REGENT UNIVERSITY SCHOOL OF LAW

22nd ANNUAL LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW MOOT COURT COMPETITION

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 DONAHUE AND THE STATE OF WEST DAKOTA

Team 18
Counsel for Respondent

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I. Do the placement preference and recordkeeping provisions of the Indian Child Welfare Act exceed Congress' Article I authority and violate the anticommandeering doctrine under the Tenth Amendment?

II. Do the Indian Child Welfare Act's Indian classifications violate the Equal Protection Clause of the Fifth Amendment?

Statement of the Case

The Donahues are a family residing in West Dakota consisting of two parents and their previously adopted Indian child, hereby called "Baby C." *Ivanhoe v. Donahue*, No. 22-386 (13th Cir. 2022). The Donahues first became familiar with the adoption process of an Indian child in September 2019 when the first began adoption proceedings for Baby C. *Id.* 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, making her eligible for enrollment in either tribe under each tribe's individual enrollment requirements and making the Indian Child Welfare Act (ICWA) applicable in this case. *Id.* After her birth, Baby C lived with her maternal aunt and was often left unattended for long periods of time, causing West Dakota's Child Protective Services (CPS) to remove Baby C and place her in foster care with the Donahues. *Id.* Baby C's biological parents each had their parental rights terminated, making her eligible for adoption under West Dakota law. *Id.* The Donahues sought to adopt Baby C and both the Quinault Nation and Cherokee Nation were notified in compliance with ICWA. *Id.* In accordance with the placement preference provision of ICWA, the tribes were permitted to find a preferred adoption placement, but the potential placement that the tribes found fell through for undisclosed reasons. *Id.* The Donahues then entered into a settlement agreement with CPS and Baby C's guardian ad litem, agreeing that ICWA's placement preferences did not apply because there were no other adoptive placements for Baby C. *Id.* The adoption was finalized in January 2020. *Id.*

In April 2020, the Donahues sought to add to their family by adopting another child of Indian descent, hereby known as "Baby S." *Id.* Baby S's biological mother was a member of the Quinault Nation but died of a drug overdose in February 2020, and the identity of Baby S's father remains unknown. *Id*. From January to April 2020, Baby S lived with his Grandmother

until she could not care for him due to her failing health. *Id*. Baby S was then placed in foster care with the Donahues. *Id*. The Donahues filed a petition for the adoption of Baby S in May 2020. *Id*. While Baby S's grandmother consented to the Donahues' adoption of Baby S, the Quinault Nation opposed the adoption and informed CPS that the tribe had two potential adoptive families for Baby S in a Quinault Tribe that was located in another state. *Id*.

After learning of the Quinault Nation's opposition, the Donahues, in the hope of keeping their family together, along with West Dakota, filed suit against the Federal Defendants in June 2020. *Id*. The Plaintiffs claimed that certain provisions of ICWA are unconstitutional and sought injunctive and declaratory relief. *Id*. In particular, the Plaintiffs allege ICWA §§ 1912(a) and (d)–(f), 1915(a)–(b) and (e), and 1951 surpass Congress' authority under Article I of the United States Constitution as well as commandeer the states, which violates the Tenth Amendment. *Id*. The Plaintiffs further claimed that ICWA §§ 1913(d), 1914, and 1915(a)–(b) violate the Equal Protection Clause of the Fourteenth Amendment because they treat Indian children differently based on race and cannot pass the muster of strict scrutiny. *Id*.

Summary of the Argument

The question before this Court is whether the ICWA violates the 10th amendment regarding anti-commandeering and the 5th Amendment equal protection guarantee. We submit that there are several compelling reasons why this Court should affirm the holding of the 13th Circuit and find that ICWA is unconstitutional under Article I Section 8 as well as the tenth and the fifth Amendments.

