No. 22-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

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

Petitioners,

v.

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

Respondents.

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

BRIEF FOR PETITIONERS

COUNSEL FOR PETITIONERS
TEAM 4
DATED OCTOBER 10, 2022

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QUESTIONS PRESENTED

I. Does Congress have the authority to enact the Indian Child Welfare Act by way of the Indian Commerce Clause and validly preempt state law in light of the robust history of federal supremacy in handling Native affairs?

II. Do the Indian Child Welfare Act's classifications, which are based on our Nation's deeply rooted traditions recognizing Indians as quasi-sovereign nations, violate the Equal Protection Clause of the Fifth Amendment?

STATEMENT OF THE CASE

James and Glenys Donahue (the Donahues) and the state of West Dakota (collectively Respondents) brought suit challenging the constitutionality of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq*. R. at. 1. In West Dakota, Indian children constitute approximately twelve percent of the child custody proceedings. R. at 2. After complying with ICWA, the Donahues adopted Baby C, an Indian child, in September 2019. R. at. 3.

Baby S is an Indian child whose biological mother was a member of the Quinault Nation. R. at 2. Baby S was removed by CPS and placed in foster care with the Donahues, who filed for adoption in May 2020. *Id.* As required by ICWA, the Quinault Nation was notified of the adoption proceeding. R. at 3. The Quinault Nation opposed the adoption of Baby S after identifying two potential adoptive families in a Quinault Tribe located in another state. *Id.*

Respondents filed suit against the United States of America, the United States Department of the Interior and its Secretary, Stuart Ivanhoe (collectively Petitioners). R. at 4. The Quinault Nation and Cherokee Nation filed an unopposed motion to intervene shortly after the suit was filed, which the court granted. R. at 2. Respondents allege ICWA §§ 1913(d), 1914, and 1915(a)-(b) violate the Equal Protection Clause of the Fourteenth Amendment, as well as §§ 1912(a) and (d)-(f), 1915(a)-(b) and (e), and 1951 commandeer the states in violation of the Tenth Amendment. R. at 4. Both parties filed cross-motions for summary judgment. *Id.*

The District Court denied Respondents' Motion for Summary Judgment and granted Petitioners' Motion for Summary Judgment after finding Congress had the authority to enact ICWA and its provisions did not violate the Equal Protection Clause. R. at 9-12. The United States Court of Appeals for the Thirteenth Circuit reversed after finding ICWA violated the

anticommandeering doctrine and did not discuss the Equal Protection Issue. R. at 16. In a concurring opinion, Chief Judge Tower ruled he would reverse solely on Equal Protection Clause grounds. R. at 17. The Petition for Writ of Certiorari was granted by the United States Supreme Court. R. at 20.

SUMMARY OF THE ARGUMENT

The Indian Child Welfare Act (ICWA) should be upheld because it was enacted pursuant to Congress' plenary power over Indian affairs, and thus, Congress may validly preempt conflicting state law. Congress has accrued broad and exclusive power under the Indian Commerce Clause over the course of centuries of historical tradition and constitutional interpretation. In light of this power, Congress validly legislated on Indian affairs in requiring that state courts apply ICWA and conferring individual rights on Native children.

ICWA does not violate the Equal Protection Clause of the Fifth Amendment because its provisions are based on the deeply rooted history of recognizing Indian tribes as quasi-sovereign nations and their political classification survives rational basis review. Even if the classifications are found to be racial, ICWA survives strict scrutiny review. Additionally, this Court should adopt the application of intermediate scrutiny should ICWA's classifications be found to be racial, as remedial laws should be viewed under a less demanding review.

ARGUMENT

For more than 40 years, ICWA has defended Native children across the country from being ripped from their homes, communities, and culture. Without it, Native children and their tribes will be cast back to their status as the prey of racially motivated, state-sponsored diaspora.

In addition to sanctioning predatory state agency practices, invalidating ICWA serves to undermine the balance between federal and state governments and endorse the use of the Equal Protection Clause as a sword, rather than a shield, against minority groups. Instead, the Court should uphold Congress' long-held supremacy in Indian affairs as validly displacing state laws that authorized the discriminatory uprooting of Native children. It should also recognize ICWA's classification of Natives as political in nature, or alternatively, as a narrowly tailored remedial measure proscribing further equal protection violations. While the Court has the indisputable power to resolve present controversy, it must do so without disturbing the careful separation of powers enshrined in the Constitution. *Baker v. Carr*, 369 U.S. 186, 215-17 (1962), *citing United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("It is for [Congress], and not for the courts, to determine when the true interests of the Indian require his release from [the] condition of tutelage….").

I. ICWA VALIDLY PREEMPTS STATE LAW, AS CONGRESS ENACTED IT PURSUANT TO ITS PLENARY INDIAN COMMERCE CLAUSE POWERS AND IT REGULATES INDIVIDUALS, RATHER THAN STATE ACTORS.

In order to exercise valid constitutional authority, Congress must promulgate law pursuant to its enumerated powers. While it is exclusively the providence of the Court to interpret the Constitution, the Court must exercise "proper respect for a co-ordinate branch of government" by presuming that Congress acted within the scope of its constitutional powers. *United States v. Harris*, 106 U.S. 629, 635 (1883). This presumption is rebuffed only where "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *Id.*

Respondents cannot clearly demonstrate that Congress lacked the requisite constitutional authority to pass ICWA. To the contrary, Congress validly preempted state law when it enacted ICWA, as it stems from Congress' constitutional powers and regulates individuals. *Murphy v.*

NCAA, 138 S. Ct. 1461, 1479 (2018). First, Congress' invocation of its Indian Commerce Clause provides robust textual and historical wellsprings of power allowing Congress to legislate on Native affairs. *See United States v. Lara*, 541 U.S. 193, 200-03 (2004). Moreover, the Supreme Court has long recognized Congress' preeminence in this arena. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

Second, ICWA does not violate the anticommandeering doctrine, as it confers rights unto Natives that evenhandedly regulate and prevent private and public violations of said rights. Additionally, because Congress drafted ICWA to remedy the routine, systematic discrimination against Native peoples and their children perpetrated by state courts and agencies, Congress also accessed its power under Section 5 of the Fourteenth Amendment.

