No. 22-386

In the
Supreme Court of the United States

October Term 2022

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

Petitioners,

v.

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

Respondents.

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

BRIEF FOR PETITIONERS

TEAM: 25
COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED

1. Whether the Indian Child Welfare Act properly preempts West Dakota state law without improperly commandeering the state through its regulation of private actors instead of the state.
2. Whether the Indian Child Welfare Act's politically classified placement preferences that promote Indian sovereignty and integrity violate the Equal Protection Clause of the Fifth Amendment.

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STATEMENT OF THE CASE

In 1977, Congress found the removal of Indian[1] Children from their familial homes to be "perhaps the most tragic and destructive aspect of American Indian life today," with twenty-five to thirty-five percent of all Native American children being placed into foster homes, adoptive homes, or other institutions. H.R. Rep. No. 95-1386, at 9. Additionally, around eighty-five percent of the Indian children who were in foster care were being placed in non-Indian homes, causing the children to have difficulties adjusting to an unfamiliar social and cultural environment. *Id.*

In response to the congressional findings that Indian children were being removed from their homes at alarmingly high rates and placed with non-Indian families, leading to irreparable loss to their culture and familial bonds, Congress enacted The Indian Child Welfare Act of 1978 ("ICWA"). 25 U.S.C. §§ 1901-1963; R. at 4. The ICWA provides a wide array of rights and regulations that must be followed, including "minimum [f]ederal standards" for child removal cases, and bestowing assistance to Indian tribes for child and family service programs. 25 U.S.C. § 1902.

Petitioners are the United States of America, Secretary of the Interior Steward Ivanhoe in his officiant capacity, the Cherokee Nation, and the Quinault Nation ("Petitioners"), and Respondents are James and Glenys Donahue, a non-Indian couple, and the state of West Dakota ("Respondents"). R. at 1-2. Respondents sued Petitioners in West Dakota District Court after the Quinault Nation refused to consent to one of the Respondents' petitions to adopt Baby S, a

[1] "Indian" is the legal term the Unites States uses for Native Americans, but it not the preferred term, with most tribes preferring the use of the tribe names when possible, or other terms such as Native American, American Indian, or Indigenous American. *Teaching and Learning About Native Americans*, Smithsonian National Museum of the American Indian, https://americanindian.si.edu/nk360/faq/did-you-know#:~:text=In%20the%20United%20States%2C%20Native,would%20like%20to%20be%20addressed, (last visited Oct. 9, 2022). While "Indian" is not the preferred term, because it is the legal term used in American jurisprudence and legislation, "Indian" will be used throughout this brief.

Quinault child, instead finding two Quinault families in a different state as potential placement options. *Id.* at 3-4. The district court discussed two issues on the Constitutionality of the ICWA, first whether certain sections of the ICWA commandeer the states, and second, whether the ICWA's placement preferences were a violation of Equal Protection under the Fifth Amendment.

The district court found both issues to be constitutional. First, the district court held that the disputed sections do not violate the Anticommandeering Doctrine because they confer rights on private parties and do not regulate state agencies, therefore, the ICWA does not violate the Anticommandeering Doctrine, but instead properly preempts West Dakota law under the Supremacy Clause. *Id.* at. 9-10. Second, the court held that the placement preferences found in §§ 1915(a)-(b) of the ICWA were purely political classifications owed rational basis review, therefore the ICWA's preferences must be upheld because the special treatment it affords Indian families and children serve Congress's unique obligation toward Indians. *Id.* at 10-11. On appeal, the Thirteenth Circuit reversed the district court's decision on both issues. First, the Thirteenth Circuit held that §§ 1912(a), (e), (f), 1915(a)-(b), (e), and 1951(a) improperly commandeered the states. *Id.* at 15. Second, that the placement preferences found in §§ 1915(a)-(b) of the ICWA were based on race and thus the preference for "Indian families" was not narrowly tailored despite Congress's intent to keep Indian children connected with some tribe to make it more likely they would join their own tribes. *Id.* at 18.

This court should reverse the Thirteenth Circuit's decision and protect the Quinault, Cherokee, and all other Indian Nations from the irreparable damage the removal of their children from their Tribes has on their cultures.