Congress' Article I Authority

The Federal Government is a government of enumerated powers. In a government of enumerated powers, the powers of each branch of government is explicitly listed in the Constitution. Congress derives its power to enact legislation from Article I Section 8 of the Constitution. Under this section, Congress has the power to regulate commerce among the Indian Tribes. However, if the term commerce is interpreted with a textualist approach, the term commerce in the Indian Commerce Clause would not grant Congress any more authority than the Interstate Commerce Clause. Despite prior decisions by this Court, the Indian Commerce Clause should not and does not grant the Federal Government plenary power over the Indian tribes. Consistent with this interpretation of the Indian Commerce Clause, the court should employ the test that it established in 1995 to determine if the legislation enacted by Congress regulates activity that substantially affects commerce. If the Court applies this test, ICWA will fail to meet the requirements of substantially affecting commerce, because child custody has little to no effect on commerce whatsoever. Therefore, ICWA should be struck down as unconstitutional due to Congress lacking the authority to regulate child custody.

Anticommandeering Doctrine

The Federal Government violated the Tenth Amendment of the Constitution by requiring states to take on the enforcement of federal legislation. Under the placement preference and recordkeeping provisions of ICWA the Federal Government has issued direct orders to the states that require state agencies to enforce federal law in the form of seeking out potential placements for foster care and adoptions that comply with the listed preferences under ICWA and also maintaining various records in a way that makes the records easily accessible and transferable to the Secretary of the Interior as well as the concerned Indian Tribes. To comply with these statutes, the employees of state agencies like those in West Dakota must spend their time, and the state agencies themselves must spend their money and resources to adequately follow the law. This Court has held in prior cases that the Federal Government cannot commandeer state governments into federal service, nor can the Federal Government shift the costs of enforcing their own legislation onto the states. In the case of ICWA, the Federal Government has violated the anticommandeering doctrine by requiring state governments to take up the financial burden of enforcing a federal statutory regime, and also dictating what actions states must take when dealing with Indian child custody cases.

Equal Protection

Under the 14th amendment, the Court has established that when citizens are treated differently based on their race, religion, gender, or other factors, the Constitution protects and ensures that all people are afforded equal protection under the law. Further, the Court has read the 5th amendment to afford the same protection when federal law treats citizens differently regarding their identity. Additionally, life, liberty, and property included in the 5th and 14th

Amendments have been interpreted to encompass many rights, such as the right to raise a family and other individual rights. The Court has previously discussed that if ICWA allowed any parent to be able to claim custody at any point, then equal protection concerns would arise.

Under the equal protection clause, the Court has determined that while cases involving racial distinctions receive strict scrutiny, cases involving political groups will receive intermediate scrutiny. Although, in the past, the Court has applied intermediate scrutiny to a case involving tribal membership, that holding was clearly narrow and excluded many with Indian heritage. By contrast, ICWA uses Indian heritage and tribal membership eligibility as a proxy for race. Additionally, the court has applied strict scrutiny to a law that included Indians, along with other racial minorities. Since ICWA clearly differentiates children and adoptive families on the basis of race, strict scrutiny should apply.

Strict Scrutiny analysis consists of two prongs that need to be satisfied to uphold a law that differentiates on race; there needs to be a compelling government interest, and the law must be narrowly tailored to achieve that goal. ICWA does not contain a compelling government interest and is overly inclusive in its means to achieve the purpose of remedying child separation and providing Indian Children with cultural engagement. ICWA does not present a compelling government interest in that it seeks to regulate personal family matters and does not support children or the sovereignty of Indian tribes. ICWA's purpose could be furthered through nonracial means. Additionally, ICWA is overly inclusive, as it includes a preference for any adoptive family with Indian heritage, not just that of the Indian child. Therefore it does not provide that child with the enrichment of their own culture and simply incorrectly conflates all Indian tribes as one.

Argument

I. The placement preference and recordkeeping provisions of the Indian Child Welfare Act exceed Congress' Article I authority and violate the anticommandeering doctrine under the Tenth Amendment.

