IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2022

No. 22-386

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 OF THE PETITIONERS

Competition ID #: 3

Attorneys for Stuart Ivanhoe, Secretary of the Interior, et al.

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QUESTIONS PRESENTED

1. Does the Indian Child Welfare Act exceed Congress' plenary authority over Indian affairs and violate the anticommandeering doctrine by allowing an Indian child's tribe to determine its placement preferences and manage adoption records in state child-custody proceedings?

2. Do the Indian classifications under the Indian Child Welfare Act constitute an impermissible racial classification or a permissible political classification?

STATEMENT OF THE CASE

I. Procedural History

This is an appeal by Stuart Ivanhoe, Secretary of the Interior; the Cherokee Nation; and the Quinault Nation to reverse a finding of summary judgment awarding custody of Baby C and Baby S to James and Glenys Donahue. The U.S. District Court for the District of West Dakota entered summary judgment for Ivanhoe et al., awarding custody of Baby C and Baby S to the Cherokee and Quinault Nations respectively, finding that allowing the Donahues to adopt Baby C and Baby S violated the respective tribes' rights under the Indian Child Welfare Act. The Donahues and State of West Dakota appealed this decision to the Thirteenth Circuit, arguing that the Indian Child Welfare Act is unconstitutional under the Tenth Amendment's anticommandeering doctrine and the Fifth Amendment's Equal Protection Clause. Ivanhoe et al filed an appeal of this decision to this Court.

II. Statement of Facts

In the late 1970s, Congress found that an alarmingly high percentage of Indian families are broken up by the often-unwarranted removal of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children were placed in non-Indian foster and adoptive home and institutional placements. R. at 4 (citing 25 U.S.C. § 1901(3)-(5)). Congress further found that the states, who bore sovereignty and responsibility over this issue, failed to recognize the essential tribal relations of Indian people as well as the

cultural and social standards prevailing in Indian communities and families. R. at 4-5 (citing 25 U.S.C. § 1901(3)-(5)). To remedy this failure and these problems, Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 et seq., which established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes [that] . . . reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." R. at 5 (quoting 25 U.S.C. § 1902). Under ICWA, these standards govern state court child custody proceedings involving an Indian child, R. at 5, and enumerate certain rights of the Indian custodian of the child and the Indian child's tribe in state proceedings involving the foster care placement or termination of parental rights of an Indian child, R. at 5-7.

In January 2020, in West Dakota, the Donahues, a non-Indian family, finalized their adoption of Baby C, an Indian child whose biological parents were members of the Cherokee Nation and Quinault Nation, in compliance with ICWA. R. at 3. The adoption process spanned approximately four (4) months, from the West Dakota state court's termination of parental rights of the child's biological parents in August 2019 and involved the consent of both birth parents and the child's maternal aunt. R. at 3. The process concluded with several settlement agreements, including the Quinault Nation's designation as Baby C's tribe for purposes of ICWA's application in the state proceedings and stipulation between Child Protective Services (CPS) and Baby C's guardian that ICWA's placement preferences did not apply because no other prospective adopters pursued the adoption of Baby C. R. at 3.

In April 2020, the Donahues began fostering another Indian child, Baby S, who was placed in the foster care of the Donahues after his biological mother, a member of the Quinault Nation, tragically died in February 2020 and Baby S's grandmother was unable to continue

caring for him. R. at 3. While the Donahues filed a petition for the formal adoption of Baby S in May 2020, the Quinault Nation opposed the adoption, informing CPS in the state that it had identified two potential adoptive families for Baby S in a Quinault Tribe located in another state. R. at 3. While Baby S's biological grandmother consented to the adoption, the record does not demonstrate that she opposed the recommendations by the Quinault Nation regarding the prospective tribal families. *Id*.

