No. 22-386

IN THE SUPREME COURT OF THE UNITED STATES

STUART IVANHOE, SECRETARY OF INTERIOR, ET AL.,
PETITIONERS

V.

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

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Team 15

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court of the United States

United States Courts of Appeal

United States Constitutional Provisions

State Constitutional Provisions

Other Constitutional Provisions

Federal Statutes

State Statutes

Secondary Sources

Other Sources

QUESTIONS PRESENTED

I. Do the Indian Child Welfare Act's placement preferences and recordkeeping provisions exceed Congress's Article I authority and violate the Tenth Amendment anticommandeering doctrine when they direct state officials to implement federal regulation of a non-economic activity?

II. Do the Indian Child Welfare Act's Indian classifications violate the Equal Protection Clause of the Fifth Amendment when they classify based on ancestry and counteract the government's stated interest?

STATEMENT OF THE CASE

1. Statement of Facts

Two children, Baby C and Baby S, face the threat of removal from their loving adoptive parents, James and Glenys Donahue ("Donahues"). R. at 13. Even though the Donahues are the only family they know, both children may be relocated to a different state and placed with strangers. R. at 13. Petitioners are the United States of America, the United States Department of the Interior, and the Secretary of the Department of the Interior, Stuart Ivanhoe ("Secretary"). They are joined by two intervening tribes, the Quinault Nation and the Cherokee Nation. R. at 1-2. Respondents are the Donahues and the State of West Dakota. R. at 1.

West Dakota. There are three Indian tribes within West Dakota's borders. R. at 2. Twelve percent of West Dakota's child custody proceedings involve Indian children, including foster care and adoptions. R. at 2. The West Dakota Child Protection Service ("CPS") publishes a manual, which states that if an Indian child is taken into custody, "almost every aspect of the social work and legal case is affected." R. at 2. When the Indian Child Welfare Act of 1978 ("ICWA") applies, it heightens the legal burden of proof for removing a child, obtaining a final order terminating parental rights, and restricting a parent's custody rights. R. at 2.

Baby C. The Donahues hoped to adopt Baby C, an Indian child. R. at 2. Baby C's biological mother is an enrolled member of the Quinault Nation, and her biological father is an enrolled member of the Cherokee Nation. R. at 2. After her birth, Baby C resided with her aunt. R. at 2. When Baby C was only eight months old, CPS received multiple reports that her aunt often left her unattended for long periods of time. R. at 2. CPS intervened, removed her from the custody of her aunt, and placed her in the care of the Donahues. R. at 2. CPS notified both

biological parents' tribes in compliance with ICWA. R. at 2. The Donahues continued caring for Baby C. R. at 2.

Two years later, a West Dakota state court terminated the rights of Baby C's biological parents through voluntary proceedings, making her eligible for adoption. R. at 3. With the consent of Baby C's biological parents and aunt, the Donahues began adoption proceedings. R. at 3. Again, state officials notified the Quinault Nation and Cherokee Nation as required by ICWA. R. at 3. The Quinault Nation found a potential alternative placement with non-relatives in Nebraska, but the placement fell through for unknown reasons. R. at 3. Both tribes agreed that the Quinault Nation would be designated as Baby C's tribe for the purpose of the adoption proceeding. R. at 3. No one sought to adopt Baby C or otherwise intervened. R. at 3. As a result, the Donahues entered into a settlement agreement with CPS and Baby C's guardian ad litem and stipulated that ICWA's placement preferences did not apply. R. at 3. The Donahues' adoption of Baby C was finalized in January 2020. R. at 3.

Baby S. In April 2020, the Donahues became foster parents and hoped to adopt Baby S, an Indian child. R. at 3. The identity of Baby S's biological father is unknown, and Baby S's biological mother was a member of the Quinault Nation but died of a drug overdose. R. at 3. For four months after his birth, Baby S resided with his grandmother. R. at 3. His grandmother was not able to continue caring for him because of her failing health, so Baby S was moved into foster care with the Donahues. R. at 3. The Donahues began adoption proceedings for Baby S in May 2020. R. at 3. Even though his grandmother consented, the Quinault Nation opposed the adoption and identified two potential adoptive families in a Quinault Tribe in another state. R. at 3.