The placement preference and recordkeeping provisions of the Indian Child Welfare Act exceed Congress' Article I authority and also violate the anticommandeering doctrine under the Tenth Amendment. Congress does not have the authority to regulate child custody cases nor the preference or recordkeeping of such cases under Article I of the United States Constitution because these activities are not within the realm of the Indian Commerce Clause. Even if this Court were to find that such activity was economic in nature and therefore within the scope of Congress' Article I powers, this Court should find that ICWA violates the sovereignty of states such as West Dakota by issuing direct orders to the states which violates the anticommandeering doctrine.

A. The placement preference and recordkeeping provisions of the Indian Child Welfare Act exceed Congress' Article I authority.

The Federal Government cannot claim that a statute or statutory scheme is constitutional if it lacks the power to enact such a statutory scheme. The Federal Government is a government of enumerated powers, meaning that "rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers." *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012). Therefore, the Federal Government only has the power to enact legislation that the Constitution allows it to. *Id.* at 535, quoting *McCulloch v. Maryland*, 17 U.S. 316, 405. If the Constitution

explicitly lists or enumerates a power that Congress holds, then the powers it does not list is left to the states. *Id.* at 534, quoting *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824).

As stated in *Lone Wolf v. Hitchcock*, "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning…" *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). This power was considered political, and "not subject to be controlled by the judicial department of the government." *Id.* This plenary authority over tribal relations was consistent with the Court's understanding of Congress' power to enact treaties with Indian tribes and foreign nations. *Id.* at 566. As described in Article I, Section 10, the Constitution explicitly grants to the Federal Government the power to enter into treaties. U.S. Const. Art. I, §10.

However, in 1871, the Federal Government "determined upon a new departure, -to govern [Indians] by acts of Congress." *Lone Wolf* at 566, quoting *United States v. Kagama*, 118 U.S. 375, 382 (1886). The court upheld this new practice of regulating Indian affairs through legislation by stating that this regulation by Congress was necessary to the protection of these dependent Indian nations, and determined that the power to regulate with statutes or acts of Congress "must exist in that government, because it never existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce laws on the tribes." *Kagama* at 384-385.

This determination of power via Justice Miller in 1886 defeats the understating of the Federal Government as a government of enumerated powers. Justice Miller stated that the power to regulate the Indians "never existed anywhere else." *Id.* at 384. To state that Congress has power that has never been explicitly granted to Congress in the Constitution rejects the idea of enumerated powers that our Federal Government is built upon. When future legislation affecting

Indians and Indian Tribes was enacted by congress and challenged in the Supreme Court, such as the case of *Morton v. Mancari*, where non-Indian employees of the Bureau of Indian Affairs challenged the hiring preference provision of the Indian Reorganization Act, the Court stated that Congress had plenary power to "deal with the special problems of Indians." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Further, the Court held that this plenary power "is drawn both explicitly and implicitly from the Constitution itself. Article I, s 8, cl.3, provides Congress with the power to 'regulate Commerce… with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation." *Id.* at 551–52. *See also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), stating that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." For this reason, when establishing legislation such as ICWA, Congress stated that it had the authority to enact such legislation via the Indian Commerce Clause. 25 U.S.C. § 1901(1).

Congress derives much of its legislative power from Article I Section 8 of the United States Constitution, which details the powers that Congress has to make and enact laws. U.S. Const. Art. I §8. The third clause of Article I Section 8 states, "The congress shall have power… [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I §8 Cl. 3. Often called the Indian Commerce Clause, the power for Congress to regulate commerce with the Indian Tribes is similar to Congress' power to regulate interstate commerce via the Interstate Commerce Clause.

Some lower courts believe that the Indian Commerce Clause is arguably coextensive with the Interstate Commerce Clause. *See e.g. Donahue v. Ivanhoe*, No. 21-19042, at 16 (13th Cir. 2022). It is true that accepting this interpretation violates the principle of *stare decisis*. *See*

Cotton Petroleum Corp v. New Mexico, 490 U.S. 163, 192 (1989). *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 45 (1996), holding that "Under the rationale of *Union Gas*, the Indian Commerce Clause is Indistinguishable from the Interstate Commerce clause," then overruling *Union Gas*. However, it is well established that this Court is willing to consider arguments against *stare decisis* in cases where prior decisions were based on reasoning that "was exceptionally weak, and the decision had damaging consequences." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2243 (2022).

