No. 22-386

IN THE

Supreme Court of the United States

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 THE RESPONDENTS

Counsel for Respondent
Team 5

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QUESTIONS PRESENTED

The United States has enacted the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63 (ICWA) to mandate child-custody outcomes for Indian children. The questions presented are:

1. Do the placement preference and recordkeeping provisions of the Indian Child Welfare Act exceed Congress's Article I authority and violate the anticommandeering doctrine under the Tenth Amendment?
2. Where the Indian Child Welfare Act racially classifies individuals as Indians, and it cannot be shown that such classification was for a compelling government interest or that the classification was narrowly tailored, does ICWA violate the Equal Protection Clause of the Fifth Amendment?

STATEMENT OF THE CASE

I. Factual Background

The State of West Dakota has three Indian tribes within its borders. R. at 2. West Dakota's child custody proceedings thereby involve the use of both the Indian Child Welfare Act , and West Dakota's Child Protection Service (CPS). *Id.*

James and Glenys Donahue (Donahues), private individuals in the State of West Dakota, sought to adopt Baby C. *Id.* Baby C's biological mother is a member of the Quinault tribe, and Baby C's biological father is a member of the Cherokee tribe. *Id.* Baby C had been in the care of the maternal aunt for a few months, but after reports that the then eight-month-old infant was left unattended for long periods of time were received by CPS, they removed Baby C from the aunt's custody. *Id.* Subsequently, CPS placed Baby C in the foster care of the Donahues, where the child lived for 2 years. *Id.*

In August 2019, a West Dakota state court terminated the parental rights of Baby C's biological parents. R. at 3. The Donahues initiated adoption proceedings of Baby C a month later, with the consent of both the biological parents and the maternal aunt. *Id.* The Quinault and Cherokee Nations were, as provided by ICWA, informed of the adoption proceedings. *Id.* The Quinault Nation notified the state court of an alternative placement for Baby C even after the Donahues had received consent to adopt her. *Id.* This potential alternative was unrelated to the child and located in a different state, but the placement fell through. *Id.* The Cherokee and Quinault reached an agreement where the Quinault was to be Baby C's tribe for the purposes of ICWA, but the Quinault never intervened in the adoption of Baby C by the Donahue. *Id.*

In January 2020, CPS and Baby C's guardian ad litem entered into an agreement, stipulating ICWA's placement preferences for the current adoption proceeding did not apply because no one eligible under ICWA had sought to adopt Baby C. *Id.* Thereafter, the Donahues successfully adopted Baby C, and the adoption was finalized in West Dakota state court, and the Donahues' home has been the only one known to Baby C since. *Id.*

Later in April of 2020, the Donahues became foster parents to Baby S, an Indian child (as defined by ICWA). *Id.* Baby S's biological mother is a member of the Quinault Nation, but it is uncertain as to which Indian tribe Baby S's father is a member of (or if he is a member at all). *Id.* Baby S was being taken care of by his grandmother from the time he was born until April 2020. *Id.* However, due to failing health, the grandmother was unable to continue to care for him, and Baby S was moved under the Donahues' foster care. *Id.* In May of 2020, the Donahues petitioned for adoption of Baby S, with the Quinault Nation opposing the adoption under ICWA. *Id.* The

Quinault notified CPS that the tribe had in fact identified two potential adoptive families for Baby S who were members of the Quinault (as provided by ICWA), but again were located in a different state. *Id.*

II. Procedural Background

After learning of the Quinault Nation's opposition to their adoption of Baby S, the Donahues and the State of West Dakota (Respondents) filed suit against the United States, the United States Department of the Interior and its Secretary, Stuart Ivanhoe, in his official capacity (Federal Petitioners). R. at 4. Respondents alleged that certain provisions of ICWA violate the Equal Protection Clause of the Fifth Amendment, as well as impermissibly commandeer the states in violation of the Tenth Amendment. *Id.* Thus, Respondents maintained these provisions of ICWA are unconstitutional, and sought injunctive and declaratory relief. *Id.* Shortly after Respondents filed suit, the Quinault and Cherokee Nations (Tribal Petitioners) filed a motion to intervene, which was granted. R. at 2. Tribal and Federal Petitioners (Petitioners), as well as Respondents, filed cross-motions for summary judgment. R. at 1.

