Docket 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
SUPREME COURT OF THE UNITED STATES

BRIEF FOR PETITIONERS

Team 14
Attorneys for Petitioners

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QUESTIONS PRESENTED

1. Is Congress exceeding its authority under Article I and the Tenth Amendment, given it has broad authority to regulate commerce and the ICWA confers rights to private individuals?

2. Do the ICWA classifications violate the Equal Protection Clause when they are politically based, and the federal government has an interest in promoting security and stability within Indian tribes?

STATEMENT OF THE CASE

FACTUAL BACKGROUND

In response to an alarming number of reports of Indian children being removed from their tribes and families to be put into homes with non-Indian families, Congress passed the Indian Child Welfare Act (ICWA). 25 U.S.C. §§ 1901-23; R. at 4. The goal of the legislation was to promote stability, security, and self-government for federally recognized tribes. R. at 6. The ICWA includes many provisions to ensure minimum federal protections for Indian children, their families, and their tribes. R. at 5-7. Among these protections are placement preferences and record-keeping provisions. R. at 5-8. The placement preferences create an order of placement to a member of an Indian child's extended family; a member of the child's tribe; and then other Indian families. R. at 7. These placement preferences ensure that an Indian child has every opportunity to be placed with a member of their community, while simultaneously ensuring that the future of Indian tribes will continue. R. at 5-7. Additionally, the ICWA has record-keeping requirements to ensure that the states are held accountable and are following the requirements of the Act. R. at 8.

The Donahues are a family who reside in West Dakota. R. at 3. They adopted Baby C, an Indian child, after placement with a tribe fell through. R. at 4. The adoption of Baby C followed the requirements of the ICWA. R. at 4. A year later, the Donahues tried to adopt Baby S, also an Indian child whose mother was a member of the Quinault tribe. R. at 4. Baby S lived with his paternal grandmother after the death of his mother. R. at 4. After his grandmother became ill and could no longer provide care for him, Baby S was sent to the Donahues for foster placement. R. at 4. Following the requirements of the ICWA, the Quinault tribe was notified of the Donahues' petition for adoption of Baby S. R. at 4. Upon notice, the Quinault tribe identified and informed CPS of two potential adoptive families for Baby S. R. at 4. Both alternative families were members

of the Quinault tribe residing in another state. R. at 4. The Donahues and West Dakota filed suit after learning that the Quinault Nation did not approve of the adoption. R. at 5.

PROCEDURAL HISTORY

The District Court. West Dakota and the Donahues—collectively, "plaintiffs"—filed suit against the federal government, claiming that various ICWA provisions violated the Constitution. R. at 4-5. Both sides filed cross-motions for summary judgment. R. at 5. The district court denied the plaintiffs' motion for summary judgment. R. at 13. Additionally, the court granted the defendants' motion for summary judgment, holding that Congress was acting within its constitutional authority when it enacted the ICWA and was not commandeering the states. R. at 9. With respect to the equal protection claim, the court held that "Indian child" was a political classification, and the ICWA passed the rational basis test. R. at 7-13.

The Court of Appeals. The Thirteenth Circuit Court of Appeals reversed the district court and remanded the case in favor of the plaintiffs. R. at 18. The court held that the ICWA commandeers states because it made states incorporate federal standards for adoption proceedings. R. at 16. Concluding that the ICWA violated the anticommandeering doctrine, the court did not address the equal protection claim. R. at 17-18. Chief Judge Tower issued a concurring opinion, agreeing with the result of the court's decision, but disagreeing with the way the decision was reached. R. at 18. The concurrence agreed with the district court's Tenth Amendment analysis and conclusion but disagreed with the equal protection analysis. R. at 18. Further, the concurrence concluded that the classifications employed by the ICWA were racial, subject to strict scrutiny, and failed that test. R. at 17-19.

SUMMARY OF THE ARGUMENT

I.

The Constitution grants Congress broad authority to regulate commerce with Indian tribes. However, Congress does not have the constitutional authority to commandeer, or force, states into implementing federal regulatory programs. This Court and the constitution have continually granted the federal government plenary power when dealing with Indian affairs, while simultaneously keeping the authority away from states' grasp.

The Thirteenth Circuit incorrectly concluded that the ICWA provisions were unconstitutional because the provisions regulated child custody and child custody was not commerce. The court ignored how adoption proceedings and placements can cross state lines, as well as how tribal reservations can also cross state lines. For example, Baby C was potentially going to be sent to live in Nebraska for alternative placement. Additionally, the court ignored the impact that people have on commerce. This Court has never restricted Congress's power under the Commerce Clause to include only the regulation of goods; in fact, Congress has been granted the authority to regulate labor conditions because the goods were crossing state lines—but the activity that was being regulated was taking place long before any goods ever left the production site.

The ICWA does not commandeer the states into action, because it evenhandedly regulates an activity in which both states and private actors engage in—adoption and foster care. Therefore, the anticommandeering doctrine is not applicable in this case. Additionally, the ICWA ensures minimum federal protections for Indian children, their parents and families, and Indian tribes. When the federal government enacted the ICWA, they were responding to increasing reports of Indian children being taken from their families and tribes. The goal of the Act was to stop this practice. Therefore, the District Court was correct in concluding that the ICWA does not compel

states or their agencies to create new laws. Further, the Thirteenth Circuit was incorrect in relying on the costs and burdens that may be imposed on West Dakota because this Court has upheld federal regulations imposed on states, even when enforcing the legislation would require states to spend time and effort in carrying out provisions.