2. Procedural History

The District Court. On June 29, 2020, after learning of the Quinault Nation's opposition, the Donahues brought suit against Petitioners in the United States District Court for the District of West Dakota. R. at 4. Respondents claimed that ICWA §§ 1912(a) and (d)-(f), 1915(a)-(b) and (e), and 1951(a) violate the Tenth Amendment by commandeering the states. R. at 4. Respondents also claimed that ICWA §§ 1913(d), 1914, and 1915(a)-(b) violate the Equal Protection Clause of the Fourteenth Amendment. R. at 4. On September 3, 2020, the parties filed cross-motions for summary judgment. R. at 4. The district court denied Respondents' motion and granted Petitioners' motion, rejecting claims of constitutional violations. R. at 12. The district court held that the ICWA provisions merely confer rights on Indian children and families and do not commandeer state agencies. R. at 9-10. Additionally, the court held that ICWA's classifications are politically based and pass rational basis review, thus not violating the Equal Protection Clause. R. at 11.

The Court of Appeals. Respondents appealed. R. at 13. On December 28, 2021, the United States Court of Appeals for the Thirteenth Circuit heard arguments. R. at 13. The Thirteenth Circuit reversed the judgment, holding that "ICWA unconstitutionally requires state courts and executive agencies to apply federal standards and directives to state-created claims." R. at 15. Even though the Thirteenth Circuit did not reach the issue of Congress's authority, it noted that its authority is far from clear. R. at 16. The court suggested that Congress does not have the power to regulate child custody proceedings because Indian children are not persons in commerce and do not have any effect on commerce. R. at 16.

Chief Judge Tower concurred, stating that ICWA classifies based on race because it applies to Indian children "based on ancestry, rather than actual tribal affiliation." R. at 18. Since

its classifications are racial, strict scrutiny must apply. R. at 18. Chief Judge Tower subsequently asserted that ICWA fails strict scrutiny because its classifications are not narrowly tailored. R. at 18-19. Thus, the judgment should have been reversed on Equal Protection grounds. R. at 19.

This Court granted writ of certiorari on August 5, 2022. R. at 20.

SUMMARY OF ARGUMENT

This Court should affirm the Thirteenth Circuit's ruling that ICWA's placement preferences and recordkeeping provisions violate the Tenth Amendment's anticommandeering doctrine. This Court should additionally hold that ICWA exceeds Congress's Article I authority and violates the Fifth Amendment's Equal Protection Clause.

First, ICWA's placement preferences and recordkeeping provisions exceed congressional authority and unconstitutionally commandeer states. The Indian Commerce Clause only allows Congress to regulate commerce. Child custody and adoption proceedings cannot be construed as economic activities, nor do they have any relationship to commerce. Without an economic activity, Congress surpassed its constitutional authority by enacting ICWA. Further, ICWA's placement preferences and recordkeeping provisions violate the anticommandeering doctrine by improperly directing state officials and usurping state legislatures' power. The placement preferences force state officials and agencies to implement federally created standards for Indian children in foster care, pre-adoptive placements, and adoption proceedings. State courts must then require higher legal burdens of proof in multiple child custody proceedings. Meanwhile, the recordkeeping provisions force state officials to keep records and produce them whenever the Secretary or the child's tribe requests. These provisions effectively require state officials to implement and enforce a federal regulatory program. In doing so, ICWA frustrates every purpose of the anticommandeering doctrine. Therefore, the placement preferences and recordkeeping provisions violate the Tenth Amendment's anticommandeering doctrine.

Second, ICWA's classifications violate the Fifth Amendment Equal Protection component. ICWA's definition of "Indian child" classifies on the basis of race by using ancestry as a substitute for race. Because the classification is racial, ICWA is subject to strict scrutiny

review. ICWA fails strict scrutiny because its classifications are not narrowly tailored to a compelling government interest. The classifications are not narrowly tailored because ICWA automatically applies to Indian children that do not have tribal connections. Even if ICWA does not classify on the basis of race, ICWA is still unconstitutional because its classifications are not rationally related to its purpose. Rather, its classifications are counterproductive to ICWA's stated goal. Thus, ICWA also violates the Equal Protection Clause of the Fifth Amendment.

For the reasons stated above, this Court should affirm the Thirteenth Circuit's decision that ICWA's placement preferences and recordkeeping provisions violate the anticommandeering doctrine. This Court should additionally find that ICWA exceeds valid congressional authority and that ICWA's race-based classifications violate the Equal Protection Clause.

ARGUMENT

I. THE PLACEMENT PREFERENCES AND RECORDKEEPING PROVISIONS OF THE INDIAN CHILD WELFARE ACT EXCEED CONGRESS'S AUTHORITY AND VIOLATE THE ANTICOMMANDEERING DOCTRINE BECAUSE THEY DIRECT STATE OFFICIALS TO IMPLEMENT FEDERAL REGULATION OF A NONECONOMIC ACTIVITY.

