the District of West Dakota. R. at 2. On September 3, 2020, the parties filed cross-motions requesting summary judgment. R. at 4. The district court denied Plaintiff's Motion for Summary Judgment and granted Defendant's Motion for Summary Judgment. R. at 12. The district court found that ICWA is constitutional on the basis that Congress holds plenary power over Indian affairs and ICWA does not violate the anti-commandeering doctrine. R. at 8. Therefore, ICWA preempts any conflicting West Dakota law according to the Supremacy Clause. R. at 8. The district court further articulated that ICWA's provisions are politically, not racially, based and satisfy rational basis review. R. at 11. Overall, the court rejected all challenges to ICWA's constitutionality and held that the statute was constitutional. R. at 12.

The Court of Appeals. The United States Court of Appeals for the Thirteenth Circuit reversed the district court's judgment. R. at 13. In the appellate court's decision, it held that ICWA violated the anticommandeering doctrine. R. at 16. However, the majority opinion did not analyze Congress's authority to enact ICWA under Article I or based on the equal protection challenge. R. at 16-17. Chief Judge Tower wrote a concurring opinion explaining that ICWA is subject to strict scrutiny review rather than rational basis review because Indian membership is a racial classification and further found that ICWA's placement preference provisions were not narrowly tailored, thus violating the Equal Protection Clause. R. at 18. On the other two issues, however, Judge Tower held that the district court correctly analyzed the Tenth Amendment and preemption issues. R. at 17.

SUMMARY OF THE ARGUMENT

Congress, in recognizing its broad power to legislate in Indian affairs, enacted ICWA to both protect the best interests of Indian children and promote the stability of Indian tribes. In two instances, challenges to ICWA have been heard in this Court and in both instances the statute was never ruled unconstitutional. Since ICWA was passed pursuant to Congress's Article I authority, applies equally to state and private parties, does not command state legislatures, and survives rational basis review under the Equal Protection Clause of the Fifth Amendment, this Court should hold that ICWA is constitutional.

ICWA is a constitutional application of Congress's Article I authority because the Indian Commerce Clause grants Congress broad plenary power to regulate Indian affairs. Congress's plenary power traces back to the special trust relationship created between the federal government and Indian nations to protect and provide for the welfare of Indian tribes across the United States. This special trust relationship, while not a direct basis for federal legislation, was a motivating factor in granting the federal government ultimate sovereignty over Indian nations. The plenary power to regulate Indian affairs granted to Congress is exclusive to the federal government and extends beyond commerce into any conduct that may affect Indian affairs. Thus, Congress is well within its authority to enact ICWA because ICWA establishes minimum federal standards that directly protect Indian children and preserves the integrity of Indian culture.

ICWA constitutionally regulates Indian child custody proceedings because it equally applies to state and private parties and does not command state legislatures or executive officials. Under the Tenth Amendment of the United States Constitution, anything that is not explicitly granted to the federal government is reserved to the states. In effect, the anticommandeering doctrine prohibits the federal government from (1) issuing direct orders to the states and (2) from

having state executive officials carry out the federal regulatory program. ICWA, through its statutory provisions, by no means violates either of these principles. Firstly, ICWA's placement preference provisions set a preference for Indian children to be with their family, tribe, or other Indian families, but does not force state legislatures to adopt this language in their statutes. Secondly, ICWA's recordkeeping provisions, requiring that the state keep records of child placement, does not require state executive officials or similar political branches to carry out the minimum federal standards. Lastly, the policy behind the anticommandeering doctrine—enabling the voting public to know who is responsible for legislation so they can vote accordingly—is furthered through ICWA because the statute does not command that state legislatures act. Simply stated, ICWA does not violate the anticommandeering doctrine.

ICWA preempts conflicting state law governing Indian child custody proceedings because ICWA is a constitutional application of Congress's Article I authority to regulate Indian affairs and does not violate the anticommandeering doctrine. The doctrine of preemption, derived from the Supremacy Clause of the United States Constitution, provides that when a state and federal law conflict, federal law prevails. Conflict preemption requires a federal law to prevail when Congress is granted authority under the Constitution to enact the law at issue and such law regulates private individuals alone or equally engages private individuals and states. Because Congress has the authority to enact ICWA through the Indian Commerce Clause and ICWA's placement preference and recordkeeping provisions apply minimum federal standards to states and private individuals equally, ICWA preempts conflicting West Dakota law.

The Indian classifications within ICWA, specifically sections 1913, 1914, 1915, and the statutory definition of Indian child, are constitutional under the Equal Protection Clause of the Fifth Amendment. The classifications within ICWA are not racial classifications, but rather

political classifications founded on the unique quasi-sovereign nature of Indian tribes and their relationship to the federal government. As political classifications, these statutory sections are subject to rational basis review, which requires these sections be rationally related to a legitimate government interest. Here, the statutory provisions grant protected rights to Indian parents and tribes in child custodial proceedings to prevent the unwarranted removal of Indian children from Indian families, which is rationally related to the legitimate government interest of ensuring the continued existence of Indian tribes. However, even if this Court should find that these sections do employ racial classifications, ICWA will still survive strict scrutiny review. These sections are constitutional even under strict scrutiny because they are narrowly tailored to further compelling government interests. Congress has a compelling interest in the continuation and longevity of Indian tribes, particularly in light of Congress's role as trustee and their Constitutional powers to regulate Indian affairs. ICWA is narrowly tailored to further this interest by ensuring that children will remain within the Indian tribes, allowing for the tribes to continue to exist and grow.

Therefore, this Court should hold ICWA constitutional because ICWA was enacted pursuant to Congress's Article I authority through the plenary power granted by the Indian Commerce Clause, ICWA does not command state legislatures or executive officials to act, ICWA preempts any conflicting state law, and ICWA survives rational basis review based on the political classification of Indian tribes.