Allowing states to take over adoption regulations for Indian children disturbs the historical relationship and long-standing precedent of leaving Indian relations in the hands of Congress. Ruling that the ICWA is not within Congress's authority under the Commerce Clause will erase federal protections; result in a lack of uniformity across states; and jeopardize all previous legislation that the federal government has passed to protect federally recognized Indian tribes.

II.

The Equal Protection Clause ensures that states will not deny anyone equal protection of the laws. Courts use one of three tests to determine if a person's equal protection rights have been violated by the government. The two tests at issue here are strict scrutiny and rational basis. Strict scrutiny is the highest test that a state must pass, and it requires the government to show that the restriction they imposed furthers a compelling interest and is narrowly tailored to achieve that interest. Further, this Court has held that federal legislation regarding Indian tribes is not based on racial classifications. Rational basis puts the lowest burden on the government, allowing a law to stand if any set of facts could provide a rational basis for the classification. Courts enter a rational basis review with a strong presumption that the classifications being used by the law in question are valid. Political classifications are subject to rational basis review. When Congress passed the ICWA, it used "Indian child" as a political classification. Additionally, tribes are considered quasi-sovereign entities, which makes them political rather than racial classifications. In analyzing the ICWA, this Court should apply a rational-basis test because the classifications are political in

nature. The ICWA is constitutional because the statute is rationally tied to the fulfillment of Congress's unique obligation toward Indian tribes. In passing the ICWA, Congress was attempting to promote self-governance and more involvement in the decisions that affect the destiny of tribes and the lives of their members. The Thirteenth Circuit applied the wrong precedent in subjecting the ICWA to strict scrutiny and by comparing the ICWA to a statute that requires a person voting to be from a specific state. Further, this argument ignores that tribes are responsible for determining membership, not the federal government. Additionally, tribal membership is not solely based on race and the federal government, nor this Court, has never given native Hawaiians a similar statute to Indian tribes.

The ICWA does not violate state sovereignty. How much or how little a federal law imposes on state proceedings is not part of the rational-basis test and does not heighten the level of scrutiny that this Court should use. The mere fact that the law imposes on state adoption proceedings is irrelevant to the Equal Protection analysis.

Analyzing the ICWA under strict scrutiny jeopardizes all future and past legislation passed on behalf of tribes and jeopardizes the relationship that the federal government has with tribes. If the ICWA is held to be unconstitutional, Congress's ability to protect tribes through legislation will be diminished in the future because the laws will be subject to strict scrutiny. Therefore, the District Court was correct in applying the rational basis test, and this Court should affirm the holdings in the district court.

ARGUMENT AND AUTHORITIES

Standard of Review. This Court reviews the legal questions of the constitutionality of the ICWA provisions and classifications *de novo*. *Brackeen v. Haaland*, 994 F.3d 249, 298 (5th Cir. 2021).

I. The Constitution, through Article I and the Tenth Amendment, gives Congress broad authority to act while still retaining some power for the states.

Congress is given broad powers under the United States Constitution to create laws, regulate commerce, and to make decisions to benefit American citizens, regardless of the state in which they live. *See* U.S. Const. art. 1. More specifically, Congress has the authority to "regulate commerce with foreign nations, and among the several states, and with Indian tribes." U.S. Const. art. I § 8, cl. 3. Although the federal government does have broad authority, this power is not without limitations. U.S. Const. amend. X. The Tenth Amendment explicitly provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Congress also does not have the power to commandeer states into implementing federal regulatory programs, either by legislation or executive action. *Printz v. United States*, 521 U.S. 898, 925 (1997). Stated more simply, the federal government cannot impose duties on state legislatures or officials to force them to carry out federal laws. *Id.* at 933.

When Congress enacted the Indian Child Welfare Act, it created placement preferences and record-keeping requirements. R. at 7-8. ICWA's placement preferences give preferential treatment to the child's extended family, then to members of the child's tribe, and finally to other Indian families that may not be in the same tribe over a non-Indian family. R. at 7-8. These preferences are for foster care, pre-adoption placements, and adoption proceedings. *Id.* Additionally, the ICWA requires that records detailing the placements of Indian children be

maintained and made available to the child's tribe or the Secretary of the Interior upon request. R. at 8. Congress enacted these ICWA provisions under its Article I power, and these portions of the Act should continue to remain as such.[1] U.S. Const. art 1.

A. The ICWA provisions are within Congress' authority to regulate commerce with Indian tribes.

Before analyzing Congress's power to regulate commerce, it is important to describe the provisions of the ICWA that are on point in this case—the placement provisions and the record keeping provision. R. at 1-21. The ICWA's placement provisions create a preference order for groups of people that an Indian child should be placed with for foster care, pre-adoption placements, and final adoptions. R. at 7. The federal government's first choice for placement of an Indian child is with a member of the child's extended family. R. at 7. If there is not an extended family member who can or will take the child, then the government prefers the child is placed with another member of the child's tribe. R. at 7. If there is not anyone in the tribe that can care for the child, then they may be placed with Indian families from other tribes. R. at 7. If none of these options are available, then the state can place an Indian child in a non-Indian home. R. at 7.