SUMMARY OF THE ARGUMENT

This case is about the Indian Child Welfare Act of 1978 in which Congress attempted to protect the best interest of Indian children, like Baby S, and promote the security and stability of Indian tribes, like the Cherokee and Quinault Nations. Without the ICWA, Indian Tribes like the Cherokee Nation and the Quinault Nation, fear that their children will be ripped from their arms, similar to how it was before Congress enacted the ICWA. If that fear is allowed to become a reality, their tribes, all other Indian people and tribes, and their entire culture could be decimated. This Court should uphold Congress's attempt at promoting the cultural and societal welfare of the tribes as the ICWA does not the Anticommandeering Doctrine because it regulates private actors, not state agencies, and it does not violate Equal Protection because this Court acknowledges that Congress owes a special duty to the Indian people.

First, the ICWA is constitutional because it does not violate the Anticommandeering Doctrine, which states that the federal government cannot force states to enforce federal regulatory programs. In order to properly understand if a federal law improperly commandeers the states, this Court must first find if that federal law can preempt state law through the Supremacy Clause. This inquiry is twofold, this Court must find the ICWA to be related to an area of authority given to Congress in Article I, and if so, the Court must find that the ICWA infers rights on private actors. When examining the purpose and policy behind Congress's Article I authority to regulate relations with the Indian tribes, it is clear that the ICWA is a valid exercise of that authority. While Congress had the authority to enact the ICWA, to preempt state law it must infer rights to or regulate the activity of individuals. The ICWA does just that by providing Indians with basic standards in court proceedings that emphasize the need to keep their

children with their tribes. Because the ICWA regulates private actors and does not force West Dakota to enforce federal regulatory policy, it does not violate the Anticommandeering Doctrine.

Second, the ICWA is constitutional because the placement preferences are based on political classifications and do not violate the Equal Protection Clause of the Fifth Amendment because Congress's goal of maintaining the continued existence, integrity, and security of Indian tribes is rationally related to Congress's unique obligation to the Indian people. When reviewing the ICWA under Equal Protection this court must first decide the level of scrutiny and then if that level is satisfied. First, since the ICWA's placement preferences found in section 1905(a) and (b) are based on if one is an "Indian," a political designation that this Court and history has acknowledged since being an "Indian" is based on tribal rules and not bloodline or ancestry, rational basis review is owed. Second, this Court found that special treatment to Indians is rational if the special treatment helps fulfill Congress's unique obligation to the Indian people. Here, keeping eligible Indian children connected to their roots emphatically meets the interest of the continued existence, integrity, and security of Indian tribes. Mr. Ivanhoe, et al. respectfully request that this court afford Indian tribes the right to stability and security by upholding the Indian Child Welfare Act.

ARGUMENT

I. The Indian Child Welfare Act Preempts West Dakota State Law Through The Supremacy Clause And Does Not Violate The Anticommandeering Doctrine Because It Regulates Private Actors.

The Indian Child Welfare Act is a federal law enacted by Congress through their authority to regulate the Indian tribes and confer rights upon tribes as private actors, which allows the ICWA to properly preempt state law without unlawfully commandeering a state such as West Dakota. The Constitution instills in Congress the authority to supersede or "preempt"

state law. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). This power is found in the Supremacy Clause, which mandates that federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. This right is not unlimited but must only be applied when Congress is exercising a power given to it by the Constitution, and that power governs private actors, not states. *See Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018); *Prinz v. United States*, 521 U.S. 898, 935 (1997) (finding that Congress may not command state and local police officers to enforce a federal regulatory program).

Congress's authority to enforce the ICWA through the Supremacy Clause must be balanced against the Anticommandeering doctrine. The Anticommandeering Doctrine is the idea that the federal government cannot command the states to "enact or administer a federal regulatory program." *New York v. United States*, 504 U.S. 144, 188 (1992); s*ee also Del v. Virginia Surface Min. And Reclamation Ass'n, Inc*., 452 U.S. 264, 288 (1981) (finding the Surface Mining Act did not "commandeer" the states to enforce a regulatory program as only private individuals were compelled to follow the act's standards). This doctrine is rooted in the Tenth Amendment's protection of the states' authority to govern themselves, "[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. However, when balancing the Anticommandeering Clause against the Supremacy Clause, this Court has emphasized that the Supremacy Clause "gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between state and federal power." *New York v. United States*, 504 U.S. at 159 (1992) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Because of this balance and the overlap in