A. The enactment of ICWA represents a valid exercise of Congress' plenary powers.

Article 1, Section 8, Clause 3 of the U.S. Constitution vests Congress with the power "to regulate commerce with the Indian tribes." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); citing to U.S. Const. Art. I, § 8; Art. II, § 2, Cl. 2. In deploying the traditional methods of constitutional construction—including analyzing the text itself, the history of its invocation and interpretation, and its underpinning purpose and public policy—one conclusion emerges: Congress had the constitutional power necessary to enact ICWA. *Mancari*, 417 U.S. at 551-52. ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").

1. ICWA was validly enacted in light of the text of the Indian Commerce Clause and its historical application, which illustrate Congress' broad, exclusive power over Indian Affairs.

Almost two centuries ago, Chief Justice Marshall interpreted the Indian Commerce Clause to confer great power unto Congress in the field of Indian affairs. *Worcester,* 31 U.S. at

559; *see also United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417 (1866). "Commerce," in this context, has since been understood to encompass the "intercourse between the citizens of the United States and those tribes." *Worcester,* 31 U.S. at 559. This construction also comports with that of the same word in the Interstate Commerce Clause. *See Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (declining to restrict the term "commerce" to refer only to trade).

Tellingly, the Court has identified "the central function of the Indian Commerce Clause" as "provid[ing] Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *see also Lara*, 541 U.S. at 200 (holding that the Constitution "grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996) ("[I]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the states to the Federal Government than does the Interstate Commerce Clause.").

Moreover, the Court has previously interpreted Congress' Indian Commerce Clause power to allow for "radical changes," such as defining the scope or even extinguishing the sovereign powers of tribes. *Lara*, 541 U.S. at 200-03 (affirming that Congress has the power to set the policy recognizing inherent tribal powers within federal law, even where the Supreme Court had acted to diminish tribal power). Therefore, ICWA's modest procedural safeguards protecting Indian parents' custodial rights over their children do not approach the zenith of Congress' power over Indian affairs.

In addition to the express text of the Constitution, the historical tradition of Congress' involvement in Indian affairs further demonstrates its power to enact ICWA. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S.Ct. 2111, 2127-29 (June 23, 2022) (instructing courts to

use historical tradition as a fulcrum for interpreting the Constitution); *see also Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("An act passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, is contemporaneous and weighty evidence of its true meaning.").

Many prominent commentators contemporary with the Constitution's ratification acknowledged the Federal Governments' supremacy in Indian affairs, including Anti-federalists and state government heads alike. *Brackeen v. Haaland*, 994 F.3d 249, 274 (5th Cir. 2021) *cert. granted sub nom*. *Nation v. Brackeen*, 212 L. Ed. 2d 215 (Feb. 28, 2022), citing John P. Kaminski, et al., The Documentary History Of The Ratification Of The Constitution 1153, 1156–58 (2004) (Anti-federalist Abraham Yates, Jr. recognizing that the Constitution would "totally surrender into the hands of Congress the management and regulation of the Indian affairs."); Letter to George Washington (Dec. 14, 1789), in 4 *Papers of George Washington: Presidential Series* 404 (Dorothy Twohig ed., 1993) (Charles Pinckney, Governor of South Carolina, observed that "the sole management of India[n] affairs is now committed" to "the general Government."). The Washington administration went so far as to declare that "[T]he United States [has], under the Constitution, the sole regulation of Indian affairs, in all matters whatsoever." *Id.* at 276, citing Letter from Henry Knox to Israel Chapin (Apr. 28, 1792), reprinted in 1 American State Papers: Indian Affairs 231–32 (Lowrie & Clarke eds., 1832).

The First Congress adopted this interpretation, exercising its sweeping power over Indian Affairs to enact a series of Acts regulating "intercourse," "with the Indian tribes." Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137. These Acts, among other things, prohibited the conveyance of Indian land to "any person" or "any state" without federal approval, § 4, 1 Stat. 138, federally criminalized "any crime" or "trespass" against an Indian in Indian territory that

would otherwise be punishable under state law, § 5, 1 Stat. 138, and disallowed any non-Indian from "survey[ing]" or "settl[ing] on lands belonging to any Indian tribe." Trade and Intercourse Act of 1793, ch. 19, § 5, 1 Stat. 330. The great breadth of conduct and actors regulated by the Indian Commerce Clause demonstrates that, closely following the Constitution's ratification, Congress employed broad use of this power.

Since then, Congress has continued to use its plenary authority over tribal relations with Indians to legislate on diverse issues. *Brackeen*, 994 F.3d at 382-84, citing *Morton v. Ruiz*, 415 U.S. 199, 236, (1974) (noting "[t]he overriding duty of our Federal Government to deal fairly with Indians wherever located" with regard to a feature of the American Parentage Act excluding federal assistance for tribe members living near reservations). From enacting criminal codes to regulating the sale of alcohol, the Court has upheld Congress' manifold exercise of its Indian Commerce Clause power, characterizing "the theater of its exercise" to extend across the "geographical limits of the United States." *United States v. Kagama*, 118 U.S. 375, 384–85 (1886); *see also Perrin v. United States*, 232 U.S. 478, 482 (1914).

In light of Congress' historically vast and potent Indian Commerce Clause powers, the Court would necessarily diverge from centuries of constitutional traditional and judicial interpretation if it were to circumscribe this power within a domain, field or location.

2. The public policy of protecting Native Americans and respecting their tribal sovereignty dictate that Congress has exclusive legislative authority over Indian Affairs.

Native tribes have always occupied a unique position in relation to the United States, as they are both quasi-sovereign and "domestically dependent" on the Federal Government. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). This fragile structure evinces the need for exclusive federal authority, as the Federal Government is best equipped to negotiate the

balance between tribal and federal sovereignties affecting tribal residents across each of the fifty states.