The United States District Court for the District of West Dakota determined that ICWA did not impermissibly commandeer states, did not violate the Equal Protection Clause, and was thereby not unconstitutional. R. at 13. Thus, the court granted Petitioners' motion for summary judgment, denying Respondents' motion for the same. *Id.*

Respondents appealed to the United States Court of Appeals for the Thirteenth Circuit, which found that ICWA impermissibly commandeered the states in violation of the Tenth Amendment.

R. at 16. Thus, the Thirteenth Circuit reversed the district court's grant of summary judgment for Petitioners, and remanded for entry of judgment in favor of Respondents. R. at 17.

SUMMARY OF ARGUMENT

Because Indian children are not goods and because this Court has long recognized the sanctity of family liberty interests, ICWA exceeds Congress's authority under the Indian Commerce Clause. Congress may regulate channels, instrumentalities, and local activities that impact Indian commerce. They may not meddle in child custody cases as child custody, like other family relationships, are outside the purview of federal power.

As a mirror to ICWA exceeding Congress's authority under the Indian Commerce Clause, the statute violates the anticommandeering doctrine under the Tenth Amendment. ICWA conscripts local state employees to carry out the federal mandate at each step of a child custody proceeding that involves an Indian child. Failure to comport to the federal directives can result in the state's decisions being undone. The responsibility for and cost of implementing the federal mandate must also be borne entirely by the states.

Moreover, ICWA violates the Equal Protection Clause of the Fifth Amendment by racially classifying individuals as Indians and failing to meet strict scrutiny.

The classification, for the purposes of ICWA, between those who are Indians and those who are not is a racial classification, as correctly recognized by the concurrence in the United States Court of Appeals for the Thirteenth Circuit. *Morton v. Mancari* did not create a broad rule that all classifications of Indians are political, rather, it held that such classifications relating to a specific self-governing Indian agency are. Further, the fact that a child, as politically uninvolved as they

are, is determined by their blood to be a member of an Indian tribe is a significant signal that the classification is a racial one, not based on politics. Thus, ICWA's classification of Indians is a racial classification, and Petitioners must meet strict scrutiny.

Petitioners' argument fails to meet strict scrutiny as they cannot show either a compelling government interest, or that classifying Indians by their race is narrowly tailored to achieve that interest. The compelling interest asserted by Petitioners is that of maintaining the child's relationship with their tribe. However, ICWA's primary objective is the best interests of the child, and secondarily the promotion of tribe stability. It does not necessarily follow that the child's best interests will always, or even often, be served by the asserted interest of maintenance with the tribe. Thus, in asserting an interest which takes away from the very class sought to be protected under ICWA, Petitioners fail to state a compelling government interest.

Additionally, Petitioners fail to satisfy narrow tailoring. Considering Petitioners' asserted interest in maintaining the child's relationship with their tribe, it is difficult to see how requiring all children who possess even the tiniest portion of Indian blood to maintain a relationship with their tribe as "narrow". Moreover, as correctly reasoned by the Thirteenth Circuit's concurrence, preferencing the placement of an Indian child with any tribe is an overinclusive method of attempting to have the child maintain a relationship with their own tribe. In conscripting children who have even the tiniest portion of Indian blood, and in further conflating all Indian tribes together, ICWA's racial classification of Indians is simply overbroad in its approach to achieve Petitioners' asserted interest of maintaining the child's relationship with the tribe. Thus, Petitioners will fail narrow tailoring.

As ICWA racially classifies Indians, and as Petitioners will not be able to meet strict scrutiny, Petitioners will further be unable to meet rationality. Therefore, this Court should affirm the reasoning of the concurrence of the Thirteenth Circuit, finding that ICWA racially classifies Indians, fails to meet strict scrutiny, and thereby violates the Equal Protection Clause of the Fifth Amendment.

