No. 22-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

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

Petitioners,

v.

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

Respondents.

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

Brief for Respondents

Oral Argument Requested

Team 17

Counsel for Respondent

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I. Did Congress exceed its Article I authority and impermissibly infringe upon State autonomy in violation of the Tenth Amendment by requiring States to take affirmative actions under the placement preference and recordkeeping provisions of the Indian Child Welfare Act?

II. Do the Indian classifications of the Indian Child Welfare Act violate the Equal Protection Clause of the Fifth Amendment by making suspect racial classifications that fail strict scrutiny?

STATEMENT OF THE CASE

This case comes to the Court because James and Glenys Donahue, residents and foster parents living in West Dakota, faced intervention from Indian tribes when seeking to adopt a fatherless Quinault infant whose mother tragically died. R. at 3. The infant's grandmother, unable to care for the child, consented to the Donahue's efforts to adopt the child. *Id.* But the Quinault Nation intervened under the Indian Child Welfare Act (ICWA) and sought to force the State to place the child with nonrelative Quinault Nation members in another State. *Id.* The Donahues and the State of West Dakota sued the federal defendants seeking declaratory and injunctive relief on the basis that provisions of the ICWA—forcing West Dakota to administer a federal regulatory program and engage in suspect racial classification—violate the Tenth and Fourteenth Amendments. *Id.* at 4.

The Indian Child Welfare Act (ICWA) conscripts State agencies to administer a federal regulatory program whenever Indian children are brought into State agency custody; in the words of West Dakota's CPS Manual, "almost every aspect of the social work and legal case is affected" when an Indian child is in CPS custody. *Id.* at 2.

In particular, the ICWA requires States to maintain detailed records concerning the placement of Native children. 25 USC § 1915(e). It further mandates States provide the federal government with a copy of any decree or order placing a child and "any such other information" needed to establish the identity of the child, any agencies with files relating to the placement, and the identities of the child's biological and adoptive parents. *Id.* § 1951(a).

The District Court did not find a Tenth Amendment violation under the theory the ICWA does no more than confer rights upon private parties. R. at 9. On the Equal Protection claim, the

District Court held the ICWA's classification of Indian children is a political classification that passes rational basis review under the Fourteenth Amendment. *Id.* at 10–11.

The Thirteenth Circuit reversed on the Tenth Amendment question, correctly concluding that because the ICWA "dictates what States must do and imposes on them the costs and burdens of enforcing a federal policy," R. at 14, it violates the anticommandeering doctrine. The Thirteenth Circuit found the ICWA is beyond the authority of Congress because under the ICWA, "Congress regulates States and their officials, not individuals." On the Tenth Amendment question, the Thirteenth Circuit thus properly reversed the District Court's erroneous judgment in favor of the United States.

The Thirteenth Circuit did not reach the Equal Protection question. This Court granted certiorari and reviews both questions de novo.

SUMMARY OF ARGUMENT

The placement preference and recordkeeping provisions of the Indian Child Welfare Act (ICWA) unconstitutionally infringes upon State authority because they commandeer State agencies and exceed the power of Congress under the Indian Commerce Clause. These provisions of the ICWA exceed Congress's Article I authority because Indian children cannot be classified as commerce, nor do they pertain to Indian tribes. Additionally, these provisions of the ICWA impermissibly commandeer State agencies because they compel State officials to take affirmative action and are not laws of general applicability.

Further, the ICWA violates the Equal Protection Clause of the Fifth Amendment because it uses a race-based classification that fails strict scrutiny. The ICWA uses Indian ancestry as a proxy for race, not as a political classification. It fails strict scrutiny because it is not narrowly tailored to achieve a compelling government interest. Respondents respectfully request this Court to affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and additionally hold that the ICWA violates the Equal Protection Clause of the Fifth Amendment.

ARGUMENT

I. THE INDIAN CHILD WELFARE ACT UNCONSTITUTIONALLY INFRINGES UPON STATE AUTHORITY BECAUSE IT COMMANDEERS STATE AGENCIES AND EXCEEDS THE POWER OF CONGRESS UNDER THE INDIAN COMMERCE CLAUSE.

A. The Placement and Recordkeeping Provisions of the ICWA Impermissibly Commandeer State Agencies Because They Compel State Officials to Take Affirmative Action and Are Not Laws of General Applicability.