Section 1915 of the ICWA requires states to keep records that detail the Indian child's placements. R. at 7-8. All records must be available to the child's tribe or the Secretary of the Interior upon request, at any time. R. at 8. After entering a final decree for an adoption placement, a state court will then provide the Secretary of the Interior with a copy of the decree. R. at 8. Additionally, the court will provide the Secretary of the Interior with any necessary information

[1] The United States District Court for the District of West Dakota and the 13th Circuit Court of Appeals placed great emphasis—through their opinions—on the issue of preemption. We will not be expanding on the issue as it was not a question on certiorari, but we maintain the argument that any West Dakota law in conflict with the ICWA is preempted. *See New York v. United States*, 505 U.S. 144 (1992).

including the tribal affiliation of the Indian child, the addresses and names of the child's biological parents, addresses and names of the parents adopting the child, and agency identification for all agencies that have files or information regarding the adoptive placement. R. at 8.

The federal government and federally recognized Indian tribes have a unique relationship that has historically created a duty for Congress to deal with the special problems of tribes, typically by creating laws specifically designed to benefit Indians. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This Court has consistently held that the Constitution gives Congress broad powers to legislate matters involving Indian tribes, and that this power is both exclusive and plenary. *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470-471 (1979); *Morton*, 417 U.S. at 551. This power is both explicitly stated in and implied from the Indian Commerce Clause. U.S. Const. art. 1, § 8, cl. 3 (stating that Congress has the authority to "regulate commerce … with Indian tribes."); *Morton*, 417 U.S. at 551. States do not enjoy the same authority when it comes to regulating the activity of Indian tribes. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020). This Court emphasized this concept when it stated: "[t]he policy of leaving Indian [tribes] free from state jurisdiction and control is deeply rooted in this Nation's history." *Id.* The District Court was correct in holding that it would be unjust to destroy Congress's authority in an area that it has absolute—or plenary—power. R. at 9.

When determining if the ICWA went beyond the federal government's power under the Indian Commerce Clause, the Thirteenth Circuit Court of Appeals relied on two of this Court's previous holdings. R. at 17. First, the court relied on the proposition that "the regulation of 'child custody' is not the regulation of 'commerce.'" *United States v. Lopez*, 514 U.S. 549, 564 (1995). The facts in *Lopez* are substantially different than the facts in this case. *Id.*; R. at 2-4. There, the federal government passed the Gun-Free School Zones Act of 1990, which made it a federal crime

for a person to have a firearm in their possession when they were in a school zone. *Lopez*, 514 U.S. at 551. The government did "not regulate a commercial activity," and it also did not place any requirements that the possession of the firearm be "connected in any way to interstate commerce." *Id.* Here, the adoption and placement of Indian children does affect interstate commerce because, as the district court mentioned in their recitation of the facts in this case, Baby C was going to be sent to live in Nebraska for alternative placement. R. at 4. Had the placement not fallen through, the legal adoption would have crossed state lines. R. at 4. The Thirteenth Circuit was correct that people are not commerce, however it was incorrect in concluding that the adoptions of children do not cross state lines and do not influence interstate commerce. R. at 4, 17. The adoption of Indian children across state borders is inherently different than prohibiting a person from possessing a gun in a local school zone. R. at 4. It cannot be argued that a gun in an isolated area impacts commerce. *Lopez*, 514 U.S. at 551. However, when people are traveling across state lines for the purpose of adopting children, and especially when those people are Indian children, the Indian Commerce Clause grants Congress the authority to legislate. R. at 1-21.

The court also relied on the proposition that "goods are the subject of commerce [but] persons are not." *Gibbons v. Ogden*, 22 U.S. 1, 189 (1824). While this concept is clearly accepted law, this argument ignores the holding that Congress is allowed and encouraged to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Lopez*, 514 U.S. at 558. The Thirteenth Circuit ignored the impact that people have on commerce in concluding that the ICWA was unconstitutional. *Gibbons*, 22 U.S. at 189. Congress is not asserting that people are goods that can be regulated, they are simply asserting that people greatly impact commerce, and that impact gives the federal government power to regulate. R. at 1-21. Additionally, this Court has never held that the commerce clause only allows Congress to regulate

goods. *See United States v. Darby*, 312 U.S. 100, 113 (1941). In *Darby*, this Court allowed Congress to regulate activities that took place prior to any goods being shipped across state lines. *Id.* at 115. Congress, under the Commerce Clause, was regulating the interstate transportation of goods that were produced under harsh, sub-standard labor conditions. *Id.* While this case is not directly on point, it supports the federal government's claim that Congress's Commerce Clause power is not limited just to the regulation of actual products, but also to things that impact commerce. *Id.* Here, people—through the adoption of Indian children—have an impact on commerce. R. at 1-21. Therefore, the ICWA is a valid exercise of Congress' constitutional powers under Article I. U.S. Const. art. 1 § 8, cl. 3.

