No. 22-386

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

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

Team 23

Counsel for Respondents

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QUESTIONS PRESENTED

I. Whether Congress exceeds its Article I authority and violates the anticommandeering doctrine under the Tenth Amendment when it regulates non-commercial adoption proceedings through the placement preference and recordkeeping provisions of the Indian Child Welfare Act.

II. Whether the Indian Child Welfare Act's Indian classifications violate the Equal Protection Clause of the Fifth Amendment by excluding individuals from adopting an Indian child simply because the adoptive parents are not of the Indian race.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The Adoption of Baby C. James and Glenys Donahue ("The Donahues") are citizens of West Dakota who successfully adopted Baby C, an Indian child with parents enrolled in Indian tribes. R. at 2. Baby C had initially resided with her aunt who left her unattended for long periods of time. *Id.* West Dakota Child Protective Services ("CPS") removed Baby C and entrusted Baby C as a foster child to the Donahues. Baby C stayed in the Donahues' care for two years. *Id.* A West Dakota state court terminated the parental rights of Baby C's parents and the Donahues began their adoption pursuit of Baby C with the consent of Baby C's parents and aunt. R. at 3. During the adoption process, the Indian Child Welfare Act ("ICWA") mandated that the CPS and state court notify the tribes of Baby C's biological parents, the Quinault Nation and the Cherokee Nation, to give either nation an opportunity to intervene and place Baby C in an alternative home with an Indian family. R. at 2–3. The Quinault Nation informed the West Dakota state court that pursuant to the ICWA, Baby C should not be placed back with the Donahues, but instead moved to Nebraska to be raised by Indian non-relatives. R. at 3. This alternative option fell through for unknown reasons. *Id.* As the only option for Baby C's adoption, the Donahues settled with the CPS and Baby C's guardian ad litem, agreeing that the ICWA placement preferences did not apply to Baby C because no one else was willing to adopt her. *Id.* The Donahues completed the regulatory requirements and completed the adoption of Baby C in January of 2020. *Id.*

The Adoption of Baby S. After successfully adopting Baby C, the Donahues began fostering Baby S, another Indian child. *Id.* Baby S's father was unknown, and his birth mother belonged to the Quinault Nation. *Id.* After Baby S's mother died from a drug overdose, Baby S lived with his paternal grandmother. *Id.* When the grandmother's health declined, Baby S was

given to the Donahues as a foster child. *Id.* The Donahues then filed for legal adoption of Baby S with the grandmother's blessing. *Id.* Once again, per the ICWA regulations, the Quinault Nation was made aware of the updated status of Baby S and intervened in the adoption proceeding, opposing the selection of the Donahues. *Id.* Instead, the Quinault Nation selected two Indian families to raise Baby S, both located in another state. *Id.* Those families have not formally come forward to adopt Baby S.

II. PROCEDURAL HISTORY

The District Court. When the Donahues learned that they could be disqualified from adopting Baby S simply because they were not Indian, they along with West Dakota ("Plaintiffs") filed suit against the United States, the United States Department of the Interior, and the Secretary of the Interior, Stuart Ivanhoe, in his official capacity ("Federal Defendants"). R. at 1, 4. The Cherokee Nation and the Quinault Nation ("Tribal Defendants") intervened. R. at 2. The Plaintiffs alleged that the ICWA § 1913(d), 1914, and 1915(a)-(b) ("Indian classification provisions") violated the Equal Protection Clause of the Fifth Amendment by creating race-based classifications that fail strict scrutiny, and that the ICWA § 1912(a), (d)-(f), 1915 (a)-(b), (e), and 1951 ("placement preference and recordkeeping provisions") violated the Tenth Amendment by commandeering the States. *Id.* The District Court held that the ICWA provisions did not commandeer the states. R. at 10. Instead, the ICWA properly pre-empted state law under the Supremacy Clause. R. at 8–9. The District Court further found that Congress properly enacted the ICWA and the provisions in question due to its enumerated powers under the Indian Commerce Clause. *Id.* Additionally, the District Court held that the ICWA's Indian classification provisions made political, not race-based, classifications, and thus passed rational basis review. R. at 10, 11.

The District Court granted the Defendants' motion for summary judgment and denied the Plaintiffs' motion for summary judgment. R. at 12.

The Court of Appeals. The United States Court of Appeals for the Thirteenth Circuit reversed. R. at 13. The court held that the ICWA provisions 1912(a), 1912(e)-(f), 1915(a)-(b), 1915(e), and 1951(a) violate the anticommandeering doctrine. R. at 15. The doctrine forbids Congress from issuing orders directly to the states, yet each ICWA provision mandates state courts and executive agencies to apply the federal standards and directives of the ICWA to state-created adoption claims. *Id.* The majority declined to decide whether Congress possessed the plenary power under the Indian Commerce Clause to have even enacted the ICWA but noted its weak legal foundation under an originalist view of the Indian Commerce Clause. R. at 16.

The Concurring Opinion. Chief Judge Tower agreed with the majority yet would have held the provisions unconstitutional solely on Equal Protection grounds. R. at 19. He held that the ICWA created race-based classifications when it defined Indian children using ancestry rather than tribal affiliation. R. at 18. Because the ICWA used over-inclusive race-based classifications, it could not be narrowly tailored to achieve the governmental interest of keeping Indian families together. R. at 18–19.