The placement preferences and recordkeeping provisions of ICWA exceed Congress's Article I power and violate the anticommandeering doctrine of the Tenth Amendment. The Indian Commerce Clause provides that Congress may "regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Meanwhile, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . . ." U.S. Const. amend. X. Even though the Constitution is the "supreme Law of the Land," U.S. Const. amend. VI, § 2, two requirements must be met for preemption to apply. *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018). For a federal law to preempt a conflicting state law, the federal law must represent a valid exercise of congressional power and "be best read as one that regulates private actors." *Id.*

The Thirteenth Circuit correctly held that the placement preferences and recordkeeping provisions of ICWA violate the Tenth Amendment's anticommandeering doctrine by directing state officials. R. at 15. Additionally, this Court should hold that Congress exceeded its constitutional authority under the Indian Commerce Clause because child custody and adoption proceedings are not commerce. Because Congress exceeded its constitutionally enumerated powers, the ICWA provisions do not preempt state law. Accordingly, this Court should find that the placement preferences and recordkeeping provisions of ICWA are unconstitutional.

A. ICWA Exceeds the Scope of Congress's Authority Under the Commerce Clause by Regulating a Noneconomic Activity.

The Indian Commerce Clause does not allow Congress to regulate child custody proceedings because they are not economic activities. Article I outlines the Interstate Commerce Clause and the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. The Interstate Commerce Clause provides that Congress can "regulate Commerce . . . among the several States . . . ." *Id.* The Indian Commerce Clause provides that Congress can "regulate Commerce . . . with the Indian Tribes." *Id.* The Indian Commerce Clause originally referred to trade with Indians and permitted Congress to regulate the conduct of the merchants, the goods sold, the prices charged, and other commerce-related matters. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659-60 (2013) (Thomas, J., concurring) (citing Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201, 216 n.99 (2013)).

Using the Indian Commerce Clause to "[interfere] with the power or authority of any State" would mark "radical changes in tribal status." *United States v. Lara*, 541 U.S. 193, 203 (2004); *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding the Indian Commerce Clause does not grant Congress the power to abrogate the States' sovereign immunity). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73-74, 84 (1977) (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946)). Domestic relations, including child custody and adoption proceedings, is an area of law that this Court has repeatedly left for the states to decide. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). "The whole subject . . . belongs to the laws of the States and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890).

"The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers." *Murphy*, 138 S. Ct. at 1476. Although the Interstate Commerce and Indian Commerce Clauses can have different applications, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), this Court's broader interpretations of commerce should illuminate the case at hand. This Court defines commerce as the buying and selling of goods. *Gibbons v. Ogden*, 22 U.S. 1, 189 (1824). Congress can regulate intrastate activities that affect interstate commerce, but commerce does not include child custody proceedings. *United States v. Lopez*, 514 U.S. 549, 555, 564 (1995); *see New York v. Miln*, 36 U.S. 102, 136 (1837) ("persons are not the subject of commerce").

In *Lopez*, this Court held that Congress cannot regulate a noneconomic activity. 514 U.S. at 551*; see United States v. Morrison*, 529 U.S. 598, 614 (2000) (holding Congress cannot regulate an activity that is not economic in nature). There, a student was charged with violating the Gun-Free School Zones Act of 1990 after bringing a firearm to school. *Lopez*, 514 U.S. at 551. This Court included a list of economic activities within the bounds of the Commerce Clause: coal mining, extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat. *Id*. at 559-60. "These examples are by no means exhaustive, but the pattern is clear." *Id.* at 560. Finding for the student, this Court reasoned that possession of a firearm in a school zone does not involve economic activity. *Id*.

Here, the placement preferences and recordkeeping provisions of ICWA are devoid of economic activity that would permit Congress's Commerce Clause authority. Analogous to *Lopez*, child custody and adoption proceedings do not involve economic activities and do not

have any substantial effect on interstate or Indian commerce. The proceedings are starkly different than coal mining, credit transactions, restaurants, and the rest of this Court's list. If Congress's power to regulate child custody proceedings is permitted under the Commerce Clause, Congress's power would be limitless. Because child custody proceedings are not economic activities and do not substantially affect interstate commerce, Congress exceeded its Article I authority. Thus, the placement preferences and recordkeeping provisions are unconstitutional.

B. The Placement Preferences and Recordkeeping Provisions of ICWA Violate the Tenth Amendment Anticommandeering Doctrine Because They Require Extensive Action from State and Judicial Officers.