The Tenth Amendment provides "the powers not delegated to the United States" are "reserved to the States." U.S. CONST. Amend. X. The anticommandeering doctrine recognizes that the power to command State officials is not delegated to the United States and is thus reserved to the States. *New York v. United States*, 505 U.S. 144, 161 (1992)*; Printz v. United States*, 521 U.S. 898, 924 (1997). Because the ICWA's placement and recordkeeping provisions compel State officials to take affirmative actions to implement a federal regulatory scheme, they should be invalidated under the anticommandeering doctrine.

1. The ICWA's preference and reporting provisions violate the anticommandeering doctrine because they require State officials to take affirmative actions to implement a federal regulatory scheme.

The placement and recordkeeping provisions of the ICWA violate the anticommandeering doctrine because they require State officials to take affirmative action.

In *Printz*, this Court applied the anticommandeering doctrine to strike the Brady Act's provisions requiring law enforcement officers to conduct background checks on potential gun buyers. *Printz*, 521 U.S. at 933. The Court struck the background check requirement on the basis the provision impermissibly required State executive officers to make affirmative acts implementing a federal regulatory scheme. *Id.*

An important exception to the affirmative act test applies to State judges, who are required to apply federal law under the Supremacy Clause. U.S. CONST. Art. VI. But federal prescriptions for State judge action are valid only "insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907.

The ICWA's recordkeeping provisions explicitly require State officials to act. 25 USC §§ 1915(a)–(b) and (e), 1951(a). The provision of 1915(e) States a record of Indian children's placement "shall be maintained by the State." *Id.* § 1915(e). The provision of 1951(a) states a State court "shall provide" the federal government a copy of any decree or order placing a child and "any such other information" needed to establish the identity of the child, any agencies with files relating to the placement, and the identities of the child's biological and adoptive parents. *Id.* § 1951(a).

While the recordkeeping provision of the ICWA applies to State courts, this is not enough to bring it within the Supremacy Clause exception for State judges because recordkeeping is not related to a matter appropriate for judicial power, i.e., application of the law to a case at bar. Rather, the recordkeeping provision treats State courts as administrative agencies. State courts engaged in administrative business should be treated the same as other State agencies engaged in administrative business. And extending the State judge exception to State courts' administrative functions would undermine the anticommandeering doctrine because Congress could simply mandate State courts to take any administrative action unrelated to their judicial functions. The recordkeeping provision, requiring State courts to take affirmative administrative acts, thus violates the Tenth Amendment anticommandeering doctrine.

The placement provisions implicitly require State agencies to act. The provisions specify "preference shall be given" under State law to various criteria during the placement of Indian

children in adopted and foster families. 25 USC § 1915(a)–(d). The ICWA regulations clarify the language of the preference provisions "creates an obligation on State agencies and courts to implement" the ICWA. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778-01 (June 4, 2016). This reading is supported by State court decisions. *Brackeen v. Haaland*, 994 F.3d 249, 407 (5th Cir. 2021). *See Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs., Off. of Children's Servs.*, 334 P.3d 165, 178 (Alaska 2014) (noting courts "must searchingly inquire about . . . [the State agency's] efforts to comply" and that the agency must identify preferred placements early in child welfare proceedings).

Because the placement provisions necessarily require State agencies to take the affirmative act of giving preference to specific criteria during the placement of Indian children under State law, these provisions also violate the anticommandeering doctrine of the Tenth Amendment.

The Court has indicated the affirmative act test establishes only the inner, not the outer bounds of State sovereignty under the anticommandeering doctrine. *New York v. United States*, 505 U.S. at 188. It is thus insightful to also apply underlying principles of constitutional jurisprudence when applying the doctrine to new statutory provisions. *See Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 547 (1985) (noting "the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for [b]ehind the words of the constitutional provisions are postulates which limit and control") (internal quotation marks omitted).

2. The ICWA's requirement of State affirmative action undermines federalism because it expands federal power at the expense of State sovereignty.

"It is incontestible that the Constitution established a system of 'dual sovereignty.'" *Printz* at 918. Under this system, reflected throughout the Constitution, the State and federal governments share "concurrent authority over the people." *Printz*, 521 U.S. at 920. Congressional authority, discretely enumerated in Article I, gives the federal government "the power to regulate individuals, not States." *Id*. The essential protection of federalism is shielding the States from requirements to "govern according to Congress' instructions." *New York*, 505 U.S. at 162. Allowing the federal government to command State officers would erase States' abilities to exercise their power. *Printz*, 521 U.S. at 922. And forcing States to implement federal regulatory schemes would enlarge federal authority by allowing Congress to implement programs without funding them. *Id.* Finally, prohibiting commandeering protects democratic accountability by keeping State officials accountable to the citizens of their States, not to officials in Washington. *Id*. at 920. On these grounds, the Court in *Printz* struck down the State-conducted background checks provision of the Brady Act, finding they reduced the States "to puppets of a ventriloquist Congress." *Id.* at 928. It can't be overstated that maintaining the federal system is important because "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the . . . officers of the 50 States." *Id.* at 922.