The Indian Commerce Clause exists within the same clause of Article I, § 8 as the Commerce Clause. When evaluating the phrase "to regulate commerce," one may begin by looking at the plain meaning of the words. The plain meaning of the words does not change depending on whom the commerce is with, either foreign nations, the several states, or the Indian Tribes. In *Gibbons v. Ogden*, the Supreme Court sought to settle the meaning of the word congress. *Gibbons* at 189 ("The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word."). In Gibbons, the court determined that the term commerce means intercourse, holding that the phrase "to regulate commerce," meant "the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Id.* at 189–90. Using this definition, the Indian Commerce Clause would allow Congress to regulate commercial intercourse between the United States and the dependent Indian Nations described in *U.S. v. Kagama*. *Kagama* at 384.

This interpretation is also consistent with the rules of statutory interpretation that when the same term or phrase appears in different parts of the same legal document or statutory

scheme, we presume that the term or phrase means the same thing in all of its appearances. *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988). If the purpose of the Indian Commerce Clause was meant to differ from Congress' authority to regulate commerce between the states, the founders could have included some language to identify that Congress had the power to regulate the affairs of the Indians as well as the Commerce. However, they did not.

If the Court were to accept this reasoning, the Court will then have to determine if Congress has the power to regulate the administration of Indian Child custody cases by the several states through enacting the placement preference and recordkeeping provisions of ICWA.

The Indian Commerce Clause does not confer on Congress the power to regulate child custody cases when child custody cases do not substantially impact commerce as a whole, nor would child custody cases involving Indian children affect commerce with Indian tribes. *See United States v. Lopez*, 514 U.S. 549, 564 (1995); *Gibbons* at 9.

If this Court were to understand the Indian Commerce Clause to regulate commerce similarly to the regulation of interstate commerce under the Commerce Clause, the Court would look to the tests provided in *Lopez,* which raised the rational basis standard to "economic activity that substantially affected interstate commerce." *Lopez* at 549. Under the *Lopez* test as applied to the Indian Commerce Clause, the Court will have to determine if the legislation covers one of three areas of Indian Commerce: (1) channels of Indian commerce; (2) instrumentalities of Indian commerce; or (3) activities substantially relating to Indian commerce. *Lopez* at 558–59. If this Court were to find that ICWA seeks to regulate an activity that is substantially related to Indian commerce, it would apply the test from *United States v. Morrison.* This test looks at four

factors to determine if an activity substantially affects commerce. *United States v. Morrison*, 529 U.S. 598, 610 (2000). These factors include a determination of (1) whether the activity is commercial or economic in nature; (2) whether there is an express jurisdictional element; (3) whether Congress presented findings; and (4) whether the link between commerce and the legislation is attenuated. *Morrison* at 610.

Applying this test, it is clear that ICWA is a statute governing child custody, and its provisions of placement preferences and record keeping have "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Morrison* at 610 quoting *Lopez* at 561. Second, the jurisdictional element is not satisfied because neither the placement preference provision nor the recordkeeping provision in ICWA contain an "express jurisdictional element which might limit its reach to [activities] that additionally have an explicit connection with or effect on … commerce." *Morrison* at 611–12 quoting *Lopez* at 562. Third, nothing in these provisions of ICWA, "nor its legislative history contain[] express congressional findings regarding the effects upon" Indian Commerce of placement preference or recordkeeping in terms of Indian child custody proceedings. *Morrison* at 612 quoting *Lopez* at 652. Finally, it is clear from the prior steps in this test that the link between placement preferences and recordkeeping in Indian child custody cases is attenuated. *Morrison* at 612. Therefore, this Court should reject Petitioner's claims that Congress possesses the power under Article I to enact this legislation, and therefore this Court should strike down these provisions as unconstitutional.