SUMMARY OF THE ARGUMENT

The Court of Appeals properly held that the placement preference and recordkeeping provisions of the ICWA exceed Congress' enumerated powers and violate the anticommandeering doctrine. Congress only has the constitutionally enumerated power to regulate commerce with the Indian tribes, not domestic family relations involving an infant with one parent who belonged to a tribe. Adoption proceedings are consistently held to be under exclusive jurisdiction of state law and do not qualify as commerce under the Indian Commerce

Clause. Even if this Court were to hold that an adoption of a three-month old Baby with no suitable biological family constituted commerce, the adoption of Baby S would be between parents and a child of the same state, not between the federal government and an Indian tribe. The ICWA provisions at issue are also unconstitutional because the provisions violate the anticommandeering doctrine by issuing direct orders to the states and forcing states to implement a federal regulatory scheme. The ICWA forces West Dakota executive agencies to make available specific records of Indian adoptions at the mere request of the Secretary of the Interior, fundamentally alters state civil adoption proceedings, and profoundly changes the entire approach state executive agencies must take when dealing with ICWA issues. By forcing West Dakota's executive agencies to follow federal orders, and by compelling West Dakota courts to implement a federal regulatory scheme by paying for detailed recordkeeping requirements, the ICWA unconstitutionally violates the anticommandeering doctrine.

The ICWA's Indian classification scheme violates the Equal Protection Clause of the Fifth Amendment because it classifies based on race and does not pass strict scrutiny review. Legislative history demonstrates that Congress intended the word "Indian" to be based on ancestry and blood relationship. Additionally, the federal government has established that tribal membership is established by descending from an Indian tribe. Thus tribal membership is determined based on *biological* heritage, making the ICWA a race-based classification. The ICWA does not pass strict scrutiny as it not narrowly tailored to achieve a compelling government interest. The ICWA is not narrowly tailored because it sweeps outside of tribal affiliation to include children who are not even members of a tribe. These children are included *solely* because of their Indian race. The ICWA also extends as far as Indian children who are not even domiciled on an Indian reservation. These children are not living amongst Indian culture and do not serve Congress'

purpose of preserving the next generation of Indians. The ICWA does not serve a compelling government interest as the context under which the ICWA was created no longer presents the same issues that necessitated creating the classification. Nor do Petitioners argue that such circumstances still exist. Even if this Court holds that the ICWA classifies based on political sovereignty, the ICWA classification also fails rational basis review. The classification is not rationally related to Congress' interest in promoting tribal security for two reasons. First, the placement preferences do not apply to children who reside on Indian land. Second, when the ICWA does apply, preference is given to members of tribes different from the child's tribal affiliation. Tribes differ in their culture, politics, economics, and religious beliefs. Thus the unique values of Indian tribal culture are not preserved when children are sent to other tribes who differ from the child's biological tribe. Therefore the classification is not rationally related to the objective of keeping Indian children with their tribes to help promote tribal stability.

ARGUMENT

The ICWA's placement preference and recordkeeping provisions exceed Congress' enumerated powers and violate the anticommandeering doctrine. Adoptions are under the exclusive jurisdiction of state law and do not qualify as commerce under the Indian Commerce Clause. Thus these provision of the ICWA do not fall within the powers delegated to Congress. The ICWA violates the anticommandeering doctrine by issuing direct orders to the states and forcing states to implement a federal regulatory scheme. Additionally, the ICWA's Indian classifications violate the Equal Protection Clause of the Fifth Amendment because the ICWA classifies based on race and does not pass strict scrutiny. Even if this Court holds that the ICWA classifies based on political sovereignty, the ICWA classifications also fail rational basis review.

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

When federal law exceeds Congress' plenary power or violates the anticommandeering doctrine, it is unconstitutional and must be struck down. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). Congress never had the enumerated power within the Indian Commerce Clause to enact the provisions at issue. Federal regulation concerning adoptions of Indian children by non-Indian parents is an overextension of federal power and an overly broad interpretation of the Indian Commerce Clause. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659–60 (2013) (Thomas, J., concurring). Even if Congress had the power to regulate this intrastate non-commercial subject matter in general, the ICWA placement preference and recordkeeping provisions at issue violate the anticommandeering doctrine by issuing orders directly to the states and by forcing the state to implement a federal regulatory scheme.

A. The ICWA's placement preference and recordkeeping provisions exceed Congress' plenary power over Indian affairs when it regulates adoption proceedings.

For the ICWA's regulations to attach to the Donahues' adoption of Baby S, the regulations must have been enacted under an enumerated power. *See United States v. Lopez*, 514 U.S. 549, 566 (1995); *see generally McCulloch v. Maryland*, 17 U.S. 316, 405 (1819); *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824). The ICWA was enacted in 1978 under the jurisdiction of the Indian Commerce Clause, which reads that Congress has the ability "[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. This Court's precedent has broadly defined which activities Congress can properly regulate under the term commerce, and under the broadest interpretation of these definitions, local activities like adopting a child does not fit. *See generally Lopez*, 514 U.S. at 558–59; *United States v. Darby*,

312 U.S. 100, 114 (1941); *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). This Court has held that "'[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.'" *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion); *see also United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935). While Congress' power may be plenary, the underlying policy rationales for such overreaching federal control has been subject to immense scrutiny. *See Adoptive Couple*, 570 U.S. at 664–66 (Thomas J., concurring); *Brackeen v. Haaland*, 994 F.3d 249, 266–68 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (U.S. Feb. 28, 2022) (No. 21-380); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L. J. 1012 (2015). All the ICWA placement-preference and recordkeeping provisions at issue exceed Congress' plenary power in the role of regulating commerce with Indian Tribes. The attempted adoption of Baby S was non-commercial activity that could not properly be regulated by Congress because it exceeds the enumerated powers listed in the Indian Commerce Clause.