If anything, the ICWA raises greater federalism concerns than the Brady Act because the ICWA makes substantive changes to State law claims, in essence requiring the State to govern according to Congress' instructions. In other elements, the ICWA and the Brady Act cannot be meaningfully distinguished. The Brady Act required law enforcement officers to conduct

investigations into whether a person could lawfully purchase a gun; the ICWA placement provision requires State agencies to give preference to certain people when an Indian child is the subject of an adoption proceeding. Both would require State agencies to follow a formula approved not by the constituents of the State, but by Congress. The Brady Act required law enforcement officers to destroy records; the ICWA's recordkeeping provisions require State agencies to keep records and give them to the federal government. Both would require State agencies to take actions dictated not by their constituents, but by Congress.

That the Brady Act required law enforcement officers to act, while the ICWA requires other State agencies to act is not a material difference in federalism analysis. The only distinction the Constitution makes among State officials is between State judges and all others. U.S. CONST. Art. VI, cl. 2. As discussed above, the exception for State judges should not be extended to courts as administrative agencies. *See again Printz*, 521 U.S. at 907.

3. The ICWA's recordkeeping and placement provisions collapse separation of powers by transferring executive power to Congress.

Article II vests the President with the executive power of the United States. U.S. CONST. Art. II. The unitary executive was a carefully considered calculation made by the framers to ensure democratic accountability and efficiency in law enforcement, the branch of government that most directly controls people's lives. The unitary executive "would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring State officers to execute its laws." *Printz*, 521 U.S. at 923.

The recordkeeping and placement provisions of the ICWA are strings by which Congress puppets State agencies. The political, practical, or moral value of the ICWA is not of concern for

the Court; separation of powers is not a principle to be upheld when convenient and abandoned when expedient, but an immutable structure established by the very first three Articles of the Constitution. The power to execute the laws passed by Congress lie in the Executive alone, not in Congress itself.

B. The Placement Preference and Recordkeeping Provisions of the Indian Child Welfare Act Cannot Preempt State Law Because They Exceed Congress' Article I Authority Under the Indian Commerce Clause and Are Not Laws of General Applicability

The placement and recordkeeping provisions of the ICWA cannot preempt State law because they exceed Congressional authority and are not laws of general applicability.

The preemption doctrine of the Supremacy Clause is the mirror image of the anticommandeering doctrine. *New York*, 155–156. For preemption to apply, the federal law in question must be a legitimate exercise of Congressional power under Article I. *Printz*, 521 U.S. at 926.

Further, preemption is valid only when "Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160. *See also Garcia*, 469 U.S. at 554 (holding that when a State-run agency must meet no further obligations than those met by other public and private employers, Congress validly preempts the State when it imposes those obligations).

Here, the ICWA's recordkeeping and placement provisions do not act upon everyone in each State. Rather, they apply only to the State itself and the State's courts and agencies. The provisions do not regulate private parties. As laws of particular applicability, these provisions of the ICWA thus do not validly preempt the State. In addition, the ICWA is invalid because it exceeds Congressional authority under Article I.

1. The Placement Preference and Recordkeeping Provisions of the Indian Child Welfare Act Excess Congress's Article I Authority Because Indian Children Cannot Be Classified As Commerce.

The Indian Child Welfare Act exceeds Congressional authority under the Indian Commerce Clause because adoption proceedings are neither Commerce nor related to Indian tribes. The Indian Commerce Clause declares "Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. 1, § 8, cl. 3. However, the ICWA does not regulate commerce, nor does it regulate commerce with the Indian tribes. The Indian Commerce Clause does not grant Congress the power to regulate domestic relations solely because the beneficiaries of the law are Native Americans. Instead, it confers power on Congress to regulate "the intercourse between the citizens of the United States and [Indian] tribes." *United States v. Holliday*, 70 U.S. 407, 417 (1865).