B. The placement preference and recordkeeping provisions of the Indian Child Welfare Act violates the anticommandeering doctrine under the Tenth Amendment.

Even if this Court holds that Congress does have the power to enact these provisions under the Indian Commerce Clause, the Court should uphold the ruling of the 13th Circuit that ICWA is unconstitutional "because it runs afoul the Tenth Amendment anticommandeering doctrine." *Donahue v. Ivanho*e, No. 21-19042, at 18 (13th Cir. 2022).

This Court has held that "the Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 900 (1997). Further, this Court's jurisprudence makes clear that "Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program, but must exercise legislative authority directly upon individuals." *New York v. United States*, 505 U.S. 144 (1992). If Congress does commandeer the States' legislative process in this way, that act of congress violates the anticommandeering principle of the Tenth Amendment. The Tenth Amendment of the United States Constitution states "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.

Preemption means that when a law enacted by Congress either confers rights on private actors or imposes restrictions, that federal law takes precedence over conflicting state law, and the state law is therefore preempted. *Murphy v. National Collegiate Athletic Ass'n,* 138 S.Ct. 1461, 1480 (2018).

The anticommandeering doctrine is rooted in the Tenth Amendment. It means that the power to command State governments with direct orders is "conspicuously absent from the list of power given to Congress..." and therefore Congress lacks this power. *Murphy* at 1476. Further, "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *New York v. United States*, 505 U.S. 144, at 178 (1992). In *New York v. United States*, this Court held that states could not be required to accept ownership of radioactive waste or regulate such waste according to the provisions Congress had created because those requirements violated the sovereignty reserved to the States under the Tenth Amendment and did not preempt state regulation of the waste. See *New York* at 145. The main reason that this act violated the sovereignty of states was because the Constitution did not bestow upon Congress the power to "commandeer" state governments into federal service or require state governments to regulate "pursuant to Congress' direction…." *New York* at 175–76. Further, in Murphy v. NCAA, this court held that the anticommandeering doctrine "prevents Congress from shifting the costs of regulation to the States." *Murphy*, 138 S. Ct. at 1477.

The opposition argues that these provisions of ICWA confer rights on private parties, specifically private adoption agencies in terms of the placement preferences, and therefore the anticommandeering doctrine has not been violated. However, it is clear that ICWA does violate this doctrine because ICWA also dictates what actions states such as West Dakota must take when dealing with Indian child custody cases.

States like West Dakota bear the burden of considering placement preferences of an Indian child. ICWA imposes on the states the costs and burdens of enforcing the federal policies of placement preferences and recordkeeping. The placement preference of the Indian Child

Welfare Act creates a hierarchy of preferred placement options of an Indian child for both adoptive and foster care or pre-adoptive placements. These placement preferences state:

> In any adoptive placement of an Indian Child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement 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. The order of preference is similar in regard to foster placement with each individual category leaving out non-Indian families. These placement preferences require state agencies to spend their time, money, and resources to execute legislation created by the Federal Government.

Further, the recordkeeping provisions of this section of the Act require "A record of each such placement, under State law, of an Indian child shall 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). These records then must be made available whenever the Secretary of the Interior or the Indian child's tribe asks for them. 25 U.S.C. 1915(e). The recordkeeping provisions further require:

> Any State Court entering a final decree or order in any Indian child adoptive placement…[to] provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show –
> (1) the name and tribal affiliation of the child;
> (2) the names and addresses of the biological parents;
> (3) the names and addresses of the adoptive parents; and
> (4) the identity of any agency having files or information relating to such adoptive placement.

25 U.S.C. 1951(a). Once again, these provisions require state actors and agencies to spend their time, money, and resources to enforce Federal legislation. Through ICWA, Congress regulates

States and their officials, not private individuals. The Constitution does not grant Congress that power.

