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 RESPONDENTS

TEAM 30

Counsel for Respondents

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QUESTIONS PRESENTED

I. Whether the Tenth Amendment's anticommandeering doctrine precludes Congress from enacting federal legislation that requires state courts and agencies to implement federal policy in state court adoptions when no federal cause of action is created.

II. Whether the Equal Protection Clause precludes Congress from enacting adoption placement preferences in the Indian Child Welfare Act that favor adoption of Indian children by those of common Indian descent without consideration of what might otherwise be in the child's best interest.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This case involves three constitutional challenges to the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–63 ("ICWA") brought by the State of West Dakota and by a non-Indian family (collectively the "State and Donahues") seeking to adopt two children in West Dakota. R. at 4.

The Donahues. James and Glenys Donahue are the "loving adoptive parents" who sought to adopt two children with Indian[1] ancestry, Baby C and Baby S. R. at 13. Baby C's biological mother is an enrolled member of the Quinault Nation, and her father is an enrolled member of the Cherokee Nation. R. at 2. Baby C and S both are the biological children of a parent enrolled in an Indian tribe. R. at 5. The Donahues sought to provide a home for both Child S and Child C. R. at 2–3. They did so with the consent of Baby C's biological parents and Baby S's biological grandmother. R. at 2–3. Still, ICWA threatened—and in Baby S's adoption succeeded—to prevent the Donahues attempts to adopt the children that, without ICWA, would have been carried out. R. at 2–3.

ICWA's Impact on the Donahues' Adoption of Baby C. Prior to living with the Donahues, Baby C lived with her maternal aunt. R. at 2. But when Baby C was just eight months old, State officials were forced to remove Baby C from her aunts care in response to reports that Baby C was being left unattended for long hours. R. at 2. Following her removal, Baby C was placed in the Donahues foster care. R. at 2. Two years later, the Donahues sought adoption of Baby C. R. at 2–3. Thus, they initiated adoption proceedings in state court. R. at 3. But the Quinault and Cherokee Nations (collectively the "Tribal Defendants") intervened, asserting an alternative

[1] The ICWA, and the record, refer to "Native Americans," and their tribes, as "Indians." This brief will do the same.

family for Baby C. R. at 3. This alternative was neither a relative nor a resident of the same state as Baby C. R. at 3. ICWA's placement preferences prefer any Indian family over all non-Indian families. R. at 6. The Tribal Defendants persisted until, for undisclosed reasons, the alternative placement fell through. R. at 3. No other alternatives were proposed, nor did any families besides the Donahues ask about adopting Baby C. R. at 3. Only then, after several additional months of delay, were the Donahues finally able to conclude their adoption of Baby C. R. at 3.

ICWA's Impact on the Donahues' Adoption Attempt of Baby S. The Donahues also sought custody of Baby S. R. at 3. Baby S lived with his grandmother until she could no longer care for him. R. at 3. Baby S's biological mother was deceased, and his father's identity is unknown. R. at 3. The Donahues provided foster care for Baby S. R. at 3. A short time later, the grandmother gave the Donahues permission to adopt Baby S, and they initiated proceedings to add another member to their family. R. at 3. But the Quinault Nation objected. R. at 3. They interjected themselves into the proceedings with two alternative placements, neither of which were relatives, nor resided in West Dakota. R. at 3. Baby S is not a member of the Quinault Nation. R. at 3.

II. PROCEDURAL HISTORY

The District Court. With the threat of Baby S and Baby C being removed from the only family they knew, the State and Donahues sued for injunctive relief and a declaration that ICWA is unconstitutional because it exceeds Congress's Article I powers, including by commandeering the States, and violates the Constitution's equal protection guarantees. R. at 4. They named the United States of America, and various federal agents as defendants (collectively the "United States"), and the Tribal Defendant's intervened. R. at 4. The district court resolved the parties

cross-motions for summary judgment in favor of the United States, holding the challenged provisions of ICWA constitutional. R. at 4.

Appellate Court. The Thirteenth Circuit disagreed with the lower court, finding several of ICWA's provisions unconstitutionally commandeered state agencies and state courts, and therefore overturned the lower court's holding in that respect. R. at 16. The majority declined to rule on the Article I and equal protection issues because of their finding as to the anticommandeering issue. R. at 16–17. However, the court mentioned briefly that they doubted Congress possessed Article I authority to enact ICWA. R. at 16.

Chief Judge Tower's Concurrence. Chief Judge Tower, in his concurrence agreed with the majority that ICWA was unconstitutional. R. at 17. But felt that ICWA should have been invalidated on equal protection, not commandeering grounds. R. at 17.

SUMMARY OF THE ARGUMENT

I.

The court of appeals correctly held that ICWA is unconstitutional. At the outset, ICWA's placement preferences and recordkeeping provisions far exceed Congress's enumerated powers. Congress's reliance on the Indian Commerce Clause as its Article I authority for ICWA is error because children are not "Commerce." Whatever Congress's purported "plenary" authority over Indian affairs is, it cannot be without limitation and cannot overcome ICWA's violations of other Constitutional principles. Nor may ICWA be supported by Congress's oblique attempt to grasp at "other constitutional authority" because no other Article I Congressional authority provides the authority to intrude into traditionally state government realm that is family law.

Even if Congress had authority to enact ICWA, it compounds its constitutional shortcomings through its placement and recordkeeping provisions commandeering of state courts

and agents in service of its federal policies. The Constitution prohibits Congress from forcing state courts to apply federal policies in state created claims. Yet ICWA does precisely that. Additionally, ICWA commandeers state agents because it dictates what they must do and imposes on them the costs and burdens of enforcing a federal policy. And ICWA is not shielded by a preemption defense because ICWA fails to create a federal cause of action, invades matters of family law traditionally left to the states, and is not best read as regulating private actors.

