REGENT UNIVERSITY SCHOOL OF LAW

22nd ANNUAL LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW MOOT COURT COMPETITION

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

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II. Under the Fifth Amendment does a race-based classification pass strict scrutiny when it does not serve a compelling economic, political, or quasi-sovereign self-government interest and is not narrowly tailored by featuring an absolute preference?

STATEMENT OF THE CASE

The ICWA violates the sovereignty of state governments and the constitutional equal protection rights of individual actors. In this case, West Dakota and James and Glenys Donahue ("Donahues") (collectively "Plaintiffs") seek to ensure the following:

(1) That the federal government does not overstep its authority by controlling the way that state officials handle state law created child custody claims; and

(2) That the basis for placing children in loving and appropriate homes is objective criteria on who may adequately provide for them and not the arbitrary placement of children in homes based on racial classification.

Currently, there are three Indian tribes within the borders of the State of West Dakota. R. at 2. Each year, around twelve percent of all child custody proceedings in West Dakota involve children of Indian descent, which inherently means that the ICWA impacts twelve percent of these state level proceedings. *Id.* As the United States District Court for the District of West Dakota ("District Court") acknowledged, the ICWA imposes a higher "burden of proof for removal, obtaining a final order terminating parental rights, and restricting a parent's custody rights" in any way. *Id.* Since the ICWA's inception, West Dakota has been required to undertake "the costs and burdens of enforcing a federal policy." R. at 15. During child custody proceedings involving an Indian child, West Dakota must notify not only the child's custodian, but their tribe(s), and the Secretary of the United States Department of the Interior ("Secretary"). R. at 5. The proceedings are subject to potential disruption at any point by the child's designated tribe. R. at 6. In addition, West Dakota must maintain up-to-date records containing specified information and make them available to the Secretary at any time upon request. R. at. 7. Further, the state must pay for an expert witness to appear in court to show that if the child is not removed from

their home, they will likely experience "serious emotional or physical damage," a higher standard than is placed on non-Indian children in need of removal from abusive and neglectful homes. R. at 6. Together, these requirements "demand[] extensive action by state and local agencies" in the State of West Dakota. R. at 15.

The burden of the ICWA affects not only sovereign states but also individual citizens. Over a period of three years, two infants were placed in the care of James and Glenys Donahue after a series of tragic events left them in need of a home. R. at 2–3. Both children have tribal ancestry, and that fact alone has led to an uphill battle subjecting the Donahues to the arduous processes of the ICWA and the fear these children may be taken from their stable home and brought to another state to live with people they have never known. *Id.*

The first child the Donahues fostered was Indian child Baby C. R. at 2. Baby C's biological mother is a member of the Quinault Nation, and her biological father is a member of the Cherokee Nation. *Id.* Baby C has never resided with either parent or tribe for any time after her birth. *Id.* Instead, she resided with her maternal aunt until the West Dakota Child Protection Service ("CPS") removed Baby C from her care following reports that the eight-month-old infant was "often left unattended for long periods while her Aunt worked." *Id.* After two years in foster care, a state court terminated Baby C's biological parents' parental rights, and she became eligible for adoption. R. at 3. Baby C's biological mother, biological father, and maternal aunt all consented to the Donahues formally adopting Baby C into their family. *Id.*

Pursuant to ICWA guidelines, the State informed both the Cherokee Nation and Quinault Nation of these proceedings. *Id.* In October 2019, the Quinault Nation notified the court that it had found another placement home for Baby C with people unrelated and unknown to her in an entirely different state. *Id.* The placement did not work, no other parties sought to adopt Baby C,

and the Donahues were able to legally make Baby C a part of their family in January 2020, after over two years of caring for her. R. at 2–3.

Four months later, in April 2020, the Donahues welcomed another Indian child into their home, Baby S. R. at 3. Baby S's biological mother, a member of the Quinault Nation, had passed away from a drug overdose two months prior, and the father's identity remains unknown. *Id.* Like Baby C, Baby S did not reside with either parent for any time following his birth. *Id.* Instead, he was placed in the care of his paternal grandmother for four months until his grandmother's failing health prompted removal by CPS and placed into foster care with the Donahues. *Id.* They then filed an adoption petition for Baby S to join their growing family, and Baby S's grandmother fully consented to the adoption. *Id.* Upon being duly notified of the pending proceedings, the Quinault Nation informed the court it had found two other potential adoptive families for Baby S. *Id.* Both families are in another state that Baby S has neither been to nor has any connection to. *Id.* The Donahues now face the possible removal of Baby S from their care based solely on Baby S's race, and not on their ability to care for him. *Id.*

In response to the heavy burden placed on West Dakota in violation of the Tenth Amendment and the denial of equal protection of the laws in violation of the Fifth Amendment, Plaintiffs filed this lawsuit against the United States of America, The United States Department of the Interior, and its Secretary Stuart Ivanhoe. R. at 1–2. After the suit was filed, the Cherokee Nation and the Quinault Nation exercised their right to intervene. R. at. 2. On September 3, 2020, the parties filed cross-motions for summary judgment, and the District Court granted summary judgment in favor of the Defendants. R. at 4, 12.

On appeal in the United States Court of Appeals for the Thirteenth Circuit, the court reversed the erroneous ruling of the District Court and remanded the case for judgment to be

entered in favor of West Dakota and the Donahues. R. at. 17. Holding that multiple provisions in the ICWA violate the Tenth Amendment's anticommandeering doctrine, it declined to reach the issue of whether the ICWA violated the Fifth Amendment. R. at 16–17. The Defendants then filed this appeal. R. at 20.