ARGUMENT

I. ICWA IMPERMISSIBLY EXCEEDS CONGRESS'S ARTICLE I AUTHORITY.

A. Both the Placement Preference and Recordkeeping Provisions of ICWA Exceed Congress's Article I Authority.

The panel for the Thirteenth Circuit made no error when it found that Indian children are not commercial goods to be regulated. R. at 16. We see no reason why this Court should disagree.

Congress is granted authority to regulate interstate commerce, commerce with foreign nations, and commerce with Indian tribes. U.S. CONST. art. I, § 8. The Indian Commerce Clause "is arguably coextensive with the Interstate Commerce Clause." R. at 16. As such, we can find guidance on Congress's limitations from this Court's jurisprudence on the subject. A majority of opinions hold that Congress may regulate channels of interstate commerce, instrumentalities of interstate commerce, and intrastate activities that impact interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995). So too for Indian Commerce.

Child custody is outside the purview of commercial regulation when children are not engaged in commerce or when there is no impact to commerce with Indian tribes. See, e.g., *Id.* at 564 (holding that "child custody" is outside Congress's regulation of "commerce"). Our earliest cases

support the notion. Congress may regulate the exchange of commodities, or commercial "intercourse." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824). "Goods are the subject of commerce" but "persons are not." *New York v. Miln*, 36 U.S. 102, 136 (1837). Indeed, Congress made clear that people are not goods to be traded following a period of violent and shameful bloodshed. U.S. CONST. amend. XIII. This Court explicitly rejected readings of Congress's enumerated power to regulate commerce as giving it authority to regulate, "marriage, divorce, and childrearing" despite the "undoubtedly significant" impact that familial relationships have on the exchange of goods. *United States v. Morrison*, 529 U.S. 598, 601 (2000). This Court has repeatedly acted to protect "[c]hoices about marriage, family life, and the upbringing of children", recognizing that such rights are fundamental. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). See also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) recognizing the same. In sum, Congress may exert its authority under the Indian Commerce clause to regulate the exchange of commodities, but Indian children do not count among those commodities. Further, Congress may not intervene on issues of child custody and childrearing because they represent a fundamental liberty interest that is sheltered from federal intervention.

In this case, Congress has implemented a regulation far outside the powers enumerated to them. Indian children are not channels of Indian commerce, as airways and rivers might be. They are not instrumentalities of commerce such as an interconnected network of railroads and depots. 29 C.F.R. § 776.29. They are not local "activities" that may impact commerce, such as large quantities of wheat grown for private use. *Wickard v. Filburn*, 317 U.S. 111, 127 (1942). Child custody is,

instead, a fundamental familial liberty interest. This Court's sensibilities should furrow at the thought of reducing the Indian child to the same category as barges and bus terminals.

Congress did not draft ICWA to address the needs of commerce. Instead, they did so specifically to make a value judgment about the composition of families. 25 U.S.C. § 1901.

B. Both the Placement Preference and Recordkeeping Provisions of ICWA Violate the Anticommandeering Doctrine Under the Tenth Amendment.

As the panel for the Thirteenth Circuit rightly argued, "ICWA unconstitutionally requires state courts and executive agencies" to apply federal standards and directives, which violates the Tenth Amendment's anticommandeering doctrine. Congress may not issue directives toward the States. *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). When Congress orders States to carry out a federal mandate while requiring the States to foot the bill, they violate the fundamental separation of powers between State and Federal authority. *Printz v. United States*, 521 U.S. 898, 926 (1997). While standards may be set by the Federal Government, it is impermissible to force State compliance with those standards by compelling State action. *New York v. United States*, 505 U.S. 144, 161 (1992). In other words, the Constitution forbids Congress from conscripting State actors from having to carry out, enforce, implement, and ultimately pay for a federal policy directive.

ICWA does exactly this. The federal government permeates the proceedings; states must comply. "In *any* adoptive placement of an Indian child under *State* law," the federal statute controls the outcome. 25 U.S.C. § 1915 (emphasis added). The federal government overrides any state court decisions about jurisdiction and which parties may be heard from in an Indian child custody dispute. 25 U.S.C. § 1911.