ARGUMENT

There is nothing more valuable to the sustainability of the Indian tribe than the children of Indian families, and the United States, in its federal trust power, has a significant interest in protecting Indian children. 25 U.S.C. § 1901(3) (2022). Historically, an especially high number

of Indian families have been broken up by the often unwarranted and unwanted removal of Indian children from their home to non-Indian homes and private institutions. Id. at (4). In recognizing the special relationship between the federal government and Indian tribes, Congress recognized their plenary power over Indian affairs in a response to several state's failures to recognize the vital importance of the Indian family and its social and cultural implications. Id. at (5). In passing the Indian Child Welfare Act ("ICWA"), Congress had two legislative goals in mind: "to protect the best interests of Indian children and to promote the stability and security of Indian tribes." § 1902. Whether someone focuses on the federal trust doctrine illuminated in the legislative history above, the Indian Commerce Clause, or the policy rationale behind ICWA, the result is the same—ICWA was within Congress's constitutional power. Cohen's Handbook of Federal Indian Law § 11.06 (Nell Jessup Newton ed., 2017) [hereinafter Cohen's].

Several courts have heard challenges to the constitutionality of ICWA. In the most recent case, the court held, through a vast litany of opinions on different issues, that ICWA was constitutionally passed because it did not exceed Congress's Article I authority and did not commandeer the states. Brackeen v. Haaland, 994 F.3d 249, 331-32 (5th Cir. 2021) (en banc) (Judge Dennis), cert. granted sub nom. Nation v. Brackeen, 212 L. Ed. 2d 215 (Feb. 28, 2022), and cert. granted, 212 L. Ed. 2d 215 (Feb. 28, 2022), and cert. granted sub nom. Texas v. Haaland, 212 L. Ed. 2d 215 (Feb. 28, 2022), and cert. granted, 212 L. Ed. 2d 215 (Feb. 28, 2022). In other instances, some intermediate appellate courts in California have declined to extend ICWA to children whose parents lack political, social, or cultural ties to the Indian tribe. In re Santos Y., 112 Cal. Rptr. 2d 692, 731 (Cal. Ct. App. 2001). However, in both instances where ICWA has been brought to the United States Supreme Court, the statute was never found unconstitutional. See Adoptive Couple v. Baby Girl, 570 U.S. 637, 655 (2013); Miss. Band of

Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989). While the first case of ICWA analyzed the statute's domicile requirements, the court analyzed a vast majority of the applicable sections of ICWA and never once made any comment to the statute being unconstitutional. Holyfield, 490 U.S. at 37. In a more recent United States Supreme Court decision, the Court analyzed several applicable provisions of ICWA in holding that a biological father cannot use the provisions of ICWA to seek custody of a child he has already given up rights to. Adoptive Couple, 570 U.S. at 655. In any event, such in depth analysis of the statutory provisions of ICWA gave this Court the opportunity to rule the statute unconstitutional, which they clearly did not.

This Court should reverse the circuit court's decision and hold that ICWA is constitutional under Congress's Article I authority and the Equal Protection Clause of the Fifth Amendment. ICWA was constitutionally passed pursuant to Congress's plenary power over Indian affairs and provides minimum federal standards equally on private parties and states. Historically, tribal membership has been analyzed as a political affiliation requiring rational basis review which ICWA surely meets. In enacting ICWA, Congress rationally pursued the legitimate government interest of protecting Indian tribes. Even assuming, *arguendo*, Indian classifications may be considered racial, ICWA still withstands strict scrutiny review and remains constitutional. If this Court ruled that ICWA was unconstitutional, the social, cultural, and political establishment of Indian reservations would dismantle, and an entire chapter of the United States Code would be rendered unconstitutional. Morton v. Mancari, 417 U.S. 535, 553 (1974) ("If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.").

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S DECISION AND HOLD THAT ICWA IS A CONSTITUTIONAL USE OF CONGRESS'S LAWMAKING AUTHORITY UNDER ARTICLE I AND DOES NOT VIOLATE THE TENTH AMENDMENT'S ANTICOMMANDEERING DOCTRINE.

Nearly every court that has decided issues of ICWA's constitutionality under the anticommandeering and commerce clause have concluded that Congress has the power to respond to serious issues threatening Indian families. Cohen's, supra, at § 11.06. Generally, this Court should presume that Congress acted within their power in passing ICWA and this presumption will prevail absent a "clearly demonstrated" lack of constitutional authority. See United States v. Harris, 106 U.S. 629, 635 (1883) ("Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that congress will pass no act not within its constitutional power."). As a historical note, Congress holds plenary power over Indian affairs and as long as such authority does not infringe upon the Tenth Amendment's prohibition on commandeering, ICWA is constitutional. Brackeen, 994 F.3d at 376 (Judge Duncan). Plenary power, often used interchangeably with the term "exclusive," provides the federal government with great discretion over Indian affairs. Gregory Ablavsky, Beyond the Indian Commerce Clause, 124 Yale L. J. 1012, 1014 (2015). Due to this great discretion, Congress may enact legislation that preempts conflicting state law even in areas generally left to the states. McCarty v. McCarty, 453 U.S. 210, 235-36 (1981).

Since ICWA was enacted pursuant to Congress's plenary power with the Indian tribes and does not violate the anticommandeering doctrine, this Court should reverse the circuit court's decision because the Indian Commerce Clause grants Congress plenary power to broadly legislate Indian affairs, ICWA sets minimum federal standards that evenhandedly apply to both

state and private parties and does not command state legislatures or executive officials, and ICWA preempts any conflicting West Dakota law.

