No. 22-386

IN THE SUPREME COURT OF THE UNITED STATES

STUART IVANHOE, SECRETARY OF THE INTERIOR, ET AL.

Petitioners,

v.

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

Respondents.

BRIEF FOR RESPONDENTS

Team 21

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Supreme Court Decisions

Court of Appeals Decisions:

District Court Decisions:

Secondary Sources:

Statutes and Constitutional Amendments

QUESTIONS PRESENTED

I. Congress violates the anticommandeering doctrine of the Tenth Amendment when enacting a federal law and mandating that a State implement that law within its borders while bearing the costs and burden of the implementation. Here, Congress mandates that West Dakota implement the Placement Preferences and Recordkeeping Requirements provisions of the ICWA in its state adoption proceedings of an Indian child, and West Dakota has no option but to comply with the federal standards of the ICWA. Does Congress exceed its power under the Tenth Amendment by imposing the regulation of a federal law on and shifting the costs and burden of implementing the federal law to West Dakota and its state agencies?

II. Laws that differentiate people based on race are considered suspect and thus must be narrowly tailored towards a compelling interest to avoid violating equal protection rights under the Fifth Amendment. The ICWA purports to protect Indian children's best interests during foster care and adoption proceedings, but its provisions put Indian children at risk of leaving the only homes they have ever known solely on the basis of their race. Does the ICWA violate equal protection rights under the Fifth Amendment by singling out Indian children and mandating its own foster care and adoption preferences on them?

STATEMENT OF THE CASE

Baby C is the biological daughter of a mother who is a member of the Quinault Nation and a father who is a member of the Cherokee Nation. R. at 2. After her birth, Baby C resided with her maternal aunt rather than her parents. *Id*. At eight months old, Baby C was placed into foster care with James and Glenys Donahue (the Donahues) after reports that she was being left unattended for extended periods of time while in the care of her aunt. *Id*.

In August 2019, after living with the Donahues for two years, Baby C became eligible for adoption after a West Dakota state court, in voluntary proceedings, terminated her biological parent's parental rights. R. at 2-3. The following month, the Donahues began adoption proceedings for Baby C with the consent of her parents and aunt. R. at 3. Subsequently, the Quinault Nation was designated as Baby C's tribe. *Id*. No one intervened in the Donahues' adoption of Baby C, and the Donahues entered into a settlement agreement with Child Protective Services (CPS) and Baby C's guardian ad litem stipulating that the Placement Preferences provision of the Indian Child Welfare Act of 1978 (ICWA) did not apply to the proceeding as no other eligible party sought to adopt Baby C. *Id.* The Donahues' adoption of Baby C was officially finalized in West Dakota state court in January 2020. *Id.*

Months later, in April 2020, the Donahues planned to adopt Baby S, another Indian Child, who was also a member of the Quinault Nation. *Id.* Baby S's biological mother died of a drug overdose in February 2020, and the identity of Baby S's father is unknown. *Id.* From his birth in January 2020 until April 2020, Baby S was in the custody of his paternal grandmother, but due to her failing health, Baby S moved in with the Donahues in May 2020. *Id.*

Shortly after taking in Baby S, the Donahues filed an adoption petition, which Baby S's grandmother, his only known living family member, consented to. *Id.* The Quinault Nation,

however, opposed the Donahues' adoption of Baby S and informed CPS it had identified two potential adoptive families for Baby S within the Quinault Nation located in another state. *Id.* Despite noting the potential availability of these two families, the Quinault Nation produced no evidence that either potential adoptive family was eligible to adopt Baby S or that they had initiated formal adoption proceedings for Baby S. *Id.*

Upon learning of the Quinault Nation's opposition to their adoption of Baby S, the Donahues filed suit against Federal Petitioners on June 29, 2020. R. at 4. The Donahues alleged the Placement Preferences and Recordkeeping Requirements provisions of the ICWA are unconstitutional and violate both the anticommandeering doctrine of the Tenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Donahues sought injunctive and declaratory relief in that they properly adopted Baby S and that the Quinault Nation is enjoined from opposing their adoption. *Id.*

After the parties filed cross-motions for summary judgment on September 3, 2020, the United States District Court for the District of West Dakota granted summary judgment in favor of Federal Petitioners. *Id.* The Donahues then appealed to the Thirteenth Circuit, which reversed the district court's decision, finding that the ICWA violated the anticommandeering doctrine by requiring West Dakota to use its state courts and executive agencies to apply federal standards and directives to its state-created claims. R. at 16-17. The Thirteenth Circuit did not rule on the Equal Protection issue, reversing the district court's decision solely on the anticommandeering doctrine issue. R. at 17. This Court granted certiorari. R. at 20.

SUMMARY OF THE ARGUMENT

I. This Court should affirm the Thirteenth Circuit's holding in favor of Respondents the Donahues and the State of West Dakota because Congress commandeers West Dakota by mandating its enforcement of the ICWA and shifting the costs and burdens of this implementation to the State in violation of the anticommandeering doctrine of the Tenth Amendment. In focusing solely on the Placement Preferences and Recordkeeping Requirements provisions of the ICWA, both provisions impact West Dakota's sovereign authority to regulate its own citizens by requiring West Dakota to bend to the will of Congress in adjusting its state adoption practices to conform with the ICWA.

While the language of the provisions of the ICWA may indirectly affect the rights of private actors in adopting an Indian child in West Dakota, the State bears a disproportionate load of the costs and burden of implementing the federal scheme. There is no explicit reference in either ICWA provision at issue here that Congress intended for an even-handed regulation of both the State and private actors, and there is similarly no language in either provision to delineate any cost or burden on private actors in the state adoption proceedings of Indian children.

Further, while it is true that Congress maintains plenary authority over Indians under the Indian Commerce Clause (ICC), the adoption of children does not constitute a form of commerce regulated by Congress under the ICC. Since children are not a commercial product and there is no monetary exchange or other qualities that would denote a commercial transaction, West Dakota's state adoption proceedings of Indian children do not fall under the purview of Congress authority afforded by the ICC.

