
No. 22-386

In the
Supreme Court of the United States

October Term 2022

Stuart Ivanhoe, Secretary of the Interior, *et al.*,

Petitioners,

v.

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

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

No. 21-19042

Brief for Petitioners

Team 13
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Oral Argument Requested

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QUESTIONS PRESENTED

- I. Whether ICWA is a valid exercise of Congress' authority under its enumerated constitutional powers and comports with the Tenth Amendment where ICWA was enacted pursuant to Congress' plenary power to legislate on behalf of federal Indian tribes, creates individual rights, and does not commandeer state legislatures or officials in protecting children and families from abusive state adoption and child welfare practices.
- II. Whether ICWA's classifications comport with the Equal Protection Clause, as incorporated by the Fifth Amendment's Due Process Clause, where the Act gives rise to political classifications that are subject to rational-basis review due to the quasi-sovereign nature of Indian tribes, and the provisions of ICWA are rationally tied to Congress' unique obligation towards the Indians.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

ICWA. Congress enacted the Indian Child Welfare Act of 1978 (ICWA) in response to an alarming number of Indian children being separated from their families and tribes through adoption or foster care placement in non-Indian homes. R. at 4–5. ICWA applies to children who are either a member of a tribe or are eligible for membership and have a biological parent who is a tribe member. *Id.* at 5. The child’s custodians and tribe have a right to intervene in proceedings for foster care or termination of parental rights, and ICWA requires that notice of a proceeding is given to these parties. *Id.* Parties seeking foster care placement or termination of parental rights must make active efforts to prevent the breakup of the Indian family and must provide evidence that the parents’ continued custody will cause serious emotional or physical damage. *Id.* at 5–6. Parents can withdraw consent to voluntary proceedings upon a showing of fraud or duress, and the child, custodian, or tribe can petition to invalidate a state court order if any of the above provisions are violated. *Id.* at 6. ICWA also imposes record keeping requirements relating to the child’s ultimate placement. *Id.* at 7. Finally, in the absence of good cause to the contrary, ICWA placement preferences ensure that the child is placed 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.*

State Plaintiff. Three federally recognized Indian tribes reside in West Dakota. R. at 2. Approximately twelve percent of the state’s child custody proceedings involve Indian children. *Id.* West Dakota’s Child Protective Services publishes and distributes a compliance manual that describes the policies and procedures for implementing ICWA, including the unique legal safeguards for the placement of Indian children. *Id.*

Private Plaintiffs. James and Glenys Donahue (“the Donahues”) are a non-Indian couple who adopted an Indian child, Baby C, in January 2020 and filed a petition to adopt another Indian child, Baby S, four months later. R. at 1–2. Baby C’s mother is a member of the Quinault Nation, and her father is a member of the Cherokee Nation. *Id.* at 2. For the first eight months of her life, Baby C resided with her aunt before being removed by CPS and placed in foster care with the Donahues, where she remained for two years. *Id.* Baby C’s parents consented to the termination of parental rights, and the Donahues subsequently initiated adoption proceedings with the consent of Baby C’s parents and aunt. *Id.* at 3. Both tribes were notified and made an agreement that the Quinault Nation would be Baby C’s tribe. *Id.* Because no person or tribe intervened, the Donahues entered into a settlement agreement with CPS and Baby C’s guardian ad litem stipulating that ICWA’s placement preferences would not apply. *Id.* Baby C’s adoption was finalized in West Dakota state court. *Id.*

Baby S’s biological father is unknown, and his mother passed away when he was less than one month old. *Id.* at 3. For the first three months of his life, Baby S lived with his grandmother. *Id.* However, the grandmother, who was dealing with her own failing health, could not take care of Baby S and placed him in foster care where he resided with the Donahues. *Id.* The Donahues then filed a petition for adoption of Baby S. *Id.* Baby S’s grandmother consented, but the Quinault Nation opposed the adoption and provided two alternative adoptive families who are members of the Quinault Nation in a different state. *Id.*

II. PROCEDURAL HISTORY

The Donahues and the State of West Dakota (collectively, “Respondents”) filed an action against the United States, the United States Department of the Interior, and Stuart Ivanhoe, in his official capacity as Secretary of the Department of the Interior, in the United States District Court

for the District of West Dakota. R. at 1, 4. Shortly thereafter, the district court allowed the Cherokee and Quinault Nations to intervene (all defendants, collectively, “Petitioners”). *Id.* at 2.