The ICWA exceeds Congressional authority because Indian children cannot be classified as commerce. This Court should begin its review of the scope of the Indian Commerce Clause by first utilizing precedent which created a definition of "commerce" almost two hundred years ago. In past opinions, this Court has focused on Chief Justice Marshall's opinion in *Gibbon v. Ogdens*, admitting "to which we so often turn with profit when this clause of the Constitution is under consideration." *Id.* Chief Justice Marshall asserts that "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 22 U.S. 1, 72 (1824). Further, "the essence of all commerce . . . relates to buying and selling and exchanging commodities." *Holliday*, 70 U.S. at 417. The Court in *U.S. v. Morrison*, which decided an adjacent legal issue about the commerce clause and its ability to be a source of authority to regulate violence against women, defined the

limits to regulating interstate commerce as those "directed at the instrumentalities, channels, or goods." *United States. v. Morrison*, 529 U.S. 598, 618 (2000).

Indian adoption proceedings are not sufficiently related to the instrumentalities, channels, or goods of commerce to be regulatable under the Indian Commerce Clause. Indian children are certainly not related to the buying and selling and exchanging of commodities, nor can they be held to be related to intercourse. Thus, the placement and recordkeeping provisions are unconstitutional because Congress has no authority under the Indian Commerce Clause to regulate Indian adoption proceedings.

2. The Placement Preference and Recordkeeping Provisions of the ICWA Exceed Congressional Authority Under the Indian Commerce Clause Because Adoption Proceedings for Individual Children Are Not Commerce with "Indian Tribes."

Not only is Congress lacking authority to enact these provisions of the ICWA because adoption proceedings are not commerce, but these proceedings also do not regulate affairs with "Indian Tribes." Section 1915(a) should apply "to all child custody proceedings involving an Indian child, regardless of whether an Indian tribe is involved." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 665 (2013) (Thomas, J., concurring). Thus, it "does not directly implicate Congress' power to 'legislate in respect to Indian *tribes*.'" *Id.* (quoting *United States v. Lara*, 541 U.S. 193, 200 (2004) (emphasis in original)). This same logic holds with § 1915(e). It is crucial to distinguish individuals who are Indian and Indian tribes collectively. Under the Indian Commerce Clause, Congress has no power to regulate the affairs of individual Indians, which is what the ICWA does here. The placement preferences and recordkeeping provisions regulate the affairs of Indian children and families who aim to adopt these children outside of their respective tribes. This is not regulating commerce with an Indian tribe. Rather, this is Congress regulating

an area that it cannot regulate. Typically, matters of family law and divorce proceedings or child custody disputes are settled under State law and should remain under State control.

However, even if this Court should find that Congress has plenary power to regulate Indian affairs, this only applies to such affairs located within reservations, and not to all Indians wherever they are located, especially when living outside of an organized tribal community. Chief Justice Marshall indicated that Indian tribes are "distinct political communities, having territorial boundaries." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020) (citing *Worcester v. State of Ga.*, 31 U.S. 515, 557 (1832)). These territorial boundaries are drawn around the lines of the physical reservation. To further support this conclusion, the Court in *Williams v. Lee* held stated that "the States have no power to regulate the affairs of *Indians on a reservation*." *Williams v. Lee*, 358 U.S. 217, 220 (1959) (emphasis added). The relevant takeaway from this opinion is the careful distinction made about Indians on a reservation. The Court did not assert that this prevention of regulation carries beyond the reservation. Further, it was said that there is a "right of *reservation Indians* to make their own laws." *Id.* (emphasis added). Each time this Court has referred to the power of Indians to self-regulate or govern their tribes, it has been in the context of Indians located on reservations only. Congress's possible plenary power does not extend to single Indians living in dispersed areas. Thus, Congress has no power to regulate Indian affairs outside of their reservations and so these provisions do not regulate commerce with Indian tribes.

II. THE INDIAN CHILD WELFARE ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT BECAUSE IT USES RACE-BASED CLASSIFICATIONS THAT FAIL STRICT SCRUTINY.

The ICWA's race-based classification system impermissibly discriminates based on Indian ancestry and violates the Fifth Amendment's Equal Protection Clause. U.S. CONST. amend. V. *See also Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (Holding the Fifth Amendment's due process clause prohibits racially discriminatory laws). In *Grutter v. Bollinger*, this Court stated that strict scrutiny applies to all racial classifications to determine whether the government is pursuing an objective that requires the use of "a highly suspect tool" like race. 539 U.S. 306, 326 (2003). Under strict scrutiny review, the government bears the burden of proving that the classification is narrowly tailored to advance a compelling government interest. *Id*. *See also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 720 (2007). As this Court has stated time and time again, classifications based on race are "too pernicious to permit any but the most exact connection between justification and classification." *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

While Congress passed the ICWA to protect the "best interest of Indian children," its adoption scheme uses race-based classifications that must be reviewed under strict scrutiny. 25 U.S.C. § 1901(3)-(5). The ICWA's race-based classifications fail to connect Indian children with their ancestral Indian tribes by preferring any Indian tribe or family over a non-Indian adoptive family. Thus, the government has failed to show that the law is narrowly tailored, and it must be struck down as unconstitutional.