Additionally, the ICWA does not preempt West Dakota state law as there is no exclusive federal jurisdiction or even concurrent jurisdiction with the ICWA commanding that West

Dakota modify and amend its state adoption proceedings to conform with federal standards. Under the principles of implied conflict preemption, there is similarly no impossibility to comply with both state and federal law and there is no substantial obstacle to the fulfillment Congress' intended purpose with the ICWA. Here, there is not a non-volitional separation of an Indian child from its family, and West Dakota is promoting Congress' intended purpose of the ICWA by finding Baby S a safe and loving home with the Donahues.

II. This Court should affirm the Thirteenth Circuit's holding in favor of Respondents the Donahues and West Dakota because the ICWA violates equal protection rights incorporated under the Fifth Amendment's Due Process Clause. The ICWA does so by treating Indian children differently solely on the basis of their race and failing strict scrutiny review due to a lack of narrow tailoring.

The ICWA falls under strict scrutiny review because it employs a race-based classification system to treat Indian children differently from non-Indian children. Under this statute, Indian children are singled out by proxy—rather than explicitly by race—through immutable characteristics like their bloodline and ancestry.

Precedent holding "Indian" as a political classification and applying rational-basis review to Indian-centric laws does not apply here. The laws in those cases treat Indians differently for non-racial reasons and over internal matters. Those laws are focused on membership status, a person's geographic location, and matters solely concerning internal Indian affairs. Here, the ICWA is subject to strict scrutiny because it treats Indians differently for racial reasons and regarding state-wide matters. The ICWA is focused on a child's racial makeup as well as foster care and adoption proceedings, two matters that affect States, Indians, and non-Indians alike.

Finally, while the federal government has a compelling interest in placing Indian children

in homes that reflect the unique values of their respective Indian tribes, that compelling interest is not met through narrowly tailored means by the ICWA. For example, the ICWA is overinclusive by encompassing children who have no connection to a tribe or Indian culture. Also, the ICWA permits Indian children to be placed in a non-Indian relative's home or a tribe of which they are not even a member. Because the ICWA fails to be narrowly tailored towards its compelling interest, it fails strict scrutiny and violates equal protection rights under the Fifth Amendment.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT'S JUDGMENT BECAUSE CONGRESS EXCEEDS ITS POWER UNDER THE ANTICOMMANDEERING DOCTRINE OF THE TENTH AMENDMENT BY MANDATING WEST DAKOTA IMPLEMENT THE PROVISIONS OF THE ICWA IN ITS STATE ADOPTION PROCEEDINGS WITH INDIAN CHILDREN.

The Thirteenth Circuit correctly held that the Placement Preferences and Recordkeeping Requirements provisions of the ICWA violate the anticommandeering doctrine of the Tenth Amendment as Congress exceeds its power by issuing direct orders to West Dakota to implement a federal law. The anticommandeering doctrine states 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." U.S. Const. amend. X. Congress is limited in its legislative capacity to those rights enumerated under the Constitution, and "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

Moreover, "[w]here 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." *See id.* at 1477 (quoting *New York v. U.S.*, 505 U.S. 144, 178 (1992)); *see also Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) (noting that "any law that commandeers the legislative processes [and

agencies] of the States by directly compelling them to enact and enforce a federal regulatory program is beyond the inherent limitations on federal power within our dual system [of government]"). In short, while the federal government has the power to "pervasively regulate[ ] the [S]tates as marketplace participants," it may not "call[ ] on the [S]tates to use their sovereign powers as regulators of their citizens." *See Travis v. Reno*, 163 F.3d 1000, 1004-05 (7th Cir. 1998); *see also Murphy*, 138 S. Ct. at 1478 (explaining that federal regulation violates the anticommandeering principle when it "unequivocally dictates what a [S]tate legislature may and may not do").

This Court laid out three principles in *Murphy*, explaining why adherence to the anticommandeering doctrine is crucial to protecting the constitutional framework of the United States. 138 S. Ct. at 1478. First, the anticommandeering doctrine serves as "one of the Constitution's structural protections of liberty" and "divides authority between federal and state governments for the protection of individuals." *Printz v. United States*, 521 U.S. 898, 921 (1997)*; New York*, 505 U.S. at 181. Second, the anticommandeering doctrine promotes political accountability by allowing States to impose regulations of their own accord rather than being commanded to do so by Congress. *See New York*, 505 U.S. at 168-169; *Printz*, 52 U.S. at 929-30. Third, the anticommandeering doctrine prevents Congress from shifting the costs of regulation to the States and avoids the pressure of weighing the expected benefits of a given statutory program against its costs. *See Printz*, 521 U.S. at 921. The ICWA violates all three principles: (1) the Constitution presumptively leaves family law matters to the States; (2) West Dakota state officials are being compelled to enforce the ICWA's substantive requirements; and (3) doing so forces West Dakota to bear the financial costs associated with implementing the ICWA. *See* U.S. Const. art. IV., cl. 2; *Brackeen v. Haaland*, 994 F.3d 249, 539-40 (5th Cir. 2021). Ultimately, this means that the ICWA regulates West Dakota rather than private individuals, which exceeds Congress' authority under the anticommandeering doctrine.

Turning to the history of the ICWA, in 1979, the Bureau of Indian Affairs (BIA) created guidelines (the "1979 Guidelines") that left the "primary responsibility" of interpreting certain language in the ICWA "with the [State] courts that decide Indian child custody cases." *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584 (Nov. 26, 1979). On the judicial front, this Court stated that the ICWA's enactment "was the product of rising concern in the mid-1970's over the consequences . . . of abusive child welfare practices that [separated] Indian children from their families and tribes through adoption or foster care placement . . . " *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Congress found that "an alarmingly high percentage of Indian families [were being] broken up by the removal . . . of their children from them by nontribal public and private agencies" and enacted ICWA to stem the "wholesale removal of Indian children from their homes." *Id.* at 36.