This Court should affirm the Thirteenth Circuit's holding that the ICWA placement preferences and recordkeeping provisions violate the Tenth Amendment and are thus unconstitutional. "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. The anticommandeering doctrine derives from the Tenth Amendment and the Framers' rejection of a central government that "act[s] upon and through the States." *Printz v. United States*, 521 U.S. 898, 899 (1997). Congress cannot direct state legislatures to enact a federal regulatory program. *New York v. United States*, 505 U.S. 144, 188 (1992). Expanding on this limitation, Congress cannot direct state officers to implement or enforce a federal regulatory program. *Printz*, 521 U.S. at 935. This Court recently affirmed these limitations and held that Congress may not prohibit valid state legislation. *Murphy*, 138 S. Ct. at 1484-85. However, "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Id.* at 1478.

In *Printz*, this Court held that a statute regulating the sale of handguns was unconstitutional because it forced state officers to implement a federal regulatory program. 521 U.S. at 933. Specifically, the Brady Handgun Violence Prevention Act ("Brady Act") established a national background check system for the sale of handguns within five years. *Id.* at 902. The Brady Act also enacted interim laws to be used until the background check system was active. *Id.* The interim laws mandated chief law enforcement officers ("CLEO") to perform background checks on prospective handgun purchasers. *Id.* at 933. The interim laws required CLEOs to "make a reasonable effort" to determine within five business days whether receipt or possession would be lawful. 18 U.S.C. § 922(s)(2). To make a reasonable effort, CLEOs were required to research local, state, and national databases, or whichever system was designated by the Attorney General. *Printz*, 529 U.S. at 933. This Court concluded that the federal government may not force state officers to accomplish a federal initiative. *Id.* at 935.

Conversely, in *Reno v. Condon*, 528 U.S. 141, 151 (2000), this Court held that the Driver's Privacy Protections Act of 1994 ("DPPA") did not violate the anticommandeering doctrine. The DPPA restricted states' disclosure of personal information from driver's license applications. *Id.* at 144. The Court reasoned that the DPPA "does not require the [state] Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151. This Court explained that the DPPA did not "require the States in their sovereign capacity to regulate their own citizens." *Id.* The Court also emphasized that the law applied equally to state and private actors. *Id. See Murphy*, 138 S. Ct. at 1479 (explaining the Court's holding in *Reno*).

Here, the function of ICWA's placement preferences and recordkeeping provisions is indistinguishable from the Brady Act in *Printz*. Similar to the CLEOs' background check

requirement in *Printz*, state officials are forced to implement Indian child placement preferences. The placement preference provision requires any "Indian child" in foster care, pre-adoptive placements, and adoptive proceedings to be placed with: "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a)-(b). Additionally, like in *Printz*, ICWA mandates state officials to keep records of these placements. 25 U.S.C. § 1915(e). The recordkeeping provisions require state officials to maintain extensive records and produce them immediately upon request. *Id.* ICWA further requires that state courts provide the Secretary with the final orders in adoptive placements. 25 U.S.C. § 1951(a).

Together, the placement preferences and recordkeeping provisions "usurp[] the lawful authority of state agencies charged with protecting child welfare." R. at 2. As the Thirteenth Circuit correctly recognized, these provisions force states to modify state law by applying federal standards and directives to state-created claims. R. at 15. West Dakota's CPS Manual states that "if an Indian child is taken into CPS custody, 'almost every aspect of the social work and legal case is affected.'" R. at 2. State officials are required to take numerous extra steps to provide an Indian child with a proper placement. In doing so, the state spends additional time and resources beyond what is required by state law alone. While all children deserve proper placements, the lack of Indian foster homes in the United States makes Congress's goals with ICWA "nearly impossible to uphold." Shirley Mae Begay and Jennifer Lynn Wilczynski, Barrier to Recruiting Native American Foster Homes in Urban Areas (June 2018) (M.S.W. dissertation, California State University, San Bernardino) (CSUSB ScholarWorks).

On the other hand, the ICWA provisions are distinguishable from the DPPA in *Reno* because they require extensive action from state and judicial officers. These provisions also force

state courts to implement a higher legal burden of proof for child custody proceedings. R. at 2; *see* 25 U.S.C. § 1912(f) (requiring "beyond a reasonable doubt" for termination). *But see Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) (finding that any burden equal to or greater than "clear and convincing evidence" for termination of parental rights "is a matter of state law properly left to state legislatures and state courts"). The provisions infringe on West Dakota's sovereign authority to govern its own citizens. Essentially, "it was as if federal officers were installed in state legislative chambers." *See Murphy*, 138 S. Ct. at 1478. This results in blatant commandeering of the state's power.

