No. 22-386

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2022

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

v.

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

On Appeal from the United States Court of Appeals for the Thirteenth Circuit

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Brief for Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

QUESTIONS PRESENTED

I. Federal law may circumvent the anticommandeering doctrine through preemption based on the Supremacy Clause when the law is an exercise of Constitutional power and regulates only private individuals, not States. The Indian Child Welfare Act (ICWA) takes its authority from the Indian Commerce Clause, an explicit grant of Constitutional authority, and confers federal, procedural rights on individuals. Do the placement preference and record keeping provisions of ICWA violate the anticommandeering doctrine?

II. The Fourteenth Amendment's Equal protection clause prohibits states from denying any person within the state's jurisdiction equal protection of the laws. ICWA establishes that preference in the adoption of Indian children will focus on placing the children with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. Does the adoption preference for Indian children violate the Fourteenth Amendment's equal protection clause?

STATEMENT OF THE CASE

In April 2020, the Quinault Nation and the United States Department of the Interior began a fight to keep Baby S in a culturally appropriate household. Born in West Dakota in January 2020, Baby S became an orphan at only one month old, when Baby S's mother died of a drug overdose. R. at 3. Baby S's mother was a member of the Quinault Nation, but Baby S's father is unknown, so he lived in the custody of his grandmother until April 2020. Id. At that time, Baby S's grandmother was no longer capable of caring for him, and Baby S was moved to foster care. Id. Baby S was placed with Appellees, the Donahues. Id.

The Donahues filed a petition to adopt Baby S in May 2020. Id. This petition was protested by the Quinault Nation, as was their right under the Indian Child Welfare Act. Id. Instead, the Quinault Nation informed West Dakota CPS that it had identifies two alternative adoptive families for Baby S. Id. Both potential families were members of the Quinault Nation, living outside of West Dakota. Id.

After they were informed of the other potential adoptive families, The Donahues and West Dakota filed suit against the Department of the Interior and the Quinault Nation, alleging that ICWA violates the Equal Protection Clause and unconstitutionally commandeers state governments in violation of the Tenth Amendment. R. at 4. Both parties filed cross-motions for summary judgement. In September 2020, the United States District Court for the District of West Dakota granted the Department of the Interior and the Quinault Nation's motion, confirming the constitutionality of ICWA. The Donahues and West Dakota in turn appealed to the United States Court of Appeals for the Thirteenth Circuit, which reversed the District Court's judgement. The Department of the Interior and the Quinault Nation now appeal this decision.

SUMMARY OF THE ARGUMENT

The issue on appeal is whether ICWA runs afoul of the Tenth Amendment's anticommandeering doctrine and the Fourteenth Amendment's Equal Protection Clause. We say that it does not. The anticommandeering doctrine does not apply to federal law when the law is preemptive under the Supremacy Clause. Further, the Equal Protection Clause requires only a rational basis review when the statute is based on a political classification rather than a racial one. A de novo review of the lower court's decision reveals that the Circuit Court erred in holding that ICWA violates the Tenth and Fourteenth Amendments.

Preemption under the Supremacy Clause applies to ICWA because the statute acts under an explicit grant of Constitutional authority and it grants rights and protections to private individuals. The Indian Commerce Clause gives Congress plenary authority to regulate Indian tribes and all Indian affairs, making ICWA a legitimate exercise of the Clause's power. Secondly, the placement preference and recordkeeping provisions of ICWA do not regulate State governments, but confer federal, procedural rights on Indian children and families. Under the Act, Indian children have the right to a placement preference with Indian families and tribes have a right to access well-kept records about Indian child placement. Additionally, ICWA does not conflict with the underlying principles of the anticommandeering doctrine. Though the doctrine is meant to reaffirm principles of federalism and state sovereignty, ICWA does not endanger these principles. The power to regulate Indian affairs has never been relegated to States, and the purpose of the Act is to preserve the Indian family and culture, not to impose federal regulatory schemes on State governments.

