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 STATE COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

Counsel for Respondents

Team 11

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Questions Presented

I. Under Article I and the Tenth Amendment anticommandeering doctrine, does Congress have authority to enact and require states to enforce ICWA when there is no constitutional basis for plenary power and it regulates children in noneconomic child custody proceedings while conscripting West Dakota and their officials as federal agents to make policy and administer the regulations?

II. Does the Indian Child Welfare Act, facially or through a discriminatory purpose and effect, violate the Fifth Amendment by using biology and ancestry to create a racial classification in its definition of Indian that fails to be narrowly tailored to the goal of maintaining a child's relationship with the tribe?

Statement of the Case

I. Statement of the Facts

Congress enacted the Indian Child Welfare Act ("**ICWA**") in response to reports of increasing numbers of Indian children being separated, often unwarranted, from their families and tribes through adoption or foster care placement. 25 U.S.C. § 1901 (1978); R. at 4. ICWA's goal is to maintain "the Indian child's relationship with the tribe." R. at 18. ICWA attempts to achieve this goal by applying various provisions seeking "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." § 1902; R. at 4. ICWA defines an "Indian child" as "any unmarried person under eighteen who is the biological child of a member of an Indian tribe and either (a) a member of an Indian Tribe or (b) eligible for membership in an Indian tribe." § 1903(4); R. at 5.

Section 1915 of ICWA mandates placement preferences for Indian child foster care, pre-adoptive placements, and adoptive proceedings. R. at 6. Under this provision, in any child placement under State law a preference must be given 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. § 1915(a); R. at 6. Further, under sections 1915(e) and 1951(a), states in which an Indian child's placement was made must maintain records of the placement, and those records must be made available at any time upon request by the Secretary of the Interior or the child's tribe. R. at 7. "If ICWA applies, the legal burden of proof for removal, obtaining a final order terminating parental rights, and restricting a parent's custody rights is higher." R. at 2. The West Dakota Child Protection Service ("**CPS**") ICWA Compliance Manual states that if an Indian child is taken into CPS custody, "almost every aspect of the social work and legal case is affected." R. at 2.

Baby C resided with her maternal aunt until CPS removed her and placed her into foster care with James and Glenys Donahue ("**Donahues**") after receiving reports the aunt neglected eight-month-old Baby C by leaving her alone for long periods of time while she worked. R. at 2. After raising Baby C for two years and seeking to provide a safe and loving home for neglected Baby C, the Donahues began adoption proceedings with the consent of both of Baby C's biological parents. R. at 2, 3. However, ICWA provisions halted and jeopardized the proceedings simply because Baby C's biological mother was an enrolled member of the Quinault Nation and her biological father was an enrolled member of the Cherokee Nation. R. at 2, 3. After complying with ICWA and after both the Quinault Nation and Cherokee Nation failed to find an alternative placement within the tribes, the Donahues entered into a settlement stipulating "ICWA's placement preferences did not apply because no one else sought to adopt Baby C" and the adoption was finalized. R. at 3.

The Donahues then sought to adopt Baby S who had been moved into foster care with them after his biological mother, a member of the Quinault Nation, died of a drug overdose. *Id.* The identity of Baby S's father is unknown and before foster care he had been living with his grandmother who consented to the Donahues' adoption of him. *Id.* The Quinault Nation identified two potential adoptive families in another state and used the placement preferences of ICWA to halt and prevent the Donahues from adopting Baby S. R. at 3.

II. Procedural History

After learning of the Quinault Nation's opposition, the Donahues and West Dakota (collectively, "**Plaintiffs-Respondents**") filed suit against the United States of America, the United States Department of the Interior and its Secretary, Stuart Ivanhoe in his official capacity (collectively, "**Defendants-Petitioners**") on June 29, 2020, in the United States District Court for the District of West Dakota seeking injunctive and declaratory relief. R. at 4. Respondents

alleged that ICWA §§ 1913(d), 1914, and 1915(a)–(b) violate the Equal Protection Clause of the Fourteenth Amendment and that ICWA §§ 1912(a) and (d)–(f), 1915(a)–(b) and (e), and 1951 commandeer the states in violation of the Tenth Amendment. *Id.* The parties filed cross-motions for summary judgment on September 3, 2020. *Id.*

Judge Bray of the district court denied Plaintiffs-Respondents' motion for summary Judgment, and granted Defendants-Petitioners' motion for summary judgment. R. at 12. The district court reasoned that ICWA (1) does not violate the Tenth Amendment because the Indian Commerce Clause grants Congress plenary power to enact ICWA and none of ICWA's provisions violate the anticommandeering doctrine, and (2) does not violate the Fourteenth Amendment as it creates a political classification that passes rational basis review. R. at 8, 10, 11. The Plaintiffs-Respondents appealed the district court's decision to the United States Court of Appeals for the Thirteenth Circuit. R. at 13.

On December 28, 2021 the United States Court of Appeals for the Thirteenth Circuit, with Chief Judge Tower concurring, reversed the district court's grant of summary judgment and remanded for entry of judgment in favor of Plaintiffs-Respondents. R. at 17. The court found ICWA violates the anticommandeering doctrine. R. at 16. Therefore, the court found it unnecessary to decide whether Congress has Article I authority but noted "authority is far from clear." R. at 16. Chief Judge Tower reversed solely on Equal Protection grounds and reasoned that ICWA violates the Fourteenth Amendment because its classifications are based on Indian ancestry, thus creating a racial classification that is not narrowly tailored and therefore fails strict scrutiny. R. at 18, 19. On August 5, 2022, this Supreme Court of the United States granted certiorari on two issues.

Summary of the Argument

This case requires this Court to reaffirm the understanding that the Constitution divides authority between federal and state governments for the protection of individuals. This Court should preserve West Dakota's recognized sovereignty in the area of family law in order to protect its citizens from illegitimate racial discrimination that unnecessarily places vulnerable children at a disadvantage in finding a loving home.