A. ICWA is a constitutional application of Congress's Article I authority because the Indian Commerce Clause grants Congress broad authority to regulate the field of Indian affairs.

In recognizing a special trust relationship between Indian tribes and the United States, the Framers of the United States Constitution granted power over Indian affairs to the federal government. Brackeen, 994 F.3d at 300 (Judge Dennis). The Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause, containing express language distinguishing the provisions related to interstate and Indian commerce, maintains the primary basis for federal powers over Indian affairs, traditionally referred to as the Indian Commerce Clause. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). Through the Indian Commerce Clause, "[t]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" United States v. Lara, 541 U.S. 193, 200 (2004); Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463, 470–71 (1979); Mancari, 417 U.S. at 551-52 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").

The federal government derived its expansive powers to regulate Indian affairs through a special trust relationship. Cohen's, supra, at § 1.03[1]. The obligation and responsibility to provide for the welfare of Indian tribes traces back to the seizure of tribal lands by the United States. Id. at § 1.04. While Indian tribes maintain a significant degree of self-governance, the United States has assumed a duty of protection and ultimate sovereignty over Indian nations. Id.

at § 1.07. The duty and special trust relationship established by the federal government was the original basis for federal authority and plenary power over Indian tribes. See Worcester v. Georgia, 31 U.S. 515, 519 (1832); United States v. Kagama, 118 U.S. 375, 384 (1886). Congress, in recognizing this special trust relationship, enacted ICWA to protect the sustainability of Indian tribes through their children. § 1902. Congress reacted in accordance with the United States' special trust relationship, carried out through the Indian Commerce Clause, to preserve the integrity of tribal culture and protect Indian children. § 1901.

While the Indian Commerce Clause is the main source of Congress's plenary power over Indian affairs, a holistic reading of the Constitution is necessary to understand the Framers' intentions when designating the scope of the federal government's powers over Indian tribes. Ablavsky, supra, at 1043. An aggregation of the provisions and clauses drafted in our Constitution designating power over Indian affairs show the Framers' intent to create a broad and supreme power. Id. In granting Congress with plenary authority over Indian tribes, the states were essentially excluded from having any role in Indian affairs. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996). An understanding that Indian affairs are not subject to state control "is deeply rooted in this Nation's history." McGirt v. Oklahoma, 140 S. Ct. 2452, 2476 (2020) (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)). This Court has consistently recognized the federal government's role in protecting Indian tribes from the states. Id.; Worcester, 31 U.S. at 558 ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."); Mancari, 417 U.S. at 552 (explaining the federal government has assumed an obligation to protect Indian tribes and maintains the power to do so).

Congress's plenary powers over Indian affairs are not limited to the regulation of Indian tribal members themselves but extend to regulate conduct that affects Indian affairs. Cohen's, supra, at § 5.01[3]. Often it is the case that regulations aimed at protecting Indian affairs have substantial effect on non-Indian members. Antoine v. Washington, 420 U.S. 194, 203 (1975); Brackeen, 994 F.3d at 308 (Judge Dennis). This Court has continued to uphold such regulations extending beyond tribal members or boundaries. United States v. Holliday, 70 U.S. 407, 417 (1865) (upholding a federal criminal statute that regulated the sale of liquor between a non-Indian to an Indian member not within tribal boundaries); Cohen's, supra, at § 5.01[3] (explaining that the Indian Commerce Clause not only regulates transactions between tribal members and tribes, but also "transactions outside of Indian country.").

The Indian Commerce Clause and Interstate Commerce Clause contain similar language, but have drastically different applications. Cotton Petroleum Corp., 490 U.S. at 192. The main purpose of the Interstate Commerce Clause is to regulate trade between the States, while the purpose of the Indian Commerce Clause is to provide Congress a vehicle of broad regulation over Indian affairs. Id.; Mancari, 417 U.S. at 551-52. During the ratification of both clauses, "no one . . . interpreted the Indian Commerce Clause to shed light on the Interstate . . . Commerce Clause[ ], or vice versa." Ablavsky, supra, at 1027. In fact, the Court cannot apply the "Commerce Clause doctrine developed in the context of commerce 'among' States with mutually exclusive territorial jurisdiction to trade 'with' Indian tribes." Cotton Petroleum Corp., 490 U.S. at 192. In furthering the distinction between the two clauses, the Court noted "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, 517 U.S. at 62 (finding that the states still hold some control over interstate trade while they have no authority over

Indian tribes). This Court has continuously narrowed the scope of federal powers regarding interstate commerce but maintains a broad interpretation of the Indian Commerce Clause to hold exclusive powers over Indian affairs. Id. at 59; Cotton Petroleum Corp., 490 U.S. at 192.

The plenary authority granted to Congress over Indian affairs "extends beyond regulating commerce." Brackeen, 994 F.3d at 374 (Judge Duncan). This Court ruled on multiple occasions that Congress is not limited to economic activity when regulating Indian tribes. See Lara, 541 U.S. at 200 (holding Congress may authorize Indian tribes to prosecute nonmember Indians); Holliday, 70 U.S. at 417 (upholding a federal statute that prohibited the sale of liquor to Indians, explaining "the intercourse between the citizens of the United States and those tribes . . . is another branch of commerce, and a very important one"). Although Justice Thomas' concurrence in Adoptive Couple v. Baby Girl argued that the Indian Commerce Clause should be narrowly defined as pertaining only to commercial transactions, the Court's majority has continued to uphold Congress's plenary power to regulate Indian affairs, without the restriction of commercial transactions. 570 U.S. at 660 (Thomas, J., concurring). Because the Indian Commerce Clause is interpreted as granting broader powers to Congress to regulate more than commercial transactions, ICWA is a constitutional application of Congress's Article I authority.