1. Adoptions do not qualify as commerce under the Indian Commerce Clause.

For more than a century, Supreme Court decisions have been handed down that limit or define the term commerce. *See United States v Kagama*, 118 U.S. 375, 376 (1886); *Lopez*, 514 U.S. at 561–563; *Adoptive Couple*, 570 U.S. at 664–66 (2013) (Thomas, J., concurring). The thread of rationale in these decisions represents a consistent yearning for the respect of federalism and the separation of powers between the federal government and the states, especially in relation to non-commercial activities. In *United v. Kagama*, Congress attempted to create federal law that governed the crime of murder between Indians on Indian reservations and established federal district court authority over such cases. *Kagama*, 118 U.S. at 376. The Supreme Court held that

while the Indian Commerce Clause did not grant the power necessary to enforce such a law, Congress still had the power to regulate Indian tribes because the United States could treat Indian tribes as "dependent communities." *Id*. at 383. While that Court claimed to have discovered inherent Congressional powers that were unenumerated in Indian affairs, it still expounded on the lack of control under the Indian Commerce Clause. *Id*. at 378. Even in 1886, the Supreme Court properly noted the logical stretch between the powers enumerated under the Indian Commerce Clause and the ever-encroaching Congressional attempts to exceed that power, writing that

> we think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

Id. at 378–79. While the Indian Commerce Clause confers upon Congress a broad mandate to regulate commerce with the Indian tribes, it does not give Congress the right to regulate non-commercial domestic activities like adoptions. *See Adoptive Couple*, 570 U.S. at 655–58 (Thomas, J., concurring). Family relations have long been regarded as completely under the jurisdiction of the states, not the federal government. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). According to Justice Thomas's concurrence in *Adoptive Couple*, "[a]doption proceedings are adjudicated in state family courts across the country every day, and 'domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" *Adoptive Couple*, 570 U.S. at 656–57 (quoting *Sosna*, 419 U.S. at 404).

In *Sosna v. Iowa*, plaintiff Carol Sosna moved to Iowa from New York and attempted to file a divorce decree against her husband in Iowa. *Sosna*, 419 U.S. at 395. The local Iowa state court denied the application for divorce because Sosna lacked the one-year residency requirement necessary to apply for a divorce in Iowa. *Id.* Sosna appealed her denial, alleging that the state of

Iowa had violated her due process rights under the Fourteenth Amendment through the state's residency requirements. *Id*. at 395–96. The Supreme Court held that Iowa's requirement was constitutional, and its "comprehensive statutory regulation of domestic relations" was an area of law traditionally regulated by states alone for their unique purposes. *Id*. at 404. The Court wrote that when it comes to states having "exclusive" control over domestic relations issues, "[c]ases decided by this Court over a period of more than a century bear witness to this historical fact." *Id*.

In *Adoptive Couple v. Baby Girl,* this Court wrestled with domestic relations issues in the context of Indian tribes. *Adoptive Couple*, 570 U.S. at 649–50. Justice Thomas's concurrence expounded on the shaky foundations of the ICWA in having jurisdiction over adoption proceedings at all, writing that implementing ICWA "requirements often lead to different outcomes than would result under state law. That is precisely what happened here." *Id*. at 658 (Thomas J., concurring). Using historical context as a guide, Justice Thomas wrote that the traditional use of the term "commerce" involved "selling, buying, and bartering." *Id*. at 659 (Thomas J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 585 (1995)). According to Justice Thomas, adoption nowhere qualifies as "selling, buying, and bartering," or any traditional definition of commerce. *Id*. at 659–60 (Thomas J., concurring).

The ICWA placement preference and recordkeeping provisions regulate adoption proceedings in excess of the powers conferred by the Indian Commerce Clause. Section 1915 informs state courts how to enforce an adoption proceeding of an Indian child and how to keep records of a state's compliance with federal law. 25 U.S.C. § 1915(a)-(b),(e). Section 1951(a) also regulates how states are meant to comply with the ICWA in regards to keeping compliance records for federal review. 25 U.S.C. § 1951(a). These regulations should have never attached to the Donahues' attempted adoption of Baby S. The adoption of Baby S is not commerce and cannot be

regulated by Congress through an over-extension of federal authority under the Indian Commerce Clause. Adoptions and other domestic relations can be regulated solely by state legislatures, and not Congress. *See generally Adoptive Couple*, 570 U.S. at 656–57 (Thomas J., concurring) (quoting *Sosna*, 419 U.S. at 404). By allowing Congress to overreach in its legislation through the ICWA, the Donahues' attempt to finalize their adoption of Baby S has been irreparably damaged.

2. Even if the Donahues' adoption of Baby S did qualify as commerce, it does not fall within Congress' jurisdiction as it does not constitute commerce between the government and Indian tribes.

The adoption of Baby S was entirely domestic activity that did not qualify as activity with an Indian tribe, therefore Congress cannot properly regulate it. Domestic relations between family members are completely domestic activities between citizens that Congress has no power to regulate under the Indian Commerce Clause. As Justice Thomas wrote in *Adoptive Couple*, the commerce clause does confer on Congress the "power to regulate commerce with all Indian persons any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States." *Adoptive Couple*, 570 U.S. at 660. Regulating commerce with Indian tribes is the proper demarcation between proper and unconstitutional federal legislation, and the ICWA steps far into the latter category. The placement preference provisions in 25 U.S.C. § 1915(a)-(b),(e), and the recordkeeping requirements in 25 U.S.C. § 1951(a) have the ability to regulate non-commercial adoption proceedings that involve Indian children, not Indian tribes. That level of over-inclusivity of federal law in an area of domestic relations which properly belongs under state jurisdiction compels a result that the provisions at issue were enacted in excess of Congress' enumerated powers and should be struck as unconstitutional.