B. The federal government is not commandeering the states because it is conferring rights on private individuals.

The Tenth Amendment plays a vital role in ensuring that the federal government does not have too much power or infringe on authority that is reserved for the states. *See* U.S. Const. amend. X. Although Congress has broad authority to enact and enforce legislation, it is not permitted to force states to act. *Printz*, 521 U.S. at 935. Under this prohibition, the government is not able to command or compel states to enforce or enact a federal regulatory program. *New York*, 505 U.S. at 161. Additionally, Congress is prohibited from enlisting state officials to carry out federal policy. *Printz*, 521 U.S. at 935. Although the federal government cannot force a state to regulate, it does have the power to pass laws that are enforceable in state courts. *New York*, 505 U.S. at 178. In addition, the federal government does have the authority to regulate individuals. *Id*. This Court has never questioned Congress's authority to pass a law that regulates the conduct of an individual by imposing restrictions on that person, or that confers rights to a private actor. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018). Similarly, this Court has held that "when

Congress evenhandedly regulates an activity in which both the States and private actors engage," the anticommandeering doctrine does not apply. *Id.* at 1478.

Under the theory laid out in *Murphy*—that the regulation of activities in which private actors and states engage does not trigger application of the anticommandeering doctrine—the federal government is not unconstitutionally commandeering the states under the ICWA. *Id.* Another case that relied on this concept concerned federal restrictions on the states disclosing personal information that people were providing in their state driver's license applications. *Reno v. Condon*, 528 U.S. 141, 144-147 (2000). There, this Court held that because restrictions and penalties were imposed by the regulation on both private actors and states that failed to comply with its requirements, the law was not commandeering South Carolina. *Id.* The ICWA does not just govern state agencies, but it also governs and affects private parties, thus equally regulating activities—adoption and foster care—in which both private actors and states are engaged. R. at 5-8. It is undeniable that the ICWA requires the states to take certain action under specific provisions. R. at 5-8. For example, the ICWA requires governmental parties to prove to the court that an effort has been made—and was unsuccessful—to prevent the breakup of an Indian family prior to termination of parental rights or seeking a foster care placement. R. at 6-7. Additionally, the ICWA imposes placement preferences that the state must follow for Indian children looking for pre-adoption placement, foster care placement, or a finalized adoption. R. at 7-8. The ICWA recording requirements also impose a duty on the state or state officials to keep and continually update records for adoption proceedings, as well as make them readily available upon request to the Secretary of the Interior or the child's tribe. R. at 8. However, the ICWA also extends obligations and rights to private parties—the child's tribe or family members. R. at 5-8. For example, when an Indian child's parent is claiming that their consent to terminate parental rights was given due to

duress or fraud, they must prove those circumstances to the court. R. at 7. Additionally, the child's family or tribe is responsible for filing petitions to invalidate actions for foster care placement or termination of parental rights, and they are likely responsible for showing that certain provisions of the ICWA were violated if the petition is in the late stages of the process. R. at 1-21.

In addition to imposing some obligations on the child's tribe, the ICWA also ensures minimum federal protections of Indian children, their parents and families, and tribes. R. at 5-6. When Congress passed the ICWA, it was responding to the increasing number of children isolated from their tribes and families by being placed in non-Indian homes through foster care and adoption. R. at 5. The federal government's main goal in passing the ICWA was to promote security and stability for tribes and families, as well as to protect the interests of Indian children. R. at 5. The government highlighted the uniqueness of the culture and values of Indian tribes, while also acknowledging that when Indian children are taken out of that environment, tribes' integrity and continued existence are diminished. R. at 5-6. The ICWA forces the state government or private individuals to prove that they took actual steps to provide rehabilitative programs and remedial services to Indian families before termination of parental rights or foster care placement can take place. R. at 6-7. This is completely in line with the goal of keeping Indian children with their parents, if possible. R. at 5-6. This also prevents the unwarranted removal of children from their families, tribes, or both. R. at 5.

The District Court was correct in its conclusion that the ICWA does not compel states or state agencies to create or refrain from creating laws or regulations. R. at 11. There is no evidence in the record to suggest that the federal government is forcing West Dakota to create a new law, nor is there any evidence to suggest that West Dakota cannot create any laws or regulations. R. at 1-21. Additionally, the Thirteenth Circuit incorrectly relied on the burdens and costs that states

would incur by enforcing the ICWA in its holding that the statute violated the anticommandeering doctrine. R. at 16. This Court has upheld federal regulations imposed on states, even when enforcement of the legislation would require states and their employees to spend time and effort in carrying out the provisions. *Condon*, 528 U.S. at 150. Any time, effort, or costs that West Dakota could incur from enforcing the ICWA provisions would not preclude the law from being constitutional. *Id.*; R. at 1-21.

The ICWA governs both states and private individuals, ensures minimum federal protections for Indian children and tribes, and does not compel states to create or refrain from creating laws or regulations. R. at 1-21. Therefore, Congress has not violated the anticommandeering doctrine in enacting the ICWA. R. at 1-21.

C. Allowing states to have control over Indians goes against the paramount policy of leaving Indians free from state jurisdiction and control.