Like the First Congress' history of protective legislation, the myriad of treaties between the United States and tribal nations illustrate the purposeful formulation of a special duty of protection owed to Natives. *See, e.g.*, *Worcester*, 31 U.S. at 519 (finding that the United States "assum[ed] the duty of protection" over the Cherokee Nation via the Treaty of Holston, July 2, 1791, 7 Stat. 39, 40). These treaties offered tribes governmental protection against non-tribal members, as well as legal recourse for any wrongs committed against the Natives' persons or property. *Brackeen*, 994 F.3d at 279-80, citing Treaty with the Northern Cheyenne and Northern Arapahoe, art. I, May 10, 1868, 15 Stat. 655, 65. In light of this longstanding "course of dealing" and these promissory treaties, as well as the tribes' "very weakness and helplessness," the Supreme Court acknowledged a resulting duty of protection, "and with it the power" to effectuate this duty. *Worcester*, 31 U.S. at 519.

Since the United States' inception, its relationship with the Native American tribes has evolved, from adversary to "that of a ward to his guardian," *Cherokee Nation*, 30 U.S. at 17, and finally, to its modern status as a "trust relationship." *United States v. Jicarilla Apache Nation,* 564 U.S. 162, 178 (2011). While Congress has not always pristinely upheld its end of the bargain, *see, e.g., McGirt v. Oklahoma,* 140 S.Ct. 2452, 2463 (July 9, 2020), the Federal Government's power over Indians emerged from the ultimate goal of giving "uniform protection to a dependent people." *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959); *see Perrin*, 232 U.S. at 482.

The fundamental purpose of protecting and defending Native peoples similarly animates ICWA—a statute designed to remedy the maltreatment of Native children by state child custody

systems. 25 U.S.C.S. § 1902 (setting forth ICWA's purpose as follows: "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families…."). Were the Court to deem ICWA outside the scope of the Indian Commerce Clause, it would be curtailing a centuries-old power that enabled Congress to fulfill its duty within its trust relationship with the Native tribes. Furthermore, relegating this power to the states would not only contravene constitutional text, purpose and historical tradition, but would also subject Natives to the inconsistent and unchecked caprice of the states. [1]

The very problem that Congress sought to address by way of the Indian Commerce Clause illustrates the grim reality Natives face in want of federal preeminence. Congressional reports indicate that states with large Indian populations during the 1960s and 1970s removed twenty-five to thirty-five percent of all Indian children from their families. H.R. REP. NO. 95-1386, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7530. These uprooted Native children were then predominantly placed in white and non-Native homes. H.R. REP. NO. 95-1386, at 9 ("In 16 states surveyed in 1969, approximately 85% percent of all Indian children in foster care were living in non-Indian homes."). In these states, Native children were removed at significantly greater margins as compared to non-Native children. *See Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Select Comm. on Indian Affairs*, 95th Cong. 539-40 (1977) (concluding that in the Dakotas, Minnesota, Maine, and Utah, Native children were over 20 to 14 times more likely to be placed in foster care than their non-Native counterparts).

This discriminatory treatment harkened back to the deplorable treatment of Native Americans throughout much of the 19th and 20th centuries. Matthew L.M. Fletcher, *Principles*

[1] Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012 (2015) ("[T]he background principle that motivated federal constitutional supremacy over Indian affairs–the concern that states' attempts to assert jurisdiction over Native nations were legally dubious and would lead to conflict–has been vindicated by American history, and it deserves more robust consideration than recent cases have afforded.").

Of Federal Indian Law § 3.6 (1st ed. 2017). The antebellum practice of rending children from their homes and families to attend off-reservation Indian boarding schools in an attempt to "Anglicize" and "Christianize" Natives was revived by state welfare agencies in the 1960s and '70s. *Id.* The resurrection of blatant discrimination and mistreatment against Natives threatened to perpetuate their diaspora, and lacking a federal safeguard, these practices will almost assuredly resume.

B. ICWA's creation of federal standards and regulation of individuals does not violate the anticommandeering doctrine.

The preemption doctrine provides that federal law may displace or preempt otherwise valid, but conflicting state actions when Congress is acting pursuant to its enumerated powers. *Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 288 (1981). The Supremacy Clause, from which preemption was adduced, states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The Court has long recognized that federal law can preempt state regulation of a particular activity in whole or in part, and federal law can also permissibly condition a state's ability to regulate an activity upon conformity with federal standards. *New York v. United States*, 505 U.S. 144, 156, 167 (1992); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

In order to have preemptive force, an act "must represent the exercise of a power conferred on Congress by the Constitution" and must regulate private actors. *Murphy,* 138 S. Ct. at 1479. The fact that states incidentally participate in the regulated activity is not dispositive; rather, the central consideration is whether the law establishes rights enforceable by or against private parties. *See Id*. at 1480.

However, under the anticommandeering doctrine, Congress cannot directly compel the state political branches to perform regulatory functions on the Federal Government's behalf. *Id.* The anticommandeering doctrine was derived from the Tenth Amendment, which reserves to the states and people any powers not delegated to the United States by the Constitution. U.S. CONST. amend. X. In order to violate the anticommandeering doctrine, a law must directly command the executive or legislative branch of a state government to act or refrain from acting without commanding private parties to do the same. *See, e.g., New York*, 505 U.S. at 188, 112.

Because ICWA's placement preference and record-keeping provisions regulate individuals by conferring rights to Native children instead of impermissibly conscripting state legislatures and agencies, ICWA does not violate the anticommandeering doctrine.

1. Congress may validly preempt conflicting state law in Indian affairs because it acted within its enumerated powers.

Under the preemption doctrine, federal law can trump contrary state law, when it expressly preempts state law, or excludes state legislation by occupying an entire field. *See Murphy*, 138 S. Ct. at 1480 (identifying "three different types of preemption—'conflict,' 'express,' and 'field.'"). While the lower court stated that ICWA implicates only conflict preemption, R. at 8, Congress' exclusive and broad Indian Commerce Clause power may also implicate field preemption, or at the very least, an extremely preclusive effect on countervailing state laws touching Indian affairs. The Court has already found that the Constitution "divested states of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla.*, 517 U.S. at 62. Hence, legal theorists have noted that the collective federal powers governing Indian affairs were tantamount to modern field preemption. Ablavsky, *supra* at 1043-44.