B. The ICWA placement preference and recordkeeping provisions violate the anticommandeering doctrine.

The Tenth Amendment to the United States Constitution demarks the line between supremacy of federal law and sovereign state powers: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Tenth Amendment separates exclusive power away from the federal government and reserves certain powers to the states in the interest of federalism. *Id*.; *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018); *New York v. United States*, 505 U.S. 144, 168–69 (1992); *Printz v. United States*, 521 U.S. 898, 921 (1997). Separation of powers between the federal government and the states is an essential part of the constitutional framework not only because state governments are more directly connected to the issues facing its citizens, but because "'[a] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.'" *Murphy*, 138 S. Ct. at 1477 (quoting *New York*, 505 U.S. 144 at 181–82). When the federal government infringes upon the sovereignty of states' rights in determining the extent of their constitutionally delegated powers, the federal government violates the anticommandeering doctrine. *Id*. at 1477. Congress violates the anticommandeering doctrine when it (1) issues orders directly to the states or (2) forces the states to implement a federal regulatory scheme. *See Murphy*, 138 S. Ct. at 1467; *New York*, 505 U.S. at 161; *Printz v. United States*, 521 U.S. 898, 900 (1997). When a federal law contains provisions that violate the anticommandeering doctrine, it is proper to invalidate the offending provisions, while keeping the remaining federal framework intact. *Murphy*, 138 S. Ct. at 1490; s*ee New York*, 505 U.S. at 186–87; *Printz*, 521 U.S. at 935. The ICWA's placement preferences in 25 U.S.C. § 1915(a),(b) and (e), and recordkeeping provisions in § 1951(a) issue orders directly to West Dakota, and force West Dakota to implement a federal regulatory scheme. Because these

provisions either issue direct orders to the states or impose a federal regulatory scheme, they violate the anticommandeering doctrine and must be struck from the ICWA as unconstitutional.

1. ICWA placement preference and recordkeeping provisions issue orders directly to the states.

Supreme Court precedent has held for decades that the clearest example of a violation of the anticommandeering doctrine is when Congress attempts to "issue orders directly to the States." *Murphy*, 138. S. Ct. at 1475; *see also Brackeen v. Haaland*, 994 F.3d 249, 401 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (U.S. Feb. 28, 2022) (No. 21-380). The anticommandeering doctrine reaffirms the notion that "the Constitution 'confers upon Congress the power to regulate individuals, not States.'" *Murphy*, 138 S. Ct. at 1467 (quoting *New York*, U.S. 144 at 177). There is no clause or provision within the Constitution that gives Congress the authority to issue direct orders to the sovereign governments of the states. *Id*. at. 1478–80. In *Murphy v. Nat'l Collegiate Athletic Ass'n*, New Jersey attempted to legalize sports gambling, but the federal Professional and Amateur Sports Protection Act ("PASPA") made it unlawful for a State "to sponsor, operate, advertise, promote, license, or authorize by law . . . a lottery, sweepstakes, or other betting, gambling, of wagering scheme . . . " *Murphy*, 138 S. Ct. at 1465 (quoting 28 U.S.C. § 3702(1)). This Court held that PASPA violated the anticommandeering doctrine by issuing a direct order to the states. *Id*. at 1467–68. The Court held that the act's provision making it unlawful for a state to authorize a gambling scheme "unequivocally dictates what a state legislature may and may not do. The distinction between compelling a State to enact legislation and prohibiting a State from enacting new laws is an empty one. The basic principle-that Congress cannot issue direct orders to state legislatures – applies in either event." *Id*. at 1467.

Here, ICWA § 1902 demonstrates the obvious nature of the federal orders when it

> establish[es] [] *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 (emphasis added). The Supremacy Clause pre-empts conflicting state laws to the extent that federal law creates rights for persons that state law cannot conflict with, not because it orders standard controls to state executive branches to carry out its wishes. *Murphy*, 138 S. Ct. at 1479; *see e.g. Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383–84 (2015). 25 U.S.C. § 1902 provides a declaration of policy that makes clear that Congress attempts to create federal standards that states must adhere to when the state oversees an adoption proceeding, and forces institutions involved with Indian adoptions to complete the adoption in accordance with federal rules. 25 U.S.C. § 1902. That is a policy of issuing direct orders on independent state branches lawfully carrying out their jurisdiction over adoption proceedings.

When the provisions attempt to define the controls that the states have to abide by, the orders get more and more involved in every aspect of child custody and adoption proceedings: 25 U.S.C. § 1915 reads that during an "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(a) (emphasis added). This is not federal law that supersedes contradictory state law – rather, this is a federal order that while the state is properly controlling an issue, its executive branch must carry out certain federal standards in the process. This is not the only ICWA provision that commands a state to carry out a federal order. The placement preferences go on in 25 U.S.C. § 1915(b) to command that "any child accepted for foster care or preadoptive placement *shall be placed* in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met." 25 U.S.C. § 1915(b) (emphasis added).

That subsection also mandates that, unless there is good cause to the contrary, placement of an Indian child shall be with

> a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Id. West Dakota Child Protection Services is a state agency that accepts children for foster care and helps to place children that come from tragic circumstances loving homes of foster parents until an adoption proceeding is finalized. R. at 2, 3. The record of the fact-finder plainly shows that the West Dakota Child Protection Services is affected by the intervention of the ICWA. R. at 2. As a state agency, CPS must take complaints from concerned citizens over child welfare, take children into custody, and help perform social work duties during domestic relations issues. *Id*. According to the record, when CPS is forced to implement the ICWA legislation, the influence is so vast that CPS had to make an ICWA compliance manual to make sure the agency did not run afoul of violating the federal orders. *Id*. Additionally, the fact-finder found that CPS acknowledges in its compliance manual to the entire agency that if they take a child into custody that happens to be Indian, "almost every aspect of the social work and legal case is affected." *Id.* (quoting CPS).