First, in accordance with this Court's recent jurisprudence over the Commerce Clause, the Indian Commerce Clause does not grant Congress Article I plenary power to legislate over Indian affairs nor does it authorize Congress to enact ICWA because child custody proceedings do not involve commerce and Indian children are not goods. Even if this Court were to find Congress has Article I authority, IWCA unconstitutionally requires West Dakota and its agencies to apply federal standards to state created custody proceedings while forcing them to create policy and undertake federal duties in violation of the Tenth Amendment anticommandeering doctrine.

Second, ICWA violates the Equal Protection Clause of the Fifth Amendment. ICWA is facially discriminatory because it creates a racial classification of Indian children based on the child's biological parents. Further, ICWA requires a higher standard for removal of Indian children and that Indian children be given a placement preference with Indian families over families of other races, which creates a discriminatory effect subject to a strict scrutiny analysis. By using the child's biology and eligibility for membership in the tribe and broadly giving preference to Indians in termination and adoption proceedings, the statute fails to be narrowly tailored to achieve the government's goal of maintaining the child's relationship with the tribe.

For these reasons, this Court should affirm the appellate court's holding and find that ICWA is unconstitutional because Congress does not have Article I authority to enact it and even if it does, ICWA commandeers West Dakota in violation of the Tenth Amendment while creating a race classification that cannot survive strict scrutiny under the Fifth Amendment.

Argument

I. ICWA does not regulate commerce with Indian tribes and there is no constitutional basis for plenary power that allows Congress to unconstitutionally force West Dakota to apply federal regulations and make policy as federal conscripts in violation of the anticommandeering doctrine.

This Court should find Congress lacks Article I authority to enact ICWA and uphold the appellate court's ruling that ICWA's provisions violate the Tenth Amendment anticommandeering doctrine. The Tenth Amendment establishes "[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. "It is in this sense that the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" *New York v. United States*, 505 U.S. 144, 156 (1992).

Congress violates its constitutionally granted powers when: (A) it does not have Article I authority to legislate, or (B) its legislation usurps the States' sovereignty by violating the Tenth Amendment anitcommandeering doctrine. *See New York*, 505 U.S. at 144. Because Congress lacks Article I authority and because ICWA's provisions violate the anticommandeering doctrine, this Court should affirm the appellate court's holding.

A. A textual analysis and historical review dispels Congress' claim to plenary power, and ICWA's provisions apply to all Indian child custody proceedings regardless of whether a tribe is involved and does not regulate commerce as Indian children are not "goods."

The Indian Commerce Clause does not confer plenary power nor any power on Congress to enact ICWA. The Indian Commerce Clause provides that Congress shall have Power "[t]o regulate *commerce* with . . . the Indian *Tribes*." U.S. Const. art. 1, § 8, cl. 3 (emphasis added). This Court has found the Indian Commerce Clause to explicitly and implicitly confer "plenary power over Indian affairs on Congress." *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974); *United States v. Lara*, 541 U.S. 193 (2004). However, a review of the original understanding

and "[a] straightforward reading of the Indian Commerce Clause, confirms that Congress may only regulate commercial interactions—'commerce'—taking place with established Indian communities—'tribes.' That power is far from 'plenary.'" *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 663-65 (2013) (Thomas, J., concurring). In his *Lara* concurring opinion, Justice Thomas found this Court's reliance on the Indian Commerce Clause raises important constitutional questions the Court did not begin to answer but should be willing to revisit. *See Lara*, 541 U.S. at 224 (Thomas, J., concurring).

"The line that courts must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the founding fathers." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022). "The drafting history of the Constitutional Convention . . . supports a limited construction of the Indian Commerce Clause" because "[i]t is . . . clear that the Framers of the Constitution were alert to the difference between the power to regulate *trade* with the Indians and the power to regulate all Indian *affairs*." *Adoptive Couple*, 570 U.S. at 663 (Thomas, J., concurring) (emphasis added); *see also* Records of the Federal Convention of 1787 (M. Farrand ed. 1911) (James Madison moved to empower Congress to "regulate affairs with the Indians," but the Convention replaced "affairs" with "Commerce"). Moreover, legislation from the beginning of the Constitutional era confirms that Congress properly understood the limitations of the Indian Commerce Clause as it was not asserted as justification for laws that regulated tribal affairs. *See e.g. United States v. Kagama*, 118 U.S. 375, 278-79 (1886); *see also* 10 Reg Deb. 4763 (1834) (during the House debate over the Western Territory bill, Congress' first attempt to regulate an internal Indian affair, not a single representative argued the Indian Commerce Clause justified such regulation). This early Court in *United States v. Kagama*, properly adjudicated this difference finding "it would be a very

strained construction" of the Indian Commerce Clause to find Congress had authority to enact the Major Crimes Act "without any reference to [the relation of crime] to any kind of commerce [with Indian tribes]." 118 U.S. 375, 278-79 (1886). Instead, the *Kagama* court looked outside the constitution and held Indian tribes were "wards of the nation" and "from their weakness and helplessness . . . there arises the duty of protection, and with it the power." *Id.* at 383-84.

While this Court has held "[i]t is now generally recognized that the [source of federal authority over Indian matters] derives from the federal responsibility for regulating commerce . . . [,]" *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 n. 7 (1973), courts continue to rely on a contemporary "trust relationship" that "has been characterized as akin" to the extraconsitituional guardian-ward relationship developed in *Kagama*. *Brackeen v. Haaland*, 994 F.3d 249, 302 n.23, 305 (5th Cir. 2021) ("it would be difficult to conceive federal legislation that is more clearly aimed at the Government's enduring trust obligations to the tribes."). However, any theory of extraconstitutional power under the semblance of a paternalistic ward relationship cannot satisfy the modern demands of constitutional jurisprudence. *See e.g. Mancari*, 417 U.S. at 535 (1974). In *Mancari*, the Indian "wardship" was held to be a statement of the "special relationship" between the United States and Indian tribes and legislation over Indian affairs must be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians." *Id.* at 555. Thus, the *Mancari* court found the plenary power granted in *Kagama* on the basis of a guardian-ward relationship to instead be based on Constitutional provisions even though the *Kagama* court rejected such a constitutional basis. *Id.* Therefore, the *Mancari* court explicitly claimed plenary power was based on the constitution while citing no textual justification and implicitly relying on the guardian-ward relationship. *See Id.*