Respondents’ complaint and request for injunctive and declaratory relief alleged that certain provisions of ICWA are unconstitutional. *Id.* at 4. In particular, Respondents alleged that ICWA §§ 1913(d), 1914, and 1915(a)–(b) run afoul of the Equal Protection Clause of the Fourteenth Amendment—as made applicable to Respondents through the Due Process Clause of the Fifth Amendment—and that §§ 1912(a), (d)–(f), 1915(a)–(b), (e), and 1951 violate the Tenth Amendment because those provisions commandeer the states. *Id.* at 4. The district court disagreed and granted Petitioners’ motion for summary judgment, finding that ICWA complied with both the Tenth Amendment and Equal Protection Clause. *Id.* at 12. In its opinion, the district court held that Congress enacted ICWA according to its plenary power over Indian affairs and, because ICWA regulates private actors, ICWA preempts state law. *Id.* at 8–10. The district court further held that ICWA’s classifications are politically—not racially—based, that rational-basis review applies, and that ICWA passes rational-basis review. *Id.* at 10–12.

Respondents appealed the district court’s order to the United States Court of Appeals for the Thirteenth Circuit. *Id.* at 16. The Thirteenth Circuit reversed the district court’s holding that ICWA does not commandeer the states. *Id.* at 15–17. However, because the Thirteenth Circuit decided that ICWA was unconstitutional on Tenth Amendment grounds, the Thirteenth Circuit majority did not address the equal protection challenge to ICWA. *Id.* at 16–17. Chief Judge Tower filed a concurring opinion stating that he would decide the issue on equal protection grounds because “ICWA’s definition of ‘Indian children’ uses ancestry as a proxy for race” and ICWA fails strict scrutiny. *Id.* at 18. On August 5, 2022, this Court issued an Order Granting Certiorari for the October 2022 term. *Id.* at 22.

SUMMARY OF THE ARGUMENT

The history leading to the enactment of the Indian Child Welfare Act (“ICWA”) is sad and shameful. In the late 1970s, Congress found that approximately 25-35% of all Indian children were removed from their homes and placed in institutions, foster care, or adoptive homes. This mass separation, initiated by state welfare and public and private adoption agencies, was deemed one of the most tragic and destructive aspects of American life at the time. Congress, recognizing the great divide between Indian social and cultural norms and adoption and child welfare practices, as well as the grave danger posed to the survival of Indian tribes by the wholesale removal of Indian children from their homes, enacted ICWA.

ICWA sets federal minimum standards for voluntary and involuntary custody proceedings involving Indian children. These standards set bare minimum requirements that safeguard the rights of Indian children, parents, and tribes. Congress passed ICWA pursuant to its plenary power to legislate Indian matters; an authority that has been recognized and affirmed by this Court for centuries. This plenary power includes Congress’ Article I authority, the Treaty power, and the Nation’s long-standing and broad responsibility to protect the tribal nations. In enacting ICWA, Congress did not command the states to enact legislation relating to Indian child custody proceedings. Likewise, Congress did not commandeer state officials to carry out a federal objective. Conclusively, ICWA does not constitute impermissible commandeering in violation of the Tenth Amendment. Moreover, where a federal law that does not intrude upon state sovereignty and is enacted pursuant to Congress’ constitutional authority, state courts are bound, under the Supremacy Clause, to enforce such a law. ICWA is one such law, and state law must give way.

This Court has never deviated from its well-established rule that federal regulations governing Indian tribes constitute political classifications rather than race-based classifications.