2. The ICWA placement preference and recordkeeping provisions force states to implement a federal regulatory scheme.

The anticommandeering doctrine is violated when Congress attempts to shift the costs of federal regulation to the states. *Murphy*, 138 S. Ct. at 1477. Not only is Congress barred from imposing orders directly to the states, it is also barred from forcing states to implement and execute a federal regulatory scheme. *Id*. If Congress were able to transfer the financial burden of its imposing legislation on states' rights, it would never need to balance the fiscal and monetary implications of its policies – it could simply let the states bear all the risks. *Id.*; *see also* E. Young,

Two Cheers for Process Federalism, 46 VILL. L. REV. 1349, 1360–61 (2001); *see generally Gregory v. Ashcroft*, 501 U.S. 452, 458–60 (1991). In *New York v. United States*, Congress enacted a radioactive waste policy that in part forced states to either accept ownership of radioactive waste created within its borders and become liable for all damages that flow from its possession or follow a set of Congressional instructions in disposing of it. *New York v. United States*, 505 U.S. 144, 145 (1992). The Court held that while Congress can pre-empt state regulation in the field of nuclear waste, the Constitution does not "authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders" to Congress' preferences. *New York*, 505 U.S. at 188.

The ICWA placement preference and recordkeeping provisions compel the states to implement a federal regulatory scheme. The placement preference requirements in § 1915 force state agencies like CPS to give placement preference to a member of the child's extended family, other members of the Indian child's tribe, or other Indian families. 25 U.S.C. § 1915(a). It also forces state agencies to attempt to find a foster setting with "reasonable proximity" to the home of the child. *Id*. This increasingly high bar of statutory requirements requires state courts and agencies locate alternative potential families, track other potential Indian families in the area and have knowledge and records of the child's extended family. This regulatory scheme is of Congress' making, and Congress may not force a state to implement it. *Murphy*, 138 S. Ct. at 1477.

25 U.S.C. § 1951(a) forces "any state court" to provide comprehensive records of all Indian child adoptive placements to the federal government whenever it chooses. 25 U.S.C. § 1951(a). The regulations require state courts to record "the name and tribal affiliation of the child, the names and addresses of the biological parents, the names and addresses of the adoptive parents, and the identity of any agency having files or information relating to such adoptive placement." *Id*. These

regulations compel states to implement a recordkeeping scheme in order to stay complaint with ICWA. The costs imposed on tracking these pieces of data, compiling them, storing them, preserving their confidentiality, and sending the information securely are all burdens imposed on the states. In effect, West Dakota is forced to execute ICWA's broad domestic relations scheme by tracking all the pertinent information and handing it over to the federal government at will.

II. The Indian Child Welfare Act's Indian classifications violate the Equal Protection Clause of the Fifth Amendment because the ICWA classifies based on race and does not pass strict scrutiny. Even if this Court holds that the ICWA classifies based on political sovereignty, the ICWA also fails rational basis review.

Racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quotation omitted). The Equal Protection Clause of the Fifth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. X. Thus the government cannot "distribute[] burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). The "central mandate" of the equal protection clause "is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). The Equal Protection Clause is violated when a statute classifies based on a suspect class, such as race, and fails strict scrutiny review. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). If the statute classifies based on a non-suspect class, such as by political group, the statute does not violate the Equal Protection Clause unless it fails a rational basis standard of review. *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989).

Under the ICWA, an Indian is defined 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). The ICWA uses the term "Indian" to classify based on race. Such a classification scheme "threaten[s] to stigmatize individuals by

reason of their membership in a racial group and to incite racial hostility." *Reno*, 509 U.S. at 643. Therefore, in order to survive an Equal Protection claim, the ICWA classification must be narrowly tailored to achieve a compelling government interest. *Grutter*, 539 U.S. at 326. Not only does the government fail to provide a compelling interest, the ICWA is not narrowly tailored. Even if this Court were to find that the ICWA uses the word "Indian" to classify based on political sovereignty, the ICWA classification still does not survive rational basis review. In order to avoid an equal protection violation under rational basis, the classification must be rationally related to a legitimate government interest. *Fox*, 492 U.S. at 480. It is not.

A. The ICWA's Indian classification scheme violates the Equal Protection Clause of the Fifth Amendment because it classifies based on race and does not pass strict scrutiny review.

The ICWA uses "Indian" as a race based classification based on ancestry and blood relationship. H.R. Rep. No. 95-1386, at 20 (1978). One cannot be part of the class unless he is *biologically* related to a member of an Indian tribe or who is eligible for membership. 25 U.S.C. § 1903(4). Respondents are excluded solely because they are not of Indian descent. R. at 3. Moreover, the ICWA classification does not further the political sovereignty of the Indian tribes, but rather furthers *state* affairs. Thus it is not a political classification. Additionally, the classification does not satisfy strict scrutiny review because it is not narrowly tailored. It sweeps so broad as to include children who are not even members of a tribe and are merely *eligible* for tribal membership based on their *biological* heritage. 25 U.S.C. § 1903(4)(b). The ICWA may also place Indian children in a different tribe than their ancestry. *Id.* § 1915. Thus Congress' purpose in enacting the ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" is not even furthered by the statute's scheme. *Id.* § 1902. This purpose is also no longer a compelling government interest as the context under which the

ICWA was created no longer presents the same issues that necessitated government intervention in creating the classification scheme.

1. The ICWA classifies cased on race.

The ICWA's placement preference provision is a raced-based classification. An Indian is defined by the statute 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." *Id.* § 1903(4) (emphasis added). As demonstrated by 25 C.F.R. § 83.11(e), the federal government has established that tribal membership is predicated on "descend[ing] from a historical Indian tribe." 25 C.F.R. § 83.11(e). Thus, tribal membership or eligibility for tribal membership is determined based on biological heritage. Further, the House of Representatives in the 95th Congress recognized when creating the ICWA that "[b]lood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe." H.R. Rep. No. 95-1386, at 20 (1978). This powerfully indicates that Congress legislated with the purpose of race rather than political sovereignty when it classified and defined "Indian child." *Id.* During the ICWA's 95th Congressional House meeting, Honorary Morris K. Udall expressed concerns that "certain provisions of the bill raise serious constitutional problems because they provide for differing treatment of certain classes of persons based solely race" and "having enough Indian blood to qualify for membership in a tribe." *Id.* at 35. Udall's warnings were never addressed by Congress and continue to remain true. Those with "enough Indian blood" can adopt Indian children, but the Donahues cannot adopt Baby S because they do not have Indian blood. *Id.* at 35; R. at 3. Additionally, Assistant Attorney General Patricia M. Wald dissented from the creation of the ICWA noting that "the blood connection between the child and a biological but noncustodial parent is a[n] [in]sufficient basis upon which to deny the present parents and the child