Respondents may contend that because ICWA intersects with family law, a field traditionally governed by state law, it unconstitutionally infringes on state sovereignty. However,

the Court has already rejected this argument, declining to delineate Tenth Amendment protections based on whether a regulated activity traditionally falls within a state's purview. *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 546-47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"). Instead, when the Federal Government acts within its enumerated powers, it "may override countervailing state interests," regardless of whether they traditionally reside in the states' bailiwick. *Maryland v. Wirtz,* 392 U.S. 183, 195 (1968). In this case, Congress' vast and well-established Indian Commerce Clause powers should preempt any conflicting state laws. Not only has Congress enjoyed unabridged and exclusive legislative authority over Indian affairs for centuries, but as discussed previously, Congress is able to quell the harmful and inconsistent effects of allowing states to intermeddle with Indian affairs.

2. ICWA's placement preferences provisions do not commandeer states' political branches because they confer individual rights to be enforced in state courts.

In *Murphy v. NCAA*, the Court reasoned that a regulation is valid so long as it "evenhandedly regulates an activity in which both states and private actors engage." 138 S. Ct. at 1478. This occurs when a statute confers either legal rights or restrictions on private parties that participate in the activity, and thus the law is "best read" as regulating private parties. *Id.* at 1479.

Sections 1915(a) and 1915(b) establish a default order of preference for adoptive placements and foster-care respectively. Where a party that is eligible to be preferred comes forward, that party shall be given preference, unless another party demonstrates "good cause to the contrary." § 1915(a) and (b). Section 1915 creates individual rights–both for the tribes and families who may qualify for placement preference, as well as the children whose tribes and

communities bonds remain intact. The Court recognized as much in *Mississippi Band of Choctaw Indians v. Holyfield* by observing that ICWA "seeks 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." 490 U.S. 30, 37 (1989) (emphasis added), citing to House Report, at 23, U.S.Code Cong. & Admin.News 1978, at 7546.

Furthermore, those obstructed from adopting based on ICWA's preference provision consist of both private and state actors. For instance, the Donahues represent private actors seeking to engage in adoption, an activity regulated by ICWA. R. at 3. Thus, because ICWA confers rights on individuals and regulates activities in which both private and public actors engage, it does not violate the anticommandeering doctrine under *Murphy*. 138 S. Ct. at 1479.

Moreover, unlike *New York* and its progeny, the only state actor that would be tasked with applying this federal law is the state judiciary. The anticommandeering doctrine pertains specifically to state political branches, as it is well-established that Congress has the power to pass laws enforceable in state courts.[2] *Printz v. United States,* 521 U.S. 898, 907 (1997) ("[T]he Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."). By contrast, in *New York*, *Printz* and *Murphy*, the overruled Acts each expressly regulated state political branches, such as state executive officers and legislatures. *See, respectively,* 505 U.S. at 151 ("Each State shall…"); 521 U.S. at 903 (conscripting state "chief law enforcement officer[s]"); 138 S. Ct. at 1468 ("It shall be unlawful for [state] a governmental entity…").

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[2] The Thirteenth Circuit Court of Appeals misstated the law when it concluded that ICWA unconstitutionally commandeered state courts.

Because state judges applying federal law, including section 1915, constitutes "no more than an application of" the Supremacy Clause, *New York*, 505 U.S. at 178, it does not violate the anticommandeering doctrine.

3. ICWA's recordkeeping provisions do not commandeer states' political branches because they expressly dictate state courts in a historically valid manner.

As the Court in *Printz* reasoned, the Constitution allows for Congress to validly obligate state judges to enforce federal prescriptions, "insofar as those prescriptions related to matters appropriate for the judicial power." 521 U.S. at 907. It further noted that recordkeeping provisions and other housekeeping requirements have been imposed on states since the First Congress as a necessary means of ensuring compliance with federal prescriptions. *Id.* at 905 (assigning "weighty evidence" to Acts enacted by the First Congress as indicative of proper constitutional interpretation). To wit, Congress enacted laws that required state courts to record applications for citizenship, transmit naturalization records and information to the Secretary of State, and register noncitizens seeking naturalization and issue certificates of registry. *See, respectively,* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103; Act of June 18, 1798, ch. 54, §§ 2-3, 1 Stat. 567; Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-55.

Under the subject Act, § 1915(e) provides that state courts must "evidenc[e] the efforts to comply" with ICWA's placement preferences and "ma[k]e available" this record, upon request, to the Secretary or an Indian child's tribe. § 1917 requires the state court that "entered the final decree" of adoption to, upon the Indian adoptee's request, provide him with his biological parents' tribal affiliation and other information that "may be necessary to protect any rights from the individual's tribal relationship." Under § 1951(a), state courts must furnish the Federal Government with a copy of the adoption decree in any proceeding involving an Indian child. *Id.* § 1951(a).

ICWA's recordkeeping provisions, much like those promulgated by the First Congress, create prescriptions in accordance with the "judicial power" exercised by state courts to ensure compliance with a federal statutory framework. *See Printz,* 521 U.S. at 907. These provisions, therefore, operate "ancillary" to the courts' "adjudicative task," and do not present a commandeering issue, as no state political agents are "pressed into federal service." *Id.* at 907-08 n.2. Should states choose to employ agencies, as opposed to courts, to perform these functions, they exercise their discretion in doing so. *Murphy*, 138 S. Ct. at 1478. They cannot, however, feign federal duress in designating these agencies as the subjects of ICWA's recordkeeping requirements when, in truth, it was the discretionary election of their political bodies.

4. Congress' authority under Section 5 of the Fourteenth Amendment augments its Article 1 powers, allowing it to enact remedial legislation that would otherwise represent commandeering.

The Fourteenth Amendment forbids states from denying equal protection and due process to "any person." U.S. CONST., amend. XIV, § 1. This Amendment must protect Natives against state-perpetuated discrimination as American citizens. *E.g., Meyers v. Board of Educ. of San Juan School Dist*., 905 F. Supp. 1544, 1571 (D. Utah 1995) (observing that the District's failure to provide education services to Indian students may violate the Equal Protection Clause). Section 5 of the Fourteenth Amendment empowers Congress to "enforce, by appropriate legislation" the Fourteenth Amendment's equal protection guarantees. U.S. CONST. amend. XIV, § 5.