Under the Equal Protection Clause, the strict scrutiny test is applied if a law draws classifications based on race. However, if the legal classification is political, the law must only

pass the rational basis review. ICWA draws distinctions based on political affiliation, not race, because Indians are defined not as a racial group, but as a member of a quasi-sovereign tribal entity. Therefore, the Act should not be subject to the strict scrutiny test. The Act passes the rational basis test because the preferences in ICWA are rationally tied to Congress's legitimate goal of protecting Indian children and families. However, even if the strict scrutiny test is applied, ICWA does not violate the Equal Protection Clause because there is a compelling governmental interest of preserving the rights of Indian children and families.

Therefore, the lower court erred by holding that ICWA violates the Tenth and Fourteenth Amendments. This Court should reverse and affirm the Act's Constitutionality.

ARGUMENT

I. ICWA DOES NOT VIOLATE THE TENTH AMENDMENT AND THE ANTICOMMANDEERING DOCTRINE.

The constitution endows Congress with certain, definite powers. The 10th Amendment states that any powers not explicitly delegated to the federal government are to be reserved for either the States or the people, a concept later denoted as the anticommandeering doctrine. U.S. Const. amend. X. The modern notion of the anticommandeering doctrine stems from only three cases, beginning with the Supreme Court's 1992 decision in *New York v. United States*. Writing for the Court, Justice O'Connor stated that the Constitution "confers upon Congress the power to regulate individuals, not States," so a commandeering of State governments is unconstitutional. *New York v. U.S.*, 505 U.S. 144, 166 (1992). The Tenth Amendment, the Court reasoned, acts as a protection against encroachment on State sovereignty and "directs us to determine … whether an incident of state sovereignty is protected by a limitation on an Article I power." *Id*. at 157. The Court held that "the Tenth Amendment confirms that the power of the Federal Government

is subject to limits that may, in a given instance, reserve power to the States." *Id*. Those instances do not include Constitutional reservations of power to the federal government. The Court further reasoned that "the Federal Government may not compel the States to enact or administer a federal regulatory program." *Id. at 188*. The principle was affirmed in *Printz v. United States*: "The Federal Government may [not] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. U.S.,* 521 U.S. 898, 935 (1997).

Murphy reaffirms the anticommandeering principle, but also examines the preemption provision, reasoning that anticommandeering issues can be circumvented if the regulatory scheme preempts State law by virtue of the Supremacy Clause. *Murphy v. NCAA*, 138 S. Ct. 1461, 1479-80 (2018). The anticommandeering principle does not apply, then, when Congress seeks to regulate or confer rights on private actors, but only when Congress seeks to use State governments to enact federal regulatory schemes.

The issue on appeal is whether the lower court erred in holding that the placement preference and record keeping provisions of ICWA violate the anticommandeering doctrine. This is an issue of law and is reviewed de novo. The lower court erred in their decision to hold ICWA unconstitutional for violating the anticommandeering doctrine. This Court should reverse and affirm the constitutionality of ICWA.

A. ICWA supersedes State law by virtue of the Supremacy Clause.

ICWA fulfills the requirements to trigger the Supremacy Clause and therefore does not run afoul of the anticommandeering doctrine. The Supremacy Clause states that when federal law conflicts with State law, the federal law is considered supreme. This Clause is not an "independent grant of legislative power to Congress," but simply a "'rule of decision'." *Id*. at

1479. For the Supremacy Clause to apply, two conditions must be met: (1) the action must "represent the exercise of a power conferred on Congress by the Constitution" and (2) the law must regulate only private actors, not State governments. *Id.* In all Supremacy Clause cases, a federal law "imposes restrictions or confers rights on private actors," a state law conflicts with these provisions, and the federal law takes precedence over the State decision. *Id.* The anticommandeering doctrine does not apply when the Supremacy Clause is triggered.

1. ICWA derives Constitutional authority from the Indian Commerce Clause.

The power to regulate Indian affairs is explicitly reserved for Congress. The Indian Commerce Clause states that the power "[t]o regulate commerce … with the Indian tribes" rests solely with Congress, as laid forth in Article I. U.S. Const. art. I, 8, cl. 3. Indian affairs, as repeatedly affirmed by this Court, are not subject to state regulation. Indeed, this Court stated only two years ago that "the policy of leaving Indians free from State jurisdiction and control is deeply rooted in the Nation's history." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020) (citing *Rice v. Olson*, 324 U.S. 786, 789 (1945)). The regulation of Indian commerce has never been left to the discretion of State governments; from the Nation's founding, that power has only been reserved for Congress.