Here, the language used in the congressional findings of § 1901 amply demonstrates Congress is relying on the "trust relationship" which is a guise for the nontextual guardian-ward relationship develop in *Kagama* that the *Mancari* court found to be untenable under modern jurisprudence. The congressional findings state "Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources." § 1901(2). Section three adds "the United States has a direct interest, as trustee, in protecting Indian children . . . ." § 1901(3). The use of "protection and preservation" harkens back to the paternalistic language used by the *Kagama* court to find the "weakness and helplessness" of Indian tribes gives rise to "the duty of protection." 118 U.S. at 383-84. As demonstrated by the Fifth Circuit in recent ICWA litigation, the use of "trustee" is evidence the ward theory is still being propagated through "trust relationships." *Brackeen*, 994 F.3d at 300. The forgoing historical and legislative evidence proves such reliance does not "faithfully reflect the understanding of the founding fathers," early Congress, nor this early Court, and instead is a strained construction of the Indian Commerce Clause. *Kennedy*, 142 S. Ct at 2428.

Constitutional analysis must begin with "the language of the instrument." *Gibbons v.* Ogden, 22 U.S. 1, 186-89 (1824). Traditional canons of interpretation demand the text of the Indian Commerce Clause be interpreted the same as the Foreign Commerce Clause and in line with this Court's recent jurisprudence of the nearly identically worded Interstate Commerce Clause. *See Comm'r v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993) (". . . identical words used in different parts of the same act are intended to have the same meaning . . ."); *see also Thurlow v. Comm. of Mass.*, 46 U.S. 504, 578 (1847). This Court has refused comparison of the Indian Commerce Clause with the Interstate Commerce Clause citing "unique historical origins of tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 488 U.S. 136, 143 (1980).

However, such reasoning belies foregoing history and this Court's well established precedent of "refus[ing] to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 329 (2000). In *Thurlow*, this Court found "[t]he power to regulate commerce among the several states is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it." 46 U.S. at 578.

Here, both the Indian Commerce Clause and the Interstate Commerce Clause utilize the words "regulate" and "commerce" and traditional canons of construction demand they carry the same meaning regardless of the object they modify. U.S. Const. art I, § 8, cl. 3. There are, however, obvious textual differences between the objects these words modify; the distinction being "with the Indian tribes" and "among the several states." *Id.* Nonetheless, these differences are similar to the differences between the Foreign Commerce Clause and the Interstate Commerce Clause which this Court in *Thurlow* found to be unimpactful on Congress' power to "regulate commerce." 46 U.S. at 578. This holding makes logical sense and defies the "tribal sovereignty" justification in *Bracker* because if "with" gave Congress plenary power over Indian tribes, then the Foreign Commerce Clause would give Congress plenary power over sovereign, foreign nations. 488 U.S. at 143. Rather, it is the nature of sovereignty not to exist at the whim of an external government. Therefore, the text of the Indian Commerce Clause supports this Court applying its recent jurisprudence regarding the Interstate Commerce Clause to the Indian Commerce Clause.

Congress is required to legislate with obedience to the parameters on congressional powers enumerated in the Constitution. *See e.g. United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez,* 514 U.S. 549 (1995). Between 1937 and 1995, this Court accepted the

idea that "[t]he power of Congress over interstate commerce is plenary and complete in itself." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). However, this Court has extraordinarily departed from that understanding delivering a marked blow to congressional Commerce Clause power by narrowly construing the reach of "commerce." *See e.g.* Morrison, 529 U.S. 598 (2000); *see also Lopez*, 514 U.S. 549 (1995) (holding commerce included 1) channels and instrumentalities of interstate commerce, 2) goods and services traveling in interstate commerce, and 3) intrastate economic activity with substantial effect on interstate commerce when aggregated). Thus, "[C]onsistent with the great weight of [Supreme Court] case law, . . . the proper [Commerce Clause] test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Lopez*, 514 U.S. at 559. Activity does not substantially affect interstate commerce if it requires this Court "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 561.

Moreover, in areas of non-economic regulation traditionally left to the states, Congress cannot regulate based on a finding of substantial cumulative effects. *See Morrison*, 529 U.S. at 609-10. General police powers retained by the states include child placement as it is the virtually exclusive province of the states and does not involve commerce. *Adoptive Couple*, 570 U.S. at 665 (Thomas, J., concurring); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). In *Lopez*, this Court rejected the Government's argument that the non-economic activity of carrying a gun in a school zone would affect education, in turn producing a less productive workforce, and thus negatively affect the national productivity because under that reasoning, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including . . . child custody), for example." *Lopez*, 514 U.S. at 564. Despite Congress'

extensive studies into the effects of violence on interstate commerce, this Court applied the *Lopez* holding in *Morrison*, finding "[g]ender motivated crimes of violence are not, in any sense of the phrase, economic activity" and "in our Nation's history, cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

Here, ICWA regulates child placement proceedings which, similar to the gender motivated crimes in *Morrison* and the act of carrying a gun on school property in *Lopez*, do not involve commerce and are the virtually exclusive province of West Dakota. To find any relation to commerce would require a piling of inferences and this Court in *Lopez* specifically found such reasoning could not apply to regulate child custody proceedings. Moreover, ICWA was enacted because of concerns that "an alarmingly high percentage of Indian families are broken up by the removal . . . of their children from them . . . ." § 1901(4). The placement preferences seek to remedy the problem of Indian Children being "placed in non-Indian foster and adoptive homes. . . ." *Id.* Again, this problem is not "in any sense of the phrase economic activity" as the regulation of child custody is not the regulation of commerce and Indian children are not "goods." *Morrison*, 529 U.S. at 613. Further, the congressional findings of § 1901, unlike the plethora of studies into the effects of violence on interstate commerce provided in *Morrison*, are void of any finding of Indian child placement effecting commerce with Indian tribes.