In order to evaluate whether Congress appropriately employed its powers under Section 5, the Court will weigh "the constitutional problem Congress faced—both the nature and the extent of state conduct violating the Fourteenth Amendment" against "the scope of the response Congress chose to address that injury." *Allen v. Cooper*, 140 S.Ct. 994, 1004 (2020).

As previously discussed, Congress passed ICWA to proscribe the rampant state practice of removing Indian children from their families at significantly higher rates than non-Indian children. H.R. REP. NO. 95-1386. This horrific practice infringed on Native peoples' Fourteenth Amendment rights: the procedural due process rights of Indian families in the lack of procedural safeguards, the substantive due process rights of Indian families to raise their children in a culturally-informed manner, and violations of the Equal Protection Clause in the ways in which states disparately applied family laws against Indian families. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control" as a fundamental right protected by the Due Process Clause); *see also,* H.R. REP. NO. 95–1386, at 11 (finding that states denied basic procedural rights to Indian parents by denying them access to counsel or expert witnesses); *see also Washington v. Davis,* 426 U.S. 229, 242 (1976) ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.").

ICWA's placement preferences and recordkeeping provisions represent "congruent" and "proportional" means of remedying or preventing these constitutional infractions. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). ICWA exerts negligible force on states while preserving and defending tribal culture and integrity, both by creating the right to remain with Native families and ensuring compliance with this rule by the maintenance of records to that effect. Given the abhorrent nature and extent of abuses suffered by Indian families at the hands of state agencies, these minimally burdensome remedial measures represent a valid exercise of

Congress' Section 5 authority. *Allen*, 140 S.Ct. at 1004. Thus, any commandeering concern is vitiated by Congress' constitutional ability to enforce the Fourteenth Amendment.[3]

In sum, Congress validly exercised its plenary power over Indian Affairs upon enacting ICWA, and it did not unconstitutionally commandeer the states by conferring and defending Native peoples' rights.

II. ICWA'S CLASSIFICATIONS, WHICH ARE BASED ON OUR NATION'S DEEPLY ROOTED HISTORY RECOGNIZING INDIANS AS QUASI-SOVEREIGN NATIONS, DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT.

The Equal Protection Clause of the Fourteenth Amendment prohibits the states from denying any person within their jurisdiction the equal protection of the laws. U.S. CONST., amend XIV, § 1. This protection is extended against the Federal Government via the Fifth Amendment's Due Process Clause which states that "no person shall be deprived of life, liberty, or property without due process of law." U.S. CONST., amend V; *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995) (ruling the equal protection analysis in the Fifth Amendment is the same as that under the Fourteenth Amendment). This protection is not absolute so long as the discriminatory law can survive scrutiny.

Classifications historically considered "suspect," such as race, are subject to strict scrutiny and can only survive if found to further a compelling government purpose where less restrictive alternatives are not available. *Fullilove v. Klutznick*, 448 U.S. 448, 517-18 (1980). Quasi-suspect classifications, such as gender, are subject to intermediate scrutiny and must be substantially related to serve an important governmental interest to survive. *Craig v. Boren*, 429

[3] Rebecca Aviel, *Remedial Commandeering*, 54 UC Davis L. Rev. 1999, 2005 (2021) ("If Congress has satisfied City of Boerne's congruence and proportionality test, then . . . Congress should be—and to this point always has been—free to regulate in a manner that issues direct orders to state actors.").

U.S. 190, 197 (1976). All other classifications are subject to rational basis review and will survive upon showing they are rationally related to serving a legitimate government interest. *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976).

Respondents are unable to show that ICWA violates the Equal Protection Clause. First, ICWA's classification of "Indian children" is politically based, which reflects our Nation's history of recognizing Indians as political communities. *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) ("Long ago we described Indian tribes as distinct, independent political communities exercising sovereign authority."). Because political status is not a suspect classification, ICWA would be subject to rational basis review, which it unquestionably survives. *Mancari*, 417 U.S. at 555. However, even if ICWA's classifications are deemed racially based, its classifications would survive strict scrutiny review, as ICWA is narrowly tailored to further Congress' compelling governmental interest. *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003).

Alternatively, this Court should employ intermediate scrutiny when the subject law is based on racial classifications that aim to remedy past discriminatory effects because the objective of preventing unequal application of the law is essential to the Fourteenth Amendment. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, J., concurring). As ICWA's means are substantially related to Congress' important governmental objective, it survives intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515, 547 (1996).

A. ICWA's classifications are based on the historically recognized political status of Indian tribes and are rationally related to Congress' legitimate interests.

Indian tribes have long been regarded as quasi-sovereigns. *Fisher v. Dist. Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 390 (1976). Their unique status stems from the Indian Commerce Clause and its treatment of tribes paralleling that of states and foreign nations. U.S.

CONST. art. I, § 8, Cl 3. The Supreme Court has repeatedly confirmed over centuries that Indian tribes are sovereign, independent states that possess the exclusive right to self-government within their territories. *Cherokee Nation*, 30 U.S. at 15.

A political classification is subject to rational basis review and has a presumption of constitutionality. *Mancari*, 417 U.S. at 555. Under rational basis review, a law can only be invalidated if there is no rational connection to any legitimate government purpose. *FCC v. Beach Communications*, 508 U.S. 307, 314-15 (1993). Conversely, where the classification is one which the Court regards as suspect, it is subject to strict scrutiny and will only be upheld if it furthers a compelling governmental purpose and there are no less restrictive alternatives available. *Fullilove*, 448 U.S. at 518.

1. ICWA's classifications are political due to Congress' recognition of the Indian tribes as quasi-sovereign nations and are rationally related to Congress' legitimate interest in protecting Indian tribes and children.