This rule is premised on the notion that federally recognized tribes are quasi-sovereign political entities that deserve unique—sometimes preferential—treatment from the federal government. There is no merit to Respondents’ assertion that ICWA’s classifications are race-based merely because the Act protects Indian children who are tribe-eligible and have a biological parent who is a tribe member. When crafting ICWA, Congress understood that tribal membership is not automatically granted at birth, and custodians of Indian children have legitimate reasons to wait on submitting their child’s tribal application.

Finally, the challenged provisions of ICWA satisfy rational-basis review. ICWA’s stated purpose is to promote the stability and security of Indian tribes and families. Congress’ decision to institute procedural safeguards to ensure that Indian families and tribes receive adequate notice and do not become the victims of fraud or duress is rationally related to ICWA’s legitimate purpose. Additionally, ICWA’s placement preferences are rationally related to ICWA’s purpose. In the absence of such preferences, Indian tribes would continue seeing their numbers dwindle and their culture washed away as state agencies intrude on the tribes’ quasi-sovereign political power. Because ICWA withstands rational-basis review and remedies serious injustices inflicted on the tribes by the states, the Act must stand.

ARGUMENT

Standard of Review. The Thirteenth Circuit reversed the district court’s denial of Respondents’ motion for summary judgment and request for injunctive relief. R. at 12, 17. The parties conceded that are no genuine issues of material fact. R. at 14. This Court reviews questions of law contained in a motion for summary judgment *de novo*. *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 176 (3d Cir. 2019). The constitutionality of a statute is also reviewed *de novo*. *Brackeen v. Haaland*, 994 F.3d 249, 298 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022). Finally,

the grant or denial of injunctive relief is reviewed for abuse of discretion. *Wong-Opasi v. Haynes*, 8 Fed. Appx. 340, 342 (6th Cir. 2001).

I. ICWA DOES NOT STRETCH BEYOND CONGRESS' ARTICLE I AUTHORITY NOR VIOLATE THE TENTH AMENDMENT BECAUSE ICWA WAS ENACTED UNDER CONGRESS' PLENARY POWER TO LEGISLATE ON BEHALF OF INDIAN TRIBES AND PREEMPTS STATE LAW.

Congress enacted the Indian Child Welfare Act (“ICWA” or the “Act”) in 1978 against the backdrop of growing concern for abusive state child welfare and adoption practices whereby Indian¹ children were removed from their homes in droves. 25 U.S.C. § 1901; *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Congressional findings leading to ICWA’s enactment recognized both the “alarmingly high” frequency at which Indian families were separated “by public and private agencies,” and the serious threat to Indian tribes and self-governance posed by such separation. 25 U.S.C. § 1901(3), (4). Congress’ decision to intervene was based on its broad authority to legislate on behalf of Indian Tribes and the historically-held conviction that the United States has a duty to “protect[] and preserv[e] Indian tribes and their resources.” *Id.* at (2). This Court has not addressed a challenge to the constitutionality of ICWA as a whole. In fact, constitutional challenges to ICWA have only recently come to pass.

While Congress’ power to create laws is not infinite, it is exceedingly broad. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). Where a federal law is enacted pursuant to Congress’ constitutionally-granted authority, the Supremacy Clause requires state courts to follow federal law as the “supreme law of the land.” U.S. Const. art. VI, § 2, cl. 1. Principles of federalism—

¹ The National Museum of the American Indian recognizes that “American Indian, Indian, Native American, Indigenous, and Native” are all acceptable terms, subject to tribal preference. Smithsonian National Museum of the American Indian, *Teaching & Learning About Native Americans*, <https://americanindian.si.edu/nk360/faq/did-you-know> (last visited September 30, 2022). Petitioners will use the term “Indian” throughout simply for clarity and consistency with the text of the Constitution, ICWA, and case law; all of which use the term “Indian” invariably.

namely, the anti-commandeering doctrine—limit federal law’s force to acts of Congress that do not usurp state legislatures or impermissibly commandeer state executives. *Murphy*, 138 S. Ct. at 1477 (citing *Printz v. United States*, 521 U.S. 898, 935 (1997)). Anti-commandeering claims are of relatively new standing in the Nation’s constitutional jurisprudence, but the underlying doctrine is premised on the text of the Tenth Amendment: “The 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. Thus, whether an act of Congress violates the Tenth Amendment necessitates a dual inquiry of (1) whether the act in question was within Congress’ constitutional authority and (2) whether the act intrudes on state sovereignty.