Giving West Dakota the authority to control adoptions and foster placements of Indian children with no guidance or regulation from the federal government disturbs the historical relationship, as well as undermines a long-standing precedent of leaving that power exclusively in the hands of Congress. *Morton*, 417 U.S. at 552. This long-standing precedent is necessary, and sovereignty over Indians should remain in the hands of Congress because essential federal protections for tribes would be gone, and any piece of legislation that the federal government has ever passed to protect Indian tribes would be in jeopardy. *See id.*(explaining that an entire section of the United States Code would be wiped out). Similarly, Congress's power under the Indian Commerce Clause would become non-existent. *Id.* Further, the ICWA provides uniformity for Indian tribes and reservations that are located throughout multiple states in the United States—a uniformity required because of a history of Indian tribes being a group that states have mistreated.

See Id. It would not have been necessary for Congress to pass the ICWA if the states adequately protected and preserved the future of federally recognized tribes. R. at 5.

The Constitution, federal statutes, and this Court have not granted states the power to regulate or control Indian tribes, but they have continually given that authority to Congress. U.S. Const. art. I § 8, cl. 3; *McGirt*, 140 S. Ct. at 2463. The United States has a deeply rooted history of leaving the regulation of Indian tribes and individuals exclusively in the hands of the federal government. *McGirt*, 140 S. Ct. at 2463. This Court has repeatedly emphasized the importance of the relationship between the federal government and federally recognized Indian tribes, as well as affirmed the government's duty to protect tribes. *Morton*, 417 U.S. at 552. Congress not only has the power to regulate Indian affairs, but it also has the power to prevent states from interfering with federal policy regarding Indians. *Id.*

Congress passed the ICWA with the intention of ensuring the stability and security of Indian tribes and protecting the best interests of Indian children. R. at 5. The government stressed the importance of Indian children being with members of their own tribe or other tribes to maintain the unique cultural and social standards and experiences that they would be deprived of if they were sent to live in non-native homes. R. at 5-6. The goals of the ICWA are exemplified by the provisions that allow for tribes and family members to intervene until finalization of adoption, through the placement preferences, and the stringent burdens they put in place requiring the exhaustion of remedial services and rehabilitative programs before termination of parental rights. R. at 5-8. All these provisions protect the interests of Indian children by affording tribes and families every opportunity to stop foster placement or adoption proceedings, as well as safeguarding the rights of both by imposing reporting and record-keeping requirements. R. at 5-8. Additionally, Congress only acted after it received an alarming number of reports of children being

separated from their families and tribes and placed into non-Indian homes because of the system that states had in place prior to creation of the ICWA. R. at 5. Had the states' previous systems placed importance on keeping Indian children with tribes in adoption or foster placement proceedings, it would not have been necessary for Congress to take action by passing the ICWA. *See* R. at 5 (discussing how Congress was responding to an issue created by state inaction). Additionally, Congress has worked to foster a relationship with federally recognized Indian tribes and to enact legislation that serves the interests of tribes. *See McGirt*, 140 S. Ct. at 2463. This relationship will be greatly diminished if the ICWA is struck down and the protection of Indian children is left in the hands of the states. *Id.*; R. at 1-21.

D. Congress has the authority to enact the ICWA and it does not force the states into action.

Article I gives Congress expansive authority to regulate commerce with Indian tribes, while the Tenth Amendment ensures that states retain some power not given to the federal government. U.S. Const. art. 1 § 8, cl. 3; U.S. Const. amend. X. Congress was acting well within its authority under the Indian Commerce Clause when it passed the ICWA. U.S. Const. art. 1 § 8, cl. 3. Additionally, the federal government is not violating the anticommandeering doctrine because Congress is equally regulating an activity in which Indian tribe members and states both engage. *See Murphy*, 138 S. Ct. at 1480. The government was only trying to ensure minimum federal protections for Indian tribes and children. R. at 5. Finally, allowing West Dakota and other states to have control of federally recognized Indian tribes jeopardizes all previous and future legislation passed on behalf of tribes and undermines the relationship that the federal government and tribes share. *See Morton*, 417 U.S. at 552. Therefore, this Court should reverse the Thirteenth Circuit's decision that the ICWA is unconstitutional on the grounds that it violates the Tenth Amendment anticommandeering doctrine. R. at 1-21.

II. The Classifications that the Indian Child Welfare Act uses do not violate Equal Protection.

The Constitution grants power to the federal government and the states, but it also ensures protections for the people. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). Included among these protections is the Equal Protection Clause of the Fourteenth Amendment, which provides that, "No state shall … deny to any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV. The Fourteenth Amendment's Equal Protection Clause applies to the states, but the Fifth Amendment applies to the federal government. U.S. Const. amend. V, XIV. While the Fifth Amendment does not explicitly contain an Equal Protection Clause, it does have a due process clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In *Bolling*, this Court held that the Due Process Clause of the Fifth Amendment contains an equal protection element; this component explicitly prohibits the federal government from denying people equal protection of the law. *Id.* Since equal protection applies to the federal government as well, the courts have applied the same analysis of equal protection to Fifth Amendment violation claims as Fourteenth Amendment claims. *Id.*