Moreover, ICWA's provisions do not regulate only Indian tribes. The provisions apply to "any adoptive [or foster] placement of an Indian child" regardless of whether a tribe is involved. § 1915(a). Here, neither baby C nor S were domiciled on a Quinault nor a Cherokee Nation reservation, nor is there evidence to show either of the children's parents or familial caretakers lived on Indian reservations. Therefore, these provisions regulate beyond commerce

"with" Indian tribes. Lastly, in finding Article I authority under the Indian Commerce Clause, the district court relies on *Morton v. Mancari*, 417 U.S. 535 (1974), which was decided before this Court dealt the blow to congressional plenary power in *Lopez* and *Morrison*, indicating the court did not perform a proper Indian Commerce Clause analysis under modern jurisprudence. Therefore, under a proper Indian Commerce Clause analysis, Congress does not have authority to enact the ICWA provisions.

As demonstrated, a review of the original understanding and a straightforward reading of the Indian Commerce Clause indicates Congress does not have plenary power and supports this Court applying recent Commerce Clause jurisprudence in finding Congress lacks authority to enact the placement preferences and record keeping provisions of ICWA.

B. Congressional command under ICWA is incompatible with the Tenth Amendment system of dual sovereignty and Congress' enumerated powers and renders West Dakota a congressional puppet by forcing state agencies to enact and enforce federal policy and undertake federal executive duties.

The placement preferences and record keeping provisions of ICWA violate the anticommandeering doctrine. The Constitution "confers upon Congress the power to regulate individuals, not states." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). "The Constitution . . . leaves to the several States a residuary and inviolable sovereignty." Federalist No. 39, p 245 (C. Rossiter ed. 1961). The anticommandeering doctrine is violated when Congress (1) "directly compel[s] States to enact and enforce a federal regulatory program . . . ," *New York*, 505 U.S. at 145, or (2) conscripts "the States' officers, or those of their political subdivisions, as its agents to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). Adherence to the anticommandeering doctrine is important as "[t]he constitution does not protect the sovereignty of States for the benefit of the States," but rather "for the protection of individuals." *New York*, 505 U.S. at 181.

1. Congress impermissibly directs West Dakota to apply the placement preferences and record keeping provisions to existing state created child custody proceedings which forces state policymaking.

ICWA directly commands state legislatures, executives, and child welfare agencies to enact federal standards and create new policy. "The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188. While Congress may evenhandedly regulate activity when the law applies equally to state and private actors, *Murphy*, 138 S. Ct. at 1478-79, it may not exclusively direct the activities of the States and impede "the States' sovereign authority to 'regulate their own citizens.'" *Reno v. Condon*, 528 U.S. 141, 150 (2000) (finding a federal act that regulated the resale of information contained in the records of state DMVs did not require States to regulate their citizens because the law evenhandedly regulated private resellers of information as well as states).

States retain sovereign authority to regulate citizens in the area of family law which "has long been regarded as the virtually exclusive province of the States." *Sosna*, 419 U.S. at 404; see also *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878) (finding "[t]he State . . . has absolute right to proscribe the conditions upon which marriage relation between its own citizens shall be created, and the causes for which it may be dissolved). "The entire adoption process, including initial placement, background checks, consent, and finalization, is regulated by State law and policies." *State Laws on Domestic Adoption*, Child Welfare Information Gateway (last visited Oct. 8, 2022), https://www.childwelfare.gov/topics/adotption/laws/laws-state/domsetic/. The anticommandeering doctrine importantly recognizes that state governments have the "responsibility to represent and be accountable to the citizens of the state." *New York,* 505 U.S. at 177. "[I]f a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018). In *New York*, this Court found Congress' mandate that "[e]ach State shall be

responsible for providing . . . for the disposal of . . . low-level radioactive waste[,]" impermissibly directed the States to regulate in the field of waste disposal rather than regulating the generators and disposers of waste which impeded the state government's responsibility to be accountable to their citizens. *New York*, 505 U.S. at 169.

Here, Congress rightfully recognizes the States' authority to regulate their own citizens through their "recognized jurisdiction over Indian child custody proceedings . . . ," § 1901(5), while simultaneously abridging their sovereign authority by commanding state agencies and courts to "follow [federal] order[s]," § 1915(c), in placement proceedings "under state law." § 1915(a). The explicit language of the placement record-requirement stating that a record of each child placement "shall be maintained by the State" and "shall be made available [by the state] at any time upon request," § 1915(e), evidences simple commands nearly identical to the unconstitutional mandate in *New York* stating "[e]ach State shall." 505 U.S. at 169. Such Congressional compulsion and regulation affects "almost every aspect of the social work and [state] legal case[s]. . . ." R. at 2.

"Executive action that has utterly no policymaking component is rare . . . ." *Printz*, 521 U.S. at 927. The distinction between "making" law and merely "enforcing" it is "surely reminiscent of, the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority . . . ." *Id.* In *Printz*, this Court found it "impossible . . . to draw the [federal] Government's proposed line at 'no policymaking,' and [this Court] would have to fall back upon a line of 'not too much' policymaking,'" where a federal regulation required state officials to expend "reasonable efforts" to conduct a background check. 521 U.S. at 927-28.

Here, similar to the regulation in *Printz* that this Court found to require State executive officers to create policy to determine what satisfied "reasonable efforts," the placement preferences require State executives to create policy to define what satisfies placement "in the least restrictive setting." § 1915(b). Further, the statute vaguely states "[t]he child shall also be placed within reasonable proximity to [their] home." *Id.* Therefore, these commands require executive action in determining what constitutes a "least restrictive setting" and the maximum and minimum "reasonable proximity" to the child's home. *Id.* Thus, as the statute provides no precise guidance on determining these standards, the forced executive action requires States' to make policy in violation of the anticommandeering doctrine.

Thus, ICWA unconstitutionally requires West Dakota to administer a federal regulatory program which inevitably requires them to create and enact policy.