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment of the Thirteenth Circuit Court of Appeals and hold that ICWA is a constitutional exercise of Congress's plenary authority and does not violate state sovereignty rights under the Tenth Amendment. This Court should also affirm the United States District Court for the District of West Dakota in holding that ICWA does not violate the Equal Protection Clause of the Fourteenth Amendment. First, ICWA falls squarely within Congress's expressed authority under the Indian Commerce Clause articulated in the United States Constitution. Congress's authority to regulate commerce in "Indian Country" is plenary, exclusive, and broad; this Court has recognized that its reach extends not only to matters in Indian territories but also to activity within a state's territorial boundaries. Second, Congress does not issue direct orders to the states through ICWA. ICWA's provisions—specifically, in Sections 1912, 1915, and 1951—prescribe acceptable minimum federal standards that ensure rights for Indian children and their families. Finally, this Court has also recognized similar provisions applying to Indian tribes contain political classifications, not race-based classifications, and therefore are subject only to rational basis review. ICWA applies to Indians not as a race, but as a distinct, independently governed group disproportionately targeted by the foster care system. Because ICWA fulfills Congress's unique obligation toward Indians,

including Indian child welfare, societal cohesion, and tribal sovereignty—a legitimate government interest—ICWA passes rational basis review under the Fourteenth Amendment.

ARGUMENT

The Thirteenth Circuit Court of Appeals erred when it held that ICWA was unconstitutional. This Court has held that "[a] facial challenge to a legislative [a]ct is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Significantly, "[p]roper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that [C]ongress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act is *clearly demonstrated*." *United States v. Harris*, 106 U.S. 629, 635 (1883) (emphasis added). Here, Respondents fail to meet their burden. ICWA is not only entitled to a "presumption of constitutionality," but satisfies its validity under the United States Constitution, our country's history and tradition regarding Congress's unique relationship with and duty to Indian tribes, and this Court's jurisprudence. Congress enacted ICWA to resolve the shocking treatment of Indian children in state adoption and welfare proceedings that disproportionately separated Indian children from their families and roots compared to non-Indian children.

This shocking treatment applies to Indian tribes not merely on account of race, but as a historically targeted political group. This Court's precedent, various Circuit court precedents, and the Constitution all recognize Indian tribes as political entities. That these political entities share a common heritage and ancestry does not render ICWA's classifications as discriminatory racial distinctions. As such, this Court should apply rational basis scrutiny. Because the placement of

Indian children within Indian tribes rationally relates to Congress' duty to Indian tribes, ICWA's classifications pass this test.

I. ICWA IS A VALID EXERCISE OF CONGRESSIONAL PLENARY AUTHORITY AND DOES NOT IMPERMISSIBLY COMMANDEER THE STATES.

Congress established ICWA for the expressed purpose of protecting the rights of Indian children, their families, and the Indian communities and tribes whose survival depends on future generations maintaining their connections to their societies. ICWA's specific mandate falls squarely in the hands of the federal government and does not invade the province of state sovereignty reserved by the Tenth Amendment of the United States Constitution. This Court has elected to resolve whether the Constitution grants particular sovereign powers to the Federal Government or has been retained by the States in either of two ways. In some cases, this Court has inquired whether an act of Congress is authorized by one of the powers entrusted to Congress in Article I of the Constitution. *New York v. United States*, 505 U.S. 144, 155 (1992); *see, e.g.*, *Perez v. United States*, 402 U.S. 146 (1971); *McCulloch v. Maryland*, 4 Wheat. 316 (1819). In other cases, the Court seeks to answer whether an act of Congress commandeers the authority of state sovereignty reserved by the Tenth Amendment. *New York*, 505 at 155; *see, e.g.*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Lane County v. Oregon*, 7 Wall. 71 (1869).

Addressing both issues in turn, Petitioners assert that the Thirteenth Circuit Court of Appeals has erroneously concluded that ICWA is unconstitutional. First, Congress had the authority, as vested by Article I of the United States Constitution, to enact ICWA. Congress's power arises not just from the Constitution but also from the Founders' intent to prescribe a special relationship between the United States and Indian tribes as well as this Court's own

jurisprudence affirming Congress's special relationship with Indian tribes and its exclusive duty and responsibility in regulating Indian affairs. Moreover, this Court's jurisprudence is clear: state regulation of tribal activities is preempted by federal law if the state scheme is incompatible with federal and tribal interests. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Second, Congress enacted ICWA to resolve states' own disappointing failures in managing Indian child welfare and adoption. ICWA's minimum federal standards do not interfere with state sovereignty or independence in regulating its domestic affairs; ICWA merely validates Congress's special relationship with Indian tribes, as the sole authority to assist their affairs, and does not interfere with state sovereignty.