inquiries, the Anticommandeering Doctrine is inextricably tied to the Supremacy Clause, being "two sides of the same coin," thus, in answering the question of whether the ICWA violates the Anticommandeering Doctrine, the Supremacy Clause must be analyzed first. *See Brackeen v. Haaland*, 994 F.3d 249, 298 (5th Cir. 2021), *cert. granted sub nom. Nation v. Brackeen*, 212 L. Ed. 2d 215 (2022), and *cert. granted*, 212 L. Ed. 2d 215 (2022), and *cert. granted sub nom. Texas v. Haaland*, 212 L. Ed. 2d 215 (2022), and *cert. granted,* 212 L. Ed. 2d 215 (2022).

A. The ICWA Properly Preempts State Law Through The Supremacy Clause.

The history of the Constitution highlights the legitimacy of the ICWA's preemption of West Dakota law that must be examined. The idea of separate federal and state governments was a significant part of the Articles of Confederation, which initially governed the United States. *New York*, 504 U.S. at 163. Under the Articles government, the federal government had no power to tax, legislate, or directly govern individuals in any capacity. *Id.* (citing Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1447 (1987)). This inability to adequately govern the nation led in part to the constitutional convention, where the Framers rejected the Articles of Confederation in favor of a constitution which would specifically give the federal government, through Congress, the right to regulate individuals without compelling the states to act in a particular way. *See New York*, 504 U.S. at 163, 166.

When a state like West Dakota has laws that conflict with a valid federal statute like the ICWA, the federal statute has priority. To preempt West Dakota law, the ICWA must first be a valid "exercise of a power conferred on Congress by the Constitution." *See Murphy*, 138 S. Ct. at 1479. Second, the federal law must regulate private actors or individuals, not the states themselves. *Id.* When the federal law only regulates private actors without commanding state

agencies to enforce a federal regulatory program, the federal law does not violate the Anticommandeering Doctrine. *New York*, 504 U.S. at 188.

1. Congress Has The Article I Authority To Regulate Indian Affairs With The ICWA.

Congress has Article I authority to regulate relations with the Indian tribes. Returning again to the Articles of Confederation, the Framers specifically rejected a state approach to regulating relations with Indian tribes. *See Haaland*, 994 F.3d at 301 (explaining how the Framers used the Constitution to replace the Articles of Confederation, removing the authority to regulate Indian affairs from the states). Instead, the Framers, through the Indian Commerce Clause, gave Congress the power "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This provision has been understood to instill Congress with the "plenary power" to deal with matters of concern to and with Indian tribes. *See Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (finding this authority is "drawn both explicitly and implicitly from the Constitution itself").

The history of violence against Indians demands that the federal government, not the states, have exclusive dealings with the tribes. The tribes are considered "domestic dependent nations" meaning they are free to govern their own issues without state intrusion but are bound by the laws and protection of the federal government. *See Cherokee Nation v. State of Georgia*, 30 U.S. 1, 17 (1891) (acknowledging that while the Indian tribes have the right to the lands they occupy, they cannot be considered foreign nations but instead creating the term "domestic dependent nations"). The tribes have sovereignty over their own affairs, but because the federal government took their land and sovereignty as independent nations, forcing them into a weaker position of power, the federal government has a responsibility to "protect the tribes from external threats." *Haaland*, 994 F.3d at 302. This is exemplified in the ICWA itself, finding that the

special relationship between the federal government and Indian tribes means that "Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources." 25 U.S.C. § 1901(2).

It is important to note that this analysis is not meant to tout the federal government as a great savior and protector of the Indian people in every circumstance. Indeed, there have been numerous times where the federal government has actively hurt the Indian people, such as when President Andew Jackson forced tribes in the eastern United States, most predominately the Cherokee tribe, to walk hundreds of miles to reservations in the west, with thousands of people dying along the way in what is now known as the Trail of Tears. *Indian Treaties and the Removal Act of 1830*, Office of the Historian, https://history.state.gov/milestones/1830-1860/indian-treaties (last visited Oct. 8, 2022). However, it is one of these atrocities that particularly highlights the need for Indian tribes to be outside of state control. The federal government ran assimilation programs that took Indian children from their homes and placed them in white run boarding schools to learn English and separate them from their heritage and culture. *Haaland*, 994 F.3d at 304. The programs were eventually stopped, but the removal of Indian children from their homes and their abuse in white American schools continued at the state level. *Id.* Preventing abuse by the states was a motivating factor in the creation of the ICWA. *See id.* at 304-05 (discussing how Congress found the states removing Indian children from their homes to be the greatest threat to their culture) (citing 25 U.S.C. § 1901(5)).