But here, Baby C has never been under her biological parents' care and instead was under her maternal aunt's care since birth. R. at 2. She was left alone for long periods of time at just eight months old before being placed into foster care with the Donahues after they received consent from Baby C's aunt and biological parents to adopt her. R. at 3. Additionally, Baby S's biological mother died of a drug overdose, the identity of Baby S's father is unknown, and Baby S's grandmother consented to the Donahues' adoption of Baby S. *Id*. Thus, there is no issue with either the Donahues' adoption of Baby C or removing Baby S from his home or breaking up Baby S's family because Baby S's only known living family member, his grandmother, had consented to the Donahues' adoption of him. *Id.*

Here, the issues before this Court focus solely on the Placement Preferences provision (25 U.S.C. § 1915) and Recordkeeping Requirements provision (25 U.S.C. § 1915(e) and 1951(a)) of the ICWA. In first looking at the Placement Preferences provision, it states that "[i]n

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." R. at 6.

The Placement Preferences provision lists the criteria for the preferences given "[i]n any adoptive placement of an Indian child under State law." *See* 25 U.S.C. § 1915(a). The state adoption proceedings for West Dakota are solely conducted and regulated by the State and its agencies. Thus, the language in the Placement Preferences provision applies solely to West Dakota as the enforcer of its state adoption proceedings and directly impacts West Dakota's sovereign authority to regulate its own citizens. Private actors do not direct the adoptive placement of Indian children in West Dakota, but the State is responsible for conducting the adoption proceedings and determining where a child should be sent at the conclusion of such proceedings. While this language may indirectly affect the rights of private actors attempting to adopt an Indian child in West Dakota, it disproportionately affects West Dakota's ability to regulate where an Indian child should be placed in foster care and how it conducts its proceedings in its own state courts.

Notably, this Court has held in *Adoptive Couple v. Baby Girl* that § 1915(a) of the ICWA "does not bar a non-Indian family . . . from adopting an Indian child when no other *eligible* candidates have sought to adopt the child." 570 U.S. 637, 642 (2013) (emphasis added). The *Adoptive Couple* Court goes on to note that § 1915(a) is "inapplicable in cases where no alternative party has *formally* sought to adopt the child." *Id.* at 654 (emphasis added). Here, the Donahues stipulated that the Placement Preferences provision of the ICWA did not apply to their adoption proceeding of Baby C because no eligible party sought to adopt Baby C. R. at 2. Later in their adoption of Baby S, while the Quinault Nation stated that there were "two potential

adoptive families for Baby S in a Quinault Tribe located in another state," the Record is silent as to any vetting of these families or any information on their "eligibility" or the "formality" of their adoption efforts, which the *Adoptive Couple* Court specifically stated was necessary for seeking to adopt the Indian child. R. at 3.

Next, in turning to the Recordkeeping Requirements provision, it states in § 1951(a) that a "state court entering a final decree in an adoptive placement 'shall provide the Secretary with a copy of the decree or order' and information as necessary regarding '(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.'" R. at 7. Again, similar to the Placement Preferences provision, the language in § 1951(a) is mandating that the West Dakota state court must act according to the will of Congress set out in the ICWA. The West Dakota state court has no discretion or power of its own and must comply with the will of Congress through the ICWA standards to maintain its records in the way Congress desires. Like the Placement Preferences provision, this is a violation of the anticommandeering doctrine because it allows Congress to impose its will on a West Dakota state entity in enforcing the provision of a federal law.

Thus, the Placement Preferences and Record Requirements provisions violate the anticommandeering doctrine of the Tenth Amendment because they enlist West Dakota to carry out the will of Congress in implementing the ICWA in its state adoption proceedings and shifting the costs and burden of these changes to the State.

A. This Court's Exception To The Anticommandeering Doctrine In *Reno v. Condon* For A Federal Law Evenhandedly Regulating A State And Private Actors Is Not Applicable Here.

The anticommandeering doctrine is limited in two distinct ways. The first limitation is

that the anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage. *Reno v. Condon*, 528 U.S. 141, 146 (2000). In *Reno*, this Court analyzed a federal law that restricted the disclosure and dissemination of personal information provided in applications for driver's licenses that applied equally to the State and private actors. *Id.* The federal statute in *Reno*, moreover, was generally applicable to both the State and private resellers of motor vehicle information. *Id.* In other words, the law in *Reno* did not regulate or otherwise impact the State's sovereign authority to "regulate [its] own citizens" but rather permissibly regulated the State "as the owner[] of data bases." *Murphy*, 138 S. Ct. at 1478-79 (quoting *Reno*, 528 U.S. at 151).

This Court's decision in *Baker v. South Carolina*, 485 U.S. 505, 513-15 (1988) provides a further example of the *Reno* private actors exception to the anticommandeering doctrine. There, a federal statute eliminated the federal income tax exemption for interest earned on certain bonds issued by state and local governments unless the bonds were registered. *Id.* at 507-08. This Court upheld that statute because it applied not only to the State, but also to any entity issuing the bonds, including "local governments, the Federal Government, [and] private corporations." *Id.* at 526-27. Because of the federal statute's general applicability, this Court found that it did not commandeer the State but rather established standards applicable to any actor, including private actors, who chose to engage in an activity that Congress had the power to regulate through its legislation. *Id.* at 514-15.

In contrast to the federal statutes in *Reno* and *Baker*, this Court struck down a federal statute in *New York v. United States* where a federal law commandeered the State to implement federal legislation by either disposing of radioactive waste within its boundaries according to Congress' instructions or assuming liability for the waste. 505 U.S. at 175-76. Five years later,

this Court again struck down another federal statute in *Printz v. United States* that required state officials to perform background checks on prospective handgun purchasers. 521 U.S. at 935. In both *New York* and *Printz*, the federal statutes at issue did not apply with equal weight to the State and private actors because the statutes commanded state officers—and only state officers—to administer and enforce the federal legislation handed down by Congress. *Id.*

Like in *New York* and *Printz*, here, West Dakota is mandated to help enforce the ICWA in its state adoption proceedings of Indian children, and this mandate is not equally applied to West Dakota and private actors. The ICWA dictates how West Dakota state courts may adjudicate state law causes of action, which interferes with West Dakota's authority to regulate the ordinary jurisdiction of its own courts. The ICWA further requires that West Dakota modify its existing state adoption proceedings for the purpose of incorporating the federal standards set out by Congress, which is a blatant violation of the anticommandeering doctrine, and like the PAPSA provision in *Murphy*, "there is no way in which this [] can be understood as a regulation of private actors." 138 S. Ct. at 1481. Further, West Dakota—not private actors—is responsible for bearing the costs and the burden of these extensive changes to its state adoption proceedings, which goes to the heart of the anticommandeering doctrine's purpose of not allowing Congress to shift costs to the States to implement a federal program. *See* R. at 15; *see also Printz*, 521 U.S. at 921.