II.

The court of appeals should have addressed ICWA's noncompliance with the Fifth Amendment's equal protection guarantees. ICWA singles out certain individuals solely because of their ancestry and biology through its placement preferences. In doing so, ICWA deprives all subjected to its regime of equal protection. ICWA contains two provisions that are race oriented. First, ICWA treats Indians as a racial group through its definition of an "Indian child." Its definition goes far beyond mere political or tribal affiliations and is referring to "Indians" as a racial group. Second, ICWA's preferences are racial discrimination—they prefer all Indian families over any non-Indian family merely based on their ancestry. And because these classifications treat "Indians" as a racial, not political group, *Mancari*'s limited exception does not apply, and these classifications are subject to strict scrutiny. But even if ICWA was subjected to a lower standard, they still fall short of compliance because its preferences are not rationally connected to Congress's interest in preventing the removal of Indian children from tribal lands.

This Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.

ARGUMENT AND AUTHORITIES

Standard of Review. The district court granted summary judgment for the United States. R. at 12. The appellate court then reversed and granted summary judgment for the Donahue's and the State. R. at 17. Summary judgment may only be awarded when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Grants of summary judgment are reviewed de novo. *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 21 (1st Cir. 2018).

ICWA had just goals; however, several constitutional shortcomings and racially based mandates cause the legislation's application not to measure up to its laudable theory.

To begin, the Founders carefully crafted a system where power was divested between the federal and state governments. This balance is critical to upholding principles of dual sovereignty that the American system was founded on. Yet, ICWA's placement preferences bulldoze this delicate balance between federal and state authority because they far exceed Congressional power in pursuit of federal family law policy. Congress grasps at the Commerce Clause for justification, claiming it grants them this power because Indian children are "resources" of the tribes and thus fall within the meaning of "Commerce." *See* 25 U.S.C. § 1901(3). But Indian children, like all children, are not commerce. Nor do child-care proceedings affect trade with Indian Tribes. This Court should confirm that Congress's power to legislate regarding Indians is not unlimited and acknowledge that Congress lacked the authority to create federal family law policy through ICWA.

Even if Congress had authority, it could not create the federal family law policy it did. All children, including Indian children, are citizens of the United States and entitled to equal protection of the laws. That a federally supported regime has denied them of such protection for

over forty years is a stain on the principles of equality this country was founded on. A child's best interest—not their ancestry or biology—should be placed at the forefront of every child-care proceeding. Yet, ICWA values ancestry over a child's best interests as it treats all Indians as a single racial group by its definition of an "Indian child" and adherence to discriminatory placement preferences. Congress justly intended ICWA to preserve and strengthen Indian families by stopping destructive adoptive practices causing forced family breakups. And if ICWA merely did this, there would be no controversy. But ICWA goes much further. ICWA's placement preferences permit a tribe to override the biological parent's wishes for their child. ICWA unlawfully treats a class of children differently simply because of their ancestry and their birth into an Indian family. This should not be the law. A child's—not tribe's—best interest must always be supreme in a child-care proceeding. This Court owes American Indian children nothing less.

I. THE PLACEMENT PREFERENCES AND RECORDKEEPING PROVISIONS OF THE INDIAN CHILD WELFARE ACT ARE UNCONSTITUTIONAL.

At the outset, ICWA is unconstitutional because its federal policies far exceed Congress's enumerated powers, invading the arena of family law which has always been "[the] exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The Constitution chose not grant Congress "all governmental powers, but only discrete enumerated ones." *Printz v. United States*, 521 U.S. 898, 919 (1997). Thus, "[e]very law enacted by Congress must be based on one or more of [these] powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). In so far as Congress enacts legislation that goes beyond these constitutional limits, it is the duty of this Court to "invalidate [that] congressional enactment." *Id.* Such is the system chosen by our Founders to ensure the correct balance of power between the federal governments and the states. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550

(1935). ICWA blatantly disregards these principles under the guise of federal supremacy and morality. The Court should look beyond ICWA's policy pronouncements and see that, despite its good intentions, ICWA violates core principles of the Constitution. Thus, ICWA should be invalidated, and this Court should seize this opportunity to remind Congress their power is not without limit.

A. Congress Lacks Enumerated Authority for ICWA.

Congress rests its authority for ICWA's federal policies in its power to "regulate Commerce . . . with Indian tribes," in the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. This is error. ICWA governs children. 25 U.S.C. § 1901(1). And children are not commerce—they are "persons" who may not be bought, sold, or bartered for. *See Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 136 (1837) (asserting that "persons" are not commerce). Nor may a child's adoption proceedings constitute "commerce." *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 564 (1995) (reasoning that federal regulations in matters of "child custody" could not be supported by the Commerce Clause because they do not make a substantial impact on trade).

Briefly, Congress grasps at "other constitutional authority" besides the Indian Commerce Clause, 25 U.S.C. § 1901(1). But no other enumerated power can rationally be said to support ICWA's forced federal policies. Congress's authority might be plenary, but it is not absolute and may not violate the Constitution.

1. ICWA's power to "regulate commerce . . . with Indian tribes" does not encompass the matters of "child custody" ICWA regulates.

An Indian child is no more an article in commerce than any other person. U.S. Const. amend. XIII. Therefore, because ICWA's placement preferences regulate *persons*—not commerce—in "child custody" cases, Congress's reliance on the Indian Commerce Clause must

be found unconstitutional. U.S. Const. amend. XIII. No contrary finding can be squared with the Constitution, or this Courts case precedence because matters of "child custody" do not share the slightest relationship to "commerce with Indian tribes." *Lopez*, 514 U.S. at 564.