SUMMARY OF ARGUMENT

The Court should affirm the Thirteenth Circuit's decision in favor of the Plaintiffs because the ICWA violates the Tenth Amendment's anticommandeering doctrine and the Fifth Amendment's Due Process Clause.

The ICWA violates the Tenth Amendment for four reasons. First, the ICWA requires states and its officials to implement federal standards for state law created child custody claims. Second, the ICWA forces West Dakota and other states to expend significant amounts of their limited resources to implement a federal regulatory program. Third, the ICWA blurs the line of political accountability and confuses the public on which entity, state or federal government, should be held accountable for the ICWA provisions that intermingle within state child custody claims. Finally, the ICWA does not preempt state law because Congress does not have the authority to regulate states. Thus, the ICWA violates the anticommandeering doctrine by forcing states to implement this federal regulatory program.

Further, the ICWA violates the equal protection component of the Fifth Amendment. The ICWA features a race-based classification by using ancestry as a proxy of race. This classification is impermissible because it does not relate to tribal membership or other quasi-sovereign distinctions. Because the ICWA applies a racial classification, it is subject to strict scrutiny which requires that the statute be narrowly tailored to a compelling government interest. The ICWA is unable to satisfy either of these requirements. First, the ICWA's express purpose

relates to merely social and cultural goals, which do not receive the same level of deference given to political, economic, and self-government interests. Moreover, the ICWA's discriminatory impact negates any claim of compelling interest. Second, the ICWA is unconstitutional because it is not narrowly tailored to its objectives. The ICWA applies beyond the bounds of precedent to reach non-tribal members off reservation. Finally, the ICWA violates the Fifth Amendment by imposing an absolute preference and undue burden. Therefore, the Court should affirm the Thirteenth Circuit's decision.

ARGUMENT

I. The ICWA violates the Tenth Amendment by controlling the way state agencies process state law claims, requiring states to expend significant resources enforcing federal laws, inhibiting political accountability, and directly regulating the actions of state officials.

The Court should affirm because the ICWA violates the anticommandeering doctrine derived from the Tenth Amendment of the U.S. Constitution. The amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. With this amendment, "[t]he Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). James Madison explained, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . ." *Id.* at 458 (quoting The Federal No. 45, pp. 292–293 (C. Rossiter ed. 1961)).

The Tenth Amendment is the bedrock of federalism and protects states from encroachment by the federal government. While Congress has significant powers, "[t]he question is not what power the Federal Government ought to have but what powers in fact have been given by the people." *United States v. Butler*, 297 U.S. 1, 63 (1936). An analysis assessing the

powers of the federal and state governments requires "[courts to] begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Thus, while the federal government has significant power to regulate, "[t]he States unquestionably do '[retain] a significant measure of sovereign authority.'" *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (internal citations omitted).

As an extension of the Tenth Amendment, "[t]he anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.,* the decision to withhold from Congress the power to issue orders directly to the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1475 (2018). The anticommandeering doctrine was implemented for three reasons. *Id.* at 1477 (2018). First, to protect structural liberty by upholding the balance of power between the state and federal governments. *Id.* Second, to "prevent[] Congress from shifting the costs of regulation to the States." *Id.* Third, to "promote[] political accountability" so voters know who to "credit or blame" for a law they do or do not like. *Id.* In sum, "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

A. <u>The ICWA usurps state authority by compelling state agencies to apply federal standards to state law child custody claims.</u>

The Court should affirm because the ICWA forces West Dakota and other states to implement federal standards in state child custody proceedings. Congress cannot "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal

regulatory program." *Id.* at 161 (citing *Hodel v. Va. Surface Min. and Reclamations Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

If Congress has a strong federal interest compelling them to legislate, "it must do so directly; it may not conscript state governments as its agents." *Id.* at 178. Further, as Justice Alito pointed out only four years ago in *Murphy*, "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." 138 S.Ct. at 1476. For example, in *Printz v. United States*, the Court held that the Brady Handgun Violence Prevention Act was unconstitutional in part because the act commanded state officials to perform background checks on prospective handgun purchasers. 521 U.S. 898, 905 (1997). The Court reached this holding even though the directive to state officials was only a *temporary* measure set to end in two years. *Id. But see FERC v. Mississippi*, 456 U.S. 742, 761–62 (1982) (determining that a federal law directing state utility regulatory commissions to consider but not adopt federal standards did not infringe on the State's sovereign powers).

Here, like the federal act in *Printz*, the ICWA requires state officials to implement a federal regulatory program. Through the ICWA, Congress has commanded the state judiciaries to give an absolute preference to one group of people over another in every child custody proceeding involving an Indian child. During these proceedings, the ICWA not only forces state judges and other officials to implement these federal preference standards but also compels them to comply with federal notice and recordkeeping requirements. Because the ICWA commandeers the state by controlling the actions of state officials, it violates the anticommandeering doctrine.

Furthermore, "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . ." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994) (internal citations omitted). However, unlike federal courts, state

courts have concurrent jurisdiction over federal claims. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Further, child custody proceedings have always been wholly left to the state, and federal courts lack jurisdiction to hear these claims. *E.g., Sophar v. United States*, 838 Fed.Appx. 328, 332 (10th Cir. 2020) (holding that federal courts lacked jurisdiction over a child custody claim). States have jurisdiction over these claims because "child custody generally is a matter that should be viewed as being at the heart of the domestic relations exception," and domestic relations are left to the state police powers. 3E Charles Alan Wright et al., *Federal Practice & Procedure* § 3609.1, text following n.32 (3d ed., Apr. 2020 update). This Court upheld this division of power in *Elk Grove Unified Sch. Dist. v. Newdow* when it concluded that the Court's deference to state law in domestic relations is so "strong" as to divest the federal courts of power over domestic relations, such as child custody. 542 U.S. 1, 12 (2004) *abrogated on other grounds by Lexmark Intern., Inc. v. Static Controls Components, Inc*., 573 U.S. 118 (2014).