ICWA is a valid use of Congress's Article I authority because Congress was granted plenary power over Indian affairs through the Indian Commerce Clause in the Constitution. Mancari, 417 U.S. at 551-52. Congress enacted ICWA to address the growing percentage of Indian children being torn away from their families and placed in adoption or foster care institutions. § 1901. While examining the evidence surrounding the massive removal of Indian children from their tribal communities by the states, Congress found "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." Id. at (3)-

(4). Just as the Framers intended to grant Congress broad and exclusive power over Indian affairs while excluding the states, ICWA furthers this motive by protecting Indian tribal culture and relations from intervening state custody proceedings.

In accordance, ICWA is a constitutional application of Congress's power to regulate Indian affairs because the Indian Commerce Clause extends beyond mere economic activity. ICWA mandates the foster care, preadoptive, and adoptive placements of Indian children to be placed with either members of their family, tribe, or other Indian families. § 1915(a)-(b). The act also provides a child's tribe the opportunity to request a different order of preferences, in which the state or agency should take into consideration the appropriate needs of the child and the tribe. Id. at (c). Congress has previously carried out its power to regulate Indian affairs through criminal sanctions and the prohibition of liquor sales in Lara and Holliday, citing the root of these regulations to be the Indian Commerce Clause. 541 U.S. at 200; 70 U.S. 417. Similarly, Congress has acted pursuant to this clause in creating ICWA's placement preferences to regulate the best interest of Indian tribal culture and the welfare of tribal children. § 1902. This application is well within Congress's broad plenary powers to regulate Indian affairs. Such broad powers to regulate Indian affairs undoubtedly contains the power to regulate Indian child custody proceedings. Although, non-Indian members of the community, including the Donahues, may be affected by ICWA's placement provisions, this fact does not preclude ICWA from controlling Indian child custody issues in state court proceedings because Congress has the power to regulate any conduct that effects Indian affairs.

Since Congress maintains broad plenary power to regulate conduct affecting Indian affairs, ICWA represents a permissible exercise of Congress's Article I authority and is constitutional.

B. ICWA does not violate the anticommandeering doctrine because it sets minimum federal standards that evenhandedly regulates private and state actors and does not command state legislatures or executive officials to enforce the federal standards.

ICWA does not violate the anticommandeering doctrine because any burden is felt equally by all parties and does not force state legislatures or executive officials to enact or administer the federal standards. Brackeen, 994 F.3d at 332 (Judge Dennis). The Tenth Amendment of the United States Constitution explains that powers not delegated to the United States are powers reserved to state governments. Developed in response to the language of the Tenth Amendment, the anticommandeering doctrine simply recognizes the structural limitation that Congress cannot issue direct orders to those in state governments. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475-76 (2018) (holding that the Professional and Amateur Sports Protection Act prohibiting a State from authorizing sports gambling was unconstitutional because "[i]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals"); New York v. United States, 505 U.S. 144, 176 (1992) (holding that Congress's threats under the taxing and spending power that essentially forced states to enact one federal regulatory program or another unconstitutionally commanded state legislatures). The federal government, in its lawmaking authority, cannot enforce a federal regulatory program by forcing state officials or other similar political subdivisions to act. Printz v. United States, 521 U.S. 898, 935 (1997) (holding that a federal regulatory program forcing state law enforcement officials to conduct background checks was unconstitutionally commandeering state officials).

ICWA does not violate the Tenth Amendment's prohibition on anticommandeering because it sets minimum federal standards, but does not force state legislatures or executive officials to enforce those standards. Under Printz, minimum standards set by the federal

government, are constitutional so long as they do not require state executive officials, or those of their political subdivisions, to enforce the legislation. Id. ICWA merely provides that Indian children in state adoptive proceedings shall have placement preferences with either members of their family, tribe, or other Indian families. § 1915 (a)-(b). While these placement preferences are used in state child custody proceedings, they do not require that state law enforcement officers or other similar political subdivisions be the ones that enforce the federal standards. Instead, ICWA merely confers upon Indian children the right to remain in families who value Indian cultural heritage. Simply stated, the placement preference provisions of ICWA do not require any action by state legislatures or force state law enforcement officials to carry out the minimum standards.

Furthermore, ICWA requires that the state where a child is placed must keep record of that placement and make that record available upon request by the Secretary or Indian child's tribe. Id. at (e). In the context of child custody proceedings generally, other state statutes impose similar recordkeeping provisions upon the court. See N.D. Cent. Code § 14-14.1-11 (2021) (providing that records of child custody proceedings be kept until the child is eighteen and that upon request of another state's court official or law enforcement officer, the court should forward the record); S.D. Codified Laws § 26-5B-112 (2022). Thus, ICWA's recordkeeping provisions align with similar state laws and does not command state law enforcement or other political subdivisions to take any action. Also, absent from the statutory provisions is any language explicitly or implicitly telling state legislatures that they must pass some form of legislation. In the anticommandeering doctrine, federal legislative programs are unconstitutional when they issue direct orders to state governments, such as commanding certain legislation either be passed or not be passed. Murphy, 138 S. Ct. at 1476. In the foundational policy goals, ICWA sets minimum federal standards that seek to protect Indian families and their cultural, social, and

political values. § 1902. Inherently, ICWA's placement preference and recordkeeping provisions do not require that state legislatures adopt specific language in their statutes, but merely imposes minimum federal standards aimed at protecting the Indian family. Thus, state legislatures are not required to take any action as a result of ICWA. Since ICWA does not require that state law enforcement officials or state legislatures take any action, the statute does not violate the principles set forth in the Tenth Amendment's anticommandeering doctrine.