Classifications of Natives are based on their political status as quasi-sovereign nations and are subject to rational basis review. *Mancari*, 417 U.S. at 554. In *Mancari,* the Court found that the Bureau of Indian Affairs' (BIA) policy of preferring to hire and promote Indians did not constitute invidious racial discrimination in violation of the Fifth Amendment, as the classifications were political designations rationally designed to further Congress' unique obligations to the Indians. *Id.* at 553, 555; *see also United States v. Antelope*, 430 U.S. 641, 645 (1977) (observing that "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians."). The BIA's policy required an applicant to have one-fourth or more degree Indian blood, as well as membership in an Indian tribe to be eligible for preference. *Id.* at 553-54. The Court held that these requirements did not constitute a

racial preference, but rather “employment criteri[a] reasonably designed to further the cause of Indian self-government.” *Id.* at 554.

Like in *Mancari,* ICWA’s classifications are based on an Indian’s political status. An “Indian child” under ICWA is any unmarried person under eighteen who is the biological child of a member of an Indian tribe and is either a member of an Indian tribe or eligible for membership in an Indian tribe. 25 U.S.C.S. § 1903(4). Although the *Mancari* court found that the BIA is *sui generis*, the concept is analogous to ICWA. 417 U.S. at 554. ICWA was intended to further Indian self-government, as Congress found there is no resource more vital to the continued existence and integrity of Indian tribes than their children. § 1901(3). Both the preferences in ICWA and *Mancari* are directly related to Indian self-government, which is the principal characteristic typically absent from racial discriminatory laws. 417 U.S. at 554.

Respondents' assertion ICWA’s classifications are racially based because they are dependent upon the ancestry of an Indian child is flawed. Instead, *Mancari* and its progeny have repeatedly held that “the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians,” despite such language being potentially “constitutionally offensive” if applied to other groups. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979). Because the Court has already determined that *Mancari* “foreclosed” the characterization of Indian ancestry as an impermissibly “racial in character,” *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480 (1976), Respondents “argument[s] that such classifications are ‘suspect’” are “untenable.” *Yakima,* 439 U.S. at 501.

Additionally, Respondent's contention that ICWA's classifications are racial because of the parentage requirement fails to recognize how tribal membership is established. Just as any other nation or sovereign can enforce criteria for membership, even if ancestry is a factor, Indian tribes can as well. *Brackeen,* 994 F.3d at 337-38. For example, the United States uses parentage as a criterion when granting citizenship to children of US citizens born outside the country. 8 U.S.C.S. § 1433.

Similarly, each Indian tribe has their own criteria for membership, which may include parentage. Membership in a tribe is generally not automatically inherited at birth, but rather takes an affirmative act to enroll.[4] However, like the United States, some tribes will pass on parents' tribal "willful political relationship" to their children to obtain membership.[5] Like in *Mancari* where the BIA's policy requiring a one-fourth blood quantum was considered a political classification, ICWA's parentage requirement would also be considered political due to a tribe's political authority to establish their own membership criteria.

Federal Indian law has continued to recognize tribal sovereignty and the government-to-government relationship that exists between the tribes and the US government. *Lara,* 541 U.S. at 202. For example, the 37th Congress explicitly rejected Indians receiving protections guaranteed to US citizens under the proposed Fourteenth Amendment[6], as the "several Indian tribes were recognized at the organization of this Government as independent sovereignties" and "have been dealt with by the Government ever since as separate sovereignties." Cong. Globe, 37th Cong., 2d

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[4] Katie L. Gojevic, Note, *Benefit or Burden?: Brackeen v. Zinke and the Constitutionality of the Indian Child Welfare Act*, 68 Buffalo L. Rev. 247, 273 (2020).

[5] Lucy Dempsey, Article, *Equity over Equality: Equal Protection and the Indian Child Welfare Act*, 77 Wash. & Lee L. Rev Online 411, 456-57(2021).

[6] Native Americans were granted US citizenship and corresponding rights under the Indian Citizenship Act of 1924. 68 P.L. 175, 43 Stat. 253, 68 Cong. Ch. 233.

Sess. 1639 (1862). As part of this relationship, Congress alone may make promises with the tribes or impose limitations on their sovereignty. *McGirt*, 140 S. Ct. at 2482 (reaffirming the importance of upholding promises between Congress and the Indian tribes unless explicitly directed). Like in *McGirt*, Congress here has not explicitly limited Indian sovereignty. On the contrary, ICWA bolsters a tribes' political status by ensuring they have authority over the placement of their children, who are the future generation of members. 25 U.S.C.S. § 1911.

As ICWA's provisions are based on the government's recognition of Indian tribes as quasi-sovereign nations, the classifications are politically based and are therefore subject to rational basis review. *Mancari*, 417 U.S. at 555. Under rational basis review, a law will be upheld if its classifications are rationally related to serving a legitimate government interest. *New Orleans*, 427 U.S. at 303. Such laws are presumed constitutional and "those attacking the rationality of the legislative classification have the burden to negat[e] every conceivable basis which might support it." *FCC*, 508 U.S. at 315. Congress is entitled to great deference in Indian affairs and "may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Rice v. Cayetano*, 528 U.S. 495, 519 (2000).

ICWA was enacted to effectuate Congress' legitimate governmental interest in protecting Indian children and tribes. § 1902. After Congress discovered that Indian children were being removed from their homes *en masse* and transplanted in non-Native homes, it implemented ICWA to end this unjust practice. § 1901(4). Congress also found that states exhibited a pattern of disregarding essential tribal relations and Native cultural standards throughout Indian child custody proceedings. § 1901(5). In order to protect the best interests of Indian children and to promote the stability and security of the tribes, Congress enacted ICWA. ICWA was designed to

ensure Native children were raised in environments that embraced their culture, thereby increasing the likelihood they would remain with and enroll in their tribe. §§ 1901(3), 1902.

Respondents are unable to meet their burden of demonstrating that ICWA's classifications entirely lack a nexus to Congress' interest in protecting Indian children and tribes. Instead, the provisions of ICWA preferring the placement of an Indian child in a tribal home are rationally connected to Congress' goals, as the children reared within a tribal community would be more likely to enroll as a member, strengthening the integrity of Indian tribes. *Brackeen*, 994 F.3d at 341 (finding Congress' goal of fulfilling its obligations to the Indian tribes has a rational connection to ICWA's provisions).