The district court correctly held that Congress acted within the scope of its authority when it enacted ICWA. Additionally, the district court correctly held that, because ICWA preempts contrary state law and does not require states to enact legislation or improperly commandeer state officials, ICWA does not violate the Tenth Amendment. The ruling of the Thirteenth Circuit should be reversed.

A. Congress Had the Authority to Enact ICWA Because History and Tradition Recognize that the Constitution Conferred Broad Powers onto Congress to Legislate Indian Matters.

States do not retain their sovereign authority where the Constitution has “divested [the states] of their original powers and transferred those powers to the federal government.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985). Whether an act of Congress infringes on the states’ Tenth Amendment powers requires determining if the power in question has, in fact, been reserved to the states. *New York v. United States*, 505 U.S. 144, 156 (1992) (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any

reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”).

Congress has “plenary power . . . to legislate on behalf of federally-recognized Indian tribes.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This plenary power derives, in part, from the “Indian Commerce Clause,” which allows Congress to “regulate Commerce . . . with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. Unless there is a clear showing that Congress acted outside of its constitutional authority, the presumption should prevail that Congress will pass only those acts which it may properly pass. *United States v. Harris*, 106 U.S. 629, 635 (1883).

This Court “recognize[s] that ‘where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide [the Court’s] interpretation of an ambiguous constitutional provision.’” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Buren*, 142 S. Ct. 2111, 2137 (2022) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment)). Article I’s grant of power to Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” was not expanded upon in the Constitution or by the framers. As such, this Court has developed an interpretation of the Interstate Commerce Clause over the centuries. *See e.g., Gibbons v. Ogden*, 22 U.S. 1, 3, 74 (defining the scope of “commerce” to mean “intercourse” between nations, and “among the several States” to mean “intermingled with”); *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (upholding provision of the Agricultural Adjustment Act penalizing farmers who exceeded wheat marketing quotas, stating that the Commerce Clause’s reach “extends to those activities intrastate which so affect interstate commerce”). In a similar vein, this Court has developed its understanding of the scope of Congress’ power to legislate over Indian Tribes. *See, e.g., United States v. Lara*, 541 U.S. 193, 200 (2004) (emphasis added) (“[T]he Constitution grants Congress

broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’” (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470–71 (1979))).

Although judicial analysis informs the interpretation of the Interstate Commerce Clause and Indian Commerce Clause respectively, the two clauses serve markedly different functions. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996) (“[T]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause.”). Indeed, this Court explicitly stated that “[t]he central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian Affairs.” *Cotton Petroleum*, 490 U.S. at 192. The latitude afforded to Congress by the Indian Commerce Clause to legislate in the field of Indian affairs has been recognized time and time again, including in the context of ICWA. *See Brackeen v. Haaland*, 994 F.3d 249, 330 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022) (noting that Congress did, in fact, properly exercise its Article I authority to enact ICWA, citing various Supreme Court decisions discussing Congress’ “plenary power” in the realm of Indian matters).²

Put simply, both Congress and this Court demonstrate an open, widespread, and—until recently—unchallenged history acknowledging that Article I conferred expansive authority on Congress to legislate on behalf of federally recognized Indian tribes. *See Cotton Petroleum*, 490 U.S. at 192. Moreover, the breadth of Congress’ authority expands, in this case, to the realm of