Therefore, if this Court finds that Congress does have the power to enact such legislation under Article I of the Constitution, we ask this Court to rule that ICWA is unconstitutional because it is in violation of the Tenth Amendment anticommandeering doctrine.

II. ICWA violates the equal protection of the 5th amendment because it makes distinctions based on race and does not provide a compelling government objective and narrowly tailored means of achievement.

A. ICWA creates racial distinctions, not political ones, by subjecting all children of Indian descent to unequal treatment.

The 5th amendment reads that no person shall "be deprived of life, liberty, or property, without due process of law." US Const. Amend. V. While the Fifth Amendment does not clearly contain an equal protection guarantee, the Court has incorporated equal protection into the Fifth Amendment to protect citizens when federal law treats individuals differently based on differentiating factors such as race, gender and citizenship. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Accordingly, the Indian Child Welfare Act is a piece of federal legislation, and the Fifth Amendment equal protection analysis will apply.

> Although liberty is not defined in any specific way, the Court has ruled that liberty
>
> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). This analysis has become a cornerstone of equal protection analysis that is implicated when the law makes distinctions based on race, gender,

sexuality, or other identifiers. The Equal Protection Clause ensures that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). ICWA directly impacts the ability to raise a family and the child's ability to find an adoptive home which may impact their future success and access to resources. Thus, ICWA falls under the scope of liberty within the equal protection clause.

The Court has also determined that equal protection concerns may be implicated in cases involving ICWA. In *Adoptive Couple v. Baby Girl*, the court stated in its opinion that an interpretation of ICWA allowed any parent of Indian descent who had not previously had custody to obtain custody at any time before the finalized adoption would cause equal protection concerns due to the potential reluctance it may cause adoptive parents before adopting an Indian child. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013). Additionally, in the case at hand, denying a child a stable home with willing parents because of race creates concerns around equal protection. The only reason that the Donahues are unable to keep Baby S in the only stable home that she has ever known is due to her racial background. A baby of a different race would be treated in a different manner; therefore, equal protection concerns arise in this case.

While petitioners rely on *Morton v. Mancari* to prove that Indian Classification is always political in nature, they are mistaken due to the clearly narrow holding in *Mancari.* *Morton v. Mancari,* 417 U.S. 535 (1974). In *Mancari*, the court's holding that the hiring preference law is subject to intermediate scrutiny is narrowly applied to only those who are a currently enrolled member of an Indian tribe. *Id.* at 554. Because *Mancari* only applies to currently enrolled tribal members, the hiring preference is not racial due to the number of people with Indian heritage who will be left out by the law. *Id.* ICWA defines an Indian child as a "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). Adoptive families who are given a preference are defined as "other Indian families" *Id.* § 1915(a). ICWA applies to all children and families with Indian heritage, not just those already enrolled in a tribe, excluding no one of Indian descent. Specifically, the Quinalt nation enrollment requirement requires genetic testing and other information that can be used as a racial identifier such as a family tree. Quinault Nation, *Enrollment Application* https://www.quinaultindiannation.com/documents/Enrollment%20Application%20Amended.pdf (Last visited Oct. 9, 2022). Additionally, classifying Indians as a political group is concerning if laws distinguishing all Indian classification were seen as nonracial, there would be essentially no limit on the distinctions that the Federal Government could make based on ancestry, as they would only have to be substantially related to an important government interest under intermediate scrutiny. *1 Cohen's Handbook of Federal Indian Law* § 14.03 (2019). Tribal membership is consistently tied to ancestry, giving it a race-like component. *Id.* In the case at hand, Baby S's eligibility under ICWA is determined by her mother's tribal membership, which is determined by her racial background. By using ancestry and tribal eligibility as a means to determine which children are affected by ICWA, the government sufficiently uses ancestry as a proxy for race, requiring strict scrutiny analysis.