In many cases, child custody cases are initiated by the West Dakota Child Protective Services (CPS), a state agency. R. at 2. CPS publishes a manual for executive agents to manage Indian child custody procedures, which notes that "almost every aspect of the social work and legal case is affected" by the federal mandate. Id. Upon a party bringing a proceeding concerning an Indian child; the regulation requires notice to both the child's parent and their tribe. 25 U.S.C. § 1912(a). When issues arise over which courts have jurisdiction over a dispute, the federal mandate has been read to require state courts to defer jurisdiction over a case when the federal interest conflicts. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 163 (Tex. App. 1995)

Before a child may be removed from an unsafe home, the States are compelled to take "active efforts" to comply with federal statutory and regulatory schemes. 25 C.F.R. § 23.2. States must conduct a "comprehensive assessment" of the Indian child's family, "with a focus on safe reunification as the most desirable goal" and not, as a state court or CPS would otherwise do, according to the child's best interest. *Id.* Services must be identified for families. *Id.* Tribal representatives must be invited – not only to assist the state's oversights of the parents but to "actively assist" the parents in obtaining services from the state. *Id.* State resources must be expended to conduct a "diligent search" for extended family members within the tribe. *Id.* "All available and culturally appropriate" strategies must be employed. *Id.* The state must both identify resources "including housing, financial, transportation, mental health, substance abuse, and peer support services" while "actively assisting" various parties in "utilizing and accessing those resources." *Id.* Work does not stop there. The state must continually monitor the "progress and participation" in these services. *Id.* In short, it is not enough for the state to merely allow interested

tribal parties a say; the state must actively work to provide, monitor, and expand state services – all because the federal mandate orders it be so. No federal funding is provided. Grants are given, but not to the states. 25 C.F.R. § 23.41.

When a state involves itself in placing the child in an alternative home or terminating the parental rights of an abusive or neglectful parent, the State is compelled by the Federal government to find and retain an expert witness – on its own dime. 25 C.F.R. § 23.122(a). This expert must be a member of the child's Indian tribe and recognized by that community as an expert in tribal custom as it pertains to familiar relationships. Such experts often have extensive experience, attending training specific to carrying out the federal mandate. *Walker E. v. Dep't of Health & Soc. Servs., Off. of Children's Servs.*, 480 P.3d 598, 610 (Alaska 2021). No matter the State's process for determining the best interests of the child; Congress intervenes through ICWA to compel State agents to make any decision in conformity with a racial placement-preference hierarchy. *Matter of Appeal in Pima Cnty. Juv. Action No. S-903*, 130 Ariz. 202, 204, 635 P.2d 187, 189 (Ct. App. 1981). The Federal government supervises this process at every step of the process. Failure to follow the federal mandates may undo State action. Id.

The intrusion by the Federal government is chaotic. State courts are ordered to graft federal standards "under state law." 25 U.S.C. § 1915(a). Responsibility for policy and the impact of decisions is obscured. *Murphy*, 138 S. Ct. at 1477. These cases involve intervention by State courts, State actors, State judgments "under State law", and the glossy veneer of State standards. 25 U.S.C. § 1915(a). Blame and credit for the decision all flow to the State, even though it was Congress through ICWA and its machinery in Washington that bears ultimate responsibility.

This is unacceptable to our Constitution's framework of federalism. In *Printz*, Congress required the States to implement a background check for individuals purchasing firearms. 521 U.S. at 902. State authorities had to collect a sworn statement from a firearm transferee containing personal information and an attestation that they were not a member of a range of classes prohibited by federal law from possessing a firearm. *Id*. State law enforcement covered the costs of implementing this mandate without federal reimbursement. *Id*. The regulation was superimposed on top of any other standard the State may have regulating firearm purchase and transfer. *Id*. State authorities could notice a transferee of various actions taken on their application, but they were not required to do so. *Id*. The petitioners in Printz sued to object that they had been pressed into federal service. *Id*. This Court agreed. *Id.* at 933.