Further, the ICWA provisions do not govern state and private actors equally. Although private actors may be involved with placements, it is the state that has sole authority over those placements. 25 U.S.C. § 1903(1). State courts are responsible for ensuring that private agencies comply with ICWA. *See* 25 U.S.C. § 1914. Private parties may ask state courts to issue compliance orders on private agencies whenever they wish. *See id.* The ICWA provisions thereby control child custody proceedings—proceedings which are usually under the purview of state officials alone. *See Brackeen v. Haaland*, 994 F.3d 249, 412 (5th Cir. 2021) ("this is regulation of state administrative and 'judicial proceedings' in service of a federal regulatory goal"); Timothy Sandefur, *The Federalism Problems with the Indian Child Welfare Act*, 26 Tex. Rev. Law & Pol. 429, 473 (2022). Therefore, the placement preferences and recordkeeping provisions of the Indian Child Welfare Act violate the anticommandeering doctrine under the Tenth Amendment.

1. The placement preferences and recordkeeping provisions contradict the underlying purpose of the anticommandeering doctrine.

The purpose of the anticommandeering doctrine is to protect against federal laws like ICWA's placement preferences and recordkeeping provisions. For decades, this Court has

upheld the anticommandeering doctrine and reinforced its importance. *Murphy*, 138 S. Ct. at 1477; *see New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 921. In *Murphy*, this Court emphasized three purposes of the doctrine. 138 S. Ct. at 1477. The doctrine "reduces the risk of tyranny and abuse," promotes political accountability, and prevents the federal government from shifting costs to the states. *Id. See Printz*, 521 U.S. at 930 ("it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error"). ICWA contradicts each purpose.

First, the ICWA provisions promote tyranny and abuse from the federal government. The plain language of both provisions specifies that the state officials implementing the placement preferences and recordkeeping duties "shall" abide by the provisions. 25 U.S.C. § 1915(a), (e). Black's law dictionary defines "shall" as "[h]as a duty to; more broadly, is required to. This is the mandatory sense that drafters typically intend and that courts typically uphold." *See* Shall Definition, *Black's Law Dictionary* (11th ed. 2019). Under this definition, the recordkeeping provisions can be read as "a record of each such placement . . . [is required to] be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section." 25 U.S.C. § 1915(e). Meanwhile, the placement preference provisions can be read as, "[i]n any adoptive placement of an Indian child under *State* law, a preference [is required] . . . ." 25 U.S.C. § 1915(a) (emphasis added). This reading clearly demonstrates that the statute modifies state law. *See New York*, 505 U.S. at 188. The statutes are a plain command from the federal government to the states, leaving West Dakota's executive and judicial officers to perform as "puppets of a ventriloquist Congress." *See Printz*, 521 U.S. at 928 (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977)).

Second, the ICWA provisions do not promote political accountability. Congress enacted ICWA, and yet, members of Congress are too far removed from ICWA's implementation. Instead of placing responsibility on federal officials, the burden of implementing ICWA falls upon state child welfare officials. State officials must ensure they are implementing a law that their state legislature never drafted, voted on, or passed. Like this Court reasoned in *Printz*, it will be the state official, and not some federal official, who will be blamed for any error in placing an Indian child. *See* 521 U.S. at 930. Ensuring children are protected by the law is necessary and crucial to their well-being. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding states have "a duty of the highest order to protect the interests of minor children"). However, this Court should allow state legislatures to enact their own laws; state officials to implement their own laws; and state courts to hear claims created by their own laws.

Lastly, the ICWA provisions unreasonably shift costs to states like West Dakota. Although the funding for fostering Indian children is the same as all other children, the placement preferences lead to prolonged proceedings. *E.g.*, County of Santa Clara Social Services Agency, *Foster Care Regulation and Policy Handbook* 18-8, https://stgenssa.sccgov .org/debs/policy_handbook_foster_care/fcchap18.pdf. With the extreme lack of Indian foster homes, the potential placement time could negatively affect the psyche of the child being placed and undoubtedly affects states' funding. Even assuming a foster child was to find a home without a prolonged placement process, the state is still forced to bear the burden of ICWA's defects. *See Printz*, 521 U.S. at 930. All the while, Congress is afforded the benefit of being a "problem solver" because they implemented a virtuous program without having to lay taxes. *See id.* Thus, ICWA improperly imposes increased costs onto the states.

The ICWA provisions command state officials to accomplish a federal goal, making it "fundamentally incompatible with our constitutional system of dual sovereignty." *See Printz*, 521 U.S. at 935. Therefore, ICWA's placement preferences and recordkeeping provisions not only violate the anticommandeering doctrine but also contradict its underlying purposes.