Further cementing the constitutionality of ICWA, any action or requirements of the statute are equally felt between the State or private party within the system. For example, ICWA requires that "any party" who is seeking a foster care placement or adoption of an Indian child give notice to the child's tribe or parent. § 1912(a). From this language, it is apparent that such notice requirements apply equally to any party that is seeking the placement for an Indian child. Consequently, ICWA's placement preference provisions are different from the other instances that the Supreme Court has found to violate the anticommandeering doctrine. In Printz, it was held that a federal statute requiring state law enforcement officials to conduct background checks unconstitutionally commanded state officials. 521 U.S. at 935. A requirement that any party must notify the tribe or parents of an Indian child is different from a statute specifying that state officials shall be the ones to enforce the federal standards. In this case, private parties and states in child custody proceedings equally feel the requirements of ICWA.

Furthermore, ICWA's requirement of a qualified expert witness and active efforts also apply to any party in the child custody proceedings. § 1912(d)-(f). In effect, the requirements of ICWA treat any state actor as if they were a private party and the requirements apply equally to states as well as private parties. As seen in Murphy, the federal government may not issue direct orders to the states. 138 S. Ct. at 1476. A federal program that sets minimum standards by no

means issues orders directly to the states when the statute applies evenly regardless of whether a party is a state or individual. Through the language of the statute, the federal government established certain requirements that broadly apply to any party that was engaged in Indian child custody proceedings. Since the statute specifically issues orders to any party and not directly to the states, this court should find that ICWA is constitutional pursuant to the anticommandeering doctrine.

Lastly, the public policy goals behind the prohibition of the federal government commanding the states—ensuring that voters know who to blame for policies that they do not like—is protected under ICWA. See Murphy, 138 S. Ct. at 1477. Under the anticommandeering doctrine, it is important that the federal government provide funding for their federal programs so that state legislators can be responsive to the local electorate and voters will know who to blame for programs they disagree with. New York, 505 U.S. at 168-69. While the federal minimum standards are applied in state court proceedings, ICWA does not force legislatures or any politically elected group to take any actions under the federal standards. As such, ICWA does not violate the public policy behind the anticommandeering doctrine. Instead, ICWA applies in a non-political setting—state child custody proceedings—that is not responsible to the local electorate. Unlike Printz, where state law enforcement officials were tasked with enforcing the background check provisions, ICWA controls state judicial proceedings—a non-political branch of the government. As such, the recordkeeping and placement preference provisions do not command state law enforcement officials or similar political actors to enforce the minimum standards and adheres to the policy goals behind the anticommandeering doctrine. In any matter, ICWA is further aligned with the goals of the anticommandeering doctrine because it is a federal statute that does not dictate what state legislators must do in their legislative chambers. Thus,

voters who are disgruntled with the federal standards in Indian child custody proceedings could hold federal legislators accountable for ICWA, rather than state legislators who are not involved in the administration of Indian affairs. As far as the anticommandeering doctrine is concerned, ICWA, as a federal statute, is specifically written in a way that furthers the public policy concerns of the Tenth Amendment by keeping enforcement out of the hands of state legislatures and executive officials.

Since ICWA does not issue direct orders to the states nor require that state officials enforce the federal standards, ICWA does not violate the anticommandeering doctrine and is constitutional. Effectively, ICWA substantially differs from any instance in which the United States Supreme Court has found there to be a violation of the anticommandeering doctrine. Thus, ICWA constitutionally protects the historically discriminated Indian tribes from being further decimated by the loss of their children.

C. ICWA preempts any conflicting state law governing Indian child custody proceedings because ICWA is a constitutional application of Congress's Article I authority to regulate Indian affairs and ICWA does not violate the anticommandeering doctrine.

According to the Supremacy Clause of the United States Constitution, federal law is "the supreme Law of the Land" and any contrary state law must adhere. U.S. Const. art. VI, cl. 2. Under the doctrine of preemption, when a state and federal law conflict, "federal law prevails and state law is preempted." Murphy, 138 S. Ct. at 1476. Conflict preemption requires a federal law to prevail when two requirements are satisfied. Id. at 1479. First, Congress must have authority under the Constitution to enact the provision at issue. Id. Second, the provision must regulate private individuals because "the Constitution 'confers upon Congress the power to regulate individuals, not States.'" Id. (quoting New York, 505 U.S. at 166). A provision,

however, may still satisfy the second prong of the preemption test when the regulated activity equally engages private individuals and states. Id. at 1478.

Congress may enact legislation that preempts conflicting state law even in areas generally exclusive to the states. See McCarty, 453 U.S. at 235-36. Family law is generally limited to the jurisdiction of the states, however, when a state law does "major damage" to a "clear and substantial" federal interest, the conflicting federal law will apply. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)); McCarty 453 U.S. at 235-36 (holding that a federal law governing military benefits preempted a conflicting state property law in the division of retired military pay during the dissolution of a marriage). The Court's extensive precedent shows Congress's authority to preempt state laws and enforce valid federal law in state court proceedings. Id.; McCarty, 453 U.S. at 235-36; Hisquierdo, 439 U.S. at 590 (finding a federal law excluding a spouse from receiving retirement benefits upon divorce preempted California's community property law). The absence of specific authority addressing ICWA's preemptive ability, or a similar Indian statute, "speaks not to the absence of federal authority to enact such a statute, but instead to historical circumstance and federal authority that is so well established as to be unquestionable." Brackeen, 994 F.3d at 313 (Judge Dennis).