ICWA's placement preferences regulate Indian children and their potential adoptive families, not trade, or any form of "commercial intercourse." 25 U.S.C. § 1903(1); § 1903(4); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824). While the precise definition of "commerce" has eluded courts, this Court has ruled out children because persons are not commerce. *Miln*, 36 U.S. (11 Pet.) at 136; *cf.* U.S. Const. amend. XIII. Thus, Congress lacks Commerce Clause authority for ICWA because it regulates persons, and "persons are *not* [commerce]." *Miln*, 36 U.S. (11 Pet.) at 136.

Sometimes, courts have broadened the Commerce Clause to extend beyond goods to encompass the regulation of "channels" or "instrumentalities" of commerce, and any "economic activities having a substantial relationship" to commerce. *Lopez*, 514 U.S. at 558–59. But even under this interpretation of the Commerce Clause, Congress still may only regulate those activities that "substantially affect interstate commerce." *Id.* at 558–59. For example, this Court held that Congress went beyond the Commerce Clause when it passed a law that banned carrying a handgun to school because guns did not have a substantial effect on interstate commerce. *Id.* at 561. And while there still is "no[] precise formulation[]" for what makes a regulation "substantially affect interstate commerce," *id*. at 567, this Court has made it clear that regulations of "family law" and "child custody" are not included, *id.* at 564.

Thus, ICWA's regulation of children, and their placement, fall far outside any definition of "Commerce." First, ICWA's regulations of children, their families, and those seeking to adopt them are the same as a student possessing a gun because neither demonstrate any relationship or

substantial effect on interstate commerce. *Id.* at 567. Because neither a local boy possessing a gun at his own school nor the individual adoption and foster placements of a child in state child-custody proceedings produce even a slight commercial interaction. *Id.* at 564. Thus, this Court should echo the holding from *Lopez* and find ICWA's regulations in matters of "child custody" are not "commerce." *Id.* at 561.

Nor should this definition be extended to encompass ICWA's federal "childcare" regime. In support, it seems sufficient to simply assert that a child should not be categorized as commerce because they are not chattel—but humans. *Miln*, 36 U.S. (11 Pet.) at 136. Thus, any attempt by a federally *elected* member of Congress to enact legislation treating children as such should easily be discarded the precise moment proposed on the house floor. Yet ICWA has been permitted to subject Indian children, their families, and those seeking to adopt or foster for over *forty years*. *See* R. at 14 (ICWA was enacted in 1978). Thus, worth reemphasizing, a child is not a good to be bought or sold, transported, or otherwise exchanged in a marketplace. *Lopez*, 514 U.S. at 564. Instead, all children—including those subjected to ICWA—are persons entitled to fair treatment under the law. *Id.* at 558–59. Even more frustrating, ICWA's placement preferences do not limit themselves to tribal members. Instead, Congress subjects even those children who may never become members of a tribe to ICWA's preferences, empowering tribes to choose who may adopt or foster these children. *See* 25 U.S.C. §§ 1903(4)(b) (ICWA's definition of Indian child includes members and non-members).

ICWA also impacts non-Indian prospective adoptive and foster families by subjecting them to the will of these placement policies despite a lack of affiliation with a tribe. *See* § 1915(a)–(b) (adoption placement preference hierarchy prefers placement with non-related Indian families of different tribes over any non-Indian family). The merits behind ICWA's goal to ensure that

Indian children remain within Indian homes is undisputed. The same cannot be said, however, of its application. Inexcusably, Congress has caused great harm to the same children it enacted ICWA to protect, depriving them of opportunities for safety and happiness. For example, because of ICWA's adoption preferences, Indian children are consistently overrepresented in foster care—they make up only one percent of the national population—yet they account for two percent[2] of children in foster care.[3] And ICWA's practices result in Indian children remaining unadopted for periods far longer than children of other races.[4] ICWA's policies, like sections 1911(c) and 1915(a), are to blame because they create obstacles, like the Tribal Defendant's right to intrude and alternative placement demands, for non-Indian families like the Donahue's attempting to adopt Indian children. *Id.* § 1915(a); R. at. 3–4. Thus, the Commerce Clause emboldens ICWA to place Indian children "at a unique disadvantage in finding a permanent and loving home." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 653–54 (2013). This Court should remedy this Congressional overstepping and recognize that ICWA cannot stand on the Commerce Clause because it regulates "child custody" proceedings that involve individual Indian children, their parents, and prospective adoptive families that are humans—not chattel—and have no impact on interstate commerce.

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[2] "Indian children constitute approximately *twelve percent* of West Dakota's child custody proceedings, including foster care and adoptions, annually." R. at 2 (emphasis added).

[3] U.S. Dep't of Health & Hum. Servs., *The AFCARS Report* 2 (June 23, 2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf.

[4] Richard P. Barth et al., *Adoption of American Indian Children: Implications for Implementing the Indian Child Welfare and Adoption and Safe Families Acts*, 24 Children & Youth Servs. Rev. 139 (2002).