In a similar situation in *Kiowa Tribe of Oklahoma v. Lewis*, the mother of an Indian child consented to her son's adoption by a non-Indian couple, who took custody of the child immediately after his birth. 777 F.2d 587, 589 (10th Cir. 1985). The child's tribe, the Kiowa Tribe, attempted to intervene in the state adoption proceedings, but the Tenth Circuit upheld the state court's finding that the non-Indian couples' adoption was not struck down by the ICWA. *Id.*

At no point did the Tenth Circuit find that the ICWA applied to private actors in any notable capacity that would inherently trigger the *Reno* private actors exception to the anticommandeering doctrine. *Id.*

Like in *Kiowa Tribe of Oklahoma*, here, the Placement Preferences and Recordkeeping Requirements provisions of the ICWA do not regulate activities in which "private actors engage," nor do they regulate the State of West Dakota equally with private actors within the State. *See City of Chicago v. Sessions*, 321 F.Supp. 3d 855, 868-69 (N.D. Ill. 2017). Not only is there no explicit reference to either provision applying to private actors specifically, but there is also no notable implicit recognition by Congress that either ICWA provision was meant to apply evenhandedly to private actors and the State or solely to private actors. *See generally* 25 U.S.C. § 1915; 25 U.S.C. § 1915(e); 25 U.S.C. § 1951(a).

Therefore, since the Placement Preferences and Recordkeeping Requirements provisions do not evenhandedly regulate the State and private actors, the *Reno* private actors exception to the anticommandeering doctrine is not applicable here.

B. Congress' Plenary Authority Over Indian Affairs Does Not Extend To West Dakota's State Adoption Proceedings Of Indian Children Because The ICC's Regulation Of Commerce Does Not Apply To The Non-Commercial Act Of Child Adoption.

While it is true that the "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs," *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), the ICC in and of itself does not provide "an automatic exemption from state law" simply because of the federal government's plenary authority over Indian tribes. *See Confederated Tribes of Siletz Indian of Oregon v. Oregon*, 143 F.3d 481, 486 (9th Cir. 1998) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980)); *see also Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*,

425 U.S. 463, 481 n. 17 (1976) (rejecting "the stark and rather unhelpful notion" that the ICC provides an automatic exemption to Indian tribes as a matter of constitutional law). This Court then strengthened this position by noting that "[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state . . . matters significantly touching the political and economic interest of the [Indian] Tribes." *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980). This Court further held that "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *see also Bracker*, 448 U.S. at 145.

Congress' power under the ICC does not extend to child custody cases where the act of adopting children does not have any significant connection to commerce. It is important to note that the Indian children themselves are not persons dealing in commerce, and neither the foster parents nor the State of West Dakota is conducting these adoptive proceedings for any commercial purpose. There is no monetary exchange between the adoptive parents and the West Dakota state court when adopting the Indian child, and the State's costs for the adoption proceedings are not readily impacted by the number of Indian children that are adopted. Further, West Dakota's state adoption proceedings do not have any commercial impact on the Quinault Nation as the decision whether to adopt an Indian child and what home that child must go to does not economically affect the Quinault Nation in any discernible way. In short, whether Baby S was adopted by the Donahues or if Baby S was given to an Indian family in another state as the Quinault Nation argues for, the Quinault Nation would experience no economic benefit or detriment either way.

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign

Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I., § 8, cl. 3. In analyzing a definition for the term "commerce," former Chief Justice Marshall noted in *Gibbons v. Ogden* that "[c]ommerce . . . is intercourse [and] 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." 9 Wheat. 1, 189-90 (1824). Here, like the Interstate Commerce Clause, the ICC "authorizes only regulations of commercial exchange, not federal control over individual behavior or over noncommercial matters such as family affairs." *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 TEXAS REV. of LAW & POL. 426, 440 (2019).

In applying former Chief Justice Marshall's definition of "commerce," West Dakota's state adoption proceedings do not fall under the plenary authority of Congress under the ICC. In fact, this Court has already explicitly held in *United States v. Lopez* that the regulation of child custody proceedings, which is at issue here, did not equate to the regulation of commerce. 514 U.S. 549, 564 (1995). In explaining its reasoning, the *Lopez* Court noted that if it were to accept the federal government's argument that Congress could regulate all activities that might lead to violent crime regardless of their attenuated connection to commerce, then there would hardly be "any activity by an individual that Congress is without power to regulate." *Id.* at 565. The *Lopez* Court's reasoning applies here as well to prevent the chilling effect of Congress overreaching its regulation abilities in the West Dakota state adoption proceedings of Indian children.

Just as Congress does not have the ability to "control the personal choices of other Americans under the Interstate Commerce Clause, so its authority over tribal members under the Indian Commerce Clause is confined to *commerce*." 23 TEXAS REV. of LAW & POL. at 440 (emphasis in original). Thus, the ICC's regulation of commerce does not extend to the state adoption proceedings of Indian children in West Dakota because the adoption of Baby S is not considered a commercial activity that would fall under the purview of Congress and the ICC.

C. The ICWA Does Not Preempt West Dakota State Law Because Neither Variety Of Implied Conflict Preemption Creates An Impossible Conflict Between The ICWA And West Dakota State Law.

The second limitation on the anticommandeering doctrine is that commandeering does not occur when Congress validly preempts state law under the Supremacy Clause. U.S. Const. art. VI., cl. 2. This Court has historically applied a presumption against the preemption of State laws because the States are independent sovereigns, and "Congress does not cavalierly preempt state-law causes of action." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). More specifically, this Court has held that a federal statute preempts state law in three situations: (1) the preemptive intent is "explicitly stated in the statute's language or implicitly contained in its structure and purpose" *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); (2) the state law "actually conflicts with federal law" *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. and Dev. Comm'n*, 461 U.S. 190, 204 (1983); or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also California v. ARC America Corp.*, 490 U.S. 93, 100 (1989).