The intrusion under ICWA is far more insidious than in *Printz*. Here, the States are compelled to notify and marshal a small army of tribes, expert witnesses, and distant relations to package up the Indian child, undifferentiated from any other generic "Indian child". Both the State and the child are subjected to a battery of questions, hearings, and inquiries all to ensure the furtherance of a distant federal policy interest. Nearly "every aspect" of the work and case are affected by Congress's meddling. R. at 2. Indeed, this is by design. Congress was clear; the intent of ICWA was to directly override and change how executive state agencies carried out state policies. Cong. Rec. 38102 (daily ed. Oct. 14, 1978) (statement by Rep. Udall in support of H.R. 12533).

Fortuitous is the Indian child who benefits from being thrust into this labyrinth. Indeed, fortune alone can save them. Loving and stable foster parents find themselves reluctant to invite Indian children into their homes; federal intermeddling means the process for prospective adoptive

parents is even more beset by trauma and indignities, as at any moment the child may suddenly be removed as happened here. R. at 3. This happens at the child's expense. Not only are their lives disrupted as these distant foreign interests align their placement with antiquated policy objectives, but they often find themselves forced to remain in abusive and dangerous households, as child abuse in Indian families goes underreported, even by national standards. Jeremy Braithwaite. Colonized silence: *Confronting the colonial link in rural Alaska Native survivors' non-disclosure of child sexual abuse*. Journal of Child Sexual Abuse, 27(6), 589-611 (2018).

ICWA is an egregious instance of federal commandeering. State courts, agencies, and employees are all conscripted to carry out a distant federal policy. This policy does not benefit the States, who are forced to stretch already thin budgets to comply with the myriad of federal requirements imposed by ICWA. It does not benefit the children, who are either left in extremely dangerous, abusive situations or shipped about without respect to their personhood, much as a commodity might be. It does not benefit the tribes either, who find that the federal policy seeking to protect the integrity of the tribal culture only serves as another stark instance of condemning Indians to a life of abuse, poverty, and neglect. This Court should find that ICWA violates the Tenth Amendment's anticommandeering doctrine.

II. ICWA'S CLASSIFICATIONS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT BY RACIALLY CLASSIFYING INDIANS AND FAILING TO MEET STRICT SCRUTINY.

The Fourteenth Amendment's Equal Protection Clause prohibits States from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. This Equal Protection Clause is incorporated in the Fifth Amendment's due process guarantee,

prohibiting the federal government from the same. *Bolling v. Sharpe,* 347 U.S. 497 (1954); U.S. CONST. amend. V. Where a classification by the government is based on race, it must meet strict scrutiny. *Grutter v. Bollinger,* 539 U.S. 306 (2003). If the classification is political, it must be rationally linked to a legitimate interest. *Morton v. Mancari,* 417 U.S. 535, 555 (1974). The Indian Child Welfare Act's classification of Indians is a racial classification not based on political concerns, and is thereby subject to strict scrutiny. Petitioners fail to show ICWA meets strict scrutiny, and will thereby fail rationality.

A. ICWA's Classifications of Indians are Racial, not Political.

ICWA defines an Indian child as a minor who is eligible for membership in an Indian tribe and is the biological child of member, or is simply a member of an Indian tribe. 25 U.S.C. § 1903(4). Although there is no express definition of a member, ICWA does define an Indian as "any person who is a member of an Indian Tribe…", where the tribe is federally recognized. 25 U.S.C. § 1903(3), (8). It follows therefore that ICWA governs child members of federally recognized Indian tribes.

However, membership comes primarily from the Tribes' determination of the child's ancestry or race. *In re Dependency A.L.W.,* 32 P.3d 297 (Wash. App. Div. 1, 2001) involved a case concerning the disposition of a child as a member of a tribe under ICWA, and utilized the Bureau of Indian Affairs' (BIA) Guidelines in holding tribes have the conclusive authority to determine membership for their tribe. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67585 (Nov. 26, 1979) ("the determination by a tribe that a child… is or is not eligible for membership in that tribe… is conclusive."). While this determination of membership

is subject to many factors, the most common threshold requirement is lineal descendancy i.e. ancestral tracing. *Adoptive Couple v. Baby Girl,* 570 U.S. 637 (2013); *Tribal Enrollment Process,* U.S. Department of the Interior (last visited Oct. 3, 2022) (https://www.doi.gov/tribes/enrollment /). Thus, federally recognized Indian tribes determine whether a child is a member of their tribe most commonly by using blood forensics, or ancestral tracing.