2. Whatever Congress's authority over Indian affairs may be, it is not absolute.

This Court has sometimes interpreted the Indian Commerce Clause broadly. *See, e.g., Morton v. Mancari,* 417 U.S. 535, 551—52 (1974) (noting Congress has "plenary power" to deal with Indian affairs under the Commerce Clause). But whatever this plenary authority is, it is not absolute. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality). Congress was only granted "discrete" and "enumerated" power. *Printz*, 521 U.S. at 919. And Congress's power remains subject to Constitutional restrictions[5] placed on their authority by the Framers. *United States v. Creek Nation*, 295 U.S. 103, 110 (1935). Thus, whatever this "plenary power" means, it cannot mean Congress may disregard constitutional limits on its authority.[6]

Instead, Congress's power to regulate commerce with the Indian tribes is no greater than Congress's power under the rest of the Commerce Clause. *United States v. Bailey*, 24 F. Cas. 937, 940 (C.C.D. Tenn. 1834) (McLean, J.). For example, as pointed out by a Justice of this Court, Congress has the same power to regulate *persons* under the Indian Commerce Clause as they have "the power to regulate commerce with all foreign nationals traveling within the . . . States" under the Foreign Commerce Clause. *Adoptive Couple*, 570 U.S. at 660 (Thomas, J., concurring). ICWA's placement preferences do not deal with *tribes*, nor are their impacts limited to tribes themselves. Contrarily, those preferences deal with persons because they place

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[5] "At founding, the Framers limited its powers to those enumerated in the Constitution." Article I and its enumerated powers demonstrate an unwillingness to give Congress such expansive power because the Founders stripped them of any authority not explicitly given. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 Iowa L. Rev. 1, 25 (1999).

[6] Congress has no more power over the tribes than it has in regulating foreign nations and among the states. *See* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201, 215 (2007).

individual Indian children with foster or adoptive parents. *See id.*; § 1903(4)(b), 1915(a)–(b). Also, the impact of adoption preferences are felt outside the tribe itself, when they subject non-Indian families seeking to adopt a child to this federal preference regime, whether the prospective parents are members of an Indian tribe or not. *See* § 1915(a)–(b). Thus, ICWA's regulation of the non-Indian families who seek to foster or adopt individual Indian children, run airy of The Indian Commerce's grant to Congress to oversee commerce with Indian tribes.

Nor can this plenary power "authorize the enactment of every type of legislation." *Lopez*, 514 U.S. at 566. Congress may only regulate those activities that substantially affect interstate commerce. *Id.* at 558–59. In *Lopez*, this Court rejected the government's arguments that a gun law was within their Commerce power because school gun violence leads to nationwide crime; and that guns lead to unsafe schools, which discourages nationwide travel were unavailing because if this was the law, there would be no perceivable activity that Congress would lack authority to regulate, including "child custody." *Id.* at 564 (holding that the federal law's connection to commerce was too attenuated to be permitted). In doing so, this Court acknowledged a constitutional principle that "[t]he Constitution withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Id.* at 566.

This Court itself stated that Congress would go too far if it wielded its Indian Commerce Clause power to "interfere with the authority of States." *See United States v. Lara*, 541 U.S. 193, 203–05 (2004). For similar reasons, in *Lopez*, this Court refused to expand the Commerce Clause to grant "Congress a plenary police power that would authorize enactment of every type of legislation" destroying state sovereignty in traditionally local matters such as family law. *See* 514 U.S. at 564–68. Thus, Congress's lack of a "general power" to regulate Indian affairs "is a proposition too clear for demonstration." *Bailey*, 24 F. Cas. at 940 (McLean, J.). And whatever

the definition of "Commerce" is, it simply cannot encompass areas of *traditional state sovereignty* whose "effects upon commerce [are] so indirect and remote that to embrace them" would destroy the difference "between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

ICWA does precisely this. Its preferences apply in matters of "domestic relations" of a "parent and child" which has "long been regarded as a virtually exclusive province of the States." *Sosna*, 419 U.S. at 404. ICWA regulates all facets of "child-custody," an area not included in any definition of "commerce," and that is located at the core of state's sovereign power. *See, e.g.*, *Lopez*, 514 U.S. at 564. Thus, the Court should recognize ICWA's shortcomings and invalidate ICWA for its misplaced reliance on the Commerce Clause. *United States v. Kagama*, 118 U.S. 375, 392 (1886).

B. Even if Congress Had Enumerated Authority for ICWA, Its Placement Preferences Still Impermissibly Commandeer State Courts and Agents.

Even if Congress had the authority to enact ICWA, its placement and recordkeeping provisions commandeer state courts and agencies to enforce their federal policy.

At the outset, the Constitution does not permit Congress to issue orders directly on the States. *Murphy v. NCAA*, 138 S. Ct. 1461, 1475–76 (2018); *see also New York v. United States*, 505 U.S. 144, 162 (1992) (recognizing the Constitution does not allow Congress to compel States to regulate according to Congress' instructions). The Anticommandeering Doctrine stands against Congressional overreaching beyond their limited powers enumerated in the Constitution. *See Murphy*, 138 S. Ct. at 1476 (reasoning that anticommandeering doctrine protects dual-sovereign system by ensuring the federal government's power is limited only to those enumerated powers).

Congress may not order State *legislatures* to regulate under its own federal plan. *Id.* Nor may Congress avoid the anticommandeering doctrine by compelling state executive *agents* directly. *Printz*, 521 U.S. at 935. Nor should this Court leave a state judiciary without the privilege of this protection. ICWA commandeers state governments and their officials, not individuals. This Court should recognize Congress cannot so easily avoid the delicate balance our Framers struck between the Federal and State Governments and affirm the lower courts holding that ICWA's placement preferences and recordkeeping provisions are unconstitutional.

1. Congress violates anticommandeering principles when its preferences offend principles of state sovereignty by mandating state courts adopt and apply federal childcare policies in state court proceedings.