The purpose of the Equal Protection Clause is to ensure that the government does not discriminate against an individual based on race or any other innate attribute of a protected class of people. *See Davis*, 426 U.S. at 239. An individual claiming an equal protection violation must show that the government intended to discriminate against them based on some inherent characteristic, like race, gender, alienage, or legitimacy. *Id.* Courts have been unwilling to hold that a law is unconstitutional based solely on its disproportionate impact. *Id.* A law may be neutral on its face but discriminatory in purpose. *Id.* at 241. For example, a law could be "applied so as invidiously to discriminate on the basis of race." *Id.* at 241. Once an individual has made a prima

facie case, the court will then use one of three different tests to analyze the government action, depending on the classification of those being discriminated against. *Id.*

The highest level of scrutiny courts will apply is strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). Strict scrutiny "requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* The lowest level of scrutiny a court will utilize to analyze an equal protection claim is rational basis. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 308 (1993). Under a rational basis review, courts will uphold the law if "any conceivable state of facts could provide a rational basis for the classification." *Id.* Intermediate scrutiny, which does not apply here, is used for gender and other classifications. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). The significant tests for this case are rational basis and strict scrutiny. R. at 1-21.

A. The ICWA uses politically—not racially—based classifications, which are subject to a rational basis review.

While racial classifications are subject to strict scrutiny review, political classifications are only subject to a rational basis review. *See Morton*, 417 U.S. at 555; *Brackeen*, 994 F.3d at 334. When courts analyze a claim that is subject to rational basis review, there is a strong presumption of the classification that the law uses being valid. *Beach Commc'ns, Inc.*, 508 U.S. at 308. The test only requires that the government's actions be rationally related to a government interest. *Id.* A party that is claiming an equal protection violation subject to rational basis review must negate every conceivable foundation that would support it. *Id.* Thus, any party with a classification subject to rational-basis review has a steep burden in proving their case. *See id.* (explaining how the government only needs to have a legitimate purpose for creating the law).

i. The ICWA uses "Indian child" as a political classification.

Where the classification is political, rational basis review applies. *See Morton*, 417 U.S. at 555. Under the ICWA, an "Indian child" is an individual who is unmarried and under eighteen years of age, and "is the biological child of a member of an Indian tribe and either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe." R. at 6. On its face, the classification appears racially determinable, however, the classifications within the act rely on tribal eligibility for the covered children. R. at 6. The classifications that the ICWA uses are not racially based because this Court has held that "federal legislation with respect to Indian tribes … is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645 (1977). Further, it is a well-accepted principle that the Constitution expressly provides Congress with the authority to single out tribes in passing legislation. *Id.* In light of this well accepted principle, courts have deemed Indian tribes as quasi-sovereign entities, thus putting them into a political classification, rather than a racial one. *See Morton*, 417 U.S. at 554. The federal-tribal relationship has long established special treatment for tribal relations, with this Court noting that "literally every piece of legislation dealing with Indian tribes and reservations … single[s] out for special treatment a constituency of tribal Indians living on or near reservations." *Id.* at 552.

In *Morton*, the federal government placed an employment preference towards Indians to work in the Bureau of Indian Affairs (Bureau). *Id.* at 537. The Bureau was responsible for managing the affairs of Indian tribes. *Id.* at 543. Prior to Congress taking action, the Bureau was predominantly operated by non-Indians, which created a system where people who were not part of the tribe were controlling the future of tribes. *Id.* at 542. The purpose behind the preference was to reduce effects that stem from non-Indians having authority over matters that affect the tribal life of Indians. *Id.* at 542. In holding that the government had not overstepped its bounds and that the

preferences were political in nature, this Court equated the Indian preferences to the requirement that a U.S. official be a resident of the state that they represent. *Id.* at 553. Additionally, it was noted that when Congress is giving reasonable preferential treatment to Indian tribes to fulfill its unique obligations toward them, the classification does not violate due process. *Id.* at 554.

The classifications that Congress used in passing the ICWA are also political classifications for the same reason the classifications in *Morton* were political. *Id.*; R. at 11-12. The Indian preferences to work in the Bureau were employment criteria that would better serve the needs of federally recognized Indian tribes. *See Morton*, 417 U.S. at 554. Here, the placement preferences for the ICWA are simply adoption preferences to better preserve the future of federally recognized Indian tribes. R. at 1-21. The preferences given to work in the Bureau did not necessarily restrict a non-Indian from working there, it just gave a preference to Indians. *Morton*, 417 U.S. at 554. Similarly, the ICWA does not fully restrict non-Indian people from adopting Indian children, it simply sets forth a preference order that places families and tribes ahead of non-Indians. R. at 7-8. Accordingly, the placement preferences of the ICWA are political in nature and are subject to a rational-basis review. *Antelope*, 430 U.S. at 645; *Morton*, 417 U.S. at 554.

ii. Congress has a unique obligation towards federally recognized Indian tribes to further tribal self-government, which is rationally related to the special treatment given by the federal government to Indian children.