Here, the issues before the Court deal exclusively with conflict preemption. In other words, the Donahues' state law claims will be preempted if they are "in actual conflict with federal law." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002). Next, we turn to whether there is express or implied conflict preemption. Express conflict preemption is found "when Congress has 'unmistakably . . . ordained' that its enactments alone are to regulate a part of

commerce, [and thus] state laws regulating that aspect of commerce must fall." *Jones*, 430 U.S. at 525 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

Congress has not expressly preempted West Dakota state law within the language of the ICWA, so we turn to implied conflict preemption, which occurs when "it is impossible for a private party to comply with both state and federal requirements," *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990), and when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Oneok, Inc. v. Learjet*, 575 U.S. 373, 373 (2015) (reaffirming the *Hines* holding that conflict preemption exists where a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress). Further, this Court held in *Crosby v. Nat'l Foreign Trade Council* that it will use its judgment to determine whether a federal statute is unconstitutional by "examining the federal statute as a whole and identifying its purpose and intended effects." 530 U.S. 363, 373 (2000).

In analyzing the first implied conflict preemption variety of impossibility to comply with both state and federal requirements, "[t]he proper question . . . is whether [a] private party could independently do under federal law what state law requires of it." *See PLIVA, Inc. v. Mensing*, 564 U.S. 604, 607 (2011); *see also Wyeth v. Levine*, 555 U.S. 555, 573 (2009). The Record is silent as to whether it would be impossible for private actors to comply with both West Dakota state law and the ICWA in adopting an Indian child, and the Federal Petitioners at no point contend in their preemption argument that there is such an impossibility of compliance.

For the second implied conflict preemption variety of a state law creating an obstacle to fulfillment of the federal law, this Court noted that "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose

and intended effects." *See Crosby*, 530 U.S. at 373; *see also Savage v. Jones*, 225 U.S. 501, 533 (1912). This Court has further stated that "preemption fundamentally is a question of congressional intent." *See English*, 496 U.S. at 78-79; *see also Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963) (noting that "[t]he purpose of Congress is the ultimate touchstone" in every preemption case). Congress' purpose for enacting ICWA was to stem abusive welfare practices in the adoption of Indian children as well as the removal of Indian children from their family homes. *Holyfield*, 490 U.S. at 36. The West Dakota state adoption proceedings do not pose such a substantial obstacle to the ICWA that this purpose in protecting Indian children cannot be served. Further, in this particular situation, there is no fear of removing Baby S from his Indian family because his grandmother has already consented to the adoption. R. at 3.

Moreover, the Fifth Circuit ruled in *Brackeen v. Haaland* that the Recordkeeping Requirements provision of the ICWA in § 1951(a) "is not a substantive child-custody standard state courts must apply under the Supremacy Clause" and that "the [Recordkeeping Requirements] provision imposes an extensive [] obligation directly on state courts and agencies [that] is not a valid preemption provision because it regulates the conduct of states, not private actors." 994 F.3d at 419; *cf. Murphy*, 138 S. Ct. at 1481 (delineating that "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States"). Section 1951(a) conscripts West Dakota's courts and state agencies in administering the system prescribed by the ICWA, which, in turn, violates the anticommandeering doctrine and is not a valid preemption provision.

Extending conflict preemption to the ICWA would "'in effect, dictate[ ] what a state legislature may and may not do,' because it would imply that a state's otherwise lawful decision *not* to assist federal authorities is made unlawful when it is codified as state law." *United States*

v. California, 921 F.3d 865, 890 (9th Cir. 2019) (quoting *Murphy*, 138 S. Ct. at 1478) (emphasis in original). Further, in relation to both the Placement Preferences and Recordkeeping Requirements provisions of the ICWA, this would clearly act to "compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme" because West Dakota does not have the option to decline to enforce Congress' will within its borders. *See Galarza*, 745 F.3d at 644.

Overall, the ICWA neither confers any federal rights nor imposes any federal restrictions on private actors, and there is no express or implied conflict preemption under the Supremacy Clause that preempts West Dakota state law in its state adoption proceedings of Indian children.

1. Absent Exclusive Federal Jurisdiction Or Concurrent Jurisdiction, The ICWA Does Not Preempt West Dakota State Law By Mandating The State Amend Its Adoption Proceedings In Accordance With The ICWA.

Unless a federal statute grants exclusive jurisdiction to federal courts on a legal claim, state courts possess concurrent jurisdiction to hear that claim under the federal statute. *Mims v. Arrow Fin. Ser., LLC*, 565 U.S. 368, 381 (2012). State and federal courts are presumed to have concurrent jurisdiction over federal law claims, but "Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of that presumptively concurrent jurisdiction" in three ways. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990). This Court has held that "Congress can rebut the presumption of concurrent jurisdiction: (1) by explicit statutory directive, (2) through an unmistakable implication from the statute's legislative history, or (3) by a clear incompatibility between federal interests and state-court jurisdiction." *Tafflin v. Levitt*, 493 U.S. 455, 459-60 (1990) (citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)).

Here, none of the three possibilities to rebut a presumption of concurrent jurisdiction are

present. There is no explicit statutory directive in the ICWA to suggest that it grants exclusive jurisdiction to federal courts on claims arising from the ICWA. Similarly, there is no unmistakable implication from the ICWA's legislative history that it was solely intended to be adjudicated by federal courts. Finally, there is no clear incompatibility between the interests of Congress and that of West Dakota on jurisdiction. In fact, the present case does not involve a federal cause of action that may be adjudicated in either a state or federal judicial forum. *See* 25 U.S.C. § 1915(a). Ultimately, there is neither exclusive federal jurisdiction or concurrent jurisdiction here as the ICWA mandates that West Dakota modify its existing state law claims by incorporating federal standards into its state adoption proceedings. *Id.*

Absent exclusive federal jurisdiction or even concurrent jurisdiction, the ICWA cannot preempt West Dakota state law by commanding that the State modify and amend its state adoption proceedings to conform with the standards set out in the ICWA.

II. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT'S HOLDING THAT THE ICWA VIOLATES EQUAL PROTECTION RIGHTS UNDER THE FIFTH AMENDMENT BECAUSE THE STATE TREATS INDIAN CHILDREN DIFFERENTLY SOLELY DUE TO THEIR RACE AND FAILS STRICT SCRUTINY REVIEW BY NOT BEING NARROWLY TAILORED.

The Fifth Amendment guarantees that "[n]o person shall…be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. Implicitly incorporated in this amendment is the Fourteenth Amendment's Equal Protection Clause which prohibits States from "deny[ing] to any person within its jurisdiction the equal protection of the law." *See* U.S. Const., amend. XIV., § 1; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In cases involving an equal protection claim, the approach to Fifth Amendment equal protection challenges is "precisely the same" as the approach to Fourteenth Amendment equal protection challenges. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975); *see also Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995).

The purpose of the Equal Protection Clause is to prevent state and federal governments from creating and enforcing laws that treat people differently according to arbitrarily drawn lines such as race and political affiliation. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). Laws that treat people differently based on immutable characteristics like race are considered suspect and are subject to the most rigorous form of scrutiny—strict scrutiny—to determine if they violate the Constitution. *See Hinson*, 70 F.3d at 417. The federal government bears the burden to prove that its race-based law is supported by a compelling interest and narrowly tailored to meet that interest. *Id*. at 417. Laws that treat people differently based on political affiliation are considered non-suspect and subject to the lowest form of scrutiny, rational-basis review. *See Morton v. Mancari*, 417 U.S. 535, 555 (1974). Under rational-basis review, the federal government must still prove that its challenged law is constitutional, but that burden is lowered such that the government need only prove that its law is rationally related to a legitimate purpose. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993).

Indians present a unique situation in equal protection challenges as they have been classified as both a race and a political entity. *See Mancari*, 417 U.S. at n. 24 (highlighting that "[t]he [employment] preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes . . . [i]n this sense, the [Indian] preference is political rather than racial in nature"); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 207-08 (1995) (explaining that the classification of "Native Americans" is a "classification based explicitly on race"). In the case at bar, Indians are treated as a racial entity under 25 U.S.C. § 1903, thus subjecting the ICWA to strict scrutiny.

Under a strict scrutiny analysis, the federal government has a compelling interest in protecting the best interests of Indian children, but §§ 1913(d), 1914, and 1915(a)-(b) of the

ICWA fail to be narrowly tailored to that interest. As such, this Court should strike the ICWA down as unconstitutional for violating the Fifth Amendment's Equal Protection Clause and thus affirm the holding of the Thirteenth Circuit.

A. The ICWA Employs A Race-Based Classification System By Relying On Tribal Ancestry And Bloodlines As A Proxy For Race.

This Court has held laws that distinguish people based on ancestry or ethnic characteristics employ a race-based classification system and thus are subject to strict scrutiny. *See Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (emphasizing that "[d]istinctions between citizens solely because of their ancestry" are interchangeable with "discrimination based on race alone"); *see also Saint Francis Coll. V. Al-Khazraji*, 481 U.S. 604, 613 (1987) (noting that "discrimination solely because of . . . ancestry or ethnic characteristics . . . is racial discrimination"). Likewise, when a law distinguishes people based on their membership in a federally recognized Indian tribe, a seemingly race-neutral classification, that distinction is also considered racially based because tribes are only recognized by the federal government if their members have ancestral links to and are descendants of that tribe. *See* 25 C.F.R. § 83.11(e); *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (defining an "Indian tribe" as a "body of Indians of the same or a similar race"). In this case, the ICWA relies on a race-based classification system by using tribal ancestry and bloodlines as a proxy for race to distinguish between Indians and non-Indians. Though the ICWA's language is not explicit in its racial discrimination, its use of bloodlines and "[a]ncestral tracing . . . employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Rice v. Cayetano*, 528 U.S. 495, 519 (2000).

In *Rice*, this Court found a race-based voting scheme that only allowed those with Hawaiian ancestry to vote in a state-wide election to be unconstitutional. *Id*. at 514-15. There,

the Hawaiian Constitution limited the right to vote for nine trustees in a statewide election to "Hawaiians." *Id*. at 498-99. "Hawaiians" included those who were descendants of people who inhabited the Hawaiian Islands in 1778 and those who were "descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778." *Id*. at 499. When the petitioner in *Rice* attempted to vote for new trustees in a state-wide election, he was barred from doing so despite holding Hawaiian citizenship because his lack of an ancestral link to the Hawaiian Islands made him a non-Hawaiian for voting purposes. *Id*. at 495. This Court found that this system shut out entire classes of Hawaiian citizens from voting in a state-wide election and making critical decisions about their State's affairs simply because of their ancestry. *Id*. at 522. Even though the Hawaiian Constitution did not explicitly restrict voting to those of "Hawaiian race" and instead tailored its language to restrict voting to those with Hawaiian ancestry, "[t]he ancestral inquiry mandated by the State implicate[d] the same grave concerns as a classification specifying a particular race by name." *Id*. at 517. Instead of judging and differentiating people based on their merit, laws and voting schemes that hinge on race reduce a person's worth and dignity to immutable characteristics outside of their control. *Id*. As such, this Court held that this type of voting exclusion was invalid under the Fourteenth Amendment's Equal Protection Clause. *Id*. at 496.