A. ICWA is a valid exercise of Congress's Article I authority.

Congress's plenary power to manage the unique issues Indians face in the United States is drawn both "explicitly and implicitly from the Constitution itself," *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974), and the Founders' intent to delegate such power to Congress predates the Constitution itself. *See, e.g.*, THE FEDERALIST NO. 42, at 269 (James Madison) (Clinton Rossiter ed., 1961); Articles of Confederation art. IX, cl. 4. Article I of the Constitution provides Congress the power "to regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes*." U.S. CONST. art. I, § 8, cl. 3 (emphasis added). The United States Constitution confers in Congress the power to enact statutes that protect tribal sovereignty, including in the intimate affairs of Indian child adoption proceedings, and this Court, since this nation's founding, affirmed the "long continued legislative and executive usage" of "power and [] duty of exercising a fostering care and protection" over Indian affairs through "an unbroken current of judicial decisions." *United States v. Sandoval*, 231 U.S. 28, 46 (1913). In enacting

ICWA, Congress acted with clear intent to address the devastating and discriminatory policies of the states to regulate Indian child adoption proceedings. Congress enacted ICWA under its Article I authority, which is rooted not only in the Constitution but the Framers' intent for the federal government to be the leading authority in regulating the special relationship between Indian tribes and the United States.

1. *Congress had the authority to enact ICWA to resolve the states' appalling mismanagement of Indian child welfare and adoption processes.*

Congress enacted ICWA in response to the "shocking" violent and discriminatory dispossession of Indian children from their families and tribal homes; through ICWA, Congress deliberately circumscribed state authority to legislate Indian domestic affairs, particularly in relation to Indian children. Framing this violent history provides the modern backdrop to Congress's intervention in the realm of Indian domestic affairs. Congress, under its plenary authority under the Constitution, can regulate "commerce which concerns more States than one," which the states fail to resolve separately and cohesively. *Gibbons v. Ogden*, 22 U.S. 1, 74 (1824). On numerous occasions, this Court specifically has upheld legislation that singles out Indians for particularized and special treatment. *See Morton v. Mancari*, 417 U.S. 535, 554-55 (1974).

The modern history leading up to ICWA's enactment demonstrates the complete failure by states to manage Indian family affairs and protect Indian child welfare in state adoption proceedings. Senate oversight hearings in 1974 produced numerous narratives, statistical data, and expert testimony documenting what one witness described "[t]he wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (quoting Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on

Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler) (hereinafter 1974 Hearings)). In its findings, Congress relied on surveys of states with large Indian populations conducted by the Association of American Indian Affairs in 1969 and 1974, which demonstrated that "approximately twenty-five (25) to thirty-five (35) percent of all Indian children were separated from their families and placed in foster homes, adoptive homes, or institutions." H.R. REP. 95-1386, 9, 1978 U.S.C.C.A.N. 7530, 7531.

Justice Brennan's opinion in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), further articulated the detailed findings of shocking state mismanagement over Indian child adoptions that stimulated swift and direct Congressional intervention.

> The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes. A number of witnesses also testified to the serious adjustment problems encountered by such children during adolescence, as well as the impact of the adoptions on Indian parents and the tribes themselves. . . . [T]here was also considerable emphasis on the impact on the tribes themselves of the massive removal of their children. Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified as follows: "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. . . . One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst, contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

Id. at 34-35. From these findings, ICWA originated "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." H.R. REP. No. 95-1386, p. 23 (1978) (hereinafter House Report). It is clear that ICWA is a result of the unique, reasonable, and rationally related

obligation that Congress has toward protecting the dignity of Indian children and the sovereignty and security of Indian tribes. *See Morton v. Mancari*, 417 U.S. 535, 555 (1974) ("As long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation towards the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress'[s] classification violates due process.").

2. *ICWA was a legitimate exercise of Congress's Article I authority under the Indian Commerce Clause and is rooted in the history and tradition of the United States' special relationship with Indian tribes.*

The United States Constitution and the history and tradition of case precedent, long affirmed by this Court, confer Congress's plenary authority to enact statutes that protect tribal sovereignty in Indian affairs, including in the intimate affairs of Indian child adoption proceedings. The Constitution's "Indian Commerce Clause" expressly authorizes Congress to regulate commerce with the tribes. *See* U.S. Const. art. I § 8, cl. 3 ("The Congress shall have Power To . . . [] regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes*.") (emphasis added). The unique history and relationship between the United States and Indian tribes are the foundational pillars on which Congress relied to enact ICWA under its constitutional authority. *See* 25 U.S.C. § 1901(2) ("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; that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe").

Congressional authority over Indian affairs originates from this Nation's founding, and even more so, the Framers' original intent was to distinguish the Indian Commerce Clause from the Foreign Commerce Clause and Interstate Commerce Clause as well as outline Congress's unique authority over Indian affairs. Article IX of the Articles of Confederation provides, "The [U]nited [S]tates in [C]ongress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, *not members of any of the states*, provided that the legislative right of any state within its own limits be not infringed or violated." ARTICLES OF CONFEDERATION art. IX, cl. 4. Until the year 1871, the United States used treaties to establish relationships with Indian tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903). "When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians." *Id*. at 566 (emphasis in the original). After the United States abandoned the use of treaties with Indian tribes, the Court found validity in Congressional action to regulate Indian affairs—citing sentiments that nonetheless divested Indian affairs away from the hands of the states. *Id*.

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They own no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.

Id. at 567 (quoting *United States v. Kagama*, 118 U.S. 375 (1886)).

Significantly, this Court has, for over a century, increasingly validated this foundational history and recognized Congress's view of its authority under the Indian Commerce Clause as "plenary," exclusive of state authority, and increasingly recognized Congress's authority under

the Indian Commerce Clause in matters that span beyond mere commerce; therefore, subjecting only a rational-basis test for constitutionality. *See, e.g.*, *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."); *United States v. Wheeler*, 435 U.S. 313 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."); *Winton v. Amos*, 255 U.S. 373 (1921) ("Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property."); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government").

Furthermore, this Court recently reaffirmed Congressional authority over Indian affairs in *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2463 (2020) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history."). The imposition of state authority over Indian affairs would directly contravene tribal sovereignty. Even Petitioners recognize that the power of Congress over tribal affairs is not without its limits. Yet, this Court has articulated a deferential standard of review "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). As explained in detail above, the federal regulation of Indian child adoption proceedings fulfills Congress's unique obligation to protect Indian populations from the "local ill feeling" and abuse subjected to them by the states. Congress's

plenary power over the history of the United States is therefore clear. As the United States District Court for the District of West Dakota concluded in its holding under the present case, "It would be manifestly wrong to vitiate congress's authority in a field in which it wields plenary power. [Respondents'] claim that Congress lacked the power to enact ICWA is therefore meritless." R. at 8.

B. ICWA's minimum federal standards do not violate the anticommandeering doctrine.

Congress ensured that Indian rights were conferred to Indian children and their tribes; it did not impermissibly contravene states' sovereignty through ICWA's statutory provisions. The Tenth Amendment provides "[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 (emphasis added); *New York v. United States*, 505 U.S. 144, 176 (1992) (The Constitution "confers upon Congress the power to regulate individuals, not States."). This Court made clear that Congress may not issue direct orders to state legislatures and synthesized three (3) important purposes of the anti-commandeering doctrine. *Murphy v. NCAA*, 138 S.Ct. 1461, 1477 (2018). First, the anti-commandeering doctrine "serves as 'one of the Constitution's structural protections of liberty;'" it promotes a "healthy balance of power between the States and the Federal Government," reducing "the risk of tyranny and abuse from either front." *Id*. (quoting *Gregory v. Ashcroft*, 505 U.S. 452 (1991)) (internal citations omitted). Second, "the anticommandeering rule promotes political accountability" on Congress and the states regarding their respective regulatory schemes. *Murphy*, 138 S.Ct. at 1477. Third, "the anticommandeering principle prevents Congress from shifting the costs of regulation to the States." *Id*.

In *Murphy*, this Court determined that the provision prohibiting state authorization of sports gambling established by Congress in the Professional and Amateur Sports Protection Act

(PASPA) violated the anti-commandeering doctrine because the provision "unequivocally dictates what a state legislature may and may not do." *Id*. at 1478. Yet, this Court also emphasized that the anticommandeering doctrine does *not* apply when Congress evenhandedly regulates an activity in which both States and private actors engage. *Id*.

> That principle formed the basis for the Court's decision in *Reno v. Condon* . . . which concerned a federal law restricting the disclosure and dissemination of personal information provided in applications for driver's licenses. The law applied equally to state and private actors. It did not regulate the States' sovereign authority to "regulate their own citizens."

Id. at 1478-79 (quoting *Reno v. Condon*, 528 U.S. 141 (2000)). Here, as in *Condon*, ICWA evenhandedly regulates both states and private actors. As discussed in more detail in the previous section, Congress enacted ICWA to preserve the interests *of the people*, specifically Indian children, their families, as well as the tribes they belong to. Respondents assert, and the Thirteenth Circuit Court of Appeals erroneously concludes, that several of ICWA's statutory provisions impermissibly commandeer states' sovereignty—implicating Sections 1912, 1915, and 1951 as unconstitutional due to their "demands [for] extensive action by state and local agencies as a condition to fulfilling their obligations to Indian children." R. at 15 (describing ICWA's active-efforts requirement).

The Thirteenth Circuit Court of Appeals conflates the "burden" imposed on state judiciaries over the protection of due process rights for Indian children and tribes; furthermore, the statutory provisions lack language "demanding" that state authorities do more than uphold due process in these proceedings—due process which non-Indian families are entitled to have—as well as federal law, which, under the Constitution, preempts the law of the states.

Section 1912(a) of ICWA provides that a party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and

the Indian child's tribe. 25 U.S.C. § 1912(a). Similarly, ICWA's § 1912(e) provision guarantees a clear evidentiary standard to assess foster care placement proceedings, 25 U.S.C. § 1912(e), which again protects Indian children from being separated from their families without clear and convincing evidence. Furthermore, ICWA's § 1915 placement preferences do not interfere with the states' sovereign authority over domestic and family affairs; they only prescribe minimum federal standards within the scope of Congress's plenary authority to protect Indian children. In addition, ICWA's § 1951 record-keeping provisions are minimum standard regulations that do not impose greater hardship or duty on the states; like the other ICWA provisions at issue, they protect the integrity of individuals' rights in adoption proceedings.

This Court even ensured that states continue to regulate their internal affairs and domestic commerce as they see fit. In other words, ICWA does not outright ban the adoption of Indian children into non-Indian families. In *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), this Court held that § 1915(a)'s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. *Id*. at 654. ICWA served the Donahue family in this case; they ultimately adopted Baby C because "[n]o one intervened in the West Dakota adoption proceeding or otherwise formally sought to adopt Baby C." R. at 3. The difference in the Donahues' attempted adoption of Baby S, however, is highlighted by the options for Baby S to be adopted by families of her tribal heritage. Such a result aligns with the preservation of future generations of Indian tribes. As Congress expressed, "there is no resource . . . more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3).

II. ICWA'S INDIAN CLASSIFICATIONS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THEY ARE A PERMISSIBLE POLITICAL CLASSIFICATION.

Respondents contend that ICWA violates the Equal Protection Clause of the Fourteenth Amendment by making a race-based distinction on the adoption of Indian children. This is not so. Rather, ICWA seeks to differentiate Indian children as part of a distinct political group: American Indian tribes, which have historically struggled to maintain their independence from United States' government overreach. Protecting the independence and future existence of Indian tribes is not only a legitimate government interest, but a compelling one, and maintaining that Indian children be placed within families in a tribe when possible not only rationally meets this interest, but is narrowly tailored.

A. ICWA's classifications are political rather than racial; therefore, this Court should apply rational basis rather than strict scrutiny.

While "American Indian" has historically been recognized as a racial identity on various government forms and proceedings, *see* Standards for the Classification of Federal Data on Race and Ethnicity, Federal Register (Aug. 28, 1995), American Indians occupy a unique position in that they have both a distinct racial identity and self-determined governance within the United States' jurisdiction. These two separate concepts are admittedly intertwined. American Indian tribes each have their own rich history and heritage, which includes a history of self-governance before American colonization, while also sharing a racial identity distinct from the rest of the United States and linked to this heritage. This murky combination can lead some to assume that any personal classifications relating to American Indian tribes must be based on race. However, this assumption ignores the political interests of American Indian tribes, chiefly protecting their continued self-governance – a legitimate United States interest, considering the United States' history of interference.

The United States recognizes American Indians as a distinct political group in a variety of contexts. In *Morton v. Mancari*, this Court upheld federal hiring preferences towards American Indians for employment with the Bureau of Indian Affairs as constitutional. 417 U.S. 535, 555 (1974). The Court reasoned that considering American Indians' unique status under federal law, it makes sense that those whose lives are governed by the Bureau of Indian Affairs would be more responsive to tribal concerns. *Id.* at 542-44. The Fourth Circuit, following *Morton v. Mancari*, held that classifications allowing only Indian tribes to run gambling operations were "political rather than racial in nature," as "the very nature of a Tribal-State compact is political; it is an agreement between an Indian tribe, as one sovereign, and a state, as another." *United States v. Garrett*, 122 Fed.Appx. 628, 632 (4th Cir. 2005) (quoting *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 734-35 (9th Cir. 2003)).

The Ninth Circuit, also following *Morton v. Mancari*, upheld a similar gambling compact in California, stating that "so long as a federal statute evince[s] a rational relationship to Congress' trust obligations toward the Indians, it involve[s] a political classification, so rational-basis review [is] appropriate." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 734 (9th Cir. 2003). The Ninth Circuit also found that classifications in Alaska imposing a preference for Indian-owned businesses to enter building contracts for projects on Indian land was not a racial classification, holding that "as long as the special treatment is rationally related to Congress' unique obligation towards the Indians, the preference would not violate equal protection." *Alaska Chapter, Associated Gen. Contractors of Am., Inc. v. Pierce*, 694 F.2d 1162, 1169 (9th Cir. 1982). By this reasoning, a classification promoting Congress' unique obligation to Indian tribes is *inherently* political rather than racial, "even though racial criteria might be used in defining who is an eligible Indian." *Id.*

Chief Judge Tower's concurrence in this case incorrectly analogized ICWA's Indian classifications to Hawaii's voter classifications in *Rice v. Cayetano.* 528 U.S. 495 (2000). While Hawaii tried to limit its voting pool by "ancestry," a "proxy for race" this Court struck down, ICWA seeks to preserve the independence and future existence of Indian tribes by maintaining the placement of Indian children within tribes. This categorization is not a "proxy for race," as the Thirteenth Circuit states. Rather, this case is more analogous to *Artichoke Joe's California Grand Casino*, as promoting the placement of Indian children with Indian tribes has more to do with "Congress' trust obligations toward the Indians," *Artichoke Joe's*, 353 F.3d at 734, rather than limiting the exercise of certain rights to certain racial groups.

While Indian tribal membership criteria include ancestry, which is linked to race, this does not mean that laws considering Indian ancestry always do so as a "proxy for race." "It is impossible to avoid the fact that racial ancestry is critical to tribal membership criteria. Indian tribes are tribes first and foremost, and tribal membership criteria must reflect this tribal character." Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. J. 1 (2012). Despite this inherent connection between race and ancestry, tribal affiliation is still ultimately a political identity.

The varying approaches different Indian tribes determine membership criteria illustrate that tribal membership is not simply a racial classification. While some tribes define membership by "blood quantum," setting a minimum floor for blood percentage "at least partly derived from Indian ancestors," others utilize "lineal descendancy," a measure farther removed from race. Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. J. 1, 4, 6 (2012). Under a lineal descendancy model for evaluating tribal membership, membership is determined not by blood, but by whether they are descendants of a tribal member.

Id. In this model, an individual with only one percent Indian blood – something someone of any race may have – may claim tribal affiliation. Considering that someone of any race could have one percent Indian blood, it follows that Indian classification is about more than race; it primarily concerns a shared heritage that is inextricably linked to the independent traditions and self-governance of Indian tribes.

ICWA's language reflects this political rather than racial nature; § 1903 defines "Indian" as "any person who is a *member* [emphasis added] of an Indian tribe. . ." and specifies no blood requirement. 25 U.S.C. § 1903. Under this definition, someone who is a member of a tribe without a blood requirement would meet the statute's Indian classification. Likewise, someone who has fifty-percent Indian blood but is *not* a member of an Indian tribe would *not* meet the statute's classification. This distinction demonstrates that ICWA is concerned with political rather than racial classifications.

Furthermore, language within the Constitution specifying certain treatment for Indians necessarily implies that Indians are a distinct political group, and that it is constitutional for Congress to treat them as such. The Commerce Clause distinguishes Indian tribes from other governments, stating that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . ." U.S. CONST. art. 1, § 8, cl. 3. This distinction applies to Indians not on account of race or ancestry, but because the founders recognized Indian tribes as distinct states requiring negotiation. *See* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 37 CAL. L. R. 495, 526 (2020). Moreover, the Constitution specifies that Congress' power to apportion taxes "exclude[s] Indians not taxed." U.S. CONST. art. 1, § 2, cl. 3, but does not specify how to determine who counts as an Indian. In order to meet this Constitutional obligation, Congress *must* be able to determine who to classify

as an Indian. U.S. CONST. art. 1, § 8, cl. 18. *See* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 37 CAL. L. R. 495, 527-32 (2020). The Necessary and Proper Clause explicitly empowers Congress to make this classification, stating that "Congress shall have Power. . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . ." U.S. CONST. art. 1, § 8, cl. 18.

That the act prioritizes placement with any Indian tribe when placement within the child's Indian tribe is not possible does not violate the equal protection clause. While individual Indian tribes are not a monolith and each have their own distinct traditions and practices, they share a history of United States government overreach and disproportionate displacement of their children. Placing an American Indian child within a tribe with which they are not affiliated still meets the overarching interest of maintaining the independence and self-sufficiency of Indian tribes, as well as meeting Congress' trust obligation to Indian tribes; this placement still combats the systemic targeting of Indian children for foster care and relocation outside of Indian tribes.

B. ICWA's classifications satisfy rational basis because they are reasonably related to a legitimate government interest.

Because ICWA's tribal classifications are political rather than racial, this Court should apply rational basis review. On rational basis review, a statute "comes to court bearing strong presumption of validity, and those attacking rationality of legislative classification have burden to negate every conceivable basis which might support it." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). "Under rational basis review of a statute challenged on equal protection grounds, Congress's judgment is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data; further, rational basis review is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Parker v. Conway*, 581 F.3d 198, 202 (3d Cir. 2009).

ICWA was enacted in response to a legitimate government interest: the "continued existence and integrity of Indian tribes." 25 U.S.C.A. § 1901(3)-(5). ICWA recognized that "no resource is more vital" to this goal than the children of Indian tribes; the continued existence of Indian tribes relies on living members through the years. 25 U.S.C.A. § 1901(3)-(5). Thus, Congress stated the explicit intent of ICWA was to not only "protect the best interests of Indian children," but also to "promote the stability and security of Indian tribes and families. . ." 25 U.S.C.A. § 1902.

This goal—promoting the stability and security of tribes—is a legitimate one. Congress noted 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 place in non-Indian foster and adoptive homes and institutions."

This disparate treatment of Indian children can be attributed to systemic barriers to resources and prejudice against Indian tribes, both of which intertwine with systemic racism. Studies have found that "[c]hildren of color compose the majority of children in foster care, with disproportionate representation of African-American and American-Indian children." Sandra Bass, Margie K. Shields and Richard E. Behrman, *Children, Families, and Foster Care: Analysis and Recommendations*, 14 The Future of Children 4, 8 (2004). "American-Indian children are represented in foster care at nearly double their rate in the general population." *Id.* at 14. This can be attributed partially to "poverty and poverty-related factors," as due to systemic barriers, American Indian children are more likely to live in low-income families and thus more likely to experience "economic instability and high-stress living environments." *Id.* However, bias against Indian tribes also factors into this disparity in child separation. "Contributing factors in

removals involved state judges and state social workers who were culturally uninformed or biased toward Native people." Victoria White, *Disproportionality of American Indian Children in Foster Care*, ST. CATHERINE UNIVERSITY (2017).

Furthermore, various courts have found that laws creating distinct opportunities for Indian tribes meet a legitimate government interest. In *United States v. Garrett*, the Fourth Circuit found that a North Carolina law limiting gambling operations to Indian tribes did not violate the equal protection clause, as promoting the economic stability of Indian tribes is "not just a legitimate, but an important government interest." *United States v. Garrett*, 122 Fed.Appx. 628, 633 (4th Cir. 2005). In *Artichoke Joe's California Grand Casino v. Norton*, the Ninth Circuit found that laws limiting casino operation to Indian tribes met a legitimate government interest – "promot[ing] cooperative relationships between the tribes and the State by fostering tribal sovereignty and self-sufficiency." 353 F.3d 712, 737 (9th Cir. 2003). In *Peyote Way Church of God, Inc. v. Thornburgh*, the Fifth Circuit held that laws limiting the use of peyote consumption to American Indian tribes met the legitimate government interest of "preserving Native American culture," which the court reasoned was "fundamental to the federal government's trust relationship with tribal Native Americans." 922 F.2d 1210, 1216 (5th Cir. 1991).