access to State courts." H.R. Rep. No. 95-1386, at 39 (1978). Scholars also agree that "the context of tribal rules that condition membership on the existence of tribal blood . . . shows that biology, above all else, makes a person Indian under ICWA." Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 27 (2008). Scholars note that perhaps the ICWA's classification scheme would be race-neutral if Congress limited the definition of Indian child to those who are *actually* members of a tribe, or if Congress were to modify 25 U.S.C. § 1903(4)(b) to read, "eligible for membership in an Indian tribe and is in the custody of a parent who is a member of an Indian tribe." *Id.* (internal quotations omitted). Yet Congress has not done so. Other courts have also understood the ICWA to classify based on race, allowing Indian tribes to "claim any children who are related by blood to such a tribe . . . solely on the basis of their biological heritage." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (Cal. Ct. App. 1996) (brackets and quotations omitted).

Respondents use *Morton v. Mancari* to justify the ICWA classification scheme by contending that the ICWA classifies based on political sovereignty. *Morton v. Mancari,* 417 U.S. 535 (1974). Yet this is unfounded as this Court deemed *Mancari*'s classification to be political because of the particular context of that case. *Id.*

First, the classification at issue involved the Bureau of Indian Affairs (BIA) hiring preferences that directly furthered tribal self-government by ensuring that tribal members were involved in BIA's governance of tribal affairs. *Id.* at 554. The BIA was an administrative agency specifically tasked with governing Indian affairs. *Id.* In contrast, the ICWA does not directly involve internal governance of tribal affairs. The ICWA's preference to place an Indian child even with members of *other* Indian tribes cannot advance tribal sovereignty and affairs as the child is not even living amongst his own tribe. 25 U.S.C. § 1915. Further, the ICWA does not implicate

other internal matters of Indian tribes such as the investigation and prosecution of crimes committed on Indian reservations by the Indians domiciled there, or even the adoption of an Indian child who is registered with a reservation and is living on tribal land. *See United States v. Antelope*, 430 U.S. 641, 645–47 (1977); *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390–91 (1976). Instead, the classification operates on vital *state* affairs rather than those internal to the tribe. *Mancari* acknowledged that "while a classification based on membership in a federally recognized tribe could target 'a discrete racial group,' it also could identify 'members of quasi-sovereign tribal entities.'" *Mancari*, 417 U.S. at 554; R. at 11. Thus, *Mancari* established only a "limited exception" and recognized that there still are instances in which tribal classifications operate impermissibly as a proxy for race. *Mancari*, 417 U.S. at 554; *Rice v. Cayetano*, 528 U.S. 495, 520 (2000).

Second, the ICWA's classification of "Indian child" differs from the political classification in *Mancari* because the ICWA broadly sweeps in biologically related children who are non-members of a tribe. 25 U.S.C. § 1902(b). The statute also applies to Indian children who are not even domiciled on an Indian reservation. 25 CFR § 23.103(a). Thus the ICWA is not merely a political classification but one based on blood relation and is distinguished from the statute at issue in *Mancari*.

In addition to legislative history, caselaw also demonstrates that ICWA's classification is based on race. When a statute defines a class of people based on their descendants, the statute is classifying based on race. *Rice*, 528 U.S. at 520. In *Rice v. Cayetano*, the Hawaiian constitution limited the right to vote for nine trustees in a statewide election. *Id.* at 498. The trustees control the Office of Hawaiian Affairs (OHA), which provides benefits for two classes of people, (1) native Hawaiian's defined by Haw. Rev. Stat. § 10-2 (1993) as descendants of not less than one-

half part of the races inhabiting the Hawaiian Islands prior to 1778, and (2) Hawaiian's defined as descendants of people inhabiting the Hawaiian Islands in 1778. *Id.* at 499. Thus only these two classes of people were eligible to vote for trustees. *Id.* Petitioner Rice sought to vote in the election but could not because while he was a citizen of Hawaii, he did not have the "requisite ancestry" and thus was not "Hawaiian" according to the statute. *Id.*

This Court held that Hawaii violated the Fifteenth Amendment when it denied Rice the right to vote because of his *race*. *Id.* at 529. The Court reasoned that the term "ancestry" was a proxy for the term "race" and rejected the state's argument that the classification was based merely on the date of an ancestor's residence in Hawaii. *Id.* at 514–16. The Court also rejected Hawaii's argument that since the restriction differentiated even among Polynesian people, the classification was race neutral. *Id.* at 516. The Court noted that failure to include all members of the race in a class defined by ancestry is insufficient to make the classification race neutral. *Id.* at 516–17. The court also looked to Hawaii's long history in using ancestry as a *racial* definition and for a *racial* purpose, as well as the "explicit tie to race" that the drafters emphasized when creating the statute. *Id.* at 515–16. Further, the Court cautioned that "ancestral inquiry . . . implicates the same grave concerns as a classification specifying a particular race by name, for it demeans a person's dignity and worth to be judged by ancestry instead of by his or her own merit and essential qualities." *Id.* at 517. Similarly, the Court noted that Hawaii's arguments failed because they "rest[ed] on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters." *Id.* at 544 (Stevens, J., dissenting).