Here, the ICWA requires West Dakota to apply federal standards to child custody cases involving Indian children effectively "commandeering" a state law domestic relations claim intended to be solely within the power of the states. While states can have concurrent jurisdiction over federal claims, Congress cannot dictate how state courts must hear state created claims. The ICWA placement preference requirements command state agencies to prefer one individual over another and govern how state courts enforce child custody claims involving Indian children. While tribal affairs are an important Congressional concern, this does not grant Congress the power to directly "commandeer" state entities regarding how they process state law claims outside of its jurisdiction. Like in *Elk Grove*, the federal government should divest itself of child custody claims and strongly defer to the states over domestic relations matters. Thus, the Court should affirm because the ICWA "commandeers" state agencies and state law claims.

B. The ICWA requires state governments to spend limited local resources enforcing a federal regulatory program.

The Court should affirm because the federal government has forced West Dakota to expend significant state resources to implement the ICWA. The anticommandeering doctrine "prevents Congress from shifting the costs of regulation to the States." *Murphy*, 138 S.Ct. at 1477. For example, in *Colorado v. U.S. Dep't of Justice*, the court held that various federal immigration statutes violated the anticommandeering doctrine in part because "the statutes shifted the cost of compliance to state and local governments with limited resources." 455 F.Supp.2d 1034, 1059 (D.Col. 2020). Similarly, in *City of Chicago v. Sessions*, the court determined that the same federal immigration statutes commandeered the city of Chicago's government by "supplant[ing] local control of local officers," utilizing limited resources, and enabling "the federal government to conscript the time and cooperation of local employees." 321 F.Supp.3d 855, 866, 869 (N.D. Ill. 2018). *But see*, *Reno v. Condon*, 528 U.S. 141, 151 (2000) (upholding a federal regulatory program in part because it did not "require state officials to assist in the enforcement of federal statutes regulating private individuals").

Here, multiple provisions of the ICWA burden states with high implementation costs. First and foremost among those requirements is the expert witness requirement in 25 U.S.C. § 1912(e) and (f). As the Thirteenth Circuit stated, "state agencies must present the testimony of expert witnesses, with specific qualifications, when they seek to place an Indian child in foster care or terminate parental rights." R. at 16. The costs of expert witnesses are exorbitant–the average price of an expert witness for trial testimony is $478 per hour. *Expert Witness Fee Calculator*, Expert Institute, https://www.expertinstitute.com/resources/expert-witness-fees (last visited Sept. 26, 2022). This requirement imposes a significant burden on West Dakota in light of the fact that "Indian children constitute twelve percent of West Dakota's child custody

proceedings…annually." R. at 2. This burden is worsened by the limited resources available to the states to comply with the ICWA's standards. Like in *Colorado* and *City of Chicago*, the federal government has forced West Dakota and other states to expend significant amounts of their limited resources to uphold and enforce a federal regulatory program.

Additionally, the ICWA requires state agencies and employees to keep and maintain a record of each placement of an Indian child in each state in which the placement was made. 25 U.S.C. § 1915(e). The state must also send a copy of the final adoption decree to the Secretary. Unlike the federal provisions in *Reno*, these provisions "conscript" local employees by requiring them to keep a record of the placement of the Indian child, and thus, impose substantial costs and burdens on state agencies with limited resources. Therefore, the Court should affirm because the ICWA imposes significant costs on states by requiring expert testimony in court proceedings and extensive placement records for Indian children.

C. The ICWA frustrates political accountability by imposing federal standards on state proceedings.

The Court should affirm because the ICWA creates political confusion as to which entity, the state or federal government, is responsible for establishing the ICWA preference and recordkeeping requirements. This Court explained the political accountability principle in 2018:

> When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.

Murphy, 138 S.Ct. at 1477. This issue of political accountability was outlined in *City of Chicago* where the federal government forced the local government to implement federal immigration policies and prevented it from adopting any contradicting policies. 321 F.Supp.3d at 870. The court determined that the restriction on state action increased the ambiguity of blame

and impeded the foundational necessity of political accountability. *Id*. *But see, Hodel*, 452 U.S. at 271 (determining that a federal statute did not blur political accountability primarily because the law allowed but did not *require* states to implement the federal regulatory program).

Here, West Dakota's citizen do not know which government is responsible for the ICWA regulations leading to erratic and inconsistent political accountability. State law governs child custody claims, so if an individual has an issue with a child custody proceeding or policy, they can go to the state legislature to advocate for change. However, because the federal government has decided to intermingle federal law with state-created child custody claims, voters do not know who to "credit or blame" for the multiple requirements that states must follow for child custody proceedings involving an Indian child. This intermingling between the state and the federal government is exactly the kind of situation the Supreme Court stated violates the Tenth Amendment and state sovereignty. Therefore, the Court should affirm because the application of the ICWA to child custody claims confuses voters and "blurs" the lines of political accountability.

D. The ICWA does not implicate the preemption doctrine because it regulates the actions of state officials, not private actors.