ICWA preempts any conflicting West Dakota law regulating Indian child custody proceedings because Congress has authority to enact ICWA through the Indian Commerce Clause and ICWA equally engages states and private individuals. Under Murphy, federal law prevails when Congress has the proper authority to enact the provisions at issue and such provisions regulate private individuals, not states. 138 S. Ct. at 1476. Since ICWA was enacted through Congress's plenary power over Indian affairs and does not violate the

anticommandeering doctrine (see analysis above), the first prong of the preemption test is met. Id. The placement preference and recordkeeping provisions regulate the private actors involved in Indian child custody proceedings and by no means issue direct orders to the states. While the provisions do involve the states through state child custody proceedings, the ability of federal law to preempt state law remains. As explained in McCarty, conflicting federal law may alter the substantive law during state court proceedings. 453 U.S. at 235-36. Although there is a lack of authority specifically addressing the preemptive ability of ICWA, like other conflicting federal laws, ICWA preempts conflicting West Dakota state law.

Therefore, since ICWA was enacted pursuant to the plenary power Congress possesses over Indian affairs and ICWA's placement preference and recordkeeping provisions do not command state legislatures or executive officials, ICWA preempts any conflicting West Dakota law.

Under Congress's Article I authority, this Court should reverse the circuit court's decision and hold ICWA is constitutional because Congress has plenary power to regulate Indian affairs through the Indian Commerce Clause, and such regulation does not violate the anticommandeering doctrine of the Tenth Amendment.

II. THE ICWA PROVISIONS CHALLENGED BY RESPONDENTS SHOULD BE HELD CONSTITUTIONAL BY THIS COURT BECAUSE THEY ARE CONSTITUTIONAL UNDER THE FIFTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

Sections 1913, 1914, and 1915(a) and (b) are constitutional under the equal protection principles embodied in the Fifth Amendment. Section 1913 ensures that, when an Indian parent or custodian gives consent to terminate parental rights, that consent will be genuine and with full understanding of the consequences of relinquishing these rights. § 1913. Additionally, this section allows for withdrawal of consent to terminate parental rights under certain circumstances

to protect against fraud or duress. Id. Section 1914 allows any Indian parent, custodian, or tribe to petition any court to invalidate a foster care placement or termination of parental rights of an Indian child if sections 1911, 1912, or 1913 of ICWA were violated in the process. § 1914. Sections 1915(a) and (b) provide adoptive, foster care, and preadoptive placement preferences for Indian children, both of which give preference to Indian relatives and tribes over other adoptive families. § 1915(a)-(b).

Also relevant to the analysis of the constitutionality of sections 1913, 1914, and 1915(a) and (b) are the sections of ICWA that define "Indian" and "Indian child," as both terms are used in the sections challenged by Respondents. ICWA defines "Indian" as "any person who is a member of an Indian tribe" and defines "Indian child" 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." § 1903(3)-(4).

Respondents allege that sections 1913, 1914, and portions of 1915 violate Equal Protection. R. at 10. However, these provisions do not violate the Equal Protection Clause of the Fifth Amendment under either rational basis nor strict scrutiny. These provisions do not contain racial classifications and thus, they are subject to rational basis review. Brackeen, 994 F.3d at 332 (Judge Dennis) ("But where the classification is political, rational basis review applies."). Under rational basis review, these statutory sections pass constitutional muster because the granting of protected rights to Indian parents and tribes in child custodial proceedings is rationally related to the legitimate governmental interest of ensuring the continued existence of Indian tribes. However, even if this Court should find that these sections employ racial classifications, and instead applies strict scrutiny, these sections remain constitutional because they are narrowly tailored to further compelling government interests. Grutter v. Bollinger, 539

U.S. 306, 326 (2003) ("[Racial] classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.").

A. The ICWA provisions at issue do not contain racial classifications, and thus, they are subject to rational basis review.

1. The ICWA provisions are political, rather than racial, classifications based on the unique status of Indian tribes as quasi-sovereign entities.

The statutory sections at issue outline political, rather than racial, classifications; these classifications are predicated on the unique status of Indian tribes and their relationship to the United States federal government as limited sovereigns, and thus are not based on racial classifications. Cohen's, supra, at § 1.01. As political classifications, these sections outlined above are subject to rational basis review, and easily withstand this scrutiny based on a plethora of legitimate government interests which these statutory sections help to achieve.

Decades of case law out of this Court "leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." United States v. Antelope, 430 U.S. 641, 645 (1977); see generally Mancari, 417 U.S. at 554 (finding an employment preference for Indian employees in the Bureau of Indian Affairs constitutional); Bd. Cnty. Comm'rs v. Seber, 318 U.S. 705 (1943) (protecting federally granted tax immunity for Indian tribes); Williams v. Lee, 358 U.S. 217 (1959) (affirming the powers of tribal courts and their jurisdiction over reservation affairs). In fact, this Court has *never* found that a statute allowing for special treatment or particularization of Indian tribes or people violated Equal Protection. U.S. Cong., Table of Laws Held Unconstitutional by the Supreme Court in Whole or in Part, Const. Annotated, https://constitution.congress.gov/resources/unconstitutional-laws/ (last visited Oct. 5, 2022). One such statute upheld by this Court was the Indian Reorganization Act of 1934, analyzed in Morton v. Mancari, which ensured

an "employment preference" for Indians in the Bureau of Indian Affairs (BIA). 417 U.S. at 537. In Mancari, the Court found the preference for hiring Indians in the BIA was reasonably and directly related to a legitimate, nonracially based goal. Id. at 554. The Court explained that the statute's preference applied to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities," thus making explicitly clear that this Court does not find preferential treatment toward Indians and Indian tribes to be racially motivated. Id.