The Court has found that the utilization of ancestral tracing may be used as a "proxy" for race. *Rice v. Cayetano,* 528 U.S. 495, 514 (2000). In *Rice*, the state of Hawaii restricted who may vote in its elections to those who are Hawaiians by bloodline, and thus only certain descendant "Hawaiians" could vote. *Id*. The Court held Hawaii had used "ancestry as a racial definition and for a racial purpose," and ruled the voting restrictions unconstitutional. *Id.* at 515.

For the purposes of ICWA, then, it seems readily apparent that the classification of Indian children is a racial classification. Here, the Indian Tribes are federally recognized, and ICWA lends the determination of tribal membership to the tribes. But the tribes use ancestral tracing and blood analysis to determine whether a child is a member, and ancestry has often been held to be "a proxy for race." *Id* at 514.

It is asserted by Petitioners that *Mancari* necessitates a finding that all classifications regarding Indian tribes are political. *Mancari* involved a case in which the BIA promulgated a statutory preference for the employment of qualified Indians at the Bureau, and this preference was attacked on Equal Protection grounds. 417 U.S. 535. The Court held that the preference of Indians at the BIA was not racial, but in fact a political classification, because it "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and

activities are governed by the BIA…" *Id.* at 554. Thus, the thrust of Petitioners' reliance on *Mancari* is that classifications regarding all federally recognized Indian tribes are political. R. at 17.

However, *Mancari*'s holding was limited to employment at the BIA, an Indian self-government service recognized as a "sui generis" authority. 417 U.S. at 554. The BIA, and the preference for the employment of Indians at the agency, was to increase Indian involvement in their own affairs. *Id.* This limited holding is supported in *Rice*, where the Court refused to extend *Mancari*'s reasoning and stated that "[*Mancari*] was confined to the authority of the BIA…" *Rice,* 528 U.S. at 520. And, although the *Rice* court (in dicta) distinguished Indians as having a "status" different than Hawaiians, this was no more than a recognition of Congress's authority to regulate Indian Tribes. *Id.* at 518.

Further, in *Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, a Hopi Indian was denied employment on a Navajo reservation for being Hopi, and brought a Title VII challenge. 154 F.3d 1117 (9th Cir. 1998). The court refused to apply *Mancari*'s political classification of Indians, finding that even though the two cases were similar regarding employment of Indians, *Mancari* was promulgated specifically for the BIA and its "unique" self-governing authority of Indian affairs. *Id.* at 1120. Therefore, *Mancari's* reasoning applies only specifically to cases involving the unique authority of the BIA, and will not be extended to include the classification of Indian children by ICWA.

In addition to its sui generis authority recognized in *Mancari*, the BIA only required tribal membership to be employed by the agency. 417 U.S. 535. But here, ICWA applies when a child

is tribally affiliated, and just as easily applies to a non-member child who is a biological descendant of a member. 25 U.S.C. § 1903(4). Even where the child is not a member, a child born to a member of a tribe is subject to ICWA by sole reason of their ancestry. And as held in *Rice,* ancestry has often been used to be a "proxy for race." *Rice,* 528 U.S. at 514. Thus, the minimum standard by which an Indian child is subject to ICWA is determined by the child's race or ancestry, while in *Mancari* it was tribal membership. *Mancari,* 417 U.S. at 535. In classifying children by their race as opposed to their tribal affiliation, ICWA surely is making a racial classification.

The classification of Indian children in ICWA is thereby a racial classification. As such, this racial classification will be subject to strict scrutiny. *Grutter,* 539 U.S. at 306.

B. ICWA's Racial Classification of Indians Fails to Meet Strict Scrutiny.

Strict scrutiny is applied to "all racial classifications to 'smoke out' illegitimate uses of race…". *Grutter,* 539 U.S. at 326; *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493 (1989); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). For classifications to meet strict scrutiny, they must be narrowly tailored to further a compelling governmental interest. *Grutter,* 539 U.S. at 333. Petitioners will not be able to show ICWA and its classifications meet strict scrutiny, and will thereby fail to meet rationality.