Congress and federally recognized Indian tribes have a long-standing relationship where Congress acts as a "guardian" to legislate for tribes to protect their best interests. *Morton*, 417 U.S. at 551. The federal government has passed numerous acts and treaties that try to further self-government within tribes. *Id.* at 541. Consistently, Congress tries to foster self-government through more participation for Indian tribes in their own affairs. *Id.* at 543. Additionally, when a preference has been given to Indian tribe members, the fact that it may discriminate against non-

Indian people has not precluded courts from upholding federal laws. *Id.* at 555. For a law to pass the rational basis test, the federal government only needs to show that the classification is rationally tied to a legitimate government interest or purpose. *Beach Commc'ns, Inc.*, 508 U.S. at 308. This Court—in holding that employment preferences were constitutional—stated that, "As 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." *Morton*, 417 U.S. at 555. Therefore, because the ICWA is rationally related to a government interest, the Act does not violate the Equal Protection Clause. *See Id.*

In *Morton*, the government was classifying Indians and giving them preferences for employment to the Bureau to combat non-Indians controlling the destiny and lives of tribe members. *Id.* at 542. Here, Congress was trying to give adoption and foster placement preferences to family members and tribe members to ensure that federally recognized tribes have a future. R. at 5. Additionally, the preferences in *Morton* were "reasonably designed to further the cause of Indian self-government and to make the [Bureau] more responsive to the needs of its constituent groups." *Morton*, 417 U.S. at 554. Here, Congress created placement preferences to ensure that the cultural and societal uniqueness of Indian tribes was preserved by keeping Indian children in homes with members of a tribe. R. at 5-6. The ICWA is analogous with the employment preferences in *Morton*, it is another example of Congress trying to serve its unique obligation to protect and provide for tribes. *Morton*, 417 U.S. at 542; R. at 5-6. At the beginning of the ICWA provisions, the federal government explicitly lays out the government's interest: promoting the stability of Indian families and tribes. R. at 5. Additionally, Congress only passed the ICWA after receiving reports that many Indian children, through foster and adoption placements, were being separated from their tribes and families. R. at 5. Prior to enacting ICWA, Congress considered

testimony about the devastating impact of removing Indian children from their tribes and placing the children in non-Indian households. *See Brackeen*, 994 F.3d at 335. The Tribal Chief of the Mississippi Band of Choctaw Indians testified that chances of Indian survival are significantly reduced by removing Indian children from their homes and raising them in households which deny exposure "to the way of their People," and in turn undercuts the tribes' ability to continue as a self-governing community. *Id.* Congress, in its findings, determined that children were the most vital resource "to the continued existence and integrity of Indian tribes." *Id.*; R. at 6. Congress, in passing the ICWA with placement provisions, was only trying to fulfill its obligation to promote self-governance and promote the stability of tribes. R. at 5. Therefore, the federal government passed the ICWA to serve a legitimate interest of providing for federally recognized Indian tribes, so the ICWA passes the rational basis test. R. at 1-21.

iii. The District Court applied the correct precedent when analyzing the Equal Protection claim.

The concurring opinion for the Thirteenth Circuit relied on the wrong precedent in deciding that the ICWA was subject to, and fails, the strict scrutiny test. R. at 18-20. In *Rice v. Cayetano*, this Court struck down a Hawaii statute (OHA) that attempted to control voter eligibility by only allowing native Hawaiians the right to vote, as well as restricting jobs at a Hawaii state agency to only allow those with Hawaiian ancestry to qualify. *Rice v. Cayetano*, 528 U.S. 495, 519 (2000). By restricting the class to ancestry, the statute was using race to discriminate, rather than a political classification. *Id.* Since the classification was racial, the statute was subject to strict scrutiny and was struck down by this Court. *Id.* The Chief Judge for the Thirteenth Circuit believed that the ICWA was conferring minimum protections only through tribal membership based on ancestry, instead of tribal affiliation. R. at 19. The opinion completely disregarded this Court's prior holdings that "federal legislation with respect to Indian tribes … is not based [on] racial

classifications." *Antelope*, 430 U.S. at 645. Additionally, the federal government is not responsible for determining eligibility for tribal membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). The power to "define its own membership for tribal purposes has long been recognized as central to [a tribe's] existence as an independent political community." *Id.* Since 1866, the Cherokees and Congress have had an agreement that a person could be eligible for tribal membership without Indian blood. Treaty with the Cherokees art. 9, July 19, 1866, 14 Stat. 799, WL 18776. Furthermore, a person can become a member of a tribe if they are a descendant of a person who was enslaved by tribes and then became a member once they were set free, or if they descend from a person of *any* ethnicity that was adopted by a tribe. *Id.* Accordingly, a person's eligibility to be a member of an Indian tribe is not just based solely on their race or ancestry. *Brackeen*, 994 F.3d at 337.

The concurring opinion believed that the ICWA preferences are not related to specific tribe interests because it viewed the preference of a child being with any Indian family, regardless of eligibility for tribal membership, conglomerated all the tribes into one. R. at 20. However, the concurrence disregarded the fact that tribes determine a person's eligibility. *Martinez*, 436 U.S. at 72. Congress is not trying to create one blended tribe, because it does not have the authority to decide if someone belongs to a tribe. *Id.* Additionally, the concurring opinion ignores the unique relationship that the federal government and Indian tribes share. R. at 18-20. Indian tribes are not bound to the geography of a specific state like the statute in *Rice* required. *Rice*, 528 U.S. at 519. While Indian tribes are quasi-sovereign bodies that co-exist with the United States, Hawaii and any other states have not been afforded the same level of sovereignty. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831). "The relationship between the government and the tribes … has always been considered a relationship between political entities." *Id.* Additionally, the federal