Although ICWA permits Indian children to be adopted into tribes other than that of their biological families, the provisions remain rationally related to Congress' goal. Many Indian tribes have descended from larger tribes and, therefore, share similar cultures, religions and languages. *Id.* at 345. By living in a home that embraces fraternal customs, the child may develop an interest in connecting with their biological family's tribe or enrolling in another tribe, which would satisfy Congress' goal of strengthening the stability of Indian tribes as a whole. *Id.*

As a rational link exists between ICWA's political classifications, which attempt to keep Indian children in tribal homes to satisfy Congress' interest in strengthening and stabilizing the Indian tribes, ICWA survives rational basis review and is accordingly not a violation of the Equal Protection Clause.

2. Should the Court find the classifications are racial, ICWA does not violate the Equal Protection Clause because it is narrowly tailored to serve Congress' compelling interest in protecting Indian children and tribes.

Laws based on racial classifications do not violate the Equal Protection Clause if they are narrowly tailored to further a compelling governmental interest. *Grutter*, 539 U.S. at 311. In *Grutter,* the court upheld a law school's admissions program, which included race as a factor, after finding they had a compelling interest in obtaining educational benefits that flow from a diverse student body. *Id.* at 343. Additionally, they found the use of race in the admissions program was narrowly tailored, as the school had considered race-neutral alternatives and race was merely one factor among many. *Id.* at 340.

Like the law school in *Grutter*, Congress enacted ICWA in an effort to remedy the residual effects of extensive historical discrimination against minority groups. § 1902. From the dawn of our Nation's history, Indian children have been removed from their homes in the name of "education" and "civilization." Gojevic, *supra*, at 249. During the Colonial period, Indian children were captured from their homes and sent to boarding schools in a concerted effort to sever their connections to their heritage and tribes. *Id.*

This continued throughout the 1800s when legislation required Natives to send their children to boarding school in order to "kill the Indian so as to save the man within." *Id.* at 251-52. In school, the children were prohibited from practicing their religion or speaking their tribal language. *Id.* This policy of removing Indian children to "civilize" them resulted in many children becoming disconnected to their tribal culture and unable to communicate with them upon their return. *Id.* at 255.

By the 1950s, boarding schools were replaced by a policy of adoption to white families. *Id.* at 256. From 1959-1967, the Indian Adoption Project was enacted in order to "remove administrative and racial barriers" so white families could adopt Native children. *Id.* These

children were publicized in the media as being neglected and in need of rescue by white families. *Id.* By the mid-1970s, non-Indian couples adopted over 12,000 Indian children. *Id.*

ICWA was created in response to twenty-five to thirty-five percent of Indian children being removed from their families and being placed in foster care, orphanages or boarding schools. H.R. REP. NO. 95-1386. Studies have revealed that Indian children were removed from their families due to physical abuse in only one percent of cases and the remainder were predicated on "vague grounds as 'neglect' or 'social deprivation' and on allegations of emotional damage the children were subjected to by living with their parents." *Id.*

The interest in protecting Indian children and tribes remains compelling today, as Indian children currently make up a rate twice as high in proportion to the general population in foster care. Dempsey, *supra*, at 462. Indian children constitute approximately twelve percent of the child custody proceedings in West Dakota. R. at 2. Natives have endured immeasurable hardship at the hands of non-Native settlers. Upon recognizing their vulnerable status, Congress undertook a unique obligation to ensure their existence is strengthened and their children are protected.

Just as the court in *Grutter* found that educational institutions occupy a "special niche in constitutional tradition," which entitled their admissions policies to deference, the "trust relationship" between Native tribes and Congress similarly inhabits a unique niche in constitutional tradition. 539 U.S. at 329; *Mancari*, 417 U.S. at 553. Thus, the Court should give deference to the Indian tribes and Congress pertaining to the placement of Indian children.

Further, ICWA is narrowly tailored because race is merely one factor in determining who would be considered an "Indian child," just as race was only considered as one factor in the admissions process in *Grutter*. 539 U.S. at 340. To wit, ICWA requires a child to have a

biological parent who is a tribal member in addition to having the required criteria for tribal membership, which vary by tribe. Dempsey, *supra*, at 465. The original draft of ICWA defined an "Indian" as any person who is a member of or who is eligible for membership in a federally recognized Indian tribe. 123 Cong. Rec. S37223 (1977). Recognizing this broad definition, Congress adopted the narrowed definition of an "Indian child." § 1903(4).

Respondents may argue that ICWA is not narrowly tailored because race-neutral alternatives may exist in order to effectuate Congress' compelling interests. However, a law may still be considered narrowly tailored even if it does not exhaust every conceivable race-neutral alternative, so long as race-neutral alternatives were given good faith consideration. *Grutter*, 539 U.S. at 339. In the present case, if any such alternatives exist, they were appropriately explored and discarded. Congress found that State social workers did not understand Native traditions and cultures regarding raising children, which resulted in the mass removal of Indian children. H.R. REP. NO. 95-1386. Congress accordingly determined the only way to properly prevent the excessive removal of Indian children was to retrofit the language in ICWA to solely address the harm befalling Native children. Dempsey, *supra*, at 466. Race-neutral alternatives would not have satisfied Congress' compelling interests.

Additionally, ICWA's placement preference provision is narrowly tailored, as it seeks to curb the problems Indian children incurred by being raised in non-Native homes. Removed children not only suffered trauma, but also had problems adjusting to social and cultural environments that differed greatly from their own. H.R. REP. NO. 95-1386. Studies have revealed that these children often struggled in adolescence, reflected by drug usage, truancy, suicide attempts, and runaway problems. Gojevic, *supra*, at 257.

Congress enacted ICWA's placement preferences to mitigate the struggles Indian children faced by surrounding them with cultures that are similar to their own. Dempsey, *supra*, at 467. By placing a child in a Native home, it allows the child to remain connected with Indian life. Because one must affirmatively enroll in a tribe, retaining an Indian child's tribal connection is vital. Congress' goal of strengthening the tribes is achieved by preserving the link between Native children and their tribal cultures, as they will be more likely to enroll.