The Indian Commerce Clause has long been construed broadly, giving Congress plenary power to regulate Indian affairs. This power is not constrained by the exact language of the Clause but is "drawn both explicitly and implicitly" from Article I. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). As such, "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903), *See, e.g., U.S. v. Cooley*, 141 S.Ct. 1638, 1643 (2021) ("In all cases, tribal authority remains subject to the plenary authority of Congress"). Supreme Court precedence makes plain that "the

Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers [the Court has] consistently described as 'plenary and exclusive.'" *U.S. v. Lara*, 541 U.S. 193, 200 (2004) (*citing Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470-71 (1979)).

Some limitations on Congress's ability to regulate commerce have been established by this Court. Reviewing the reach of the Interstate Commerce Clause, the Court in *United States v. Lopez* held that Congress's power under the Interstate Commerce Clause is not infinite, specifically mentioning family law, including "child custody" as outside Congress's reach. *U.S. v. Lopez*, 514 U.S. 549, 564 (1995). *U.S. v. Morrison* likewise affirmed that the Interstate Commerce Clause is not limitless, declaring the Violence Against Women Act an unconstitutional exercise of the Clause. *U.S. v. Morrison*, 529 U.S. 598 (2000).

As a regulation of Indian affairs, ICWA represents a valid exercise of the Indian Commerce Clause. §1901 of the Indian Child Welfare Act states that Congress has "assumed the responsibility for the protection and preservation of Indian tribes and their resources," and that the preservation of the Indian family and culture is an essential element of that responsibility. 25 U.S. §1901. Declaring Congress's position on protecting Indian children, §1902 states:

> "[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." 25 U.S. §1902.

These policy considerations place the Act squarely in the authority of the Indian Commerce Clause. Plenary power means "full, complete, entire" authority over Indian affairs, including over the preservation of Indian families and culture. *Plenary,* Black's Law Dictionary (11th ed. 2019). ICWA's provisions fall well within the boundaries of the Indian Commerce Clause's power.

Limitations on the definition of "commerce" set forth in the context of the Interstate Commerce Clause are not applicable to the scope of the Indian Commerce Clause. This Court has "well established that the Interstate Commerce and Indian Commerce Clauses have very different applications," noting that the former is meant to protect "free trade among the states," while the latter is meant "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 two clauses are distinct Constitutional concepts and cannot be automatically applied to situations where one is appropriate. *See, e.g. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (declaring that "[t]ribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other). Therefore, decisions limiting the scope of the Interstate Commerce Clause cannot be applied to the Indian Commerce Clause, which functions differently and provides Congress with broader, plenary power over the wide realm of Indian affairs.

2. ICWA confers procedural rights on private citizens.

The placement preference and recordkeeping requirements of ICWA do not regulate State governments but regulate private individuals by conferring specific rights on Indian children. Under *Murphy*, preemption applies when federal law "imposes restrictions or confers

rights on private actors." *Murphy*, 138 S. Ct. at 1479. This does not include laws which impose regulatory schemes on State governments.

The placement preference provision in § 1915 of ICWA states: "In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S. § 1915(a). This section does not demand certain procedures from the State governments but provides Indian children with the right to be placed in the homes of tribal members or other Indian families. The provision gives no directions to State actors but establishes that Indian families are to receive a preference in Indian child placement, regardless of whether State or private actors do the placing.

Likewise, the recordkeeping requirements of § 1915 provide Indian children and families with federal procedural rights. According to this provision: "A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe." 25 U.S. §1915(e). Such a requirement merely extends rights and protections to Indian children and their tribes by requiring that they have access to records of placement proceedings. The Act does not commandeer State agencies to complete federal programs, but simply requires States to respects the federal procedural rights hereby afforded to Indian children and families.