government has not acknowledged that people who are native to Hawaii "have a status like that of Indians in organized tribes." *Rice*, 528 U.S. at 518. Further, this Court in *Rice* stated that the purpose of OHA was to grant the right to vote to individuals of defined ancestry, excluding all others (which was a violation of the Fifteenth Amendment). *Id.* at 514. Moreover, this Court acknowledged the special treatment that Indian tribes receive as different from the OHA and as an example of the promotion of tribal sovereignty. *Id.* at 514, 519. When passing the ICWA, Congress considered how the "[r]emoval of Indian children from their cultural setting seriously impacts … long-term tribal survival." S. REP. NO. 95-597, at 52 (1977). Tribal interference regarding child welfare promotes tribal sovereignty. *Id.* The concurring opinion applied the wrong precedent in holding that the ICWA used "Indian" as a racial classification instead of a political one. R. at 18-20.

B. The ICWA imposing on state adoption proceedings does not heighten the level of scrutiny that courts should employ in analyzing an Equal Protection claim.

Congress—through the established, historical relationship with Indian tribes—has plenary authority to pass legislation to provide for the tribes. *Nat'l Lab. Rels. Bd. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 549 (2015). This power rests exclusively in the hands of the federal government and is completely free from state interference. *See Id.* Neither this Court, nor the Constitution, has ever granted such broad authority for a state to regulate tribes. *Id.*

When Congress exercises its constitutional authority to create a federal right that state courts must respect, the government is not violating state sovereignty. *Brackeen*, 994 F.3d at 341. Furthermore, how much or how little a federal law imposes on state proceedings is not part of the rational-basis test. *Id.* Since the ICWA uses political classifications to further the legitimate interest of preserving the future of Indian tribes, the mere fact that it intrudes on West Dakota's—or any other state's—adoption proceedings does not change the analysis that this Court should apply. *Id.*

This Court should view the ICWA conferring minimum federal protections for Indian children the same as it would for any other legislation that has conferred rights or preferences singling out Indian tribes. *Id.* Because the federal government, through the ICWA, is identifying a political class and acting for a legitimate government purpose, it should be subject to a rational-basis review, not strict scrutiny. R. at 5-7. A law will pass rational-basis review even when it disadvantages a particular group—here, non-Indians—if it is serving a government interest. *Romer v. Evans*, 517 U.S. 620, 632 (1996). The fact that the ICWA imposes on state adoption proceedings does not mean that it categorizes individuals based on being part of a suspect class or jeopardizes a fundamental right. *Brackeen*, 994 F.3d at 341. The classifications used in *Rice* were subject to strict scrutiny because the state of Hawaii was discriminating based on race and because a fundamental constitutional right—voting—was at stake. *Rice*, 528 U.S. at 522. Here, there is no fundamental right at stake, and the federal government is not discriminating against, or classifying, individuals based on race, because Indian tribes are a political classification. *See Antelope*, 430 U.S. at 645. Therefore, the ICWA does not violate the Equal Protection Clause under the rational basis test, and the mere fact that the law intrudes on state adoption proceedings does not subject it to a heightened level of scrutiny. *Brackeen*, 994 F.3d at 341.

C. Classifying the ICWA as racially discriminatory would jeopardize all laws that have come from the federal-tribal relationship.

This Court viewing the classifications in the ICWA as racial— and subjecting them to strict scrutiny—would put any law that Congress has passed for the welfare and stability of tribes in jeopardy, as well as diminish the relationship between the federal government and federally recognized tribes. *Morton*, 417 U.S. at 552. Every law that Congress has ever created to extend protections to Indian tribes affords special treatment to tribes and their members and singles them out as a political class. *Id.* The ICWA is not different from any other piece of legislation that the

federal government has passed to vest authority back to Indian tribes to self-govern and to give the tribes more control over their own fates. *See id.*; R. at 5-7. Further, the federal government has maintained a relationship with federally recognized Indian tribes that has created a duty for Congress to take measures for tribes' protection. *Morton*, 417 U.S. at 552. This Court has long recognized Congress's exclusive and expansive authority to regulate Indians and Indian tribes on and off the reservation. *See e.g., United States v. McGowan*, 302 U.S. 535, 539 (1938) ("Congress possess the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States."). Additionally, courts have repeatedly upheld federal government preferences for Indians, regardless of whether those Indians were located on or near the reservation. *See Brackeen*, 994 F.3d at 336. If the ICWA is labeled as racially discriminatory, Congress's ability to protect tribes through legislation will be diminished in the future because any law that they pass would no longer use political classifications, but racial ones instead. *See Morton*, 417 U.S. at 552. Instead of having to show that the federal government is serving a legitimate government purpose, the government would have to prove that there is a compelling interest they are serving, and that the law is narrowly tailored to achieve that compelling interest. *See Reed*, 576 U.S. at 171. Therefore, this Court should uphold the district court's decision that the ICWA is subject to, and passes, a rational-basis review. R. at 13.

CONCLUSION

It is for these reasons that we believe this Court should REVERSE the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

We certify that a copy of Petitioners' brief was served upon Respondents, James and Glenys Donahue, and the state of West Dakota, through the counsel of record by certified U.S. mail return receipt requested, on this, the 10th day of October, 2022.

/s/
Attorneys for Petitioners