C. The Placement Preferences and Recordkeeping Provisions of ICWA Do Not Preempt State Law Because Enacting the Provisions Surpassed Congress's Power.

Because ICWA's placement preferences and recordkeeping provisions exceed congressional authority and unconstitutionally commandeer states, the provisions do not preempt state law. Preemption is drawn from the Supremacy Clause, which provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof[ ] . . . shall be the supreme Law of the Land. . . ." U.S. Const. amend. VI, § 2. The Supremacy Clause "is not an independent grant of legislative power to Congress. Instead, it simply provides 'a rule of decision.'" *Murphy*, 138 S. Ct. at 1479 (citing *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 325 (2015)). There are three main types of preemption: conflict, express, and field. *Id.* at 1480. Conflict preemption occurs when a federal law imposes restrictions or confers rights on private actors in a manner that conflicts with state law. *Id.* at 1479. To preempt state law, a federal law must satisfy two requirements. *Id.* First, the federal law must "represent the exercise of a power conferred on Congress by the Constitution." *Id.* Second, the federal law must "be best read as one that regulates private actors." *Id.*

Here, "[w]hile ICWA does confer rights on private parties, that is not the end of the matter." R. at 15. ICWA does not preempt state law because it does not represent a valid exercise of congressional power. As established above, ICWA exceeds Congress's authority granted by the Indian Commerce Clause because child custody proceedings are not commerce. ICWA further exceeds Congress's authority because it unconstitutionally commandeers state legislation

and state officials. *See Murphy*, 138 S. Ct. at 1476 ("And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States."). Thus, considering Congress surpassed its power in enacting ICWA, the placement preferences and recordkeeping provisions do not preempt state law.

Therefore, this Court should rule that ICWA's placement preferences and recordkeeping provisions are unconstitutional. Respondents acknowledge the admirable intent of ICWA to keep Indian children within their tribes. However, state sovereignty should not be sacrificed in pursuit of this goal. Accordingly, this Court should affirm the Thirteenth Circuit's decision and rule that the ICWA provisions violate the anticommandeering doctrine. This Court should further hold the ICWA provisions exceed Congress's power.

II. THE INDIAN CHILD WELFARE ACT'S RACE-BASED CLASSIFICATIONS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT BECAUSE THEY CLASSIFY BASED ON ANCESTRY AND BURDEN MORE CHILDREN THAN NECESSARY.

Because ICWA classifies based on race, the classifications are subject to strict scrutiny and fail, thus violating the Fifth Amendment. The Fifth Amendment provides that "no person shall… be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Due Process Clause implicitly prohibits denying any person equal protection of the law. *United States v. Windsor*, 570 U.S. 744, 774 (2013). Fifth Amendment equal protection claims are subjected to the same standards as Fourteenth Amendment equal protection claims. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). When a law classifies based on race, the law is subject to strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (holding "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.") Meanwhile, when a

law's classification is politically-based, the law is subject to rational basis review. *See Morton v. Mancari*, 417 U.S. 538, 555 (1974).

As this Court predicted in *Adoptive Couple*, ICWA's classifications violate the Fifth Amendment Equal Protection Clause. 570 U.S. at 656. First, ICWA classifies on the basis of race and is therefore subject to strict scrutiny. Under strict scrutiny, ICWA violates the Fifth Amendment by failing to narrowly tailor its classifications to serve a compelling government interest. Second, even if ICWA does not classify on the basis of race, the classifications still fail rational basis review. Thus, this Court should hold that ICWA violates the Fifth Amendment.

A. ICWA's Race-Based Classifications are Subject to Strict Scrutiny Because They Classify Based on Ancestry.

This Court should apply strict scrutiny because ICWA classifies Indian children based on race. In *Rice v. Cayetano*, 528 U.S. 495, 514-15 (2000), this Court held that a Hawaii statute classified based on race because it used ancestry as a proxy for race. There, the statute barred a citizen of Hawaii from voting in a state election for the Office of Hawaiian Affairs ("OHA"). *Id.* at 499. The statute did so by restricting voter eligibility to "native Hawaiians" and "Hawaiians." *Id.* at 498-99. Native Hawaiians were defined as only "descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778." *Id.* at 499 (citing Haw. Rev. Stat. § 10-2 (1993)). Hawaiians were defined as only "persons who are descendants of people inhabiting the Hawaiian Islands in 1778." *Id.* (citing Haw. Const. art. XII, § 5). Noting that the statute classified citizens based on their ancestry, this Court held that the race-based classifications were unconstitutional. *Id.* at 514-15, 524. The Court reasoned that "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Id.* at 516-17.