1. There is No Compelling Government Interest in Racially Classifying Indians.

Petitioners assert that maintaining the child's relationship with their tribe is a compelling government interest. R. at 18. The Court has found that the relationship between Indian tribes and their children "finds no parallel in other ethnic cultures found in the United States." *Miss. Band of*

Choctaw Indians v. Holyfield, 490 U.S. 30, 52 (1989). Yet, it is difficult to reconcile the characterization of a child solely by their blood for determining how they are to be raised as a "compelling interest," especially when taking into account the best interests of the child.

In *Adoptive Couple v. Baby Girl*, a biological Cherokee father had a child with a Hispanic mother, and expressed he did not want to support the mother or the baby. 570 U.S. 637 (2013). Four months after birth and no financial support from the father, the mother put up the baby for adoption with a non-Indian couple, and when the father was notified, he contested the adoption. *Id.* The Court found that because the father had demonstrated no interest in the child, and because the child was only a miniscule portion of Cherokee (3/256 Cherokee) the child was permitted to be adopted by the non-Indian parents. *Id.* This case supports the proposition that although the best interests of the child and the tribe are concomitant, the relationship between the two does not always serve the best interests of the child.

The objective of ICWA as proscribed by Congress was to "protect the best interests of Indian children" and "promote the stability and security of Indian tribes and families". 25 U.S.C. § 1902. ICWA thereby was primarily passed for an Indian child's best interest, with the secondary objective of maintaining the stability of Indian tribes. The interest asserted by Petitioner in maintaining the child's relationship with a tribe demonstrably takes away from the child's best interests. It does so by specifically classifying the child on the basis of the child's ancestry, and as shown in *Adoptive Couple*, grouping that child with a tribe that shares the same bloodline. The child's education or health is a less significant factor to the tribe than the child's bloodline, for proceedings under ICWA.

Petitioners then, assert that maintaining the child's relationship with the tribe is more compelling than the recognition of the best interests of the child. This interest in fact takes away from the very class sought to be protected under ICWA – Indian children. Thus, by asserting an interest that is detrimental to the same class which ICWA seeks to benefit, Petitioners fail to state a compelling government interest.

2. ICWA is Not Narrowly Tailored to further a Compelling Government Interest.

Petitioners further cannot show that the interest of maintaining the child's relationship with the tribe is "specifically and narrowly framed" to meet that objective. *Grutter,* 539 U.S. at 333. Looking to the intent of ICWA, the purpose for which it classifies Indian children, and Petitioners' asserted interest, the racial classification would fail narrow tailoring.

ICWA was primarily passed for the best interests of Indian children. 25 U.S.C. § 1902. Thus, Petitioners' asserted interest must be read with an eye first toward the best interests of the child, which may or may not include maintaining the child's relationship with their tribe. As seen in *Adoptive couple,* these interests often clash, resulting in ICWA prizing the affiliation with a tribe over and above the best interests of the child. In asserting a child's interests are best served by classifying them according to their bloodline, Petitioners adopt an overinclusive and coerced method of attempting to achieve a healthy relationship between the child and tribe.

Furthermore, as touched on by the Thirteenth Circuit, ICWA's preferences are overinclusive in the sense they place an Indian child within *any* tribe. 25 U.S.C. § 1915. Considering the Petitioners' asserted interest of maintaining the child's relationship with their tribe, placing an

Indian child in the confines of *another*, wholly unrelated tribe plainly does not narrowly advance this asserted interest.

In light of the asserted interest in maintaining the child's relationship with the tribe, ICWA is simply to broad and overinclusive in its reach. By putting the child's best interests secondary to placement with a tribe, and by unreasonably conflating different Indian tribes together, ICWA fails narrow tailoring.

CONCLUSION

For the foregoing reasons, the judgment of the Thirteenth Circuit should be affirmed.

Respectfully submitted,

__/s/_____

Team 5

Counsel for Respondent