In sum, ICWA survives strict scrutiny because it is narrowly tailored to serve Congress' compelling interests in protecting Indian children and Indian tribes.

B. This Court should adopt intermediate scrutiny review for Equal Protection challenges to racial remedial laws.

Laws that prejudice discrete and insular minorities are subject to the most heightened level of scrutiny. *United States v. Carolene Products Co.*, 304 U.S. 144, n. 4 (1938). However, by contrast, laws with racial classifications that remedy past discrimination should be subject to intermediate scrutiny. *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 373 (2014) (Sotomayor, J., dissenting). A law survives intermediate scrutiny if the discriminatory means used are substantially related to an important governmental objective. *Virginia*, 518 U.S. at 547.

1. Intermediate scrutiny should be applied to racial remedial laws, as the purpose of the Equal Protection Clause is not served when these laws are applied under strict scrutiny.

This Court has previously held that all racial classifications must be reviewed under strict scrutiny. *Adarand Constructors*, 515 U.S. at 224. In iterating the rationale for applying strict scrutiny to racial classifications, the Court in *Carolene Products Co*. held that "prejudice against discrete and insular minorities" merits "more exacting judicial scrutiny." 304 U.S. at n. 4. However, numerous Justices of this Court have urged for a lesser level of scrutiny to be applied

to laws that benefit, rather than burden, minority groups, as striking down ameliorative legislation departs from the mandate of the Equal Protection Clause. *Schuette,* 572 U.S. at 373 (Sotomayor, J., dissenting).

Indisputably, laws designed to prejudice racial minorities should be subject to strict scrutiny to fulfill the promise of the Equal Protection Clause. *Carolene Products Co.*, 304 U.S. at n. 4. Conversely, ICWA should be examined under a less demanding lens, as it is intended to benefit, rather than prejudice, Natives and remedy past discrimination. *Bakke*, 438 U.S. at 359 (Brennan, J., concurring) (concluding that racial classifications designed to further remedial purposes must serve important governmental objectives and be substantially related to achieve those objectives).

While the Court may flinch at the prospect of divining whether Congress' intent is remedially beneficial to minorities or discriminatory, *see, e.g., Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989), this inquiry comports with other well-established methods of review. For instance, in cases involving facially neutral laws that are alleged to have a disparate impact on a protected class, the Court is tasked with determining whether the legislature's purpose was discriminatory. *Washington*, 426 U.S. at 245-47 (finding a statute establishing a racially neutral qualification for employment which caused a greater proportion of Black applicants to fail to qualify was not a violation of the Equal Protection Clause by examining its purpose). If the Court is able to consider the purpose of facially neutral laws in the facially-neutral context, it can do so regarding laws that have explicit racial classifications.

ICWA's purpose is clear: to protect Indian children and promote the stability and security of Indian tribes. § 1902. By adopting the same inquiry as a facially neutral law, ICWA would

clearly be shown to have a remedial purpose and therefore should be subject to intermediate scrutiny. *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring) (holding intermediate scrutiny is the proper inquiry into racial classifications designed to further remedial purposes).

Applying intermediate scrutiny to racially remedial laws best serves the purpose of the Equal Protection Clause–that is, to prohibit further discrimination of Blacks and other marginalized groups. Cong. Globe, 37th Cong., 2d Sess. 1639 (1862). Counterintuitively, under current standards, those in opposition of racially remedial laws are afforded the protections which were intended to serve minorities. By opposing ICWA and its remedial goals, Respondents are championing a revival of the discriminatory treatment of Indians by using the very protections designed to preclude such invidious discrimination.

The Equal Protection Clause's purpose of protecting subordinated groups will be best effectuated by applying intermediate scrutiny to ICWA. Permitting a lower standard of scrutiny to remedy the removal of Indian children and the destabilization of their tribes will prevent this discrimination from continuing in the future. Anything less would represent a perversion of the Equal Protection Clause.

2. ICWA survives intermediate scrutiny because its provisions are substantially related to Congress' important interest in protecting Indian children and tribes.

Intermediate scrutiny requires that classifications serve important governmental objectives and the means employed be substantially related to the achievement of those objectives. *Virginia*, 518 U.S. at 524. The *Virginia* Court ruled that an unconstitutional exclusion is properly remedied when the ameliorative provision eliminates the discriminatory effects of the past and bars like discrimination in the future. *Id.* at 547. The Court found that the school's proposed separate program for women was a violation of the Equal Protection Clause because it

failed to remedy the past discrimination and establish an important governmental interest in the exclusionary treatment. *Id.* at 555-56.

Unlike in *Virginia,* ICWA's provisions preferring placement in Native homes is a remedy for the discriminatory removal of Indian children in the past and prevents such removal in the future, which is substantially related to Congress' important governmental interest in protecting Indian children and tribal security, as detailed above. The need for this ameliorative provision is evidenced by the lack of acceptance Indian children feel in white communities, which leads to trouble in adolescence, as well as the erosion of tribes from lack of enrollment. Gojevic, *supra*, at 257.

Accordingly, ICWA survives intermediate scrutiny, as its provisions are substantially related to Congress' important interest in protecting Indian children and tribes.

CONCLUSION

Petitioners ask the Court to reverse the decision of the Thirteenth Circuit Court of Appeals and grant the underlying Motion for Summary Judgment. This result is grounded in robust Supreme Court precedent proclaiming the broad and exclusive nature of Congress' power over Indian affairs, consequently allowing Congress to preempt countervailing state law. Additionally, the Fifth Amendment challenge should be disposed of in light of the compelling government interest that informed ICWA's narrowly tailored provisions and the spirit of the Equal Protection Clause, which disallows the prejudice ICWA was designed to remedy. In sum, ICWA should survive both because of its firm constitutional foundations, as well as the need for safeguards against the continued abduction of Native children and the abasement of their tribes.

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Respectfully Submitted,

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Counsel for Petitioners