By classifying based on race, ICWA exceeds political classifications. In *Mancari*, this Court held that a hiring preference for Indian tribal members in the Bureau of Indian Affairs ("BIA") constituted a political classification. 417 U.S. at 553-54. The Court reasoned that "[t]he preference is not directed towards a 'racial' group consisting of 'Indians;' instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.'" *Id.* at 553 n.24. Thus, the Court found that "the preference is political rather than racial in nature." *Id.*

Here, ICWA classifies Indian children by using ancestry as a proxy for race. Like the classification in *Rice*, which relied on distant Hawaiian ancestry, the ICWA classification also relies on ancestry. ICWA defines an "Indian child" as "any unmarried person under eighteen who 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." 25 U.S.C. § 1903(4) (emphasis added). The determination of whether a child is eligible for membership or whether a biological parent is a member of the tribe is solely "within the jurisdiction and authority of the tribe." Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153 (Feb. 25, 2015). There is no federal minimum blood requirement. *Id.* For example, the Cherokee Constitution defines membership eligibility solely based on whether someone had an ancestor on the Dawes Roll. Cherokee Const. art. IV, § 1.

ICWA "put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple*, 570 U.S. at 655. As a result, any child with a distant Indian ancestor is considered eligible for tribal membership. In this way, ancestry operates as a proxy for race. This use of race exceeds the political classifications in *Mancari*. Unlike the preference in *Mancari*, which included only tribal members and excluded

many people racially classified as Indians, ICWA does the reverse. 417 U.S. at 553 n.24. ICWA includes children racially classified as Indians even if they have no formal ties to a tribe. Thus, this Court should hold that ICWA classifies Indian children based on race and must be subject to strict scrutiny.

B. ICWA's Race-Based Classifications Fail Strict Scrutiny Because They Are Not Narrowly Tailored.

To survive strict scrutiny, a law's classifications must be narrowly tailored to serve a compelling government interest. *Grutter*, 539 U.S. at 326. Courts "apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Id. But see Palmore*, 466 U.S. at 432 (holding racial classifications are "more likely to reflect racial prejudice than legitimate public concerns"). To determine whether a law is narrowly tailored, this Court considers whether the law is overinclusive, underinclusive, or both. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 804 (2011). An overinclusive law burdens more people than necessary to achieve its goal. *See Overinclusive*, Black's Law Dictionary (11th ed. 2019). *See also Brown*, 564 U.S. at 804; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring).

In *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003), this Court held that an undergraduate admissions policy was not narrowly tailored because it automatically included every minority applicant. There, the university ranked applicants on a point scale and automatically gave twenty points to members of underrepresented minority groups. *Id.* at 255-56. The Court noted that the policy did not provide individualized consideration of applicants or their potential contribution to diversity. *Id.* at 272, 274. Thus, the policy failed strict scrutiny. *Id.* at 275.

Here, "Congress intended ICWA to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." R. at 5. Even assuming a compelling government interest, ICWA fails strict scrutiny because its racial classifications are not narrowly tailored. *But see Palmore*, 466 U.S. at 432 (holding racial classifications are "more likely to reflect racial prejudice than legitimate public concerns"). Like the policy in *Gratz*, ICWA burdens more children than necessary because it automatically applies to any Indian child even if they have no tribal connections. The government's interest is simply not served in cases where the child had no connections with the tribe in the first place. Further, "the statute prioritizes a child's placement with any Indian family, regardless of whether the child is eligible for membership in that person's tribe." R. at 19. In this way, ICWA conflates all Indian tribes together and treats them as an "undifferentiated mass." *United States v. Bryant*, 579 U.S. 140, 160 (2016) (Thomas, J., concurring). Thus, ICWA's classifications fail strict scrutiny.

C. Even if ICWA's Classifications are Subject to Rational Basis Review, the Classifications Fail Because They Are Not Rationally Related to Tribal Interests.

Even if ICWA's Classifications are subject to rational basis review, the classifications violate the Equal Protection Clause because they are not rationally related to tribal interests. To satisfy rational basis review, the classification must be "rationally related" to a legitimate government interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Laws involving Indians must be "tied rationally to the fulfillment of Congress'[s] unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. *See Rice*, 528 U.S. at 520. However, classifications for Indians cannot extend beyond a tribe's "internal affair[s]" into an "affair of the state." *Rice*, 528 U.S. at 520-22. This Court warned that a blanket exemption for Indians would raise "obviously more difficult" equal protection issues. *Mancari*, 417 U.S. at 554; *see Rice*, 528 U.S. at 520 (repeating this warning).