This Court applied the Anticommandeering doctrine to state legislatures. *See New York v. United States*, 505 U.S. at 161 (holding Congress may not "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.") The Court extended the doctrine to state executive agencies because it recognized a Congressional attempt to avoid the doctrine by "conscripting the State's officers directly" rather than the legislatures. *See Printz*, 521 U.S. at 935 (holding anticommandeering doctrine is not limited to state legislatures because other state officials may not be "dragooned . . . into administering federal laws."). Now, this Court should again extend the doctrine to state courts rather than officials and prevent Congress from circumventing the doctrine, like in *Printz*, and hold that as "Congress cannot circumvent that prohibition by conscripting the State's officers directly," *id.* at 935, it may not slip by this prohibition simply because it orders the state courts instead of its officers what law to apply in state-law causes of action.

ICWA forces a state court, instead of its officials, to discard their own state's child placement procedures for Congress's own preferences. But the difference is irrelevant. Whether

Congress directly commands a state's judge, or officer to cast aside a state law, the results are the *exact* same—a state is being "directly compelled by Congress to enforce a federal regulatory program." *Id.* at 935. Congress does not have this power according to this Court in *Printz* nor do they here simply because they are targeting a different branch of government. *Id.* This Court should not permit Congress to "circumvent" the doctrine by compelling a state court to adjust its laws to match ICWA's federal preferences. *Murphy*, 138 S. Ct. at 1475–76.

Additionally, ICWA intrudes into state family law matters, which traditionally reside at the very core of state authority. *See In re Burrus*, 136 U.S. 586, 593 (1890). Such an intrusion is uniquely troublesome because the Constitution carefully divested authority among the federal and state governments to best protect citizens from any attempt to consolidate authority amongst either sovereign "as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. at 187. Parents have a "fundamental" right to direct the upbringing of their own children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality). But it is hard to see this "fundamental" right when ICWA gets involved. For example, it lets tribal governments ignore adoption decisions made by Indian parents, as shown in this case. R. at 3–4. But *Troxel*, 530 U.S. at 57, said it's unconstitutional for the government to give a third-party authority over a child on a parity with, or superior to, that of the parents. Instead, the law must give "special weight" to the child's parent to determine their best interests. *Id.* at 69. Thus, ICWA is unconstitutional because it deprives a child's parent of their "fundamental" right.

Moreover, ICWA fails to establish a federal cause of action, thus, ICWA's placement preferences undermine the "political accountability" that the anti-commandeering principle promotes. *Murphy*, 138 S. Ct. at 1477. ICWA forces state courts to implement Congress's federal policies "under state law." 25 U.S.C. § 1915(a). This leads to a loss of accountability

because whether it is the state or federal governments responsibility is blurred. *Murphy*, 138 S. Ct. at 1477. For example, when an Indian child is placed with a particular family, the judgment will not indicate it was from a federal-court under "federal law," rather the judgment will indicate it was issued under a state-court judgment and under "State law." 25 U.S.C. § 1915(a). Thus, even though Congress's federal policies are responsible for the child's fate, the credit—or blame—will inevitably be placed on the state courts, agents, legislatures, and officials instead.

2. ICWA's recordkeeping provisions unlawfully force state agents to take active efforts to ensure Congress's federal policies are followed.

Besides state courts, ICWA's placement preferences and recordkeeping provisions commandeer its agents because its policies mandate the transfer of responsibility to state agents to ensure Congress's federal child-care policies are enforced. *Printz*, 521 U.S. at 922. For example, if a child falls under ICWA's policies, then state—not federal—agencies are charged with taking various steps to ensure Section 1915's placement preferences are enforced, which requires States to maintain records evidencing the "efforts" it took "to comply" with the preferences. 25 U.S.C. § 1915(e). Thus, Congress "transfers" ICWA's enforcement to state agencies. *Printz*, 521 U.S. at 922. If this was the law, then the apparent importance of the "division of power between State and Federal Governments," and the division of "powers between the three branches of the Federal Government," *id.*, would be rendered merely a relic of a bygone era.

3. ICWA is not preempted because Congress did not create a federal cause of action or regulate private actors.

Federal preemption does not apply in the present case because ICWA fails to create a federal cause of action, nor is it a regulation that is "best read" as regulating private actors. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015); *Murphy*, 138 S. Ct. at 1479.

Federal Preemption dictates that where federal and state rules of decision conflict, state courts apply the federal ones. *Armstrong*, 575 U.S. at 324. Thus, there is no debate that when a state court cause of action *conflicts* with a federal cause of action, the federal law validly preempts the state law. *Id.* But it does not follow that a state court considering a state cause of action must apply federal law.

Moreover, a federal law can only preempt state law if it can be "best read as one that regulates the conduct of private actors." *Murphy*, 138 S. Ct. at 1479. To be considered a law that "regulates private actors," it must "impose[] restrictions or confer[] rights" on private actors. *Id.* at 1480–81. ICWA's placement preferences do neither. ICWA prohibits neither the Indian children nor the prospective adoptive families from doing anything. Instead, ICWA's placement preferences instruct the state courts themselves how child-custody proceedings involving an Indian child will be conducted by demanding they adhere to their federal placement policies. 25 U.S.C. § 1915(a). Like a federal law that demanded a state's legislature not to change their gambling laws could not "be understood as a regulation of private actors" because no private actors lost the ability to gamble due to that law, *Murphy*, 138 S. Ct. at 1481, a federal law demanding a state court to do something also does not regulate private actors. Thus, ICWA can only constitute a federal regulation on the States, which is prohibited by the Constitution. *New York v. United States*, 505 U.S. at 178.

II. ICWA'S DEFINITION OF AN INDIAN CHILD, AND ITS FOSTER AND ADOPTION PREFERENCES DEPRIVE INDIAN CHILDREN OF EQUAL PROTECTION.