B. ICWA does not violate the underlying principles of the anticommandeering doctrine.

The placement preference and record keeping provisions of ICWA are not problematic for the underlying principles of the anticommandeering doctrine. The anticommandeering doctrine was established by the Court to reaffirm the importance of the enumerated powers doctrine and the continued existence of state sovereignty. In *New York*, Justice O'Connor reemphasized the power of the Tenth Amendment to protect the principles of federalism. The Court held that "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York*, 505 U.S. at 157. Likewise, Justice Scalia in *Printz* noted that "[r]esidual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones." *Printz*, 521 U.S. at 2376.

The Indian Child Welfare Act is not one of the instances described by Justice O'Connor. While *New York* and *Printz* underline the importance of residual state sovereignty in the Constitutional scheme, the power to regulate Indian affairs was never intended to be exercised by State governments. The Indian Commerce Clause is one of Congress's enumerated powers, and thus does not fill within the scope of the anticommandeering doctrine. There is no commandeering of State authority or sovereignty because states never had the authority to regulate Indian affairs in the first place.

The legislative purpose of ICWA is not to commandeer State governments and resources, but to protect Indian children and families from separation and cultural degradation. To the Senate Select Commission on Indian Affairs in 1977, Chief Calvin Isaac of the Mississippi Band of Choctaw Indians spoke of the dangers that improper Indian child placement poses to the preservation of Indian culture. He argued: "[C]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage,

are to be raised in non-Indian homes and denied exposure to the ways of their people." Indian Child Welfare Act of 1977: *Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 154, 157 (1977). Likewise, §1901 of the Act states that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them 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. §1901. The purpose of the Act is not to commandeer State governments, and the practical application of ICWA does not achieve this fictional purpose. The law was enacted as a legitimate exercise of Congress's explicit and enumerated power over Indian affairs and is thus not in conflict with the principles of the anticommandeering doctrine.

II. ICWA DOES NOT VIOLATE THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

The Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws. U.S. Const., amend. XIV, § 1. If a law draws on classifications based on race, the law must satisfy the strict scrutiny test. *Morton,* 417 U.S. at 555. However, if a legal classification is political, then a rational basis review is applied. *Id*. ICWA states:

> "In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families', and; '[i]n any foster care or pre-adoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with— (i) 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." 25 USC §1915 (a).

The appellants argue that the classifications in ICWA cannot exceed the strict scrutiny standard and therefore violate the Fourteenth Amendment's Equal Protection Clause. Legislation that interferes with fundamental rights is unreasonable under due process and must be set aside or limited unless there is a compelling public purpose, and the legislation is necessary for the accomplishment of that purpose and be subject to a strict scrutiny standard of review. *In re Vincent M.*, 150 Cal. App. 4th 1247, 1258. However, in *Morton*, the Supreme Court rejected that the classification of Indians was based on race. *Morton,* 417 U.S. at 554. The Court held that preference is granted to Indians as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. *Id.* at 555. The Court also noted that as long as the unique legal status of tribal members could be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, legislative judgements would not be disturbed. *Id*. The unique legal status of Indians is not based on race, and as such, a rational basis of review should be utilized to determine whether this classification violates the Equal Protection Clause of the Fourteenth Amendment and not the strict scrutiny. *Id.*

The issue on appeal is whether the lower court erred in holding that ICWA does not violate the fourteenth amendment equal protection clause. The lower court erred in holding that ICWA violates the equal protection clause of the Fourteenth Amendment, and this decision should be reversed.

A. ICWA's definition of Indian children is based on political affiliation, not race.

The Supreme Court held in *Morton* that preference to Indians was granted not because Indians were viewed as a discrete racial group, but as members of quasi-sovereign tribal entities with lines intertwined with and governed by the BIA. *Id.* at 555. The court looked at the classification of Indians with regards to preference in employment. *Id*. The court found that the preference of Indians was granted towards 'federally recognized' tribes which excluded individuals that were classified as Indian based on race. *Id.* at n. 24.

Similarly, in *In re Adoption of C.D.*, the court determined whether ICWA applied in the adoption of the child. *K.D. v. M.L. (In re Adoption of C.D.)*, 751 N.W.2d 236, 238 (2008). The court held that Indian tribes have exclusive jurisdiction over wholly internal tribal matters because Indian tribes have inherent power to define and determine membership. The Indian tribe's power to define and determine membership is central to the tribes existence as independent political communities. *Montana v. United States*, 450 U.S. 544, 564 (1981). Because power is central to the tribe's existence as an independent political group, the application of ICWA is based on political affiliation and not race.