Like in *Rice*, where certain Hawaiian citizens were given the right to vote simply because of their Hawaiian ancestry, here, the ICWA mandates its provisions on certain children simply because of their Indian bloodline and ancestry. The ICWA defines Indian children 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). This definition encompasses children who have never lived on tribal lands and those who, like Baby C and Baby S, were removed from their tribal lands at an early age. Even

though Baby C and Baby S have been in the Donahues' care since they were just eight and five months old, respectively, they are subjected to the ICWA's standards simply because they are both biological children of a Quinault Nation member. R. at 2-3. In addition to having Indian blood, a child is considered "Indian" if he or she is currently a member of (or at least eligible to be a member of) an Indian tribe. Such membership hinges, as noted above, on one's descendant links to an Indian tribe. Here, Baby C is an Indian child because her biological mother is a Quinault member and the Quinault Nation designated her (Baby C) as such. *Id*. Likewise, Baby S is an Indian child because his maternal descendant line from the Quinault Nation makes him eligible to be a Quinault Nation member. R. at 3. As such, in addition to having Indian blood, children like Baby C and Baby S fall under ICWA's reach simply "because an ancestor . . . was an Indian." *See Adoptive Couple*, 570 U.S. at 655. Because the ICWA looks to a child's ancestry and bloodline to determine if they are Indian, the ICWA is rooted in race and thus must be subjected to strict scrutiny to survive a constitutional challenge.

B. This Court's Narrow Finding In *Mancari* That "Indian" Is A Political Classification Does Not Apply To The ICWA Because The ICWA Differentiates People Solely Based On Race, Is Not Restricted Geographically, And Affects Affairs Of The State And Non-Indian Families.

Indians are a unique class of citizens in that they have been treated as both a racial group and political entity. *See Loving v. Virginia*, 388 U.S. 1, 2, 5 (1967) (noting that statutes prohibiting marriages between "Caucasians" and "Indians" are "racial classifications"); *see also United States v. Antelope*, 430 U.S. 641, 645 (1977) (highlighting that "[f]ederal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications"). While the Federal Petitioners will likely argue that a line of precedent demonstrates that "Indian" is a political classification, this Court has been prudent in narrowing those decisions to avoid such a blanket classification. *See Mancari*, 417 U.S. at 554.

In *Mancari*, this Court held that an employment preference for Indians did not constitute an equal protection violation under the Fifth Amendment. *Id*. at 535. There, the then-Secretary of the Interior issued a directive which stated that the BIA, a federal agency responsible for implementing federal laws related to Indians, would grant a preference for Indians when hiring and promoting workers. *Id*. at 538. Under this directive, those who are members of a federally recognized tribe and hold one-fourth or more Indian blood would be entitled to this employment preference. *Id*. at n. 24. After this directive was handed down, several non-Indians filed suit on the basis that this Indian employment preference violated their equal protection rights under the Fifth Amendment. *Id*. at 539. This Court found no equal protection violation because this federal employment preference treated Indians as a political entity and subsequently passed rational-basis review. *Id*. at 553-54. This Court focused on three matters in *Mancari* to reach its conclusion that "Indians," in this limited context, is a political classification.

First, even though this employment preference has a racial component to it (by requiring people to have one-fourth or more Indian blood to qualify), its application ultimately hinges on whether one is a member of an Indian tribe. *See Mancari*, 417 U.S. at n. 24. By excluding non-tribal members who are still racially Indian, this preference demonstrates that its focus is on tribal membership and not solely on race, bloodline, or ancestry. As such, this preference is not directed towards Indians as a race but "rather as members of quasi-sovereign tribal entities." *Mancari*, 417 U.S. at 554. "In this sense, the preference [for Indians] is political rather than racial in nature." *Id*. at n. 24.

Second, this employment preference was enacted to ensure that those who live on or near tribal lands can run the BIA since they, compared to non-tribal Indians, are better suited to addressing and resolving matters concerning their people. *Id*. at 554. This preference is no different than our constitutional requirement "that a United States Senator, when elected, be 'an

Inhabitant of that State for which he shall be chosen.'" U.S. Const. art. I., § 3, cl. 3. Again, the focus of this preference is not on immutable characteristics but rather on political geography to ensure that an agency which caters to Indian affairs is run by those who live amongst Indians and are attuned to tribal matters. *See Mancari*, 417 U.S. at 554.

Third, this preference is focused on encouraging self-government amongst Indians over internal tribal affairs, and does not shut out entire classes of people (i.e. non-Indians) over matters that also affect them. *Id*. *Mancari* and its progeny demonstrate that when Indians are singled out by law to govern and handle matters that only affect them and their internal affairs, their Indian classification is political and not racial. *See e.g.*, *Antelope*, 430 U.S. at 645-47 (discussing a federal criminal code that applied "only" to "enrolled tribal members" who committed a crime "within the confines of Indian country"); *see also Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 673, 679, 688-89 (1979) (deciding on a treaty preserving Indian tribe members' right to fish from their "traditional tribal fishing grounds"). Because the laws in *Antelope* and *Washington* only affect Indians and their internal affairs, non-Indians are not being treated discriminatorily because of their race. For these reasons, this Court found that the BIA's employment preference singled out Indians not as a race but rather as a political entity. *See Mancari*, 417 U.S. at 554. This Court's narrow finding in *Mancari* does not apply here because the ICWA relies on "Indian" as a racial classification, is not restricted for political geography reasons, and applies to foster care and adoption proceedings, both of which are matters that affect States, Indians, and non-Indians alike.

First, unlike in *Mancari* where tribal membership is the main focus to determine whether a person is Indian or not, the ICWA's definition of an Indian child focuses solely on the child's bloodline and ancestry. As discussed above, a child is Indian if he or she is the biological child of

an Indian tribal member and is either a tribal member or eligible for tribal membership due to their ancestry. *See* 25 U.S.C. § 1903(4). Unlike the employment preference in *Mancari* which excludes people who are racially Indian, the ICWA encompasses any child who is racially Indian and not just those living on or near tribal lands. As such, children like Baby C and Baby S are affected by the ICWA solely because of their race. Second, unlike in *Mancari* where Indians are singled out based on their geographic location, the ICWA does not restrict itself to children on particular lands. Again, any child, simply because of their bloodline and ancestry, are subject to the ICWA's provisions. Finally, unlike in *Mancari* where it was permissible to treat Indians differently over matters concerning internal Indian affairs on tribal lands, here, the ICWA pertains to matters that affect both Indians and non-Indians throughout the country. Adoption and foster care are traditionally state matters, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), and thus the ICWA is not restricted to internal Indian affairs. Moreover, the ICWA emphasizes its jurisdictional breadth by permitting Indians to invalidate a child-placement order "in *any* court of competent jurisdiction . . . if the action violated any provision of §§ 1911–13." 25 U.S.C. § 1914 (emphasis added).