² Importantly, though it did not explicitly address a constitutional challenge to ICWA, this Court has ruled on ICWA-related issues and did not question the constitutionality of the Act as a whole. *See Holyfield*, 490 U.S. at 53–54 (reversing the ruling of the Supreme Court of Mississippi and remanding with instruction for the state court to comply with ICWA’s jurisdictional provisions).

child custody proceedings concerning Indian children. *See Holyfield*, 490 U.S. at 53–54. The Thirteenth Circuit, in *dictum*, cast doubt on Congress’ authority to enact ICWA, drawing its skepticism from a reading of Article I that the Indian Commerce Clause is “arguably coextensive” with the Interstate Commerce Clause. R. at 16. However, the line of decisions by this Court makes clear that the clauses are different both in kind and in application. *Cotton Petroleum*, 490 U.S. at 192; *Seminole Tribe*, 517 U.S. at 62. In the face of a long line of decisions to the contrary, Respondents cannot clearly show that Congress acted outside of its constitutional authority when it enacted ICWA. Therefore, this Court should presume that Congress was well within its power to do so. However, even if there is still ambiguity as to whether Article I alone bestowed Congress with the power to enact ICWA, Congress, in its findings, pointed to additional authority from which its “plenary powers” derive. 25 U.S.C. § 1901(2).

1. *Congress Has Assumed Responsibility for the Protection of Indian Tribes and is Authorized to Deal with Indian Tribes Through the Treaty Power.*

Congress’ plenary power over Indian affairs is rooted not only in the explicit text—and this Court’s own interpretation—of Article I, but also implicitly from other provisions in the Constitution. *Mancari*, 417 U.S. at 551–52. Congress noted that its authority to enact ICWA is also rooted in the Nation’s “responsibility for the protection and preservation of Indian tribes and their resources.” 25 U.S.C. § 1901(2); *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.”). Furthermore, Congress pointed to the “statutes, treaties, and the general course of dealing with Indian tribes” as a source of its legislation. 25 U.S.C. § 1901(2); *Worcester v. Georgia*, 31 U.S. 515, 581–82 (1832) (“By various treaties, the Cherokees have placed themselves under the protection of the United States: they have agreed to trade with no

other people, nor to invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self-government, nor destroy their capacity to enter into treaties or compacts.”), *abrogated on other grounds by Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962). Although Article II vests the treaty power in the President, “treaties made pursuant to that power can authorize Congress to deal with ‘matters’ with which otherwise ‘Congress could not deal.’” *Lara*, 541 U.S. at 201 (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)); *see also id.* (“[F]or much of the Nation’s history, treaties, and legislation made pursuant to those treaties, governed relations between the Federal Government and the Indian tribes.”).

Congress enacted ICWA with the acknowledgment of the long and arduous history the United States has with Indian tribes. In doing so, Congress properly invoked not only its Article I authority, but also relied on its broad responsibility to remedy a legitimate threat to the wellbeing of Indian children and the very survival of Indian tribes.

2. *Congress’ Consideration of its Authority to Enact ICWA is Due Deference.*

Deference for Congress’ judgment in enacting a particular piece of legislation is “particularly appropriate when . . . Congress specifically considered the question of the Act’s constitutionality.” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). The Committee on Interior and Insular Affairs (the “Committee”) directly addressed the constitutionality of ICWA. The Committee found that Congress’ power to legislate broadly within the sphere of Indian affairs was “sweeping” and that the line of cases supporting the breadth of this power was “unbroken” and “numerous.” H.R. Rep. No. 95-1386, at 13 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7530.

The Constitution confers on Congress the powers of war and peace; of making treaties and of regulating commerce . . . with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They (Congress) are not limited by any restrictions on their free actions.

Id. (quoting *Worcester*, 31 U.S. 515 at 559).

The Committee also incorporated into its findings that the dependency of Indian Tribes on the United States and the power to protect the Tribes has “always been recognized by the executive and by Congress, and by th[e] Court.” *Id.* at 14 (quoting *Kagma*, 118 U.S. at 383-84). Notably, the Committee acknowledged that, though Congress’ powers are plenary, those powers may not be exercised arbitrarily. *Id.* Comprehensively, the Committee addressed whether Congress properly exercised its plenary authority in enacting ICWA. *Id.* (finding that ICWA was a proper exercise of Congress’ plenary power because the Indian Commerce Clause has been construed as Congress’ authority to regulate all matters with Indian tribes and Indian individuals).