The Court should affirm because the ICWA regulates state officials in violation of the anticommandeering doctrine, and thus, does not implicate the preemption doctrine. The preemption doctrine applies when the federal government attempts to regulate private individuals, and the anticommandeering doctrine applies when the federal government attempts to regulate state officials. While the anticommandeering doctrine is derived from the Tenth Amendment, the preemption doctrine derives its authority from the Supremacy Clause, which states, "[t]his Constitution, and the laws of the United States…shall be the supreme law of the land." U.S. Const. art.VI, cl. 2. The Supreme Court has recognized three types of preemption:

conflict, express, and field. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990). However, all three forms "work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Murphy*, 138 S.Ct. at 1480.

There are two requirements for a federal statute to preempt state law. "First, [the statute] must represent the exercise of a power conferred on Congress by the Constitution." *Id.* Simply referring to the Supremacy Clause does not grant the federal government absolute authority over states. *Id*. "Second, since the Constitution 'confers upon Congress the power to regulate individuals, not States,'" the regulation must "be read as one that regulates private actors." *Id.* (quoting *New York*, 505 U.S. at 166). For example, in *Printz*, this Court determined the federal scheme of the Brady Handgun Violence Prevention Act did not apply equally to State and private actors. 521 U.S. at. 935. The Court reached this conclusion because the law commanded state officers to administer and enforce the act by conducting background checks on prospective handgun purchasers instead of regulating the activity of individuals. *Id.* Additionally, the *Murphy* court determined that the federal statute regulating sports gambling which required states to maintain their existing laws against sports gambling without change did not preempt state law because "there is no way in which this provision can be understood as a regulation of private actors." 138 S.Ct. at 1481. *But see, McGirt v. Oklahoma*, 140 S.Ct. 2452, 2477 (2020) (holding that federal preemption of crimes occurring on Indian reservations is permissible as it applies to criminal prosecutions occurring on Indian reservations).

Here, the first preemption requirement is not met because the ICWA was not within Congressional power to establish. The Constitution does not provide Congress the power to

regulate state law created claims. Furthermore, Congress does not have the Constitutional authority to direct states to operate in a certain way when enforcing these claims. As the Court stated in *Murphy*, solely pointing to the Supremacy Clause does not confer upon Congress the power to regulate in any manner it sees fit. While Congress does have control over some Indian affairs, it cannot dictate how states operate child custody claims solely because the child involved is of Indian descent. Unlike the criminal matters at issue in *McGirt*, the nature of a child custody claim should be left to state control. Further, *McGirt* is distinguishable because nowhere in the record does it state that any of the events at issue occurred on an Indian reservation. In conclusion, the ICWA does not preempt state law because Congress did not have the Constitutional authority to establish the law.

The second requirement for a federal law to preempt a state law is also not met. While the ICWA does regulate private parties, it also regulates states and state officials. Like the federal regulation in *Printz*, the ICWA does not equally regulate individuals and states. Instead, the ICWA forces state courts and court officials to implement an absolute placement preference when handling an Indian child custody case. Furthermore, state officials, not individuals, are forced to keep records of the placement and proceedings and must send these records to the federal government. As the Thirteenth Circuit stated, "[t]hrough the ICWA, Congress regulates States and their officials, not individuals." R. at 16. This Court has long held that Congress does not have any authority to regulate state officials, and therefore, the ICWA does not preempt state law, and the Court should affirm the Thirteenth Circuit's decision.

In conclusion, the ICWA violates the anticommandeering doctrine because it commands states to enforce federal law, requires states to expend significant resources, and regulates state officials.

II. The ICWA's racial classification fails to satisfy strict scrutiny under the Fifth Amendment because it does not serve an economic, political, or otherwise compelling interest and it is not narrowly tailored to its express objective.

The ICWA is unconstitutional under the Fifth Amendment because its racial classification does not further a compelling interest, nor is it narrowly tailored to achieve its objective. The Fifth Amendment's Due Process Clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. This clause ensures equal protection for all persons under the law, and is similar to the Fourteenth Amendment's Equal Protection Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

In interpreting the constitutional right to equal protection under the law, this Court has established that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Based on this premise, race-based classifications are treated as "immediately suspect" and subject to "the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 215, 216 (1944). Strict scrutiny dictates that the classification "must serve a compelling governmental interest and must be narrowly tailored to further that interest." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995). The Court should affirm because the ICWA cannot satisfy "the very heavy burden of justification which the [Constitution] has traditionally required of [] statutes drawn according to race." *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

A. The ICWA relies on an impermissible race-based classification that uses ancestry as a proxy for race, and does not trigger the deference given to quasi-sovereign entity.

The ICWA's sweeping definition of "Indian Child" is unconstitutional because it extends beyond tribal membership and is not intended to further the economic and political goals of Indian Tribes as quasi-sovereign entities.

i. *The ICWA's definition of "Indian Child" unlawfully extends beyond tribal membership.*

The Court should affirm because the ICWA is based entirely on an impermissible racial classification. When determining whether a racial classification is invidious, "[this Court has] observed that 'racial discrimination' is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" *Rice v. Cayetano*, 528 U.S. 495, 515 (2000) (quoting *St. Francis Coll. v. Al–Khazraji*, 481 U.S. 604, 613 (1987)). In *Rice*, the statute at issue only permitted Hawaiians and Native Hawaiians to vote for the Office of Hawaiian Affairs Board of Trustees members. *Id.* at 509. Hawaiian was defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.* (quoting Haw. Rev. Stat. §§ 10–2). A Native Hawaiian was similarly considered "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778." *Id.* The Court held that these definitions "did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise." *Id.* at 513. This method of using ancestry as a "proxy for race" is impermissible. *Id.* at 514. In contrast, the Court upheld a seemingly race-based classification in *United States v. Antelope*, because "respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe.". 430 U.S. 641, 646 (1977).