2. West Dakota is forced to maintain additional records within a complex system where strict budgets and guidelines are necessary, forcing it to hire additional employees and shifting the increase in costs to state courts and agencies.

ICWA impermissibly conscripts state agencies and officials to undertake federal duties and burdens the States with the excessive costs. The prohibition against compelling states to enact or enforce a federal regulatory program cannot be circumvented by Congress conscripting state governments and their agents. *See* Printz, 521 U.S. at 935 (finding this rule applies not only to those tasked with policy making but also to those assigned mundane tasks). "Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than . . . by 'reduc[ing] [them] to puppets of a ventriloquist Congress[.]'" Id. at 928. Child welfare systems across the United States have social workers handling many more cases than they can effectively handle within an understaffed

and complex system of strict budgets. *See e.g. Shortage of child Welfare Workers Straining the System*, MST SERVICES (last visited Oct. 8, 2022), http://info .mstservices.com.

Importantly, "the anticommandeering principle prevents Congress from shifting the costs of regulation to the states." *Murphy*, 138 S. Ct. at 1477. "By forcing state governments to absorb the financial burden . . . Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz*, 521 U.S. at 930. In *Printz*, this Court found a federal law that regulated the transfer of handguns violated the anticommandeering principle because States were responsible for funding the required background checks and it pressed state officers into service making it likely the state officers would be blamed for any errors rather than a federal official.

Here, similar to the regulation in *Printz* that conscripted state law enforcement officers, state agencies and courts who have far from mundane tasks, are pressed into federal service as they are required to keep advanced records and apply a heightened placement standard. Without such action the federal regulatory scheme is inoperable. Further, because state child welfare and protective service agencies are already understaffed and overworked, the added responsibilities require states to hire more workers and absorb the financial burdens in a system which already has strict budgets. This will require states to increase taxes and render the state, not Congress, politically accountable to their citizens. Therefore, even if this Court finds that ICWA does not require States to enact regulations, conscripting State agencies reduces them "to puppets of a ventriloquist Congress," and violates the anticommandeering doctrine. *Printz*, 521 U.S. at 935.

3. ICWA puts Indian children, like Baby S, at an unnecessary disadvantage in finding a permanent and loving home.

ICWA constrains West Dakota's ability to protect its citizens' liberty and thus hurts rather than helps Indian children. The anticommandeering doctrine "serves as one of the

Constitution's structural safeguards of liberty." *Printz*, 521 U.S. at 921. "The Constitution does not protect the sovereignty of States for the benefit of the States," but rather "for the protection of individuals." *New York*, 505 U.S. at 181. "[ICWA] reflects the presumption that the protection of an Indian child's relationship with the tribe serves the child's best interests." *People In Interest of Z.C.*, 487 P.3d 1044, 1047 (Colo. App. 2019). However, when state social workers are overworked, the best interests of the child are often overlooked. *Shortage of child Welfare Workers Straining the System*, MST SERVICES (last visited Oct. 8, 2022), http://info .mstservices.com. In *In Re Shayla H.*, the Nebraska appellate court reversed the trial court's finding that the removal was in the children's best interest and placed the children back into a physically abusive home because the children were Indian children and the state had not satisfied ICWA's active efforts burden. 846 N.W.2d 688 (Neb. App. 2014).

Here, although not physically abused like the children were in *In Re Shayla H.*, Baby C was neglected by her aunt as she was left unattended for long periods of time at the age of only eight months. R. at. 2. Fortunately, CPS was able to remove her and place her in foster care with the Donahues. R. at 2. However, even after consent was obtained from both biological parents and Baby C lived with the Donahues for two years, ICWA halted the adoption proceeding and put Baby C at risk of being removed from her loving home with the Donahue and placed in unfamiliar home. R. at 3. Forcing states to apply a higher standard for removal and placement constructs additional barriers and impedes the States' ability to protect their most vulnerable citizens.

According to a study in the Journal of Child and Family Studies, almost 20% of Indian families live below the poverty line. Catherine E. McKinley, Jennifer Lilly, Jessica L. Liddell, & Hannah Knipp *"I Have to Watch Them Closely": Native American Parenting Practice and*

Philosophies, Journal of Child and Family Studies (Oct. 8, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8714024/. This has a disproportionate impact on Indian children as the suicide rate of Indian youth is two and a half times the national average. *Fast Facts: Native American Youth and Indian Country,* Center for Native American Youth (Jul. 1 2016), https://www.cnay.org/resource-hub/fast-facts/. Indian children are also arrested at three times the national average, and have a high school graduation rate of only 79%. *Id*. The States not only have a right, but a heavy interest in protecting Indian children. However, ICWA seeks to undo state law placements, such as in the case of Baby S, and therefore jeopardizes Indian children's ability to find loving and permanent homes. R. at 3.

Therefore, the challenged provisions directly regulate the States and commands them to enforce a federal regulatory scheme requiring them to create policy and undertake federal duties while constraining their ability to protect their citizens. Therefore, the provisions violate the anticommandeering doctrine.

Because Congress does not have Article I authority and the placement preferences and record keeping provisions violate the anticommandeering doctrine, this Court should affirm the appellate court's reversal of summary judgment and find ICWA unconstitutional.

II. ICWA's Indian classification violates the Equal Protection Clause because it creates a racial classification in the explicit language of the statute and, in operation, has a discriminatory purpose and effect while failing to be narrowly tailored to maintain a child's relationship with a tribe.

This Court should affirm the appellate court's ruling that ICWA presents a racial Indian classification and fails to pass strict scrutiny. The Fifth Amendment ensures equal protection under the law. U.S. Const. Amend. V. It is for this reason that "[r]acial classifications are antithetical to the [Fifth] Amendment." *Shaw v. Hunt*, 517 U.S. 899, 907 (1996). Racial classifications are "highly suspect" and are subject to strict scrutiny in order to "smoke out"

improper use. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Therefore, a law must be found unconstitutional under the Fifth Amendment where: (A) there is a racial classification and (B) the law fails strict scrutiny analysis. *Id.* Because ICWA creates Indian racial classifications that fail strict scrutiny analysis, this Court must find it violates the Equal Protection Clause.