In light of the long history of abuses at the hand of the states, and the unique status of Indians, this Court has consistently held that only the federal government has the authority to handle Indian affairs. *See Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving

Indians free from state jurisdiction and control is deeply rooted in the Nation's history"); *See e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2476 (2020) (discussing how the practice of sending Indians to federal court instead of state court is consistent with the history of Congressional authority). Instead, this court has repeatedly reiterated Congress's plenary power to be interpreted in the "broadest possible terms." *Haaland*, 994 F.3d at 300; *See Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982) (recognizing Congress's "broad Power" to regulate a tribe through the Indian Commerce Clause) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)).

The ICWA was created through Congress's broad plenary power to protect Indian children from losing their culture. *See* 25 U.S.C. § 1901(1). In *Haaland*, the Fifth Circuit held that this was a key aspect of Congress's Article I authority because it "empower[s] the federal government to ensure states do not spoil relations with the Indian tribes through the unwarranted taking and placement of Indian children in non-Indian foster and adoptive homes." 994 F.3d at 304. Because of Congress's constitutionally given right to regulate the Indian Tribes and the long history showing the necessity of and deference to that Constitutional right, the ICWA is valid under Article I and passes the first step of the analysis.

2. The Supremacy Clause Requires the ICWA to Preempt West Dakota Law.

The ICWA specifically bestows rights on individuals which requires the preemption of state law. The specific type of preemption applicable in this case is conflict preemption, which is when "Congress enacts a law that imposes restrictions or confers rights on private actors" and "a state law confers rights or imposes restrictions that conflict with the federal law" then "the federal law takes precedence and the state law is preempted." *Murphy*, 138 S. Ct. at 1480. A federal law can still be valid if it "regulates states that participate in an activity in which private

parties engage" as long as the federal law establishes rights or restrictions on private actors. *Haaland*, 994 F.3d at 299 (citing *Murphy* 138 S. Ct. at 1478, 80). The ICWA confers rights on Indians by providing "minimum [f]ederal standards" for the removal and placement of their children in foster and adoptive homes, and "providing for assistance to Indian tribes in the operation of child and family service programs." 25 U.S.C. § 1902. Any incidental regulation on West Dakota does not invalidate federal law and negate preemption because the purpose of the ICWA is to infer certain rights to Indians, not to regulate the states. *See* 25 U.S.C. § 1902 (declaring a national policy of protecting the interests of Indian children through special standards and support); Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 Notre Dame L. 351, 361 (2020) (explaining how state law is preempted when the federal law regulates people, and the states and courts must follow that federal law). The ICWA plainly confers rights on private actors, therefore, it properly preempts West Dakota law.

Additionally, the Thirteenth Circuit erred when it held that the ICWA improperly preempted state law because it does not provide a federal cause of action. *See* R. at 15. It is true that the ICWA does not have its own federal cause of action, but that has no relevance to this case because it has been well established that state courts must honor federal rights when they are intertwined with a state cause of action. *See Haaland*, 994 F.3d at 317. This applies even to areas of law generally governed by the state, such as domestic and custody matters, when there is conflict between the state and federal laws. *See id.* at 318. Because the substantive family law of West Dakota conflicts with the ICWA, the ICWA preempts West Dakota law and must be applied. *See id.* (explaining that when the state substantive law conflicts with a federal statute in an area where Congress has Article I authority, the federal statute may be applied).