"[C]lassifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution[.]" Antelope, 430 U.S. at 645. Article I section 8 of the United States Constitution, containing the Indian Commerce Clause, grants Congress the power to regulate commerce with Indian tribes. "[S]uch regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." Id. at 646 (quoting Mancari, 417 U.S. at 553 n. 2). The Senate Report on ICWA recognized that Indian tribes were distinct, semi-sovereign governmental entities, and thus should have a significant degree of control over concerns such as child welfare, which state governments have the power to control. Cohen's, supra, at § 11.01. Thus, the ICWA provisions allowing for preferences in child placement are merely a recognition of the tribe's political sovereignty, not a distinction based on race.

Further, states often have statutorily-defined preferences for family in adoption and foster proceedings—the preference for Indian tribes is merely a recognition that the tribal family structure is more extensive than the traditional American nuclear family. S.D. Codified Laws § 26-7A-19.1 (2022) (stating a preference for children to be placed with relatives subsequent to a temporary custody hearing alleging abuse or neglect); Okla. Stat. tit. 10A, § 1-4-204 (2022) (stating that the Department of Human Services should consider the person with the "closest existing personal relationship with the child" when determining child placements). Additionally,

other states have requirements that consent be given by parents prior to adoption, so this requirement is also not unique to ICWA and does not implicate a racial classification within the statute. N.D. Cent. Code § 14-15-05 (2021) (requiring the consent of mother, father, legal custodian, and others before an adoption proceeding may begin).

Under this Court's equal protection analysis, Indian tribes are a political classification. Mancari, 417 U.S. at 554. Respondents point to Rice v. Cayetano as standing for the proposition that statutes referencing ancestry implicate racial classifications. R. at 18. However, Rice is clearly distinguishable and explicitly states that the classifications within statutes relating to Indian tribes and affairs are outside the category of racial classification. 528 U.S. 495, 519-20 (2000). First, Rice is distinguishable from the case at bar on multiple grounds: the case centered on a Hawaii statute that limited the right to vote to "native Hawaiians," thus excluding petitioner Rice, who did not have the requisite Hawaiian ancestry. Id. at 499. The Rice opinion focused on a state statute, not federal, which implicated Fifteenth Amendment voting rights, not the Equal Protection Clause of the Fifth Amendment. Id. Also, the statute in Rice required a person to have a certain quantum of blood in their bodies to be able to cast a vote, whereas ICWA merely requires that the person must be eligible for membership in a recognized governmental entity. Id. Beyond these distinctions, the Court in Rice explicitly stated that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." Id. at 519. Since the court has allowed particularized treatment of Indians and their tribes in similar manner as ICWA, it is apparent that Indian tribes are seen as political rather than racial classifications.

Importantly, ICWA specifies that an Indian child who is *not already* a member of a tribe must be both "*eligible for membership in an Indian tribe* and is the biological child of a member

of an Indian tribe," thus indicating that the critical feature of ICWA is the affiliation with a tribe, not merely having a blood relationship to an Indian person. § 1903(4) (emphasis added). Although ICWA's classifications for Indian children include those children with tribal ancestors, not just those who are already members, this definition is merely a recognition of the fact that tribal affiliation is a process which typically requires an affirmative action by a tribal enrollee or parent. Indian Child Welfare Act Proc., 81 Fed. Reg. 38,778 (June 14, 2016). "Tribal eligibility does not inherently turn on race, but rather on the criteria set by the tribes, which are present-day political entities." Brackeen, 994 F.3d at 338 (Judge Dennis). Minors typically do not have the ability or capacity to undergo the tribal enrollment procedure, and thus, ICWA's eligibility requirement is not racially motivated. Id. at 340 (Judge Dennis) ("Congress was not drawing a racial classification by including the eligibility requirement but instead recognizing the realities of tribal membership and classifying based on a child's status as a member or potential member of a quasi-sovereign political entity, regardless of his or her ethnicity.").

In addition to this Court's own precedent indicating that special or particularized treatment of Indians or Indian tribes is not racially suspect under Equal Protection analysis, there are compelling policy reasons supporting the conclusion that ICWA contains political classifications, rather than racial. "Literally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations." Mancari, 417 U.S. at 553. If the classification of Indians as special or particular groups were deemed unconstitutional under Equal Protection principles, "an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." Id. Thus, based on this Court's own precedent and the federal recognition of Indian tribes as quasi-sovereign

entities, ICWA's provisions are subject to rational basis review because they do not implicate racial concerns.

Since Indian tribal membership is a political classification, ICWA is subject to rational basis review.

2. These ICWA provisions survive rational basis review because they are rationally related to the goal of ensuring the continuance and longevity of the Indian tribes and people.

As the ICWA provisions are based on political classifications, these statutory sections must be held constitutional so long as they withstand rational basis review. Brackeen, 994 F.3d at 332 (Judge Dennis) ("[W]here the classification is political, rational basis review applies."). When the Court reviews a statute under rational basis review, the statute is strongly presumed to be constitutional and "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]'" FCC v. Beach Commc'ns, 508 U.S. 307, 314-15 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). A law is unconstitutional under rational basis review "only when the classification bears no rational connection to any legitimate government purpose." Brackeen, 994 F.3d at 333 (Judge Dennis).

Congress outlined its several purposes in passing ICWA in the statute itself and throughout several reports and studies conducted to determine the severity of the child welfare issue impact on Indian tribes. Cohen's, supra, at § 11.01. Section 1902 of ICWA states that Congress intended for ICWA to safeguard Indian interests, "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." § 1902. Congress intended for ICWA to promote the "unique values of Indian culture." Id. The congressional reports analyzed during the passage of ICWA demonstrate the legitimacy of these

stated government purposes—the reports demonstrated an "aggregate abuse" of the Indian people, which Congress felt could be corrected through ICWA's provisions. Cohen's, supra, at § 11.01 ("Congressional reports documented the ignorance and hostility of state social workers and judges toward tribal culture and its benefits, such as the tradition of involvement of extended families in child-rearing."). Congress identified and explicitly stated in ICWA its recognition that "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children[.]" § 1901. Congress then passed ICWA with the purpose of protecting the Indian tribal structure and preventing future destruction of the tribal system through abuse of the child welfare system. Cohen's, supra, at § 11.01.