A. The ICWA Uses Indian Ancestry as a Proxy for a Race-Based Classification Not as a Classification Based on Political Status.

The ICWA Sections 1913(d), 1914, and 1915(a) and (b) create racial—not political—classifications based on their broad use of Indian ancestry to regulate adoption proceedings involving Indian children and non-Indian adoptive parents. *See Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (defining racial discrimination as policies that single out "identifiable classes of persons…solely because of their ancestry or ethnic characteristics"). In *Rice v. Cayetano*, Hawaii passed a statute that explicitly limited voters to people with "Hawaiian" or "native Hawaiian" ancestry. *Rice v. Cayetano*, 528 U.S. 495, 496 (2000). After reviewing the law under strict scrutiny, this Court held the law unconstitutional because Hawaii "used ancestry as a racial definition and for a racial purpose." *Id*. at 517. Further, this Court observed that "[a]ncestral tracing…employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Id*. In addition, this Court found that the law impermissibly applied to an "arm of the State" rather than a tribe's internal affairs. *Id*. at 520–21.

In *Morton v. Mancari*, this Court found that singling out based on tribal affiliation is a political classification rather than a racial one, and thus subject to rational basis review. 417 U.S. 535, 555 (1974). There, a law gave preferential employment treatment to Indians in the Bureau of Indian Affairs ("BIA") "not as a discrete racial group, but rather, as members of quasi-sovereign tribal membership." *Id*. at 554. The law applied only to those members of "federally recognized" tribes and thus excluded people who are racially classified as Indians. *Id*. at 552, 555 n.24. Thus, the law at issue was based on a person's choice to be a member of a tribe – a mutable characteristic – rather than the person's actual race. *Id*. at 551, 553 n.24.

The ICWA categorizes people like the ancestral racial classification at issue did in *Rice*, not like the voluntary membership did in *Mancari*. The ICWA defines an "Indian child" as an 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 himself, or (b) eligible for membership in an Indian tribe. 25 U.S.C. § 1903(4). Therefore, the ICWA's applicability turns on a child's Indian ancestry and blood relation, like the law in *Rice*, rather than one's voluntary decision to join a tribe, like in *Mancari*.

While some classifications based on ancestry might be allowed within the internal affairs of a tribe, the ICWA's ancestral classifications are applied to "an arm of the State" and require a more searching review. *Rice*, 528 U.S. at 520–21. Like Hawaii using Hawaiian ancestry as a proxy for race, the ICWA singles out an identifiable class of persons—children with eligibility for tribal membership through their blood—as a proxy for race. The ICWA uses race to explicitly favor general tribal membership at the expense of Indian children and non-Indian adoptive parents. It uses the federal government's authority by governing State courts and State adoptive proceedings directly—not tribal governments. Indeed, the ICWA can be availed when a child is not even a member of or has no actual connection to a tribe but for their ancestry. *See* 25 U.S.C. § 1903(4). Therefore, the ICWA uses the power of the federal government to enforce race-based classifications.

Thus, the ICWA requires strict scrutiny review because it employs a race-based classification system. Whether the ICWA applies in a specific case depends solely on the child's ancestry rather than actual tribal membership. *Id*. In contrast, the law in *Mancari* required actual tribal membership (a political classification) to gain preferential hiring treatment; people had to

be recognized tribal members to benefit from that law. The ICWA, however, imposes a racial classification based on the child's Indian heritage.

B. The ICWA Fails Strict Scrutiny Review Because It Is Not Narrowly Tailored to Further a Compelling Government Interest.