If Congress had the power to enact ICWA, the legislation was constitutionally invalid because it relied on impermissible racial classifications.

Racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Indeed,

these types of preferences may "balkanize us into competing racial factions carry[ing] us further from the goal of a political system in which race no longer matters." *Id.* at 657. Thus, "[t]he equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring); *see also City of Richmond v. Croson*, 488 U.S. 469, 521 (1988) (Scalia, J., concurring) (describing discrimination based on race as "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society").

ICWA violates the fundamental guarantees of the Equal Protection Clause of the Fifth Amendment. U.S. Const. amend. V. Congress passed ICWA to put a stop to racially motivated adoption practices of Indian children in the 1970s. But in application, ICWA mandates that a state conduct child custody proceedings involving Indian children differently than those involving similarly situated non-Indian children. ICWA creates a government run racially discriminatory regime that treats children, their biological parents, and potential non-Indian adoptive parents differently based on race and ancestry. And they do so based on the child's biology. Through these racial classifications, ICWA violates equal protection and deprives at-risk children of the legal protections they need.

Equal protection ensures "racial neutrality in governmental decision making." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). ICWA runs afoul of this constitutional principle by purposefully and impermissibly discriminating between individuals on the basis of race.

A. ICWA's Classifications Are Subject to, and Fail, Strict Scrutiny.

This Court reviews "all racial classifications" under strict scrutiny. *See Adarand*, 515 U.S. at 207–08, 227. They are presumptively unconstitutional. *Palmore v. Sidoti*, 466 U.S. 429 (1984) (finding racial classifications in child-placement proceeding unconstitutional).

A federal policy can only survive this "most searching examination," if it both: (1) serves a compelling governmental interest, and (2) is narrowly tailored to further that interest. *Id.* at 235. ICWA does neither. ICWA's classifications have failed to serve a compelling governmental interest for over forty years because its racially discriminatory definitions and preferences are "odious to a free people whose situations are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495 517 (2000). Nor is ICWA narrowly tailored because a non-relative Indian family not from the same tribe or state is still given preference over all non-Indian families "based solely on their race." *J.A. Croson Co.*, 488 U.S. at 508.

1. ICWA is subject to strict scrutiny because its racial classifications treat "tribal Indians" differently.

This Court has repeatedly held that every law that has treated "tribal Indians" differently than other American citizens is a racial classification subject to strict scrutiny. *Rice*, 528 U.S. at 520; *Adarand*, 515 U.S. at 214. This general rule finds application even where a law regulates only members of tribes because tribes use a person's ancestry or biology to determine membership. And this Court has consistently found classification based on ancestry indistinguishable from those based on race. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *see also Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that "discrimination solely because of . . . ancestry . . . is racial discrimination").

ICWA's racial discriminations begin with its definition of an "Indian Child." 25 U.S.C. § 1903. ICWA defines an "Indian child" broadly, encompassing any child who is a member of a

tribe, or who is merely eligible for membership and is the biological child of a tribal member. 25 U.S.C. § 1903(4). Tribal membership usually requires the person seeking to join to satisfy certain ancestral or biological requirements before they are enrolled. For example, the Cherokee Nation requires a person have a direct ancestor on the Dawes Rolls.[7] *See also, e.g.*, Navajo Nation Code Ann. tit. I, § 701(b) (2016) (membership requires 25% Navajo blood).

Even ICWA's more narrow definition for those children that are enrolled members his or herself is still racial because tribes have ancestral or biological requirements that must be met to become a member. Navajo Nation Code Ann., tit. I, § 701(b). In fact, in all cases involving an "Indian child," ICWA mandates a preference for placement with the child's extended family, any enrolled member in the Indian child's tribe, or some other Indian family. 25 U.S.C. § 1915(a); *see also id.* § 1915(b) (similar preferences for foster and pre-adoptive placement). ICWA prefers a placement with any adult that is a member of the over 500 federally recognized Indian tribes over any non-Indian family. *See id.* § 1901(3). Thus, ICWA subjects children needing a home, like Baby S and Baby C, and non-Indian families, like the Donahues attempting to provide that home, to disparate policies because of factors not within their control. In doing so, ICWA treats these children as a mere "resource" to be dealt with as a tribe sees fit, *id.* § 1901(3), instead of people with unique needs beyond their biological makeup. And as evidenced by the present case, this treatment can lead to delays, and even the barring of the adoption altogether.

ICWA invades state courts and subject's children to disparate treatment based on factors like their ancestry, which they cannot control. It dictates their future based on their birth into a family with tribal member ancestry, with no regard to the fact these children may never become a member themselves. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). ICWA identifies

[7] Cherokee Const. art. IV, § 1. The Dawes Rolls was an attempted census of tribal membership overseen by the Dawes Commission in 1898.

children of a particular race and routes them to families of the same race, leaving "children at a great disadvantage solely because an ancestor—even a remote one—was an Indian," raising "equal protection concerns." *Adoptive Couple*, 570 U.S. at 655–56; *Rice*, 528 U.S. at 522. And in doing so, ICWA disregard the States "duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore*, 466 U.S. at 433.

ICWA's ancestral classifications are a "proxy for race" because they both "employ[] the same mechanisms[] and cause[] the same injuries . . . ." *Rice*, 528 U.S. at 514. They "demean[]" an individual's "dignity and worth" rather than focusing on the individual's "merit and essential qualities." *Id.* at 517. As a result, these presumptively invalid classifications are subject to the highest level of scrutiny.