In *Mancari*, the Court held that a hiring preference was reasonably and rationally related to Congress's unique obligation toward Indians. 417 U.S. at 555. The Court first noted that the preference "is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 554. *But see Rice*, 528 U.S. at 521 (striking down a classification because "[t]he OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations.") The Court analogized this hiring preference to the requirement that United States congressional members be citizens of their districts. *Mancari*, 417 U.S. at 554. Similar to the congressional requirement, the "preference . . . is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* In this way, the BIA and its hiring preference are sui generis. *Id.* The Court was clear that this preference did not apply to any other governmental agency and thus did not create more difficult equal protection issues. *Id.*

Here, even assuming ICWA presents a legitimate government purpose, ICWA differs from *Mancari* and thereby fails rational basis review for three main reasons. First, unlike *Mancari*, ICWA does not involve the BIA or a similar sui generis government agency. *Id.* Rather, ICWA intrudes upon state agencies and courts, like those in West Dakota. State agencies and courts are not quasi-sovereign tribal entities that require different treatment. Yet still, ICWA forces state officials to abide by separate, less protective standards for Indian children. So, ICWA not only directs state officials, but it also requires Indian children to endure harsher and longer abuse before intervention. *See* 25 U.S.C. § 1912 (d)-(f) (requiring evidence that satisfies

increased burdens of proof). Like *Mancari* cautioned, ICWA applies a blanket exception to state agencies that creates difficult equal protection issues. 417 U.S. at 554.

Second, the "Indian child" classification fails to rationally connect Indian children to their tribes. The purpose of ICWA is to prevent the unwarranted removal of Indian children from their tribes because "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). However, ICWA applies to children who are not members of a tribe but are only eligible for membership. Because tribes freely determine what constitutes eligibility, ICWA puts these children "at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Adoptive Couple*, 570 U.S. at 655. *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153 (Feb. 25, 2015) (defining eligibility is solely "within the jurisdiction and authority of the tribe"). ICWA can even override the wishes of biological parents. Biological parents may prefer their children to not be placed with a tribe, but ICWA allows tribes to supersede their wishes. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 40 (1989*)* (biological parents drove 200 miles away from the reservation to give birth to twins then voluntarily surrendered them to the adoptive family within two weeks to prevent the twins from being placed on the reservation). *But see Troxel v. Granville*, 530 U.S. 57 (2000) (striking down a law permitting visitations against a non-Indian parent's preferences because it interfered with the fundamental right of parents to rear their children). The purpose of ICWA, to maintain a connection between Indian children and their tribes, is simply not served by including Indian children who were never tribal members in the first place.

Third, the "Indian family" classification fails to rationally connect Indian children to their tribes. Nothing requires an Indian family to be from the same tribe as a child. *See* 25 U.S.C.

§ 1915(a). Even when Indian children are members of one tribe, ICWA allows the children to be placed in a different state with a completely different tribe. This is precisely what Petitioners sought to do with Baby C and seek to do with Baby S. R. at 3. By placing vulnerable Indian children with a completely different tribe, ICWA treats these children as a mere resource to tribal survival. In doing so, ICWA treats all tribes as an "undifferentiated mass." *Bryant*, 579 U.S. at 160 (Thomas, J., concurring). Placing an Indian child with a completely different tribe is inconsistent with ICWA's stated purpose. This classification is not only overinclusive, but it is also counterproductive to ICWA as a whole. Therefore, ICWA is not rationally related to the government's interest and fails rational basis review.

Thus, ICWA's race-based classifications violate the Fifth Amendment Equal Protection Clause. The classifications utilize ancestry as a proxy for race and require strict scrutiny review. In applying strict scrutiny, the classifications are not narrowly tailored to ICWA's purpose. Even when subjected to rational basis review, the classifications do not rationally link Indian children to their tribes. ICWA's classifications do not rationally satisfy their purpose, and at times, the classifications even counteract ICWA's purpose. Accordingly, this Court should also find that ICWA violates the Equal Protection Clause.

CONCLUSION

This Court should AFFIRM the judgment of the United States Court of Appeal for the Thirteenth Circuit and hold that the Indian Child Welfare Act violates the Tenth Amendment anticommandeering doctrine. This Court should further hold that the Indian Child Welfare Act exceeds Congress's Article I authority and violates the Fifth Amendment Equal Protection Clause.

Respectfully Submitted,

Team 15
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