Here, while the Fifteenth Amendment and voting rights are not at issue, the principal remains the same: the government cannot discriminate based on race unless the statute passes strict scrutiny. Just as the Hawaii statute used the term "ancestry" as a proxy for race, the ICWA uses

"Indian" as a proxy for race. This is indicated by the statute's legislative history revealing that Congress "explicitly tie[d] [the ICWA] to race" when it defined "Indian" as a blood relationship. *Rice*, 528 U.S. at 497; H.R. Rep. No. 95-1386, at 20 (1978).

Similar to Hawaii's justification that the restriction was race-neutral since it differentiated even among Polynesian people, petitioners contend that the ICWA is race-neutral because it classifies based on the political status of Indians. R. at 10. Yet the ICWA is based on Indian ancestry, not tribal membership as the ICWA defers to tribal membership *eligibility* rather than actual *affiliation* with a tribe. 25 U.S.C. § 1903(4)(b). Additionally, just as the OHA governed state affairs in Hawaii, the ICWA governs state affairs. Thus the classification cannot be a political classification that falls under *Mancari*'s exception.

Further, just as the Hawaii voting statue "demean[ed] a person's dignity and worth" by classifying based on ancestry instead of by merit and qualifications, the ICWA has the same affect in classifying based on blood relationship. R. at 2–3. Highly qualified non-Indian foster and adoptive parents are denied the same opportunity as Indians who may be less qualified, simply because the non-Indian parents do not have Indian blood. *Id.* The ICWA classification thus implicates that individuals are better suited to be foster parents based on race rather than merit and ability to care for a child.

At the very least, when no alternative party has formally sought to adopt an Indian child, the adoption placement preferences of the ICWA are inapplicable and thus a non-Indian family can adopt an Indian child. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). In *Adoptive Couple*, the biological father of the child was a member of the Cherokee Nation, making the child 1.2 percent Indian. *Id.* at 641. The South Carolina Supreme Court held that under the ICWA, the child at 27 months old was required to be removed from her non-Indian foster parent's home to live with

her biological father simply because he was Indian. *Id.* The father had no previous contact with the child and had previously attempted to relinquish his parental rights before the birth mother gave the child up for adoption. *Id.* No other party sought to adopt Baby Girl other than her current foster parents. *Id.* This Court held that the ICWA's adoption-placement preferences are inapplicable in cases where no alternative party has formally sought to adopt the child because there "simply is no 'preference' to apply if no alternative party that is eligible to be preferred under §1915(a) has come forward." *Id.* at 654. This Court thus reversed and recognized that "[t]he ICWA was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor — even a remote one — was an Indian." *Id.* at 655. Further, the Court acknowledged the policy concerns under the ICWA as an Indian biological father could "abandon his child in utero" and fail to provide any support for the biological mother, yet could "play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests." *Id.*

Here, just as Baby Girl's parent in *Adoptive Child* sought to use the ICWA simply because the parent was Indian, so too the Quinault tribe seeks to use the ICWA simply because Baby S's deceased mother was Indian. R. at 3. Just as no one else sought to adopt Baby Girl in *Adoptive Couple* (the father was merely arguing that his parental rights should not have been terminated), no eligible alternative party under §1915(a) has formally come forward and sought adoption of Baby S. *Id.* The tribe found two potential adoptive families for Baby S in *another* state, for the sole reason that the other families are Indian. *Id.* Yet the Quinault nation has only merely *informed* the CPS of these two "potential adoptive families." *Id.* Therefore there is "no preference to apply" between the Donahues' and another party. Baby S's grandmother who previously had custody of

the child even approved of the adoption. *Id.* Yet because of the ICWA, the Quinault nation "played [the] ICWA trump card at the eleventh hour" to over-ride the grandmother's approval and the Donahues' petition for adoption. *Id.* The ICWA thus puts Baby S at a "great disadvantage" merely because her deceased mother was an Indian. *Id.* While the ICWA's classification scheme favoring Indians always violates the Equal Protection Clause regardless of whether or not there is an alternative party seeking adoption, this Court should at the very least hold the ICWA classification inapplicable when no Indian party has formally come forward to adopt the child.

2. The ICWA fails strict scrutiny.

As held by this court in *Adarand Construction, Inc. v. Pena*, the "government may treat people differently because of their race only for the most compelling reasons." *Adarand Construction, Inc. v. Pena*, 515 U.S. 200, 227 (1995). The ICWA classifies based on race and is thus subject to strict scrutiny. In order to satisfy strict scrutiny review, the statute's classification must be narrowly tailored to achieve a compelling government interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

a. The ICWA is not narrowly tailored.

First, the Indian classification scheme is not narrowly tailored. In order for the government to meet this standard, it must demonstrate that "neutral alternatives that are both available and workable do not suffice." *Fisher v. Univ. of Tex.*, 579 U.S. 365, 431 (2016). Yet there is no evidence in the legislative history or the record that Congress considered any race neutral alternatives before passing the ICWA Indian preference provisions. The ICWA is also not narrowly tailored because it sweeps in children who are not even members of a tribe *solely* because of their biological heritage. 25 U.S.C. § 1903(4)(b). If the ICWA were narrowly tailored, it would not extend so broadly outside of tribal affiliation. The result of this widespread provision is that an

Indian family located *anywhere* in the United States, with no connection to a child, has an unconditional preference over any other citizens based solely on Indian race. *See generally City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989). Lastly, the ICWA also reaches as far as to apply to Indian children who are not even domiciled on an Indian reservation, thus they are not living amongst Indian culture and do not serve Congress' purpose of preserving the next generation of Indians.

Other provisions of the ICWA not at issue *are* narrowly tailored, proving that Congress is entirely capable of tailoring statutory language to Indian tribal interest in a much more narrower fashion than it did in § 1915(a) with broad racial preferences. For example in § 1911(a), Congress granted exclusive jurisdiction over "any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe," and in § 1922, Congress also tailored the language to be based on domicile in outlining the emergency removal of "an Indian child who is a resident of or is domiciled on a reservation." Therefore, Congress has the ability to narrow the scope of ICWA provisions yet has allowed the racial classification scheme to reach farther than is necessary.

b. The ICWA does not further a compelling interest.