Here, like in *Rice*, the ICWA does not mention race, but uses ancestry as a proxy for race. The ICWA defines "Indian Child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe *or* (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. §1903(4) (emphasis added). This language extends the classification to include not only tribal members but also those with eligibility based on biological lineage, taking it beyond the application of *Antelope*'s precedent. Thus, the ICWA's impermissible reliance on ancestry as a proxy for race is unconstitutional discrimination in accordance with this Court's holding in *Rice*.

ii. *The ICWA's application to non-tribal members removes the deferential protection otherwise afforded to quasi-sovereign entities.*

The Court should hold that the ICWA violates equal protection rights because it does not serve an economic or political purpose and, therefore, is not entitled to the same deference given to classifications intended to further the functions of a quasi-sovereign entity. The context of the classification is fundamental in concluding whether invidious racial discrimination has occurred. *Compare Rice*, 528 U.S at 522 (determining that since "the elections for [Office of Hawaiian Affairs] trustee are elections of the State, not of a separate quasi sovereign," the racial classification was unconstitutional), *with Morton v. Mancari*, 417 U.S. 535, 542 (1974) (upholding a classification where the statute was implemented to provide Indians with "a greater degree of self-government, both politically and economically"). Where race is used as a determinative factor outside of serving a quasi-sovereign entity's economic and political efforts, the distinction relies "on the demeaning premise that citizens of a particular race are somehow more qualified than others." *Rice*, 528 U.S. at 523.

In contrast, the Court has determined that classifications related to self-government as constitutional. *See Morton*, 417 U.S. at 542; *Antelope*, 430 U.S. 645–646. In *Morton*, the Court

upheld a hiring structure within the Bureau of Indian Affairs ("BIA") that provided a preference for Indians over other applicants to make the organization "more responsive to the interests of the people it was created to serve." 417 U.S. at 543. The court differentiated the classification as not a discrete racial group, "but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. In this way, "the legal status of the BIA is truly *sui generis*." *Id.* However, the Court declined to extend this rationale to "any other Government agency or activity" or to permit a more complex "blanket exemption." *Id.* Similarly, *Antelope* upheld a federal conviction for a crime committed on a reservation based on the "unique status of Indians as 'a separate people' with their own political institutions." 430 U.S. at 646.

Here, the ICWA's racial classification cannot reasonably be tied to quasi-sovereign self-government justifications when it impacts only the most intimate of social dynamics–that of the nuclear family. The language of the ICWA itself supports this distinction, pointing to the "cultural and social standards" giving rise to the law, not political or economic concerns of self-government. 25 U.S.C. § 1901(5). In the absence of the valid justification of political or economic concerns of self-government, this racial classification will be held to a more stringent standard. The Department of Justice (DOJ) outlined this issue saying:

> Assuming, as [the DOJ does], that a court would apply a stricter standard of review than it had to apply in . . . the *Morton* case and in the *Antelope* case, the question would be whether the interest that you have identified . . . would be deemed compelling enough to overcome what is clearly a classification based on race.

Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs, 95th Cong. 122 (1981) [Hereinafter *Hearings on S. 1214*] (statement of Larry Simms, attorney/adviser, Office of Legal Counsel, U.S. Dep't of Justice). The DOJ expressed the belief that the Court "would scrutinize

very closely" any classification, which "would set up a possibility for people being classified solely on the basis of the amount, the percentage of Indian blood." *Id.* at 120; *see also Tribal Enrollment Process*, U.S. Dep't of Interior (last visited Sept. 21, 2022) (stating that, though tribal enrollment processes vary by tribe, membership based on traceable lineage and "tribal blood quantum . . . are common"). The DOJ argued against a classification based on lineage instead of membership by requesting that the ICWA only require parental "consent" for non-member Indian children. *Id.* at 121. Instead, the ICWA still features a transfer provision that would give the Indian child's tribe exclusive jurisdiction over children residing outside the reservation so long as it is "absent [parental] objection." 25 U.S.C. § 1911(b). As the DOJ has made clear, this passive consent is insufficient in situations like this case where Baby S's custodian has consented to the State's adoptive placement with the Donahues. Unlike the provisions at issue in *Morton* and *Antelope*, the ICWA does not serve an economic or political purpose and, therefore, is not entitled to the same preference justifications of a quasi-sovereign entity. Thus, strict scrutiny should apply.

B. The ICWA does not further a compelling interest because it relates only to social and cultural values, and any governmental interest is overcome by its discriminatory effect.

The Court should affirm because the ICWA does not further a compelling interest under the strict scrutiny standard and its discriminatory impact overcomes the expressed interest. In assessing the validity of a statute's purpose, this Court stated "[t]he justification . . . must not rely on overbroad generalizations about the different talents, capacities, or preferences of [different groups]." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Further, the Court has long since dispensed with the archaic idea that a statute can be justified based on any inherent characteristic of a racial group. *Id.* at 533 (stating in dicta that "supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications").

i. *The ICWA's purpose does not align with the compelling interests of quasi-sovereign self-government that are supported by this Court's precedent.*

The ICWA's stated purpose does not meet the necessary threshold of a compelling interest sufficient to survive strict scrutiny. This Court has determined that laws intended to further economic and political purposes are entitled to higher deference than other less compelling interests. *See, e.g., United States v. Carolene Prods Co.*, 304 U.S. 144, 147 (1938) (giving greater deference to a compelling economic interest regarding the sale of goods in commerce); *Peña*, 515 U.S. at 224 (holding that "[p]olitical judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, [ ] but the standard of justification will remain constant") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (plurality opinion)). Accordingly, the Court in *Morton* upheld the BIA hiring structure largely because "the preference is reasonable and rationally designed to further Indian self-government." 417 U.S. at 555. Outside of these limited contexts, the interests behind race-based classifications are less likely to be sufficiently compelling. The Court in *Rice* explained that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." 528 U.S. at 517. Further, in *Loving v. Virginia*, the Court identified the interests of preserving "racial integrity" and preventing "the obliteration of racial pride" as unconstitutional endorsements of supremacy that do not withstand strict scrutiny. 388 U.S. 1, 7 (1967).

Unlike the preference at issue in *Morton*, the ICWA does not further the political or economic goals of a quasi-sovereign entity, but rather only serves to "to recognize . . . the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). The ICWA's social and cultural objectives, while understandable, are not sufficient to

withstand the elevated standard of strict scrutiny that exceeds the rational basis review applied in *Morton*. In this way, this case is distinguishable from cases, such as *Carolene Prods Co.*, *Peña*, and *Morton*, which afforded higher deference to the governments' compelling economic and political interests. Further, the ICWA reflects the overbroad generalizations and inherent differences that the Court has identified as unconstitutional in *Virginia*.

Additionally, marriage and child-rearing are liberties that have traditionally been protected from government interference. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (listing both protected liberties alongside one another: "the right . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."); *Loving*, 388 U.S. at 7 (holding that, though "marriage is a social relation subject to the State's police power," a statute banning interracial marriage is a violation of the Fourteenth Amendment). Further, the DOJ expressed its opinion that for the ICWA to be constitutional "a compelling governmental interest would have to be shown to justify denying parents and guardians who are not tribal members access to the state courts" and that, in its view, "no such compelling interest has been demonstrated." *Hearings on S. 1214* at 222 (statement of Larry Simms, attorney/adviser, Office of Legal Counsel, U.S. Dep't of Justice).

Adopting and raising children, much like the right to be married at issue in *Loving*, should be treated with greater respect by the courts to protect against interference with such a sacred liberty. Strict scrutiny sets a high bar to reserve the individual liberty of child rearing to police powers that favor compassion and competence over government interference. In the same way that this Court in *Rice* struck down a statute based on a "demeaning premise," the Court should similarly hold the ICWA as unconstitutional for suggesting that some individuals are

better suited for parenting based on their race. Therefore, the ICWA's purpose does not serve a compelling governmental interest and should be held unconstitutional.

ii. *The ICWA's express purpose is not compelling in light of its actual discriminatory effect.*

The Court should hold that the ICWA is unconstitutional because its practical effect negates the already insufficient express purpose. When determining whether the government's interest is sufficiently compelling to withstand strict scrutiny, this Court looks to both the statute's express purpose and its actual effects. *Rice*, 528 U.S. at 517 (holding that the State's interest was "undermined by its express racial purpose and by its actual effects"). Even seemingly admirable goals that would otherwise be considered compelling can be defeated by their discriminatory effect. *Id.* at 515. Further, every race-based classification is subject to strict scrutiny, regardless of whether the program is remedial. *Peña*, 515 U.S. at 226 ("More than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system."). *City of Richmond v. J.A. Croson Co.* emphasized this point explaining that: "The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." 488 U.S. 469, 505–06 (1989).

Rice demonstrates how the discriminatory effect of a statute can defeat a government's interest. 528 U.S. at 515–16. This Court held that even the respectable State efforts to "treat the early Hawaiians as a distinct people, commanding their own recognition and respect" and "to preserve that commonality of people to the present day" were not compelling enough to overcome its blatant discriminatory impact. *Id.* at 515. The Court rejected Hawaii's argument that the voting scheme reflected a fiduciary-beneficiary relationship, stating that in effect it was

founded on a "demeaning premise" that race somehow inherently qualified individuals with the skills necessary to vote. *Id.* at 523.

Here, the governmental interest in preserving cultural and social integrity is impermissible in light of the discriminatory impact, particularly in the child welfare context. Instability causes irreparable damage to children who have been frequently relocated within the child welfare system. *See e.g., What Impacts Placement Stability?*, Casey Family Programs (Oct. 3, 2018) ("Child development research tells us that children need consistency, predictability, and attachment to a caring adult to thrive. This is especially true for children in foster care, who have experienced trauma leading up to and including removal from their home and community."). Further, "frequent changes in placement for foster care children" have been associated with poor psychological and physical health outcomes impacting both their childhood development and adult lives. Christian M. Connell, et al., *Changes in Placement Among Children in Foster Care: A Longitudinal Study of Child and Case Influences*, 80 Soc. Serv. Rev. 398, 398 (2006).

The ICWA's absolute preference policy allowing the removal of a child from a non-Indian family at any point in the child welfare proceedings is detrimental to the children it seeks to protect. The grave reality undercuts the importance of its stated purpose of "protecting Indian children." 25 U.S.C. § 1901(3). Baby S has now spent over two years in the capable custody of the Donahues, which is eight times as long as he spent with any relatives. To move the child now would be cruel in light of the connection and security he has developed in the Donahues' home. If anyone is capable of raising a child in a compassionate home, it is those who have met the high qualifications and endured the rigorous procedural process required to become certified by the state as a foster parent. These onerous requisites to foster parenting counter the "demeaning premise" within the ICWA's absolute preference that suggests some people are inherently better

suited to parent children based on race alone. Especially in this case, where the Donahues have taken in not one, but two, children of Indian descent. Thus, the ICWA is unconstitutional because its harmful and discriminatory effects severely undercut its express purpose.

C. The ICWA is not narrowly tailored to further its express purpose because it is overly broad, features an absolute preference, and imposes an undue burden.

The ICWA is overly broad by both maintaining "unequal standards for 'Indian children' and 'Indian families'" and by extending beyond the bounds of tribal reservations. R. at 18. While "[n]arrow tailoring does not require the exhaustion of every conceivable race-neutral alternative . . . [it] does, however, require serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

i. *The ICWA is overly broad because it applies outside of tribal territory and to non-tribal members.*

The Court should affirm because the ICWA's application to children who are not members of tribes and do not reside on reservations does not meet the strict scrutiny standard that the law be narrowly tailored to achieve its purpose. Tribal authority extends only to events occurring on reservations or involving tribal members. *See Antelope*, 430 U.S. at 642 (holding that "[b]ecause the crimes were committed by enrolled Indians within the boundaries of the Coeur d'Alene Indian Reservation, respondents were subject to federal jurisdiction"); *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Montana*, 424 U.S. 382, 389 (1967) (per curiam) (holding that a state court had no jurisdiction over an adoption proceeding that took place on an Indian reservation and involved only tribal members); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020) (holding that crimes committed within Indian territory are within the exclusive jurisdiction of the federal prosecution for purposes of the Major Crimes Act). In addition, the DOJ recognized the potential for constitutional challenges to the overbreadth of the ICWA. It

rightly suggested that its application should be limited, in accordance with precedent, to incidents where "the Indian child is residing on the reservation with a parent or custodian who has legal custody." *Hearings on S. 1214* at 42 (statement of Larry Simms, attorney/adviser, Office of Legal Counsel, U.S. Dep't of Justice).

Here, the ICWA goes beyond the bounds of precedent. The provisions defy a clear dividing line that has been establishing jurisdiction for half a century. Further, each of these precedents applies only to a tribe's interest in its own members. None of the cases deigns to diminish each tribe's integrity by conflating them all into one homogenous group as the ICWA attempts to do. Chief Judge Tower noted in his concurrence that the "ICWA's provisions are overinclusive and therefore not narrowly tailored" by "conflat[ing] all Indian tribes together." R. at 18–19. Therefore, the ICWA is overbroad in definition and application in violation of the Constitution.

ii. *The ICWA's absolute preference provisions fail to comply with the "plus" factor structure requirement for race-based classifications.*

The Court should affirm because the ICWA implements an impermissible absolute placement preference based on race. This Court has held that a race-based absolute preference is unconstitutional even when presented as a remedial measure. *City of Richmond*, 488 U.S. at 508. In *Grutter v. Bollinger*, the Court explained that "truly individualized consideration demands that race be used in a flexible, nonmechanical way." 539 U.S. at 334. *Grutter* involved an admissions preference implemented to achieve a class enrollment of 350 students "with varying backgrounds and experiences" out of 3,500 applicants. *Id.* at 312–314. The law school admissions structure in *Grutter* was upheld largely because the school considered race a "plus factor" along with other diversity factors such as travel experience, fluency in multiple languages, personal adversity, family hardship, community service, and career experience. *Id.* at 338. To satisfy the "plus

factor" standard outlined in *Grutter*, race cannot be a defining feature in the race-conscious structure. *Id*. at 337 ("There is no policy, either de jure or de facto, of automatic acceptance or rejection based on any single 'soft' variable.").

Here, although race may only be measured as a "plus factor" while considering other characteristics, the ICWA considers race a determinative factor in foster placement without weighing any other characteristics. The benefits of cultural identification within a foster home must be weighed as one factor, along with consideration of the potential benefits of staying with other capable families. In creating an absolute preference, all other important factors are overlooked, such as the psychological and emotional benefit of stability offered by maintaining the same foster home for a child. The rigidity of the ICWA also fails to consider that by staying with his foster family of over two years, Baby S would not only gain parents but also a sister who shares his Indian ancestry with the Quinault tribe. Further, the tribe's preference would require Baby S to move out of West Dakota, compounding the already tremendous amount of change the child has experienced at his young age.

Furthermore, the ICWA's absolute preference provisions must be considered in the context of the child welfare system, which is demonstrably different from that of the law school admissions context of *Grutter*. In contrast to the preference structure in *Grutter* that narrowed a pool of 3,500 applicants to a mere 350, the ICWA seeks to impose an inflexible, categorical preference to the deficit of the foster care system where 214,421 households are able to foster the more than 400,000 children that needed homes. John Kelly, *Who Cares 2020: Executive Summary*, The Imprint (Nov. 10, 2020, 6:57 PM). Further, in West Dakota, twelve percent of all foster care children are subject to the burdens and interruptions imposed by the ICWA. This extreme deficit is evidence that restrictions, such as the absolute preference in the ICWA, are

inappropriate for the child welfare context. Because the statute follows an absolute racial preference and does not consider any other factors, it fails to meet the standard set by this Court's precedent to satisfy the narrow tailoring requirement.

iii. *The ICWA imposes an undue burden by allowing an intervening placement at any point in child custody proceedings.*