B. The Preemption of West Dakota Law Does Not Violate the Anti Commandeering Doctrine.

The ICWA does not violate the Anticommandeering Doctrine because it regulates private actors and courts, not agencies, which is fully within the bounds of the Supremacy Clause. A federal statute violates the Anticommandeering Doctrine when it "directly command[s] the executive or legislative branch of a state government to act or refrain from acting without commanding private parties to do the same." *Haaland*, 994 F.3d at 299. However, a federal statute does not improperly commandeer the state when it "evenhandedly regulates an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. This even-handed regulation happens when a federal statute gives a private actor who participates in a specific activity legal rights or limitations related to said activity. *Haaland*, 994 F.3d at 323-24. Additionally, a federal statute does not violate the Anticommandeering statute if it requires state courts to follow the federal law. *See Haaland*, 994 F.3d at 317. The ICWA does not improperly commandeer the states because it regulates Indians engaged in activities with state courts, which are obligated to follow federal law.

The sections of the ICWA on appeal are fair statutes regulating activities engaged in by and inferring rights to the Indian tribes, so they do not commandeer the states. The Thirteenth Circuit incorrectly found the following sections to violate the Anticommandeering Doctrine: § 1912(a) notice requirement; §§ 1912(e)-(f) expert witness requirement; §§ 1915(a)-(b) placement preferences; § 1915(e) placement record keeping requirement; and § 1951(a) record keeping requirement. R. at 15. None of these sections violate the Anticommandeering Doctrine for the following reasons.

Sections 1912(a), (e)-(f), and § 1915(a)-(b) all deal with evidentiary rules, often requiring higher standards of proof than what is required by the states and requiring expert witnesses in

certain situations, thus bestowing special rights to Indian families that West Dakota must follow. *See Haaland*, 994 F.3d at 319. The only obligation on West Dakota is for the state to follow the evidentiary standards and expert witness requirements in court proceedings, something that falls fully within the Supremacy Clause, which usurps state law in judicial proceedings, "[j]udges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.; *See Haaland*, 994 F.3d at 320 (finding these sections to be valid under the Supremacy Clause) (citing *New York* 504 U.S. at 178). Anticommandeering is specifically the forcing of agencies to enforce federal regulations but does not apply to federal laws the judicial branch is required to uphold. *See Haaland*, 994 F.3d at 317. This is an important distinction from other cases such as *New York v. United* States. There, Congress enacted a law requiring the states to regulate and dispose of radioactive waste within their borders. *New York*, 504 U.S. at 188. The law pressured the state legislatures to adopt and implement the federal regulations. *See id.* Because it commanded the states to regulate and dispose of radioactive waste through the legislature and regulatory agencies, the federal law commandeered the states and was invalid. *See id.* Here, nothing in these provisions goes beyond requiring the state courts to follow the ICWA requirements, which is proper and not commandeering. *See Haaland*, 994 F.3d at 317.

Requiring courts to maintain records is a regular responsibility of the courts and does not violate the Anticommandeering Doctrine. Sections 1915(e) and § 1951(a) requiring West Dakota courts to keep records of Indian child placements simply require the state to uphold federal law pursuant to the Supremacy Clause because record keeping is judicial matter. *See Haaland*, 994 F.3d at 321 (explaining that record keeping and sharing requirements have historically been an obligation on the state courts under the Supremacy Clause). Once again, both sections infer

rights on Indians that the West Dakota courts must respect because they do not commandeer West Dakota agencies. *See Haaland*, 994 F.3d at 321 (finding the Supremacy Clause mandates states to follow § 1915(e) and § 1951(a)). Unlike in *Prinz v. United States*, where Congress attempted to circumvent the Anticommandeering Doctrine by directing state officers themselves to regulate the process of purchasing firearms, here the ICWA merely requires the courts to maintain records and share them upon request. *See* 521 U.S. at 935. Requiring the courts to keep records and share them with the federal government and Indian tribes upon request imposes no regulatory burden upon the states, therefore these sections do not violate the Anticommandeering Doctrine. *See Haaland*, 994 F.3d at 321. Because every disputed section in the ICWA is valid and does not commandeer West Dakota but instead properly preempts it, the ICWA is constitutional and must be followed by the states.

II. The ICWA's Classifications Of "Indian Child" And "Other Indian Families" Refer To People Belonging To Or Eligible To Join Quasi-Sovereign Tribes, Initially Accounted For In The Constitution, That Are Federally Recognized; Therefore, The Classifications Are Political.