Second, there is no longer a compelling government interest for the ICWA's racial classification. The ICWA was enacted in response to "an alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children . . . by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901. Further, Congress sought 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.

Id. § 1902. However, such an extreme measure as the ICWA classification is no longer necessary because the context under which the ICWA was created no longer presents the same issues that made a racial scheme compelling government interest. The ICWA was enacted because of hearings and investigations conducted in the 93d [sic], 94th, and 95th Congress at the urging of Indian tribes. H.R. Rep. No. 95-1386, at 27 (1978). Various public and private witnesses testified confirming reports of "abuses of the rights of Indian tribes, parents, and children in the process" of Indian children and placing them in foster or adoptive homes. *Id.* Such abuses were present in surveys conducted by the American Indian Affairs in 1969 and 1974. *Id.* In states with large Indian populations, the surveys demonstrated that around 25 to 35 percent of Indian children were separated from their families and placed in foster care, adoptive homes, or institutions. Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Committee on Interior and Insular Affairs, 93d Cong. 1 (1974) (Opening Statement of Hon. James Abourezk, A U.S. Senator from the State of South Dakota). In Minnesota, one in every eight Indian children under 18 years old was living in foster care, which was five times greater than non-Indian children. *Id.* In Montana, the ratio of Indian foster-care placement was at least 13 times greater than those of non-Indians. *Id.* In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare in 1967 to 1968 were of Indian children, yet Indians made up only seven percent of the child population. *Id.* In Arizona, 4.2 times more Indian children were placed for adoption in

1976 than non-Indian children. *Id.* Such statistics at the time of the ICWA's consideration thus indicated a disproportionate taking of Indian children for placement with non-Indian families. Yet Congress has not demonstrated that such disproportionality was the product of racial discrimination.

Additionally, as stated by this Court in *Shelby County v. Holder*, "the problem Congress [seeks] to remedy cannot be historical; it must persist in the present." *Shelby County v. Holder*, 570 U.S. 529, 553 (2013); *United States v. Cannon*, 750 F.3d 492, 510 (5th Cir. 2014). This Court in *Grutter v. Bollinger* and *City of Richmond v. J.A. Croson Company* held that "raceconscious [sic]" governmental remedial actions must have "a termination point" to ensure "all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989)). Yet petitioners have not contended that any tribe today is in danger of the same abuses when the ICWA was enacted. Concerningly, there is no "termination point" under the ICWA's classification scheme, nor does Congress nor the Secretary of the Interior provide "evidence for [the] conclusion that remedial action [continues to be] necessary." *Croson*, 488 U.S. at 510. Thus it is unconstitutional.

B. Even if this Court deems the Indian Child Welfare Act's definition of "Indians" to be based on a political classification and thus subject to rational basis, the ICWA also fails rational basis.

In order to survive rational basis review, the burden is on the respondent to show that the ICWA classification is not rationally related to a legitimate government interest. *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989). The classification is not rationally related to Congress' interest in "promot[ing] the stability and security of Indian tribes" for two reasons. 25 U.S.C. § 1902. First, the placement preferences of section 1915 do not apply to children who reside on Indian land. 25

C.F.R. § 23.103(b). Second, when the ICWA does apply, preference is given to members of tribes *other than* the tribe that the child is part of, making the statute not rationally related to the objective of "keeping children with their tribes" and helping promote tribal stability. *Id.* Another objective of the ICWA is to preserve the "unique values of Indian culture." 25 U.S.C. § 1902. Yet placing an Indian child in a family from a *different* Indian tribe does not even plausibly further the survival and culture of the child's tribe. This is because tribes differ in their culture, politics, economics, and religious beliefs. For example, the Quinault tribe is governed by an eleven member business committee and derives its economy predominantly from the Quinault Beach Resort and Casino, timber, and various fishing entities. Quinault Nation, https://www.quinaultindiannation.com/index.htm. In contrast, the Coeur d'Alene Tribe is governed by seven elected members and has two primary areas of economic development: agriculture and gaming. Coeur d'Alene Tribe, https://www.cdatribe-nsn.gov/our-tribe/. Even more different is the Cherokee nation where laws are enacted and finances are managed by a seventeen member legislative body called the Tribal Council. Cherokee Nation, https://www.cherokee.org/about-the-nation/. The majority of Cherokees currently practice some form of Christianity, yet a significant number of tribal members still observe the older traditions of stomp dancing and ceremonies. *Id*. Thus the unique values of Indian tribal culture are not preserved when children are sent to other tribes whose way of life is different from the child's biological tribe. Therefore, the ICWA classification fails rational basis.

Because the ICWA classifies based on race and fails strict scrutiny, or at the very least, classifies based on political sovereignty and fails rational basis, the classification scheme violates the Equal Protection Clause of the Fifth Amendment.

CONCLUSION

In conclusion, the ICWA's placement preference and recordkeeping provisions exceed Congress' enumerated powers. Adoptions are under the exclusive jurisdiction of state law and do not qualify as commerce under the Indian Commerce Clause, nor can a federal provision remain constitutional when it is over-inclusive and regulates totally intrastate activities not with the tribes themselves. Thus these provisions of the ICWA do not fall within the powers delegated to Congress. These provisions also violate the anticommandeering doctrine by issuing direct orders to the states and forcing states to implement a federal regulatory scheme. Further, the ICWA's classification scheme violates the Equal Protection Clause of the Fifth Amendment because it is race-based and does not pass strict scrutiny. Even if this Court holds that the ICWA classifies based on political sovereignty, the classification also fails rational basis review as it sweeps too broadly in its Indian classifications. Thus, this Court should affirm the Thirteenth Circuit and rule in favor of the Donahues.

Respectfully submitted,

Team 23

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