B. ICWA does not apply to individuals who are racially classified as Indians and should not be subject to the strict scrutiny test.

Strict scrutiny applies to "all racial qualifications 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).

The court in *In re Vincent M.*, 150 Cal. App. 4th 1247, 1249, did not apply the strict scrutiny test because it held that ICWA limited its scope to children who are members of, or eligible for membership of a federally recognized tribe. *In re Vincent M.*, 150 Cal. App. 4th

1247, 1249 (2007). In *In Re Vincent,* the Court determined that ICWA did not discriminate on a racial basis because ICWA recognized political affiliation from tribal membership in a federally recognized tribe, rather than a racial or ancestral Indian origin. *Id*. Since ICWA does not classify Indian children based on race, the strict scrutiny test did not need to apply to assess whether ICWA violated equal protection provisions. Instead, the rational basis for ICWA was applicable. *Id*.

Similarly, the Court in *Morton* did not apply the strict scrutiny test because it held that the preference granted to Indians did not constitute 'racial discrimination' or racial preference. *Morton*, 417 at 553. In *Morton*, the Court assessed whether the preference granted to Indians through the BIA resulted in racial discrimination and violated the equal protection clause. However, the Court found that as long as the preferences granted to Indians were tied [on a rational basis] to the fulfillment of Congress' unique obligation towards the Indians, the preference did not violate due process [or the equal protection clause]. *Id.*, at 554-55.

In the case at hand, similar to *Morton* and *In Re Vincent*, the strict scrutiny standard should not apply. The preferences granted in ICWA are not based on racial preferences of Indians. Instead, the preferences in ICWA are tied on a rational basis to Congress' unique goal of protecting the placement of Indian children with Indian tribes. The goal of ICWA is to protect the interests of the Indian children and families, and also the interests of the tribe's long term tribal survival. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, (1989).

C. ICWA does not violate the Equal Protection Clause even under the strict scrutiny test because there is a compelling governmental interest.

On the other hand, should the court decide that the classification of ICWA is based on race and the strict scrutiny test should apply, ICWA does not violate the equal protection clause

because there is a compelling government interest. The Court held in *Grutter* that when race-based action is necessary to further a compelling government interest, such action does not violate the constitutional guarantee of equal protection so long as the classifications are narrowly tailored to further compelling government interests. *Grutter*, 539 at 326-27. In *Grutter v. Bollinger,* the dissent disagreed with the majority opinion and argued that the Law School admissions policy violated the equal protection clause. The dissent argued that the Law School failed the strict scrutiny because it was devoid of any reasonably precise time limit on the use of race in admissions. The Court argued that the majority permitted the Law School's use of racial preferences on a seemingly permanent basis and strict scrutiny required programs be limited in time. *Id.* at 327. However, the court also acknowledged that not all decisions influenced by race "[were] equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context." *Id*.

In the case at hand, should this court decide to apply the strict scrutiny standard, ICWA does not violate the equal protection clause because there is a narrowly constructed governmental interest. In *Miss. Band of Choctaw Indians*, 490 at 44-45, the Court held that the text of ICWA, the legislative history of ICWA and the hearings that lead to ICWA's enactment it was clear that Congress was concerned with the rights of Indian families and Indian communities. The purpose of ICWA was to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society. Id. (quoting House Report, at 23). The establishment of ICWA shows that there was a compelling government interest in creating a "Federal policy that, where possible, an Indian child should remain in the Indian community…and by making sure that Indian child welfare determinations are not based on "a

white, middle-class standard which, in many cases, forecloses placement with [an] Indian family. *Id*.

CONCLUSION

The lower court erred in holding that ICWA violates the Tenth and Fourteenth Amendments. First, ICWA fulfills the requirements for preemption under the Supremacy Clause, and thus does not run afoul of the anticommandeering doctrine. Second, ICWA is based on political, not racial classifications, and thus requires the application of the rational basis test. ICWA passes this test by promoting a legitimate governmental interest. This court should reverse the lower court and affirm the Constitutionality of ICWA.

Respectfully Submitted,
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