A. The use and definition of "Indian children" and the discriminatory purpose and effect of distinguishing based on the child's biology and ancestry creates a constitutionally suspect racial classification.

ICWA creates a racial classification. Racial classifications draw distinctions between citizens solely because of ancestry. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). A racial classification is present when there is either (1) a facial classification on the basis of race or (2) a racially discriminatory purpose and effect. *Loving*, 388 U.S. at 11; *Washington v. Davis*, 426 U.S. 229, 238-40 (1976).

1. The statutory language explicitly distinguishes Indian children from the general populace of the United States.

ICWA creates a facially discriminatory classification on the basis of race because it only applies to Indian children who are "the biological child[ren] of a member of an Indian tribe and either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe." § 1903(4). A facial classification exists where a law explicitly distinguishes between citizens on the basis of race. *Loving*, 388 U.S. at 11. A law is facially discriminatory when it calls for different treatment based on race, regardless of whether the policy benefits or disadvantages the minority group. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989) (finding a racial classification where a city had a policy requiring any contractor who was awarded a contract to subcontract a portion of the dollar amount to one or more "Minority Business Enterprises"). Further, "racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (citing *Loving*,

388 U.S. at 8. *See Flowers v. Mississippi*, 139 S.Ct. 2228, 2242 (2019) (finding an unconstitutional racial classification where black jurors were struck from jury selection based on their race even though all potential jurors could be struck based on race); *Loving*, 388 U.S. at 9, 11 (finding an impermissible race classification where a law prohibited interracial marriage).

In *Mancari*, this Court determined there was not a racial classification where qualification as an "Indian" required a person to be "a member of a Federally-recognized tribe" and have "one-fourth or more degree Indian blood," because this would exclude "many Indians who are racially qualified as 'Indians.'" 417 U.S. 535, 552, 555 n.24 (1974); *see also United States v. Antelope*, 430 U.S. 641, 645 (1977) ("[F]ederal legislation with respect to Indian *tribes* . . . is not based upon impermissible racial classifications" when Congress is "singling out Indian *tribes* as subjects of legislation") (emphasis added). However, more recently in *Gratz v. Bollinger*, this Court found a racial classification where a university policy automatically dispersed one-fifth of the points required for admission to applicants who were from an underrepresented minority group. 539 U.S. 244, 270 (2003). Additionally, in *Kahawaiolaa v. Norton* the Ninth Circuit stated that *Mancari* distinguished Indians as a political group because it applied only to tribal members in a "political, rather than racial" nature. 386 F.3d 1271, 1279 (9th Cir. 2004). The court went on to reject the notion that "distinctions based on Indian or tribal status can never be racial classifications subject to strict scrutiny." *Id.*

Moreover, in *Palmore v. Sidoti*, this Court found an impermissible racial classification where the state had a law in place preventing children from living in racially mixed households, reasoning "problems racially mixed households may pose for children" due to societal prejudice, could not "support a denial of constitutional rights[.]" 466 U.S. 429, 434 (1984).

Here, unlike *Mancari*, tribal membership is not required for an individual to be classified as an Indian, and unlike the 25% Indian standard in that case, no minimum standard has been set for ICWA. *See* § 1903. Though tribal membership is one way to qualify as an Indian, ICWA expands qualification to encompass those who are merely eligible for tribal membership as long as they have one biological parent who is a member of a tribe. *Id.* As a result of this wide-ranging definition, those who are as little as 1% Indian have been found to meet ICWA standards. *See Adoptive Couple*, 570 U.S. at 641 ("This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee"). ICWA also differentiates itself from the scope of Congress' "[permitted] racial classifications" specified in *Antelope*. 430 U.S. at 645. Here, it is not *tribes* which are the subject of legislation, but individual *children*—in fact, the children who are subject to this legislation do not even have to be tribal members. §§ 1915(a); 1903(4). Further, like the political exception stated in *Kahawaiolaa*, ICWA treats Indians as a racial and not a political class by defining them biologically instead of by their tribal status.

ICWA also calls for differential treatments based upon racial classification, which is similar to the treatment in *J.A. Croson*. In that case, contracts had designations based upon whether a business was a minority. Here, there are designations of where a child must be placed for adoption, foster care, and preadoptive placements based solely upon the fact that he or she is an Indian child. *See* § 1915(a)-(b). In the same vein, just as there was a different policy put into place for minority groups in *Gratz,* ICWA creates a procedural policy that is different for Indian children than it is for the general population. *See* R. at 2 ("If ICWA applies, the legal burden of proof for removal, obtaining a final order terminating parental rights, and restricting a parent's custody rights is higher"). ICWA allows Indian tribes to petition courts regarding "any action

for foster care placement or termination of parental rights," and it allows for "adoption which has [not] been effective for at least two years [to be] invalidated." §§ 1914, 1913(d); *see also* R. at 2 (quoting CPS Manual) ("[I]f an Indian child is taken into CPS custody, 'almost every aspect of the social work and legal case is affected'").

Additionally, ICWA does not even attempt to hide under the guise of equal treatment. Similar to *Loving* and *Palmore*, where this Court found racial classifications in laws prohibiting interracial marriage and children from residing in interracial homes, ICWA racially classifies Indians with the preference that Indian children be adopted by Indians. § 1915(a). Also, distinguishable from *Flowers*, where all jurors could be struck from the jury based on their race, here "preference [is] given . . . 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." *Id.*

Therefore, ICWA creates a racial classification on its face by its definition of an Indian child and the different standards it creates for the placement of Indian children.

2. Ancestry is used as a proxy for race and is proven by a discriminatory purpose and effect.

Even if the Court finds that ICWA is not facially discriminatory, it has both a discriminatory effect and purpose because it employs the child's biology and eligibility for tribal membership to use ancestry as a proxy for race. A statute may be inferred to have a discriminatory purpose based on the totality of the relevant facts, including the fact "that the law bears more heavily on one race than another." *Washington v. Davis,* 426 U.S. at 242. When a law is not facially discriminatory it can still be held unconstitutional when its "impact falls on the minority." *Hunter v. Erickson*, 393 U.S. 385, 391 (1969).