This Court should uphold the Indian Child Welfare Act because it makes classifications based on political affiliation to maintain Indian sovereignty which does not violate equal protection under the Fifth Amendment. When considering equal protection claims under the Fifth Amendment and Fourteenth Amendments this Court has consistently used the same analysis. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). When faced with a statue that makes classifications based on political categories this Court has applied rational basis review. *Mancari*, 417 U.S. at 555. When this Court uses rational basis review, it owes great respect to Congress and must presume the statute is constitutional. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993). In sum, the Act must be upheld as constitutional unless it has no rational relationship to Congress's intent. *Id*. This Court in *Mancari* stated "[a]s long as the special

treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555. Like the ICWA here, a statute that makes political classifications based on a "government-to-government" relationship must not be disturbed when it is rationally tied to Congress's intent to promote Indian culture. *Haaland*, 994 F.3d at 334.

A. The ICWA's "Indian" Classifications Refer To Members Of Federally Recognized Tribes Which Are Quasi-Sovereign Political Entities, Who Grant Membership Based On Their Criteria and Are Politically Independent, Making The "Indian" Classification A Political One.

The Indian Child Welfare Act §§ 1915(a) and (b) list preferences for where an "Indian child" should be placed during adoption proceedings. 25 U.S.C.- §§ 1915(a)-(b). The preferences include the child's extended family, people from their tribe, other "Indian" families, or foster care approved by "Indians." *Id*. All these classifications are politically based because they all rely on the placement being "Indian," a federally recognized classification created by congress. Historically, this Court has held that legislation referring to "Indians" is political and not based on race, the same should apply here. *United States v. Antelope*, 430 U.S. 641, 646-7 (1977). Further, Congress has repeatedly enacted laws giving preference and "special treatment" to "Indians" throughout history; and this Court has affirmed such special treatment where Congress gives tribes more control of their destiny. *Mancari*, 417 U.S. at 555.

Moreover, the ICWA's classification of "Indian" is a political one evidenced by history and how congress interacts with tribes as if they are an independent government. *Mancari*, 417 U.S. at 553. The Constitution itself treats tribes as the likes of foreign nations. U.S. Const. art. I, § 8, Cl. 3. This Court has also acknowledged that Congress has granted tribes more control of their destinies, allowing them to act similarly to foreign nations. *Mancari*, 417 U.S. at 553-4. This designation created by this Court creates a unique political status for Indian tribes, allowing

for Congress to grant special treatment to Indian tribes because Congress is acting as though this is a government-to-government interaction. *Haaland*, 994 F.3d at 334. This treatment does not start and stop on the reservation, but extends to whoever could be considered a member of an Indian tribe or even a future member of an Indian tribe. United States v. McGowan, 302 U.S. 535, 539 (1938); Mancari, 417 U.S. at 552. Thus, to be considered "Indian" or an eligible member, geographical location is not a determining factor.

Further, individual tribes determine who is eligible for membership and race or bloodline do not have to be factors. *See Haaland*, 994 F.3d at 337. But first, some standards must be met to be considered a federally recognized tribe. One such requirement is that the tribe has maintained some political influence or authority over its members since the 1900s. Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 Stan. L. Rev. 491, 538 (2017) (explaining how Indian tribes act independently and maintain relationships with the United States of America). As stated, each sovereign tribe determines membership into their federally recognized tribe, and the fact that bloodline or ancestry might be included in one tribe's determining factors of eligibility does not raise concerns here because the tribe is its own political entity that can make its own rules. *Haaland*, 994 F.3d at 337-8. Further, just because an Indian child might not be a member of a tribe yet, that does not mean they are not eligible to be in one. *Id*. Moreover, the Thirteenth Circuit's opinion that this case is more like *Rice* than *Mancari* is unfounded because *Rice* dealt with native Hawaiians who only could be considered as such by tracing their ancestorial bloodline. *Rice v. Cayetano*, 528 U.S. 495, 522 (2000). Here, bloodline is not the sole factor used to determine eligibility. Further, native Hawaiians are not granted the same political status as federally recognized tribes, and thus are not treated as "quasi-sovereign political communities." *Haaland*, 994 F.3d at 339. Therefore, this Court in *Rice* was

faced with a fundamentally different question that is not applicable here. Additionally, the Thirteenth Circuit's assertion that the ICWA is based on ancestry and not membership in a tribe because children who have not taken the affirmative action of registering with a tribe to qualify, must be rejected because they are minor children incapable of going through the administrative hoops despite qualifying for tribal membership.