2. ICWA's classifications do not fall within the *Mancari* exception, which subjects classifications regulating Native Americans as a political group to rational-basis review.

One narrow exception to the general rule exists, but only applies if a law's classifications regulate Native Americans as a "political" rather than racial group. *Mancari*, 417 U.S. at 552; *Rice*, 528 U.S. at 520, 522. In *Morton v. Mancari*, the Court upheld a law that preferred Indian tribal members in hiring for positions with the BIA. 417 U.S. at 535. The Court concluded that the hiring preference was "political rather than racial in nature," because it only applied to members of "federally recognized tribes," and was "not directed towards a racial group consisting of Indians. *Id.* at 553. The Court reasoned the preference was political because it regulated the lives of Native Americans as "members of quasi-sovereign tribal entities." *Id.* And that the preference was "reasonably designed to further the cause of Indian self-govern[ance]." *Id.* at 553–54. Thus, the hiring preference was a political, not a racial classification. *Id.* at 554. But *Mancari* itself stated that "a blanket exemption for Indians from all civil service

examinations" would present an "obviously more difficult question" than the preference before them. *Id.*

This Court again in *Rice* asserted that the holding in *Mancari* was narrow, and not a replacement of the general rule that classifications based on tribal status are racial subject to strict scrutiny. 528 U.S. at 518–22. That case involved a state law that restricted voter rights so only native "Hawaiians" could vote for an upcoming election for tribal office. *Id.* at 498–99. This Court rejected the argument that the ancestral requirement to hold the office distinction was a political classification. *Id.* at 518–22. In finding it was a racial classification, the Court distinguished its holding from *Mancari* stating that case involved a law that singled out a "constituency of tribal Indians,"' rather than a law that grouped together persons as one "racial group consisting of Indians." *Id.* at 519 (quoting *Mancari*, 417 U.S. at 553 n.4). But the law classified groups of people solely on their ancestry. *Id.* at 515.

ICWA's third definition for an "Indian child" is not shielded by the limited exception from *Mancari* because it extends to encompass non-member children merely "eligible" for membership, based on their *ancestry*. *See* 25 U.S.C. § 1903(3), (4). Thus, the ICWA does not limit its scope to merely members, instead, it encompasses those who are only eligible because of their ancestry. 25 U.S.C. § 1915(a). The law in *Mancari*, on the other hand, incorporated no ancestral element, limiting its scope to only enrolled tribal members. 417 U.S. at 553 n.24. Thus, ICWA's definition is more like the classification in *Rice* because in both cases, the classifications place the biology and ancestry of the person under the microscope. 528 U.S. at 518–22.

Nor do ICWA's "Indian child" classification further tribal self-governance or the "internal affair[s]" of tribes, as necessary to fall under *Mancari*, but instead regulates the "critical state

affairs" of state-court child-custody proceedings. *Rice*, 528 U.S. at 520, 522. Ironically, ICWA is inapplicable in the "internal affair[s]" of tribes for children living within Indian lands. *See* 25 U.S.C. § 1911(a). Instead, ICWA applies in state-court child-custody proceedings outside reservations, although the "domestic relations of . . . parent and child[] belongs to the laws of the states, and not to the laws of the United States." *In re Burrus*, 136 U.S. at 593–94.

If ICWA seeks to regulate the tribes as political entities, as *Mancari* requires, and as Petitioners no doubt will attempt to assert, then why do ICWA's preferences treat the over 500 federally recognized tribes—each its own sovereign, unique from the next—as one single group? 25 U.S.C. § 1915(a) (preferring placement with any Indian family from any tribe). Through this preference, ICWA conflates hundreds of different tribes and their members together into one group, making it like the law from *Rice* that sought to "preserve the commonality of [these] people." 528 U.S. at 514–17, 519–20. Thus, ICWA's preferred placement based on the biology of both the child and the adoptive family is a racial classification because the child and the adoptive families are limited to this preference simply because their biology. *Id.* at 514. A law's use of "ancestry" as a proxy for "race" was not enough to escape strict scrutiny by this Court in *Rice.* 528 U.S. at 514–17, 519–20. Nor should it be here.

Another way ICWA's definition is racial, not political, is that even if a child was adopted at birth by member of a tribe, practiced their religion, spoke their language, and was involved in the tribal government they still would fall outside ICWA's scope simply because of their biological deficiencies. *In re Francisco D.*, 178 Cal. Rptr. 3d 388, 396 (Ct. App. 2014). This is race-based discrimination dressed up as political, like the classification in *Rice*. Therefore, ICWA's definition of an Indian child—rooted in the ancestry and biology of the child—is a classification subject to strict scrutiny. *See Hirabayashi*, 320 U.S. at 100; *Rice*, 528 U.S. at 516–17.

Like ICWA's definition, ICWA's adoption and foster preferences also fall outside of *Mancari*. To begin, ICWA's preferences subject a child to its racially based preferences whether they are an enrolled member or not so long as they are the *biological* child of an enrolled member. 25 U.S.C. § 1903(3), (4). But ICWA's preferences' discriminatory reach does not stop with Indian children; rather, its adoption and foster preferences subject potential adoptive families to its discriminatory policies as well because ICWA places their ancestry—not their merits as a potential caregiver—at the forefront of placement decisions. *Id.* § 1915(a) (preferring any other Indian family over any non-Indian parent). Thus, ICWA's preferences are distinguishable from *Mancari* because, unlike the law in *Mancari*, ICWA's preferences cover more than just members of a tribe. 417 U.S. at 553. Further, ICWA maintains this preference for placing an Indian child with any Indian family even if the family lives in another state and are enrolled in a different tribe. *See* 25 U.S.C. § 1915(a). Although other factors besides ancestry and biology sometimes play a role in this child-custody determinations, a racial classification is still racial even though other considerations are considered. *Rice*, 528 U.S. at 516–17.