In effect, the ICWA treats Indian children differently because of their race and shuts out entire classes of people from matters that affect them and the decisions they make regarding their families. Because the ICWA employs a race-based classification system, it is thus subject to strict scrutiny.

C. The Federal Government Has A Compelling Interest In Placing Indian Children In Homes Reflecting The Unique Values Of Indian Culture, But The ICWA Is Not Narrowly Tailored To Achieve That Interest.

Strict scrutiny applies 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." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). Under a strict scrutiny analysis, the federal government possesses the burden to prove that its race-based statute is supported by a compelling interest and narrowly tailored to meet that interest. *See Hinson*, 70 F.3d at 417.

Here, the federal government has a compelling interest in wanting to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . [by placing] such children in foster or adoptive homes which . . . reflect the unique values of Indian culture." 25 U.S.C. § 1902. Several provisions of the ICWA, however, fail to achieve this compelling interest in a narrowly tailored fashion.

First, the ICWA's definition of an "Indian child" is overinclusive. Under the ICWA, any child is an Indian child if they are unmarried, under eighteen years of age, a biological child of an Indian tribal member, and either a member of an Indian tribe or an eligible member of an Indian tribe. *See* 25 U.S.C. § 1903. As argued above, this definition encompasses Indian children who have never grown up on tribal lands as well as children of mixed ancestry. The ICWA does not protect the best interests of Indian children by placing them in homes reflecting Indian culture when it applies to those who are only Indian by blood and who are accustomed to a culture different from that of their tribal ancestors. Here, Baby S's best interest is at stake simply because he is a biological child of a Quinault Nation member. R. at 3. Despite being raised by the Donahues since he was five months old, Baby S's race places him at risk of leaving the only family and culture he has ever known for a Quinault Nation family in another state. *Id*.

Second, the ICWA's Placement Preferences provision is also overinclusive. The ICWA mandates that in any foster care placement, pre-adoptive proceeding, and adoptive proceeding, an Indian child should be placed with, in order of preference, "(1) a member of the child's extended family; (2) other members of an Indian child's tribe; or (3) other Indian families." 25

U.S.C. § 1915(a). This statute favors non-Indian extended family members and other Indian families even though the ICWA is meant to put Indian children in homes that foster their learning, understanding, and appreciation of their tribal roots. Indian tribes are not a collective monolith—each has its own unique traditions, heritage, and systems. The ICWA's willingness, or rather mandate, of putting Indian children in any Indian home or with any extended family member—Indian or not—runs contrary to this interest. Giving any Indian tribal family "an absolute preference over other citizens based solely on their race . . . is not narrowly tailored." *Richmond*, 488 U.S. at 508.

Third, the ICWA's invalidation statute puts children at risk of being returned to parents who do not deserve to have their parental rights reinstated. The ICWA permits "a parent or Indian custodian from whose custody the Indian child was removed, or the child's tribe [to] file a petition in any court of competent jurisdiction to invalidate an action in state court for foster care placement or termination of parental rights if the action violated any provision of §§ 1911-13." 25 U.S.C. § 1914. This statute comes into effect if, for example, an Indian child's biological parents had their parental rights terminated and it is later found that the party who terminated those rights did not prove, beyond a reasonable doubt, that the biological parents' custody "will likely cause the child 'serious emotional or physical damage.'" 25 U.S.C. § 1912(f). Statistics show that the leading cause of death of Indian children under the age of fourteen is alcohol-related accidents. *See Child Abuse Is Color Blind: Why the Involuntary Termination of Parental Rights Provision of the Indian Child Welfare Act Should Be Reformed*, 89 U. DET. MERCY L. REV. 257, 267 (2012).

Moreover, as of 2020, Indian children "have the highest rate of [child maltreatment] at 15.5 per 1,000 children in the population of the same race or ethnicity . . . [and] the second

highest rate of [child fatalities] at 3.85 . . . per 100,000 children."[1] Should a party fail to meet the ICWA's high burden of proof to terminate the parental rights of an Indian child's biological parents, there is a risk that these statutes in tandem will cause Indian children to return to abusive homes. In the case at bar, there is a risk that the order terminating the parental rights of Baby C's biological parents will be invalidated because there is no record that West Dakota and the Donahues proved, beyond a reasonable doubt, that if Baby C stayed with her biological parents, she would suffer "serious emotional or physical damage." 25 U.S.C. § 1912(f). This is so even though Baby C resided with her maternal aunt after her birth, has not been cared for by her biological parents, and has been left alone for long periods of time while her maternal aunt worked. R. at 2. To reinstate Baby C's biological parents' parental rights would put her at risk of being taken away from her caring home with the Donahues and back into trying circumstances with her biological family. This in no way comports with the ICWA's purpose of acting in an Indian child's best interests.

Finally, the ICWA fails to be narrowly tailored to its compelling interest by permitting parents, within two years of their child being placed in a home, to terminate that adoption upon a showing that their consent to the adoption had been procured through fraud or duress. *See* 25 U.S.C. § 1913(d). This federal statute is silent on the standard biological parents must meet to show that their consent has been obtained under fraud or duress. This inherently creates a risk of Indian children's lives being disrupted even after they have been adopted by another family.

Though the ICWA is supported by the compelling interest of putting Indian children's

[1] *Child Maltreatment 2020*, CHILDREN'S BUREAU OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/child-maltreatment-report-2020_0.pdf.

best interests first and fostering a connection between them and their Indian heritage, its provisions fail to be narrowly tailored towards that interest. As such, the ICWA fails strict scrutiny and violates equal protection rights under the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this Court should affirm the Thirteenth Circuit's judgment affording injunctive and declaratory relief for Respondents the Donahues and West Dakota and holding that the Donahues properly adopted Baby C and that the Quinault Nation is enjoined from opposing their adoption of Baby S.

Date: October 10, 2022

Team 21

Attorneys for Respondents

SIGNATURE BLOCK

Team 21

Team 21

Attorneys for Respondents

Date: October 10, 2022