Finally, the ICWA's classification of "other Indian families" is not a proxy for keeping Indian children with a general Indian "race." Rather, it is Congress's attempt at keeping children with federally recognized tribes in the interest of not decimating a political class. Thus, Congress's classifications in the ICWA are political because, first, Congress has historically given special preferences to Indians that this Court has recognized. *Antelope*, 430 U.S. at 464-7. Second, the ICWA treats Indians as a quasi-sovereign government that does not differentiate between being on or off a reservation. *McGowan*, 302 U.S. at 539; *Mancari*, 417 U.S. at 539. Third, Congress's federally recognized tribes make their own rules when determining who qualifies as a member of the tribe. It does not have to be based on bloodline, and simply because a child is not a registered member of a tribe because of administrative barriers does not exclude them as an eligible member for reasons other than bloodline. See *Haaland*, 994 F.3d at 337. Thus, the ICWA's classifications are not based on race but are instead based on political classifications.

B. The ICWA's Attempt to Keep "Indian Children" Connected With "Other Indian Families" Is Rationally Related To Congress's Goal Of Maintaining The Continued Existence, Integrity, And Security Of Indian Tribes.

Since the ICWA makes political classifications, this Court must apply rational basis review. This Court has stated that statutes that give special treatment to Indians can be tied to Congress's unique obligations to them. *Mancari*, 417 U.S. at 555. In enacting the ICWA, Congress acknowledged that it was failing to promote the status of Indian tribes because of the

systematic failure of Indian child placement during adoption proceedings. 25 U.S.C. § 1901(5); *Haaland*, 994 F.3d at 286. Congress explicitly enacted the ICWA:

> [T]o 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*.

The ICWA is an attempt by congress to combat the "alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children from them." 25 U.S.C. § 1901(4). Removing Indian children would hinder the stability of Indian tribes as the next generation would be "lost," thus the tribe would artificially die out. Instead, Congress is attempting to promote the stability of tribes and trying to offer a layer of security so the next generation of Indians would grow up as a proud fixture in their native tribes. *Haaland*, 994 F.3d at 286. Congress's attempt to end the unwarranted breaking up of Indian children from their native tribes created a special relationship between congress and Indians. *Id*. The special relationship was protecting the best interest of the children and promoting the integrity of Indian tribes in an effort to protect their tribal sovereignty. *Id*. at 341.

A preference for keeping Indian children with Indian tribes and families promotes Congress's goal of fostering stability within tribes by keeping these kids engaged in tribal traditions. *Id*. If a proceeding placed a child with a family who respected Indian traditions, the child would have a base knowledge of what it culturally means to be an Indian. Logically, it would be more likely that the child would follow through and join a tribe. *Id*. Joining a tribe was Congress's ultimate goal because it would promote the survival of the Indian people. *Id*. Thus, the ICWA is a success even if only a few children decide to join a tribe after being placed with the preferred groups, and therefore has a rational connection to Congress's goal.

Furthermore, the Thirteenth Circuit's argument that the statute is too expansive because it allows for placement with Indian families from other tribes must be rejected. *See* R. at 19. As the District Court as well as the Fifth Circuit point out, many modern tribes have developed from larger bands of tribes that shared close cultural ties and traditions. *See* Greg O'Brien, *Chickasaws*: *The Unconquerable People,* Mississippi History Now (Sept. 23, 2020, 9:20AM), https://mshistorynow.mdah.state.ms.us/articles/8/chickasaws- the-unconquerable-people. Thus, by placing a child with an Indian family in a different tribe, the child's interest in their own tribe may be sparked, and they could decide to become a member and continue in their tribal traditions. Additionally, just because a law may not have a perfect fit does not mean it does not further Congress's unique obligations and goals with the ICWA. *Haaland*, 994 F.3d at 343. Therefore, this Court should find that Congress's unique obligation of promoting the stability of Indian tribes is met by the ICWA.

CONCLUSION

For the foregoing reasons, Mr. Ivanhoe, et al. respectfully requests that the Court Reverse the Thirteenth Circuit Court of Appeals upholding constitutionality of the Indian Child Welfare Act.

DATED this 10th day of October 2022.
Respectfully submitted,
/s/ Team 25
Counsel for the Petitioners
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