ICWA's focus on the ancestry and biology of a child, and his or her potential adoptive families, show a racial—not political—motivated classification. ICWA's definition, adoption, and foster classifications are all subject to strict scrutiny.

3. ICWA fails strict scrutiny because its classifications do not serve a narrowly tailored, compelling governmental interest.

ICWA's classifications fail to comport with either strict scrutiny or rational-basis review. First, a racial classification may only survive strict scrutiny if it serves "a compelling governmental interest and must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235. ICWA cannot survive this "most searching examination." *Id.*

First, ICWA was enacted with fair goals in mind but today, ICWA seeks to remedy an outdated problem. No evidence exists that supports the belief that if ICWA was revoked the abusive adoptive practices present over forty years ago would return. Congress may not deploy such a wide sweeping remedy rooted solely in historical issues. The government's need must still exist today to continue to be compelling. *See Shelby County v. Holder*, 570 U.S. 529, 553 (2013).

Second, "[e]ven conceding the Tribal Defendants' assertion of a compelling state interest, ICWA's provisions are overinclusive and therefore not narrowly tailored to achieve that interest." R. at 18–19. ICWA's placement preferences give priority to any Indian family, regardless of that family's location or specific tribal affiliation. 25 U.S.C. § 1903. In doing so, ICWA treats all Indians as one racial group. *Mancari*, 417 U.S. at 553. And this preference casts to wide a net to be considered narrowly tailored to the interest of maintaining the Indian child's relationship with his tribe. *J.A. Croson Co.*, 488 U.S. at 508. Even worse, ICWA still "does little to alter the conditions that Congress held responsible for the unwarranted breakup of Indian families," because Congress focused ICWA on placement, not prevention." Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 Hastings L.J. 1287, 1334 (1980). ICWA's failure to be "narrowly tailored" is clearly illustrated in the present case: First, Baby C's biological parents' parental rights were terminated *voluntarily*—not unwillingly—and they *both* expressed consent for their biological daughter to be adopted by the Donahue's. R. at 3. Second, Baby C did not even live with her parents before her placement with the Donahue's. R. at 2. Thus, no "unwilling breakup of an Indian family" could have rationally occurred because: (1) it was not unwilling because the parents consented, R. at 3, and (2) no "breakup" occurred because as Baby C did not even live with her biological mother, R. at 2. Yet, even in situations like this where a "loving adoptive [family,]" is available, ICWA empowers the

parents' tribes to interfere and disrupt the proceedings. 25 U.S.C. § 1911(c). This is not indicative of a law that is sufficiently narrowly tailored.

ICWA is unconstitutional because it fails strict scrutiny. It does not serve a compelling government interest, and it is not narrowly tailored.

B. Alternatively, ICWA Fails Rational Basis Review Because Its Preferences Are Not Related to Congress's Goal of Preventing the Breakup of Indian Families and Removal of Children from Tribal Lands.

ICWA fails even the lesser rational-basis review. To comport with this standard, Congress must demonstrate that ICWA is rationally tied "to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. In doing so, Congress "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446. At its enactment, Congress's goal was to prevent the breakup of Indian families and the removal of children from tribal lands. 25 U.S.C. § 1901(3), (4). ICWA's placement preferences fall flat in relation to this goal because they cannot be rationally tied to this goal.

ICWA's placement preferences are not rationally tied to Congress's goal of preventing the breakup of "Indian" families through forced removals of Indian children from tribal lands because they *do not* even apply until after the child has been removed from their biological parents. A policy that applies after a child has been removed from their family cannot rationally be said to "prevent the breakup" of a family because there is no family whose breakup could be prevented. *See* 25 U.S.C. § 1912(e), (f). And once removed, ICWA's preferred placement with "Indian" foster families hurt rather than help the child because Indian foster families are few. *See* Debra Utacia Krol, *Inside the Native American Foster Care Crisis Tearing Families Apart*, Vice.com, Feb. 7. 2018. The availability of Indian foster families is so alarmingly low that in Los

Angeles County, home to *10 million people*, there was only *one*.[8] Thus, ICWA's legal barriers hurt the children's chances of adoption. This need not be the law. There are families qualified, willing, and committed to caring for these children—like the Donahues—that are discarded by ICWA because they are from the wrong race.

But ICWA is furthest from this goal when it overrides the wishes of biological parents who give their consent to their child's placement with loving families outside a tribe. A parent's right to make "decisions concerning the care, custody, and control" of their children is "fundamental." *Troxel*, 530 U.S. at 65 (plurality opinion); *see also id.* at 80 (Thomas, J., concurring); *id.* at 87 (Stevens, J., dissenting); *id.* at 78–79 (Souter, J., concurring). This Court has recognized that a statute that places the interest of third parties above the parents' "fundamental right" is unconstitutional. *Id.* at 72. Yet ICWA gives tribal governments an interest in the child at a minimum on par with the parents. *Id.* at 52–53. A tribe is not a parent, nor should it be treated as such. The Donahues had consent from the families to adopt these children. That should have been the end. Instead, the Tribal Defendants were empowered to interfere because that family is "Indian" and the Donahues are not. This is racial discrimination—far from Congress's purported goal—and should not be permitted by this Court.

[8] Daniel Heimpel, *L.A.'s One-and-Only Native American Foster Mom*, The Imprint (June 14, 2016, 4:00 AM), https://imprintnews.org/news-2/l-a-s-one-native-american-foster-mom/18823.

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS