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 JUDICIAL CIRCUIT

BRIEF FOR RESPONDENTS

Team #1
Counsel for the Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

QUESTIONS PRESENTED

I. Under the United States Constitution, does the Indian Child Welfare Act of 1978 violate the Anti-Commandeering Doctrine of the Tenth Amendment when the Act is best read to regulate states and state actors and is not based in an enumerated power?

II. Under the United States Constitution, does the Indian Child Welfare Act of 1978 violate the Equal Protection Clause of the Fourteenth Amendment when the Act discriminates based on race?

STATEMENT OF THE CASE

A. Procedural History

On June 29, 2020, the Donahues and West Dakota filed suit against the Federal Defendants in the United States District Court for the District of West Dakota in response to the Quinault Nation's opposition to the adoption of Baby S. R. at 4. On September 3, 2020, the parties filed cross-motions for summary judgment. *Id.* The Cherokee Nation and the Quinault Nation ("Tribal Defendants") filed an unopposed motion to intervene shortly after the commencement of the lawsuit, which the Court granted. R. at 2. The Honorable Judge Marcus Bray denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment. R. at 12. Plaintiffs made a timely appeal to the United States Court of Appeals for the Thirteenth Circuit. R. at 13. On December 28, 2021, the Appellate Court reversed the district court's holding and entered a judgement in favor of the Appellants. R. at 17. Thereafter, a timely petition was filed to the United States Supreme Court by the Appellants/Petitioners, Stuart Ivanhoe, Secretary of the Interior, *et al.* R. at 20. On August 5, 2020, the United States Supreme Court entered an order granting writ of certiorari.

B. Statement of Facts

West Dakota has three Indian tribes within the State's borders and Indian children constitute approximately twelve percent of West Dakota's child custody proceedings annually, including foster care as well as adoptions. *Id.* The Indian Child Baby C's biological mother is an enrolled member of the Quinault Nation, and her biological father is an enrolled member of the Cherokee Nation. *Id.* After her birth, Baby C resided with her maternal aunt. *Id.* After receiving reports that Baby C was often left unattended while her aunt worked, CPS removed Baby C from her aunt's custody and placed Baby C in foster

care with the Donahues. *Id.* Both the Quinault Nation and the Cherokee Nation were notified in compliance with ICWA requirements. *Id.* Baby C lived with the Donahues for two years, and in August 2019, Baby C's biological parents terminated their parental rights in a voluntary proceeding in a West Dakota state court. R. at 2-3. Both biological parents and the maternal aunt consented to the Donahue adoption proceedings in September 2019. R. at 3. Again, both the Cherokee Nation and Quinault Nation were notified in compliance with ICWA. *Id.* In October 2019, the Quinault Nation notified the state court that it had an alternative placement for Baby C with non-relatives in Nebraska, however for reasons not disclosed, the placement fell through. *Id.* The Donahues stipulated with CPS and Baby C's guardian ad litem that ICWA's placement preferences did not apply because no one else had sought to adopt or intervene on behalf of Baby C. *Id.* The Donahues' adoption of baby C was finalized in West Dakota state court in January 2020. *Id.*

The Donahues became foster parents to Baby S, another Indian Child, in April 2020. *Id.* Baby S's biological mother was a member of the Quinault Nation before she passed aware from a drug overdose. *Id.* The identity and location of the biological father is unknown. *Id.* With both parents absent, Baby S had been in the custody of his paternal grandmother from birth. *Id.* Due to the grandmother's failing health, she was unable to continue caring for him and Baby S was moved into foster care with the Donahues. *Id.* The following month the Donahues filed a petition for the adoption of Baby S. *Id.* The adoption had the consent of Baby S's grandmother but was opposed by the Quinault Nation. *Id.* The Quinault Nation located two potential adoptive families for Baby S located in another state. *Id.*

C. Standard of Review

This matter involves legal issues of statutory and constitutional validity relating to the Indian Child Welfare Act of 1978. The issues at bar are matters of law concerning potential Constitutional violations, specifically the Tenth Amendment and the Fifth Amendment. This Court reviews constitutional or of law under a *De Novo* standard of review and affords no deference to a lower court's ruling. A standard does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991).

SUMMARY OF THE ARGUMENT

The guiding force of this nation is the United States Constitution and the Amendments contained therein. The Constitution is the anchor to the principle of the separation of powers between branches, where the states are granted any powers not explicitly given to the federal government. The anticommandeering doctrine is a culmination of these principles and declares that it is impermissible for the federal government to directly issue orders to the states. Under this Court's decision in *Murphy v. NCAA*, a two-pronged test was established to determine when a federal law properly preempts a state law issue and does not violate the anticommandeering doctrine. The *Murphy* test requires that (1) the act represents an exercise of power granted to Congress by the Constitution and (2) be best read as one that regulates private actors.

The first prong is failed because the Indian Commerce Clause, of which ICWA is premised on, does not grant Congress the power to regulate child custody proceedings. The field of domestic relations has historically been a power granted exclusively to the states. In addition, this Court's jurisprudence has traditionally determined that the term "commerce" is not persons. The second prong also fails because the language of the statute points to Congress' intent to regulate states and state actors. When read plainly, the mandatory language of the provisions shows that the Act was designed to command the states to perform the functions of Congress. In alignment with constitutional principles, this Court has historically held that the Federal Government may not issue orders directly to the States and may not command states or state agencies to enforce federal regulatory programs. Because the recordkeeping and placement preference provisions of ICWA fail

both prongs of the *Murphy* test, the provisions violate the anticommandeering doctrine under the Tenth Amendment.

Similarly, the Equal Protection Clause of the Fourteenth Amendment prohibits States from "deny[ing] to any person within its jurisdiction the equal protection of the laws." This clause is implicitly incorporated into the Fifth Amendment's guarantee of Due Process and the same analysis with respect to Equal Protection claims under the Fifth and Fourteenth Amendments. In evaluating an Equal Protection claim, strict scrutiny applies to laws that rely on classifications of persons based on race. However, where the classification is political, the standard of scrutiny is lowered, and rational basis review applies. The Indian Child Welfare Act is legislation that draws classifications based on race and should be reviewed under strict scrutiny. When reviewed under strict scrutiny, ICWA's Indian classifications violate the Equal Protection Clause because the Act's classifications are not tailored to a compelling government interest. Additionally, ICWA's Indian Child classifications would violate a lower standard of review because they are not tied to a rational state interest.

ARGUMENT

I. THE INDIAN CHILD WELFARE ACT OF 1978 VIOLATES THE TENTH AMENDMENT BECAUSE THE ACT UNLAWFULLY COMMANDEERS STATE ACTORS.

The Constitution grants Congress certain enumerated powers, including the power to create laws and to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8. However, the powers of Congress are not absolute. The Tenth Amendment states 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. That is, besides the enumerated powers specifically granted to Congress, "all other legislative power is reserved for the States, as the Tenth Amendment confirms." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). In fact, this Court has said that "[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse. . . ." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

The anticommandeering doctrine evolved as a means to maintain the healthy balance between the States' powers and the Federal Government. The doctrine incorporates the spirit of the Tenth Amendment and prevents federal intrusion into matters historically reserved to the states, including domestic relations and child custody issues. It is described as "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,* 138 S. Ct. at 1475. However, the anticommandeering doctrine does not preclude

Congress from enacting legislation for matters of importance. Rather, this Court has found that "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *New York v. United States*, 505 U.S. 144, 178 (1992).

Even when Congress passes legislation for a federal interest in which it issues orders directly to the states, such as ICWA, such legislation does not automatically impede upon state sovereignty. This Court addressed this issue and created a two-pronged test in *Murphy*, establishing the parameters of when federal provisions may supersede and preempt state law. *Murphy,* 138 S. Ct. at 1479. First, the act must "represent the exercise of a power conferred on Congress by the Constitution" and second, the act "must be best read as one that regulates private actors." *Id.* In passing the Indian Child Welfare Act, Congress violated the anticommandeering doctrine by acting outside the bounds of any enumerated power granted to it and by conscripting state actors to comply with the burdensome recordkeeping and placement preference provisions of the act.

A. The Indian Child Welfare Act Of 1978 Violates The Tenth Amendment Because It Was Not Enacted Under Any Enumerated Power Granted To Congress.

Congress is acting properly when it legislates according to the enumerated powers granted to it by Article I, Section 8 of the Constitution. When enacting the Indian Child Welfare Act, Congress stated that the Indian Commerce Clause and "other constitutional authority" granted it plenary power over the affairs of Indians. 25 U.S.C. § 1901(1). This Court held that "the central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs." *United States v.*

Lara, 541 U.S. 193, 200 (2004) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

However, the extent of Congress' reach under the Indian Commerce Clause has not been directly addressed by this Court, resulting in confusion and inconsistency. This Court's decision in *Seminole Tribe of Florida v. Florida* surrounded Congress' passage of the Indian Gaming Regulatory Act. 517 U.S. 44, 47 (1996). The Act was passed under Congress' Indian Commerce Clause power and provided Indian tribes with the ability to seek licenses for gambling operations from states, with the states being required to negotiate in good faith. *Id.* Should a state not operate in good faith, the tribes were granted a remedy to sue the state in federal courts. *Id.* This Court held that the Indian Commerce Clause did not give Congress the power to abrogate the sovereign immunity of states in violation of the Eleventh Amendment. *Id.* However, this Court remained silent on the exact extent of Congress' powers under the Indian Commerce Clause. *Id.* at 62-72.

For the past two hundred years, this Court has elaborated on the general meaning of "commerce" under the Constitution. In *Gibbons v. Ogden*, the dispute centered around the State of New York granting an exclusive license to Aaron Ogden to navigate its waters by steamboat and to allow for the exclusion of others to navigate those waters. 22 U.S. (1 Wheat.) 1, 1-2 (1824). Ogden filed suit against Thomas Gibbons, who had received a license under an act of Congress to operate his own steamboats in New York waters and claimed that it granted him the rights to operate the boats. *Id.* at 2-3. This Court held that the exclusive license granted by New York State was in violation of the Constitution and void. *Id.* at 240. When analyzing the term "commerce," the Court noted that "the correct definition of 'commerce' is, the transportation and sale of commodities" and that people

are distinctly different from commerce. *Id.* at 76. Further, this Court reasoned that "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Id.* at 188.

In 1865, this Court again addressed the understanding of "commerce" found in the Constitution. In *United States v. Holliday*, this Court considered the constitutionality of an 1862 act of Congress that stated that a person would be fined five hundred dollars and subject to imprisonment should they sell "spiritous liquors" to an Indian in Indian country. 70 U.S. 407, 417 (1865). This Court looked to the reasoning of *Gibbons* and found that the act regulated both traffic and interactions with the Indian tribes and involved the exchange of good and commodities. *Id.* This Court held that that Act was a regulation of commerce under the powers granted to Congress and noted that "commerce with the Indian tribes, means commerce with the individuals composing those tribes." *Id.*

The understanding of "commerce" has continued to develop as one aimed at truly commerce-related activities. In 1995, this Court rejected the argument in *United States v. Lopez* that an act passed by Congress meant to prevent the possession of guns in schools was a valid use of Congress' commerce power. 514 U.S. 549, 567-68 (1995). In *Lopez*, a high-school student was convicted of violating the Gun-Free School Zones Act of 1990, where "Congress made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" *Id.* at 551. This Court held that the Act was not rationally related to an activity that would substantially affect interstate commerce. *Id.* at 567. To hold otherwise would be to

impermissibly "pile inference upon inference" of what commerce truly is and would broaden the commerce power to areas only tenuously related. *Id.* at 564-67.

Even as recently as 2013, the concept of "commerce" as it relates to the Indian Commerce Clause has remained ambiguous, though this Court's jurisprudence in general areas of commerce has evolved. In 2013, this Court addressed the intervention provisions of ICWA when a lower court's decision ultimately resulted in a 27-month-old child to be removed from her adoptive parents and placed in the custody of her biological father, whom she had never met. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013). Though the majority did not address the constitutionality of the act nor whether the Indian Commerce Clause granted Congress the power to enact ICWA, Justice Thomas noted in his concurrence that "neither the text nor the original understanding of the Clause supports Congress' claim to such 'plenary' power." *Id.* at 659. Because domestic relations and child custody have historically been an exclusive power given to the states and not to Congress, Justice Thomas questioned "whether the Constitution grant[ed] Congress power to override state custody law whenever an Indian is involved." *Id.* at 656-58. He observed that the statute's language did not give the term "commerce" the ability to regulate noneconomic activity like the adoption of children. *Id.* at 659. Nor did the phrase "'with the Indian *tribes* . . . give Congress the power to regulate commerce with all Indian *persons*. . . ." *Id.* at 660. Justice Thomas determined that "[a] straightforward reading of the text, thus, confirms that Congress may only regulate commercial interactions – 'commerce' – taking place with established Indian communities – 'tribes.' That power is far from 'plenary.'" *Id.*

Even though the existing jurisprudence is ambiguous on the power the Indian Commerce Clause grants to Congress, Justice Thomas' analysis is rooted in both the

history and tradition of this Court's position of what commerce is. Historically, this Court has determined that areas such as child custody are not under the purview of "commerce" because finding so would mean that Congress could regulate the activity of anything. *Lopez,* 514 U.S. at 564. Further, this Court has said for close to two hundred years that people are not commerce and commerce is generally understood to mean goods, commodities, and activities affecting both. *See Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, (1824); *United States v. Lopez*, 514 U.S. 549 (1995). A plain reading of the Indian Commerce Clause coupled with the historical understanding that states exclusively regulate child custody proceedings show that ICWA cannot be held as an act originating from an enumerated power of Congress. Because ICWA was not created under an enumerated power, it fails the first prong of the *Murphy* test and improperly commandeers the states in violation of the Tenth Amendment.

B. The Indian Child Welfare Act Of 1978 Violates The Tenth Amendment Because It Unlawfully Regulates States And State Actors.

Congress' stated goal in enacting the Indian Child Welfare Act was to protect Indian children, which it deemed to be the most vital resource to Indian tribes as a whole. 25 U.S.C. § 1901. However, Congress drafted both the recordkeeping provision and the placement preference provision in a way that is best read as impermissibly commandeering the state and its agencies.

The second prong of the *Murphy* test requires the act "be best read as one that regulates private actors." *Murphy,* 138 S. Ct. at 1479. This Court has determined that when interpreting statutes, there is a "judicial duty to give faithful meaning to the language Congress adopted in light of the evident legislative purpose in enacting the law in question." *Graham County Soil and Water Conservation Dist. v. U.S.*, 559 U.S. 280, 298

(2010). Further, "a provision unambiguously imposes a binding obligation on the States when 'the asserted right [is] couched in mandatory, rather than precatory, terms.'" *Burban v. City of Neptune Beach, Florida*, 920 F.3d 1274, 1279 (11th Cir. 2019) (quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)). Typically, language such as "must" and "shall" would indicate mandatory terms. *Id.*

Though issues involving the Tenth Amendment are not new, the pioneering case establishing the anticommandeering doctrine occurred in 1992. *New York v. United States*, 505 U.S. 144, 161 (1992). In *New York*, the State challenged the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that required states to provide for disposal of radioactive waste generated inside their borders in a specified manner. *Id.* at 149. This Court found that the "take title" provision of the Act was beyond the authority of Congress and unlawfully commandeered the states. *Id.* at 176. The Court noted that the Constitution "confers upon Congress the power to regulate individuals, not States." *Id.* at 166. The take title provision "offer[ed] state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress." *Id.* at 175. This Court stated that "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." *Id.* at 176. As a result, the provision exceeded constitutional authority and unlawfully commandeered the State because it mandated specific obedience to the federal instructions and did not give the State a choice in how to regulate. *Id.*

Five years later, this Court again addressed the principles of anticommandeering when Congress amended the Gun Control Act of 1968 to include the Brady Act, which would require "the Attorney General to establish a national instant background-check

system by November 30, 1998" and have law enforcement officers perform certain duties in the interim relating to background checks of gun purchasers. *Printz v. United States*, 521 U.S. 898, 902-04 (1997). Using the reasoning of *New York*, this Court held that the interim provision in the act unlawfully commandeered the states and "the Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officer, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 935. It reasoned that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service . . . the police officers of the 50 States." *Id.* at 922.

Using the principles established in both *New York* and *Printz*, this Court found that an act of Congress regulating personal driver's information of state motor vehicle departments did not unlawfully commandeer states and did not violate the Tenth Amendment. *Reno v. Condon*, 528 U.S. 141, 143 (2000). In *Reno*, Congress passed the Driver's Privacy Protection Act of 1994, which "establish[ed] a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent." *Id.* at 144. This Court held that the Act was a "proper exercise of Congress' authority to regulate interstate commerce under the Commerce Clause." *Id.* at 148. The Court reasoned that "[b]ecause drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation. *Id*.

More recently, this Court again determined that Congress unlawfully commandeered the states when it made it "unlawful for a State to 'authorize' sports gambling schemes." *Murphy*, 138 S. Ct. at 1468. In *Murphy*, Congress passed the

Professional Sports Protection Act, which contained a provision that made it "'unlawful' for a State or any of its subdivisions" to promote any sports gambling scheme in competitive sporting events. *Id.* at 1470. Should a violation be found, a remedy was included in the legislation that allowed both the Attorney General and professional and amateur sports organizations to file a civil suit against the violators. *Id.* at 1470-71. This Court established a two-pronged test for determining when a federal provision permissibly supersedes and preempts state law, finding that first, the act must "represent the exercise of a power conferred on Congress by the Constitution" and second, the act "must be best read as one that regulates private actors." *Id.* at 1479. Using this test, this Court found that the provision violated the anticommandeering doctrine because it "unequivocally dictate[d] what a state legislature may and may not do." *Id.* at 1478.

When looking at both the recordkeeping and placement preference provisions of the Indian Child Welfare Act, the language is couched in mandatory terms that is directed towards states and their agencies. The placement preference provision states that, "[i]n *any* adoptive placement of an Indian child under State law, a preference *shall* be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) (emphasis added). Like the provision in *New York*, the placement preference does not give room for state involvement at all. The terms are couched in mandatory language and point to Congress implying them to be compulsory and not "preferences" like they are worded. The language also implies a directive to the state agencies and not to Indian individuals. While the provisions may serve to provide

protections to Indian children and families, the reality is that the provisions command specific state action.

The recordkeeping requirements similarly point to Congress directing state action in this field. The provisions state that records "*shall* be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference . . . [s]uch record *shall* be made available at any time upon the request of the Secretary or the Indian child's tribe." 25 U.S.C. § 1915(e) (emphasis added). The Act goes on to state that State courts "*shall* provide the Secretary with a copy of such decree or order together with such other information as may be necessary . . . ." 25 U.S.C. § 1951(a) (emphasis added). The language of "shall" throughout the Act unambiguously commandeers the states and directs it to comply with the mandatory requirements absent any alternative choice.

Further, the recordkeeping and placement preferences differ from the Act in *Reno* in several ways. In *Reno*, the act regulated tangible information that could substantially be tied to commerce, which granted Congress the right to regulate it under the Commerce Clause. Here, the provisions regulate child custody proceedings, which involve people and are historically under the exclusive purview of the states. Because the provisions are phrased in mandatory terms and requiring compliance, in addition to being directed towards state agencies, both the recordkeeping and placement preference provisions violate the anticommandeering doctrine under the Tenth Amendment.

II. THE INDIAN CHILD WELFARE ACT OF 1978 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT.

The Equal Protection Clause of the Fourteenth Amendment prohibits States from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. This clause is implicitly incorporated into the Fifth Amendment's

guarantee of Due Process. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The same analysis is applied with respect to equal protection claims under the Fifth and Fourteenth Amendments. *See Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995). In evaluating an Equal Protection claim, strict scrutiny applies to laws that rely on classifications of persons based on race. *Id.* However, where the classification is political, the standard of scrutiny is lowered, and rational basis review applies. *See Morton v. Mancari*, 417 U.S. 535, 555 (1974). Congress passed the Indian Child Welfare Act to address rising concerns over abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. *Miss. Band Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (referencing the Indian Child Welfare Act of 1978 Sections 1901-1963).

When reviewed under strict scrutiny, the Indian Child Welfare Act's Indian classifications violate the Equal Protection Clause of the Fifth Amendment because they are racial classifications which are not tailored to a compelling government interest. Additionally, ICWA's Indian Child Classification violate a rational basis review because they are not rationally tied a legitimate state interest.

A. ICWA's Indian Child Classifications Use Ancestry As A Proxy For Race.

When Congress passed the Indian Child Welfare Act of 1978, it was with the intent to address rising concerns over abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement. 25 U.S.C. § 1901-1902. In 1974, this Court's ruling in *Morton v. Mancari* provided guidance to lower courts in two relevant parts: first, where a law draws classifications based on race, the law must satisfy strict scrutiny and second,

when the two *Mancari* factors are present, the classification ceases to be racial and becomes political. *Mancari,* 417 U.S. at 555. In *Mancari*, this Court held that an exception exists wherein a law that draws classifications based on race, thus being subject to strict scrutiny, ceases to be racial and becomes political when two factors are present: first, the law applies only to members of federally recognized tribes and second, the legislation is aimed at federal interests in furthering tribal self-government. *Id.* at 551. This Court understood tribal self-government narrowly to mean a political and economic interest. *Id.* at 551. Under the *Mancari* exception, such a law would be considered political and subject to rational basis scrutiny. In *Mancari*, the non-Indian employees of the Bureau of Indian Affairs (BIA) brought a class action claiming that the employment preference for qualified Indians was unconstitutional. This Court held that the Indian preference "does not constitute invidious racial discrimination in violation of the Fifth Amendment, because it is reasonable and rationally designed to further Indian self-government. *Id.* at 551-55.

In the case at bar, the *Mancari* exception does not apply because neither factor is present. First, the law must apply only to members of federally recognized tribes. *Id.* at 554. Read plainly, the adverb "only" excludes anyone that is not a current member of a federally recognized tribe. Thereby excluding all others, including potentially eligible individuals that are not currently members as is the case with Baby S. Baby S's biological mother was a member of the Quinault Nation, a federally recognized tribe. However, Baby S is merely eligible for membership. As Baby S is not a member, the first factor of the *Mancari* exception is absent.

The second factor of the *Mancari* exception requires the legislation's aim to be on federal interests in furthering tribal self-government, which is understood narrowly as

political and economic interests. *Id.* at 551. The proceedings in *Mancari* were centered around an employment dispute, whereas here, the record is absent any legitimate "political or economic" interest. Here, the Quinault Nation is attempting to rip Baby S away from their most immediate family member and place them out of state with two potential Indian families. R. at 3.