In *Shaw v. Reno*, this Court held that redistricting legislation is a violation of the Equal Protection Clause when it is unreasonably irregular because it fails to follow procedures and

practices regularly used for similar purposes. 509 U.S. 630, 634 (1993). This Court went on to explain that when the government's scheme lacks the rationality of consistency with trends in similar legislation, "it can be understood only as an effort to segregate . . . on the basis of race." *Id* at 630. In *Rice v. Cateyano*, this Court held that the use of ancestry was discriminatory because it enacted race-based qualifications for those defined as "Hawaiian" or "Native Hawaiian." 528 U.S. 495, 496 (2000). The voting structure was found to be unconstitutional because it granted the right to vote "to persons of defined ancestry and to no others." *Id.* at 514. This Court held that the voting structure used ancestry as "a proxy for race" and reflected "the State's effort to preserve the commonality of people to the present day." *Id.* at 515. Further, in *Berkley v. United States*, the court held that strict scrutiny, not rational basis, applied to the Air Force's policy giving preferential treatment to minorities and women when making cuts, even when the policy was in place to remedy past harms to those minority groups. 287 F.3d 1076, 1082 (2002). The appellate court stated that because the policy "requires differential treatment of officers based on their race" it must be evaluated under a strict scrutiny analysis. *Id.* at 1082.

Here, like the policy for redistricting discussed in *Shaw*, ICWA irrationally deviates from the prior practices for adoption and termination proceedings by putting in place an Indian classification that has the purpose and effect of both advantaging tribal families and disadvantaging families of other races. The state policy did not take into account "compactness, contiguousness, geographical boundaries, or political subdivisions" as was the normal practice. *Shaw*, 517 U.S. at 630. ICWA similarly institutes higher standards for removal of Indian children and a placement preference for tribal families in adoption proceedings that fails to follow the procedures typically followed by West Dakota in adoption proceedings of non-Indian

children. R. at 5. Because ICWA treats the adoption proceedings of Indian children differently, it can only be understood to be an effort to segregate based on race in the same way as the redistricting boundaries in *Shaw*.

Also, like in *Rice*, where ancestry was used as a proxy for race in Hawaii's voting structure, ICWA uses ancestry as a proxy for race to give separate treatment to "Indian children." Just as Hawaii's voting structure achieved the goal of discriminating based on race by including all Hawaiians and no others, ICWA effectively discriminates based on race as it applies to all biological children of tribal members regardless of whether they have any real connections to the tribe. *See* § 1903(4). Requiring both biological ancestry and "eligib[ilty] for membership in an Indian tribe" makes ICWA's definition of an Indian child based solely on race and has no reasonable connection to the tribes as a political group. *Id.* In fact, ICWA's preferences only apply to children who are living off tribal reservations because proceedings on reservations are already the exclusive jurisdiction of the tribes. § 1911(a). Because ICWA seeks to use ancestry as a proxy for race, the Indian child definition must be viewed by this Court as a definition on the basis of race.

Finally, Petitioners claim that Indians are a political class because of the duty owed by the federal government to Indian tribes. However here, like in *Berkley*, the policy requiring different treatments of a minority race, even for a remedial purpose, is discrimination based on race that must be subject to strict scrutiny. Just as the government sought to remedy the past difficulties of minority groups in the Air Force, ICWA seeks to remedy the harm done to the Indian child's relationship with the tribe. (R. at 18). Though both may be seemingly noble causes, the Equal Protection Clause requires that they be fulfilled through other means than the use of race. ICWA uses ancestry to effect all children with any biological ties to the tribe. To

allow for the use of a racial classification in ICWA would only open the door to an expansion of permissible violations of the Equal Protection Clause that can further harm minority groups in the future. Thus, ICWA creates a racially suspect classification that demands a strict scrutiny analysis.

B. The racial classification fails to be narrowly tailored enough to maintain an Indian child's relationship with the tribe, thus failing strict scrutiny analysis.

ICWA's Indian classification fails to pass the rigor of strict scrutiny. The policy of this Court is to hold racial classifications "constitutionally suspect." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Therefore, racial classifications are subject to strict scrutiny even if one may think the classification is "benign." *Johnson v. California*, 543 U.S. 499, 505 (2005). This means classifications are constitutional only if (1) there is a compelling government interest at stake and (2) the law is narrowly tailored to achieve that interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). This Court has emphasized that no matter the circumstances, "strict scrutiny remains, nonetheless, strict." *Bush v. Vera*, 517 U.S. 952, 978 (1996). When applying strict scrutiny, courts must remember the standard is not "strict in theory but feeble in fact." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 314 (2013).

1. ICWA fails to establish a sufficiently compelling interest because the generality of protecting Indian children, families, and tribes, does not provide sufficient guidance to create a significant change.

Defendants have failed to show a compelling interest. Racial classifications are "in most circumstances irrelevant" to any purpose. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). For a federal interest to reach the level of compelling, it needs a high degree of specificity. *Compare Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C.*, 478 U.S. 421, 475-77 (1986) (finding remedying past discrimination is a compelling interest in the context of union membership), *with J.A. Croson*, 488 U.S. at 498 (finding no compelling interest because

"[a] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury"). For example, in *Grutter*, the government found a compelling interest in attaining a diverse population when it was in the context of a school setting. 539 U.S. at 308; *see also Fisher*, 570 U.S. at 310-11 (holding diversity in the school setting is a compelling interest when "a diverse student body [will] serve its educational goals" so long as diversity is not based upon set ratios). In *Burwell v. Hobby Lobby Stores, Inc.*, an interest in providing equal opportunity met the standard of compelling in the context of the workplace. 573 U.S. 682, 733 (2014).