Additionally, the Supreme Court previously held that laws that impact people with Indian heritage may go through a strict scrutiny analysis. In *Richmond v. J. A. Croson Co.* this Court held that a law requiring subcontracting to businesses that were defined as including "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts," were subject to strict scrutiny because of the distinctions made on the basis of race. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 478 (1989). Laws impacting Black and Asian Americans have

historically been held to a strict scrutiny standard. *Loving v. Virginia*, 388 U.S. 1 (1967), *see also Korematsu v. United States, 323 U.S. 214 (1944).* The utilization of strict scrutiny in Richmond and categorizing Indians with other racial groups show that people with Indian heritage are no less of a racial group than the other groups included, and strict scrutiny should apply.

B. ICWA does not satisfy strict scrutiny because it does not provide a compelling government interest with narrowly tailored means.

As the court has previously stated, "Strict scrutiny leaves few survivors." *City of L.A. v. Alameda Books*, 535 U.S. 425, 455 (2002). In cases of remedial race-based laws, the Court applies the most strict test of constitutionality, which requires a narrowly tailored means to achieve a compelling government interest. *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003). The purpose of ICWA, defined by congress, is to:

> Protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes, which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902. Generally, a law has been found to meet the qualifications of a compelling government interest if it presents an important issue that can only be resolved by racial classifications. In past cases, this has included issues of racial representation to remedy past discrimination. In *Grutter v. Bollinge*r, the court found that a racially based admissions scheme by a law school was compelling because "the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity," and this goal could only be achieved by admitting a more racially diverse student body. *Grutter,* 539 U.S. at 308. ICWA, by contrast, does not seek to diversify and put Indian children on a path to success but rather to keep people of Indian heritage separate and turn a blind eye to what family situation is best for the child,

regardless of race. Unlike *Grutter*, the provisions in ICWA are not the only means by which necessary for the past racial discrimination to be remedied. While there is past discrimination by the Federal Government, particular procedures mandated by ICWA are not successful in remedying this discrimination. Protecting the best interests of Indian children and promoting the stability and security of Indian tribes can be achieved without racial classification. Children can be protected by placing them with the best adoptive family, and Indian tribes can achieve security and stability through federal funding and political participation. ICWA does not present a compelling government interest that can only be remedied through racial classifications of children eligible for adoption.

ICWA is not narrowly tailored to its goal because it places an Indian child with any family of Indian descent, not just the tribe that that particular child has ancestry from or is eligible for, making it overinclusive. Previously, this Court has held that an action must be narrowly tailored to remedy past discrimination. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 478 (1989). In *Richmond*, the court found that a city's plan to require construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" was not narrowly tailored because the percentage was not tied to any specific discrimination and because while there was a history of discrimination against black residents, they were grouped in with other racial minorities who did not have a history of discrimination, making it overinclusive. *Id.* at 506, 507. Similarly, ICWA lumps all Indian tribes together, ignoring the cultural differences between each group. Justice Thomas identified this important principle of Indian law in his concurrence in *United States v. Bryant,* saying, "until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty." *United States*

v. Bryant, 579 U.S. 140, 160–61 (2016). By giving preference to adoptive parents with any Indian heritage, ICWA completely undermines the distinct cultural differences between Indian tribes. While a preferred placement with a member of the child's own tribe would help achieve the goal of remedying the past separation of Indian children from their tribes, placing an Indian child with any person of Indian heritage does nothing to further a connection to their culture and tribal traditions. Giving a preference to any person of Indian descent as a foster parent is overinclusive and does not achieve the goal of cultural connection. Additionally, taking an Indian child away from their original tribe and placing them with a member of a culturally separate tribe continues the pattern of separation no more than placing them with a willing and able adoptive family of another race. Taking a young child away from a stable foster home such as the Donahues should not be outweighed by a racial preference that will not benefit the child. Therefore, ICWA is overly inclusive, as it extends a preference to adoptive parents that will not further the goal of preventing tribal separation and cultural connection.

Conclusion

For the reasons set forth above, James And Glenys Donahue, And The State Of West Dakota respectfully request this Court affirm the previous ruling of the 13th Circuit.

Respectfully submitted,

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

By:

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