In *Rice v. Cayetano*, this Court struck down a similar state statute restricting voter eligibility to native Hawaiians and positions at a state agency to those with Hawaiian ancestry. *See Rice v. Cayetano*, 528 U.S. 495, 526 (2000). This Court held that "limiting voters to those persons whose ancestry qualified them as either Hawaiian or native Hawaiian, violated the Fifteenth Amendment by using ancestry as a proxy for race and thereby enacting a race-based voting qualification." *Id*. at 498. Accordingly, this Court held that strict scrutiny applies to a prospective law that conducts such impermissible gamesmanship with the statute. *Id*. at 527. Three years after *Rice*, this Court held in *Grutter v. Bollinger* that strict scrutiny applies to all racial classification to smoke out illegitimate use of race by assuring that the government is pursuing a goal important enough to warrant use of a highly suspect tool. *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003).

Here, under Section 1903(4) of ICWA, "Indian child" is defined 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). Read plainly, a child can only be considered an Indian child if they are related to a tribal ancestor biologically. That is, ICWA's "Indian child" definition is using tribal ancestry as a proxy for race. This was the sort of gamesmanship

that was struck down and subject to strict scrutiny by this Court in *Rice*. *See Rice*, 528 U.S. at 517.

The "Indian child" definition here uses Indian ancestry as an impermissible proxy for race and absent the specific facts noted above, the *Mancari* exception, is not applicable. Pursuant to this Court's ruling in *Grutter*, the appropriate standard of review for a statute that discriminates based on a racial classification is strict scrutiny. For these forgoing reasons, ICWA's Indian child classifications should be subject to strict scrutiny.

B. Under Strict Scrutiny, ICWA's Indian Child Classifications Are In Violation Of The Equal Protection Clause Of The Fifth Amendment.

Not all governmental racial classifications are automatically invalidated by strict scrutiny. *Grutter*, 539 U.S. at 308. However, all governmental racial classifications must survive strict scrutiny. *Id.* To survive strict scrutiny review, the classifications must satisfy two requirements: first, it must be narrowly tailored, and second, it must be to further a compelling governmental interest. *Id.* Even in the limited circumstance when drawing racial distinctions is permissible in order to further a compelling state interest, the government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Id.* at 333 (citing *Shaw v. Hunt,* 517 U.S. 899, 908 (1996)).

1. ICWA Is Not Narrowly Tailored.

As it relates to the first strict scrutiny requirement, the purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493 (1989). In *Richmond*, this Court held that the City of Richmond impermissibly tailored

a local law which incorporated a "30% waiver set-aside" in order to compensate black contractors for past discrimination, because it would affect future residents. *Id*. at 506. This Court reasoned that under Richmond's scheme, the 30% quota was not narrowly tailored because a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country would enjoy an absolute preference over other citizens based solely on their race. *Id.* at 508. "We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination". *Id.*

Here, Indian children constitute approximately twelve percent of West Dakota's child custody proceedings annually. R. at 2. ICWA is not narrowly tailored because even assuming, *arguendo,* that ICWA serves a compelling government interest, ICWA's provisions are unrelated to specific tribal interests because the statute prioritizes a child's placement with any Indian family, regardless of whether the child is eligible for membership in that family's tribe. *See* 25 U.S.C. § 1915(a). Congress prefaced the enactment of ICWA to "remedy the problem of Indian families being broken up by the removal of their children. *See* 25 U.S.C. § 1901(1). However, ICWA conflates all Indian tribes together as one culture and one family rather than being narrowly tailored to maintaining the Indian child's relationship with their individual tribe. In effect, ICWA sought to remedy the removal of children from their families, but allows, as here, a child to be removed from the state in which their only immediate family member resides in and be transferred to another state. As written, this contradicts Congress's proposed purpose for enacting ICWA in the first place. As applied, ICWA is not narrowly tailored because it prioritizes a child's placement with any Indian family, which conflates all Indian tribes together, and therefore fails strict scrutiny review.

2. ICWA Is Not A Compelling Government Interest.

To survive strict scrutiny review, the classifications must satisfy two requirements: first, it must be narrowly tailored, and second, it must be to further a compelling governmental interest. *Grutter*, 539 U.S. at 308. This Court held that the provision in ICWA was not one that permits individual reservation-domiciled tribal members to defeat the tribe's exclusive jurisdiction. *Id*. at 53. However, this Court has held in *Croson* that remedying past discrimination, without more, is not a compelling interest unless remedial action is necessary. *See Croson,* 488 U.S. at 510 (citing *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 277 (1986)). This Court used a fact-based analysis in its holding that 42 U.S.C. §1983 was unconstitutional on its face. *Id.*

Here, as in *Croson*, there must be a fact intensive analysis to determine whether the remedial action was necessary to determine the presence of a compelling government interest. The proposed compelling interest has been declared by Congress to protect the best interests of Indian children and promote the stability and security of Indian tribes and families. ICWA fails to do so by conflating all Indian tribes as the same Indian culture and, in doing so, acts contrary to the proposed purpose of ICWA. The child placement preferences in ICWA would allow Baby S, who is an eligible, non-enrolled member of an Indian tribe, be uprooted from their most immediate family member and to be moved out of state to another Indian tribe. Thus, ICWA is not a compelling interest because the past discrimination against Indian tribes is not the one that ICWA's provisions are responding to and is not a compelling government interest.

C. Under The Lower Standard Of Rational Basis Review, ICWA's Indian Child Classifications Violate The Equal Protection Clause Of The Fifth Amendment Because The Legislation Is Not Rationally Tied To Furthering Tribal Self-Governance.

Assuming *arguendo* that ICWA's beneficiaries are classified according to their political status, the relevant provisions must still be rationally linked to the fulfillment of Congress' unique obligation toward Indians. *See Mancari*, 417 U.S. at 555. That is, as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. *Id.*

Under the *Mancari* exception, when the two factors are present, the law ceases to be racial and becomes political. *Id.* at 535. The first factor requires the law to apply only to members of federally recognized tribes and the second requires the legislation to aim at federal interests in furthering tribal self-governance. *Id.* at 551. That is tribal self-governance has traditionally been understood by this Court to be the appropriate rational link under this lower standard of scrutiny. *See generally United States v. Antelope*, 430 U.S. 645, 646 (1977). Tribal self-governance has been defined as advancing tribal political self-governance by transferring jurisdiction from state court to tribal and federal courts. *Id.* This Court has respected the exclusive jurisdiction of Indian tribes when the matters arise specifically from that area. *Id.* at 647. However, absent a circumstance of exclusive jurisdiction, this Court has struck down cases that dealt merely with federal regulation implicating Indian interests. *Id.* In 1976, this Court held that members of the Northern Cheyenne Tribe could be denied access to Montana State courts in connection with an adoption proceeding arising on their reservation. *Fisher v. District Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 383 (1976). That is, because the proceedings arose from an area of exclusive jurisdiction, the Northern Cheyenne Tribal Court, they were not struck down. *Id*. at 389.

Here, an example of an ICWA provisions that extends exclusive jurisdiction can be found in 25 U.S.C. § 1911(a), where it states "[w]here an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. 25 U.S.C § 1911. In contrast, § 1913, § 1914, § 1915 afford no such exclusivity. *See* § 1901-§ 1915. This inconsistency between the wording in ICWA indicates that not all the provision extends exclusive jurisdiction to the tribes. Unlike *Fisher* and *Moncari*, the case at bar is absent exclusive jurisdiction because it takes place in state judicial proceedings. R. at 5. Absent this exclusive jurisdiction, the child placement provisions do not transfer jurisdiction from state courts to tribal courts. Thereby, the ICWA provisions do not further tribal self-governance, they are not rationally related to the legislature and fail rational basis scrutiny.

Conclusion

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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