Although Subsection A.1, *supra*, outlines Congress’ deeply rooted constitutional and historical authority to enact ICWA and the provisions therein, this Court need not take Petitioners’ word for it. Indeed, the challenges mounted by Respondents against ICWA’s enactment are neither novel nor unaddressed. Because Congress directly considered whether it had the authority to enact ICWA and, supported by a plethora of decisions from this Court, found that it did, Congress’ determination that ICWA is constitutional should be given deference.

B. ICWA Does Not Violate the Tenth Amendment Because It Does Not Require the States to Legislate Nor Commandeer State Executives and Preempts Contrary State Law.

“The 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. Congress’ Article I authority to enact a federal law and the state’s Tenth Amendment authority to retain its sovereignty in the same regard are “mirror images of each other.” *New York*, 505 U.S. at 156. The core of “anticommandeering” is that Congress may not issue orders directly to the states; however, this doctrine is seldom invoked. *Murphy*, 138 S. Ct. at 1475. To be sure, including *Murphy*, this Court has upheld all but three federal laws alleged to violate the Tenth Amendment.

See *New York*, 505 U.S. 144, 188; *Printz*, 521 U.S. 898, 935. From these cases emerged two basic principles: First, the federal government may not usurp state legislatures by commanding states to enact certain laws. *New York*, 505 U.S. at 179. Second, the federal government may not commandeer state officials to carry out federal law. *Printz*, 521 U.S. at 935.

While Congress may not issue commands to state legislatures or state officials, state courts are bound to enforce federal law under the Supremacy Clause. *Murphy*, 138 S. Ct. at 1476 (noting that the Supremacy Clause mandates that “when federal and state law conflict, federal law prevails and state law is preempted”); *Brackeen*, 994 F.3d at 317 (internal quotations omitted) (holding that ICWA falls into the latter category “between a law that unconstitutionally conscripts state governments as the federal government’s agents, and a law that establishes federal rights or obligations that the states must honor despite any conflict with state law”).

1. *ICWA Does Not Compel the States to Act and Does Not Command Control of State Officials.*

An act of Congress that requires compliance with federal standards but neither commands a state to regulate its own citizens nor usurps control of state officials in order to carry out a federal directive does not offend the Tenth Amendment. See *Reno v. Condon*, 528 U.S. 141, 151 (2000). In *Condon*, this Court upheld the Driver’s Privacy Protection Act of 1994 (the “DPPA”), which restricted states from disclosing, without drivers’ consent, personal information contained in South Carolina’s Department of Motor Vehicles (“DMV”) database. *Id.* at 144, 151. State law, however, provided that personal information stored with the state DMV was freely and easily obtainable to any person or entity with few procedural barriers for procurement of such information. *Id.* at 147. In holding that the DPPA did not run afoul of the anti-commandeering doctrine, this Court stated that “[t]he DPPA regulate[d] the States as the owners of the databases. It [did] not require the South Carolina Legislature to enact any laws or regulations, and it [did] not require state officials

to assist in the enforcement of statutes regulating private individuals.” *Id.* This principle is also understood as the idea that a federal statute may unconstitutionally impinge upon state sovereignty if the statute “regulate[s] the ‘States as States.’” *Garcia*, 469 U.S. at 537 (quoting *Hodel v. Va. Surface Min. & Reclamation Ass’n, Inc.*, 452 U.S. 264, 287-88 (1981)).