The government cannot show that the ICWA's racial classification is narrowly tailored to advance a compelling government interest and, thus, it must fail strict scrutiny. Congress promulgated the ICWA to counteract the increasing number of Indian children being separated from their families and tribes through adoption in non-Indian homes. R. at 4. Racial classifications reviewed under the Equal Protection Clause receive strict scrutiny. *See Gratz*, 539 U.S., at 270. *See also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995). Because of the inherently invidious nature of racial classifications, the Court performs "a most searching examination." *Adarand*, 515 U.S. at 223. Even remedial measures that subject groups to different standards based solely on race are unconstitutional. *Gratz*, 539 U.S. at 270. Thus, the government has a high burden to prove why it must use racial discrimination to achieve a certain goal, even if that goal is intended to help historic harms for a specific racial group.

In addition, the government must prove that the law is narrowly tailored to achieve the government's goal. *Grutter*, 539 U.S., at 326 (2003). Racial discrimination used to achieve a compelling government interest does not violate the Fifth Amendment only when it is narrowly tailored to further that interest. *Id*. at 308. In *Grutter*, this Court upheld a university's race-based admissions policy because, while the university considered race, the policy was "flexible enough to ensure that each applicant [was] evaluated as an individual and not in a way that makes race…the defining feature of the application." *Id*. at 309. Conversely, a law that either *de jure* or *de facto* turns based on race is impermissible and may not be upheld. *See Gratz v. Bollinger*, 539

U.S. 244 (2003) (finding that the university's admission policy violated the Equal Protection Clause because its use of race was not narrowly tailored to achieve the State interest in diversity).

Here, the ICWA explicitly discriminates based on race by enforcing a unique regime on Indian children that is distinct from non-Indian people during State adoption proceedings. Unlike the university's flexible admissions policy in *Grutter*, State court adoptions subject to the ICWA must comply with an exhaustive list of standards for Indian children and non-Indian adoptive parents than non-Indian child adoptions solely because of their race. For example, Section 1915 requires States to give preference to "other members of the Indian child's tribe" over non-Indian adoptive parents, regardless of the child's best interest. 25 U.S.C. § 1915(a); R. at 6. Moreover, Section 1913(d) allows an Indian parent to withdraw consent to adoption within two years after the final decree of adoption. *Id.* § 1913(d); R. at 6. Both sections apply solely because of race and do not apply in non-Indian child adoption proceedings.

Even if the government has a compelling state interest, the ICWA still fails strict scrutiny because it is not narrowly tailored. Petitioners argue that the government has a compelling interest in protecting the safety and continuity of Indian children and their tribal ancestry. R. at 4; 25 U.S.C. § 1901(3)–(5). However, the ICWA does little to ensure that its goal of tribal continuity is achieved to remedy this historic harm. For example, Section 1915(a) preferences placement with any "other Indian families" over a non-Indian adoptive parent even if the child has no connection or eligibility for membership in that tribe solely because a non-Indian adoptive parent lacks Indian ancestry generally. *Id*. § 1915(a). In the instant case, this allows the Quinault Nation to intervene to try and take Baby S from the Respondents—who Baby S had been residing with for months—to send the child to a State with which the child has zero familial

connection. R. at 3. In this scenario, the tribe will not be able to educate the Indian child in their customs and the child would not grow up in the family's ancestral home.

Further, the ICWA is overbroad in that it applies to every child of an Indian parent with tribal membership however slight the parent or child's connection to the tribe may be. This occurs because the ICWA broadly covers every Indian child irrespective of the percentage of Indian blood the child has. It is also underinclusive by excluding all children with Indian ancestry residing within a reservation. *Id*. § 1915(a). The ICWA treats Indian tribes interchangeably by generally preferencing placement with *any* Indian family over non-Indian ones yet does little to protect the individual relationship between an Indian child and his specific ancestral tribe as Congress intended. R. at 4. Like the admissions policy in *Gratz*, the ICWA simply applies based on race. However, it does not further the government's goal of protecting that child's ancestral tribe's continuity because the child may end up with an Indian family from a separate and distinct tribe.

The ICWA discriminates solely based on a child's Indian ancestry, a proxy for race, and must be reviewed under strict scrutiny. Because the ICWA conflates Indian tribes by preferencing any tribe or Indian family over non-Indian adoptive parents at the expense of the child's best interests, it is not narrowly tailored to achieve the government's goal of protecting Indian children and their ancestral tribe's continuity. Thus, the ICWA unconstitutionally discriminates based on race. For the foregoing reasons, this Court should find the ICWA to be a violation of the Fifth Amendment's Equal Protection Clause.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to affirm the decision of the U.S. Court of Appeals for the Thirteenth Circuit on the Tenth Amendment issue and additionally hold that the ICWA violates the Equal Protection Clause of the Fifth Amendment.

Respectfully submitted,

s/ Team 17