The application of the "Indian Family" preference at any point in child custody proceedings imposes an undue burden on the disfavored class. The Court in *Grutter* recognized Justice Powell's argument in *Bakke* that remedial measures "would risk placing unnecessary burdens on innocent third parties who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Grutter*, 539 U.S. at 324 (internal quotations omitted). To satisfy the narrow tailoring component of strict scrutiny, the race-based policy at issue "must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'" *Id.* at 341 (quoting *Metro Broad. v. FCC*, 497 U.S 547, 630 (1990)). In contrast to *Grutter*, the Court held that the minority preference policy at issue in *FCC* was not unduly burdensome to non-minorities. 497 U.S. at 600. This was largely because the preference did not revoke any broadcast licenses awarded to non-minority companies and allowed them to "apply for a new station, buy an existing station, file a competing application against a renewal application of an existing station, or seek financial participation in enterprises that qualify for distress in the sale treatment." *Id.*

Here, unlike the policy in *FCC*, the ICWA revokes an expectation by allowing the tribe to intervene with an alternative placement at any point in the proceeding. The facts at issue in a family court proceeding are inherently distinguishable from the emotionless, straightforward sale and competition of broadcasting licenses. Baby S has now been with the Donahues for two years. At the *start* of the adoption proceedings, the child had been with the Donahues longer than he

had been in the custody of any blood relative. To be stripped of the parental bond between a foster mother and father and their foster child after having spent the most formative months of the child's life together is undoubtedly an unjust and undue burden.

Finally, the ICWA is not in accordance with the customary practice of state court proceedings which rightfully recognize the damage that instability and breaking formative bonds can have on a young child. Federal standards already recognize the value of maintaining familial bonds and prefer a placement with a relative who is willing and able to adopt, independent of the requirements of the ICWA. 42 U.S.C. § 671(a)(19). In this provision, the goal of maintaining ancestral ties is accomplished by identifying available relatives "within 30 days after removal" without imposing an absolute preference at any point in the proceeding. *Id.* § 671(a)(29). Instead, the preference for "an adult relative over a non-related caregiver" is balanced alongside other important considerations that would ultimately lead to the best outcome for the child. *Id.* § 671(a)(19). These simple features, which are absent in the ICWA, would reflect narrow tailoring to the government's stated interest while not placing an undue burden on foster families or the foster children the ICWA purports to protect. In conclusion, the ICWA is not narrowly tailored because of the undue burden it places on non-Indian families, undercutting its stated purpose and inhibiting the welfare of the child. For these reasons, the ICWA violates the equal protection component of the Fifth Amendment's Due Process Clause.

D. Even if the Court were to deny that a suspect racial classification exists, the ICWA still fails to meet the standards of rational basis review.

The Court should hold that the ICWA fails to satisfy even the lower level of scrutiny under rational basis review. When a court deems a statutory provision not facially discriminatory, it must determine whether the "statute depriving the suitor of life, liberty or property had a rational basis" for doing so. *Carolene Prod. Co.*, 304 U.S. at 152. Under rational

basis review, the statute must "bear a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Even in a situation that does not involve a suspect class or fundamental right, any laws that impose "countervailing costs" on a "discrete class" "can hardly be considered rational unless it furthers some substantial goal." *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (determining that Texas violated the Equal Protection Clause under rational basis review by denying undocumented children free public education without a substantial state interest).

Here, the overbroad provisions outlined in § 1915(a) and (b) granting an absolute preference to Indian foster and adoptive families are not rationally related to the government's objective. Similar to the children in *Plyler*, the Indian children subject to governance by the ICWA based on their parent's tribal affiliation or their own eligibility for membership "can affect neither their parents' conduct nor their own status." *Plyler*, 457 U.S. at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)). As noted by Chief Judge Tower in his concurrence in the Thirteenth Circuit's decision, under the ICWA, children may be placed with other Indian families "regardless of whether the child is eligible for membership in that person's tribe." R. at 19. By preferring a placement with *any* Indian family regardless of their tribal affiliation, the government diminishes its objective of achieving a placement that will "reflect the unique values of Indian culture" associated with the child's tribal membership or eligibility. Further, it debases Indians' identities by failing to recognize the unique cultural differences that distinguish each tribal entity and instead conflates them into one homogenous group.

Moreover, the source the District Court relied on in defending the overbreadth of § 1915(a) and (b) undermines its claim that the shared culture of different tribes can justify a placement outside of the child's tribe. The District Court's cited article, *Chickasaws: The*

Unconquerable People, highlights that "[a]t various times the Chickasaws warred against the Choctaws, the Creeks, [and] the Cherokees." Greg O'Brien, Mississippi History Now (May 2003). O'Brien describes the history of the relationship between Indian tribes as "a long era of intermittent . . . warfare" and "decades of conflict." *Id.* Surely this grave history of confrontation among tribes is equally as important to acknowledge as any oversimplification of the tribes' shared "linguistic, cultural, and religious traditions." R. at 11. Therefore, the ICWA is unconstitutional not only under the strict scrutiny analysis but even the lower standard of rational basis review.

In conclusion, the ICWA violates the Fifth Amendment by using ancestry as a proxy of race to impose an unlawful race-based classification that does not further a compelling economic, political, or quasi-sovereign self-government interest and is not narrowly tailored to achieve its express social and cultural objectives.

CONCLUSION

The Court should affirm because the ICWA violates the Tenth Amendment by infringing on states' rights and the Fifth Amendment by using an impermissible racial classification that neither serves a compelling interest nor is narrowly tailored.

Respectfully submitted this the 10th day of October 2022.

James and Glenys Donahue, and
the State of West Dakota,
Respondents.

By: Team 8

COUNSEL FOR RESPONDENTS