The provisions of ICWA are rational methods to achieve the government's legitimate purposes outlined by Congress because sections 1913, 1914, and 1915 in particular protect the Indian parent's and tribe's rights in facing the potential removal of a child. These sections ensure that genuine consent is given to a termination of parental rights, or if not, that the termination be invalidated, and ensures that an Indian child will have at least an improved chance of remaining within the tribal structure through the placement preferences. §§ 1913-15. Further, this Court explained in Mancari that preferential treatment of Indian tribes and their members was particularly reasonable in that case since the "lives and activities [of Indian tribes] are governed by the BIA in a unique fashion." 417 U.S. at 554. In the case at bar, there is also a unique impact on Indian families justifying the particularized treatment of Indian tribes and their members. ICWA was passed expressly because of the "alarmingly high percentage of Indian families . . . broken up by removal, often unwarranted, of their children from them by nontribal public and private agencies[.]" § 1901. ICWA's provisions address and mitigate that issue, and thus are rationally related to the legitimate purpose of ensuring Indian tribes' survival.

Since ICWA was enacted to further the government's legitimate interest in establishing federal minimum standards to protect Indian tribes and their members, and the provisions of ICWA are rationally related to those interests, ICWA is constitutional pursuant to rational basis review under the Equal Protection Clause of the Fifth Amendment.

B. Even if the Court determines that the ICWA provisions at issue contain racial classifications, these classifications survive strict scrutiny.

Should the Court find that ICWA does contain some racial classification and decide to apply strict scrutiny, these ICWA provisions remain constitutional. A racial classification is constitutional under strict scrutiny where it is "narrowly tailored to further compelling governmental interests." Grutter, 539 U.S. at 326. A policy is narrowly tailored so long as it does not "unduly harm members of any racial group" and is the "least restrictive means of achieving a compelling state interest." Id. at 341; McCullen v. Coakley, 573 U.S. 464, 478 (2014). Here, the government has compelling, and constitutionally required, interests in protecting Indian tribes and narrowly tailored the ICWA provisions to achieve those interests.

ICWA and its accompanying House Report outlined multiple compelling interests that the government has in promoting the welfare of Indian tribes. In section 1901 of ICWA, Congress recognized that states consistently failed to respect and recognize "the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." § 1901. Studies conducted by the Association on American Indian Affairs in 1969 and 1974, cited in the House Report on ICWA, found that 25% to 35% of all Indian children had been removed from their families, often without cause. H.R. Rep. No. 95-1386, at 9 (1978). An "alarmingly high percentage" of these children were placed in non-Indian foster homes, adoptive homes, and institutions. § 1901. ICWA recognizes the necessity of having Indian children raised in tribal environments for the continued existence of Indian tribes; without future generations of

Indian children, Indian tribes would cease to exist. Id. As such, the federal government has "a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." Id. Further, the Indian Commerce Clause in the United States Constitution states that Congress shall regulate commerce with the Indian tribes; thus, Congress has a duty to ensure the existence of Indian tribes in order to carry out its constitutional duties. ICWA ensures that Indian tribes, and thus the federal government's relationship with these tribes, will continue to exist.

The statutory sections of ICWA, particularly sections 1913, 1914, and 1915, are narrowly tailored to achieve the government's compelling interest in the continued existence of Indian tribes. Section 1913 is narrowly tailored to achieve this interest by preventing the forcible removal of Indian children from Indian families without cause. ICWA's requirements that Indian parents or custodians give knowing, genuine consent to termination of parental rights, and providing recourse should that consent be elicited by fraud or duress, are narrowly tailored because they are the least restrictive means in Indian child custody proceedings. Section 1914 is also narrowly tailored because it provides another safeguard against the improper removal of an Indian child by allowing Indian parents or custodians to challenge removals that violate other provisions of ICWA. Section 1915's placement preference provisions are narrowly tailored because they are merely preferences, not requirements. Finally, ICWA's definition of Indian child is also narrowly tailored in light of the previously mentioned realities of tribal membership. In order to ensure that all Indian children are able to remain engaged in Indian culture, the definition of Indian child cannot be limited only to those children who are already tribal members, because tribal membership often requires affirmative action that a child does not have the capacity to take. Thus, none of these statutory sections impose an undue burden on any

particular race. In fact, they ensure that the burden of having children wrongly taken from an Indian home is removed from Indian families.

Due to the fact that the language of ICWA only applies to Indian tribes and their eligible members, ICWA survives strict scrutiny review since it is narrowly tailored to achieving the government's compelling interest because ICWA is the least restrictive means to protect the continued existence of Indian tribes.

Under the Equal Protection Clause of the Fifth Amendment, ICWA is constitutional because ICWA survives the rational basis review that is applied to statutes containing political classifications. In the alternative, if this Court finds that ICWA contains racial classifications and subjects the statute to strict scrutiny, ICWA remains constitutional because it is narrowly tailored to achieve the government's compelling interests.

CONCLUSION

Since Congress has plenary power over Indian affairs, ICWA does not command state legislatures and executive officials, and ICWA preempts conflicting state law, this Court should reverse the circuit court's decision on the anticommandeering and preemption issues and hold that ICWA is constitutional. This Court should also hold that ICWA does not violate the Equal Protection Clause of the Fifth Amendment because ICWA contains political rather than racial classifications that withstand rational basis review, thus ICWA is constitutional.

Respectfully Submitted,

/s/ *Team 12*
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