Here, similar to *Local 28*, ICWA shares the common goal of remedying a past wrong, but it fails to meet the standard of a compelling interest, as it more closely resembles *J.A. Croson* becuase it only gives a generalized claim—that it is "protecting the best interests of Indian children" and "promot[ing] the stability and security of Indian tribes and families[.]" § 1902. In this way, ICWA fails to provide a determination of "the precise scope of the injury." *J.A. Croson*, 488 U.S. at 498.

ICWA also contrasts with both *Grutter* and *Fisher*. In those cases the goal was diversity in education, while here ICWA is achieving the exact opposite of diversity, as it seeks to keep Indian children separate and isolated from other families who are not Indian. *See* § 1915. Similarly, it also contrasts with *Burwell*. In that case, equal opportunity in the workplace was a compelling interest, but here, Indian children do not have equal opportunity as far as adoption is concerned, seeing as "the legal burden of proof for removal . . . is higher," creating a possible scenario where other children can be more easily removed from dangerous environments while an Indian child would be forced to remain. R. at 2. Therefore, the scope ICWA's claimed interest fails to reach the level of a compelling interest.

2. By relying on the race of Indian children and parents as the only factor in establishing separate treatment and by failing to employ non-race based alternatives, ICWA fails to be narrowly tailored.

Even if ICWA has a sufficiently compelling asserted interest, the law's attempt to keep Indian children in a relationship with their tribe is not narrowly tailored to the interest of "protect[ing] . . . Indian children" and "promot[ing] . . . Indian tribes and families." § 1902. Racial classifications are only constitutional if they are narrowly tailored to meet the purported interest. *Adarand*, 515 U.S. at 227. Courts makes this determination by asking whether a race-neutral alternative could achieve the presented interest. *See Wis. Legislature v. Wis. Elections Comm'n*, 142 S.Ct. 1245, 1250-51 (2022) (finding the lower did not conduct a proper analysis for the purpose of fair voting where "[t]he question . . . the court failed to answer [was] whether a race-neutral alternative that did not add a seventh majority-black district would deny black voters equal political opportunity").

Policies lacking a narrow tailoring are those with a sweeping policy regarding race. *See Gratz*, 539 U.S. at 270 (finding no narrow tailoring for the stated interest of educational diversity where a university policy automatically distributed admission points to underrepresented minorities); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 282 (1986) (finding no narrow tailoring where a policy of laying off nonminority teachers in order to retain minority teachers was not the least intrusive means to remedy past discrimination in education); *but see Fisher*, 570 U.S. at 384-85 (finding narrow tailoring for college admission goal of diversity where race was a factor in the holistic selection process); *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 317 (1978) (finding it permissible for universities to use race as a "plus" factor in admissions).

Additionally, when no race-neutral alternatives are considered, the policy in question is not narrowly tailored. *See J.A. Croson*, 488 U.S. at 507. Also, if the classification is shown only to have a minimal effect in achieving the presented goal, such evidence demonstrates that the

policy is not narrowly tailored. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733-35 (2007). In *Parents*, the Court found the law was not narrowly tailored where there was evidence no race-neutral alternatives were considered and the student assignment plan was tied only to racial demographics. 551 U.S. at 733-35.

Here, there is no narrow tailoring as ICWA closely resembles *Gratz* and *Wygant* because it uses a blanket policy regarding race that encompasses "any adoptive placement of an Indian child." *See* § 1915(a). Unlike *Fisher*, where race was a part of the holistic selection process, or even *Regents*, where race was considered a positive factor for selection, ICWA's preferential list collectively excludes those who are not Indian from consideration for adoption or foster care placements. *See* § 1915(a)-(b). It is true that other families can be considered if there are no placements available from ICWA's preferential list. *See* R. at 3. However, this does not mean Indian families have a "plus" status as in *Regents*—this would imply that both families are equally considered with one factor pulling a family for preference—where Indian families are the only ones considered unless there are none available, they do not have "plus" status, but the only status. 438 U.S. at 317; *see also* R. at 3 ("ICWA's placement preferences did not apply because no one else sought to adopt Baby C"). Also, ICWA not only fails to provide additional qualifications for tribal members, but fails to have a tribal membership requirement altogether. *See* § 1903. Additionally, ICWA's preference that Indian children be placed with an Indian family, even if that family does not share the same tribal connection as the child's biological parents, further evidences a lack of a narrow tailoring. *See* § 1915(a).

Similar to *Wis. Elections Comm'n*, other race-neutral alternatives should have been considered. Like in *Parents*, the government did not attempt to resolve this issue before using an unnecessary race policy. The government could have provided society additional resources to

those struggling with social issues which often lead to the placement of children in foster care. Alternatively, or in conjunction, it could have provided resources to maintain cultural engagement without preselecting family placement. However, it has failed to do so.

The standard of ensuring "workable race-neutral alternatives do not suffice" is not always easy, or even ideal. *Fisher*, 570 U.S. at 312 (2013). However, it is necessary, seeing as race discrimination is "especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). The fact that non-Indian families are also disadvantaged under ICWA cannot factor into a narrow tailoring analysis. To turn a blind-eye from racial policies based upon who they affect would take us "back to 1868" while reversing both the roles and "the clock of our liberties." *Regents*, 438 U.S. at 294-95. Additionally, this would effectively implement a different standard based upon who the discrimination impacts, which would be an untenable system. Creating such a system would be asking the judiciary to determine what level of discrimination is tolerable, and "to produce such rankings does not lie within judicial competence." *Id.* at 295-96. Therefore, even if there was a compelling interest, strict scrutiny requires the conclusion that ICWA is not narrowly tailored to meet that interest.

Because ICWA broadly states that its purpose is protection of Indian children, families, and tribes, it fails to show a compelling interest, and similarly, the scope of its application is too broad to be narrowly tailored to the stated goal, meaning it fails to pass the strict scrutiny standard. Therefore, this Court should find ICWA violates the Equal Protection Clause.

Conclusion

For the reasons stated, Respondents respectfully request this Court affirm the holding of the Thirteenth Circuit and find ICWA unconstitutional in violation of Congress' Article I authority, the Tenth Amendment, and the Fifth Amendment.

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Team 11