Congress' goal of combatting the disproportionate separation of Indian children from their families and placement within families outside of their tribes – a trend attributable to systemic barriers and American cultural bias – meets the trust obligation between Congress and American Indian tribes. Classifying Indian children as a distinct group to be placed within Indian families is rationally related to this interest; placing Indian children within Indian families protects the independence and continued existence of Indian tribes, as it directly combats the

disproportionate displacement of American Indian children in homes outside of American Indian tribes. Because Congress fulfilling its obligations to American Indian tribes implicates political rather than racial concerns, this Court need not find that ICWA takes the least restrictive means of protecting Indian children and tribal independence; it must merely find that the approach and the end goal are rationally related.

C. Even if this court finds that ICWA's classifications are race-based, the classifications satisfy strict scrutiny because they are narrowly tailored to a compelling government interest.

Petitioners maintain that ICWA's tribal classifications are political rather than racial. However, even if this Court finds the classifications are racial and thus warrant strict scrutiny, ICWA's classifications are narrowly tailored to the compelling interest of meeting Congress' trust obligation to American Indian tribes.

Meeting Congress' trust obligations to Indian tribes is a compelling government interest, as it originates not only from Congressional statute, but from a combination of "the Constitution, Indian treaties, and federal acknowledgment of Indian tribes." Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 37 CAL. L. R. 495, 506 (2020). This Court and the lower courts have suggested that meeting constitutional obligations is a compelling government interest. *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981) ("We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling."); *Walker v. Beard*, 789 F.3d 1125, 1136 (9th Cir. 2015) (citing *Widmar v. Vincent*, 454 U.S. 263, 275 (1981)) ("Compliance with the Constitution can be a compelling state interest."). In *United States v. Hardman*, the Tenth Circuit held that "fulfilling trust obligations to Native Americans remain compelling interests," citing the origins of this trust in the Constitution. *United States v. Hardman*, 297 F.3d 1116, 1128-29 (10th Cir. 2002) ("Thus, we

have little trouble finding a compelling interest in protecting Indian cultures from extinction, growing from government's ‘historical obligation to respect Native American sovereignty and to protect Native American culture.’” (internal citations omitted)). This same compelling interest – fulfilling Congress’ trust obligations to Indian tribes as imposed by the Constitution – led Congress to pass ICWA. *Id.* at 1129.

If this Court determines that ICWA creates racial classifications, it should find that these classifications are narrowly tailored to meeting Congress’ constitutional obligations to the Indian tribes. This Court has found laws based on racial classifications to survive strict scrutiny in a variety of contexts, particularly in affirmative action cases. In *Grutter v. Bollinger*, this Court upheld a law school’s use of race in the admissions process, finding that (1) securing a diverse student body is a compelling government interest and (2) the law school’s use of race as only “a ‘plus’ in a particular applicant’s file” was narrowly tailored to meet that interest. 539 U.S. 306, 309 (2003). This Court reasoned that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” but rather requires “good faith consideration of workable race-neutral alternatives” that do not result in “a dramatic sacrifice” of the ultimate compelling interest. *Id.* at 339. In *Fisher v. University of Texas at Austin*, this Court upheld a university’s use of race as a component of an applicant’s “Personal Achievement Index,” finding that (1) securing “the educational benefits that flow from student body diversity” is a compelling interest, and (2) the “available and workable” race-neutral alternatives would not have sufficiently met this compelling interest. *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 381 (2016).

If this Court determines that ICWA’s Indian classifications are racial, then there are no available and workable race-neutral alternatives that would sufficiently meet Congress’ trust obligation to Indian tribes regarding fostering Indian children. As ICWA asserts, “there is no

resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(2). Placing fostered Indian children in unaffiliated families is a blow to the future existence of Indian tribes, which rely upon the passing down of shared heritage. No neutral alternative and no soft preference for tribal placement can adequately push back against the disproportionate displacement of Indian children from their communities.

CONCLUSION

For the foregoing reasons, this Court should uphold the constitutionality of ICWA and reverse the judgment of the court below.

Respectfully submitted,

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