In contrast to *Condon*, this Court’s most recent decision finding impermissible commandeering involved a federal law—the Professional and Amateur Sports Protection Act (“PASPA”)—which proscribed states from “authorizing by law” gambling on “competitive sporting events.” *Murphy*, 138 S. Ct. at 1470. PASPA was a clear directive to the states as sovereigns that their respective legislatures must not authorize sports gambling. Importantly, Justice Ginsburg’s dissent in *Murphy* noted the values that anticommandeering seeks to safeguard. *Id.* at 1489 (Ginsburg, J., dissenting) (“The concern triggering the [anticommandeering] doctrine arises only ‘where the Federal Government compels States to regulate’ or to enforce federal law, thereby creating the appearance that state officials are responsible for policies Congress forced them to enact.” (quoting *New York*, 505 U.S. at 168)).

ICWA does not regulate the states as states. Like the DPPA in *Condon*, ICWA does not require state legislatures to enact any laws or “require state officials to assist in the enforcement of statutes regulating private individuals.” *Condon*, 528 U.S. at 151. While PASPA was a congressional directive that prohibited states from enacting laws allowing for sports gambling, ICWA issues no such commands on state legislatures. What ICWA does do is confer federally-created rights on private parties—Indian children, parents, and tribes, like the South Carolina drivers in *Condon*—and sets federal minimum standards for the protection of those rights.

Further evidence that Congress did not impose an unconstitutional directive on state legislatures is found in 25 U.S.C. § 1921, which provides that, if state law imposes a more exacting

standard on Indian child custody proceedings, state law should displace ICWA's provisions. Congress did not commandeer the states in order to enforce ICWA; instead, it set a floor for states to either follow or exceed.

In the case of Baby S, the Quinault Nation identified two adoptive families within the Quinault Tribe who sought to adopt the child. R. at 3. ICWA did not require West Dakota to enact any laws in order to carry out the Quinault Nation's placement preferences for Baby S, nor did ICWA's placement preferences dictate the actions of state officials. Here, West Dakota had to simply defer to ICWA's language and recognize that the Quinault Nation identified a placement within the Quinault Tribe for Baby S, and honor the Quinault Nation's placement preference. *See* 25 U.S.C. § 1915(a). Instead, West Dakota seeks to place Baby S with the Donahues, a non-Indian couple. R. at 3. In addition to acting in direct contravention to Congress's objective to keep Indian families and tribes together, Respondents arrogantly assume that removing an Indian child from the cultural and social norms of its tribe is in the child's best interest.

Congress recognized that its responsibility for Indian tribes obligated it to legislate. To address the state-created problem of mass separation of Indian children from their parents, Congress directly regulated all individuals involved in the child custody process. Congress did not force state officials or legislatures to become its puppets, and there is no concern that citizens are fooled by an appearance that the states, and not Congress, are pulling the strings.

2. *ICWA Imposes Requirements on Private and Public Parties Even-Handedly.*

When a federal regulation applies evenhandedly to both public and private actors, the anticommandeering doctrine is not implicated. *Murphy*, 138 S. Ct. at 1478. The principle of "evenhandedness" flows from the same rationale that impermissible commandeering happens when Congress seeks to regulate the states as sovereigns. *See* Edward A. Hartnett, *Distinguishing*

Permissible Preemption from Unconstitutional Commandeering, 96 Notre Dame L. Rev. 351 (2020) (“[I]f a law applies equally to state and private actors, it must be because the law applies to activity that the state undertakes in some role other than its role as sovereign.”).

In *Condon*, in addition to holding that the DPPA did not usurp control of state legislatures or state officials and thus did not violate anticommandeering principles, this Court noted that the DPPA was a “generally applicable” statute. *Condon*, 528 U.S. at 151 (“The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information.”); *see also New York*, 505 U.S. at 160 (reiterating the unconstitutionality of the statute requiring states to regulate radioactive waste disposal, stating “this is not a case in which Congress has subjected a State to the same legislation applicable to private parties”).

ICWA unquestionably regulates state and private actors evenhandedly. Section 1912(a) requires that, in involuntary proceedings, “the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify” the child’s parents, custodian, Indian tribe, or Secretary of the United States Department of the interior.” 25 U.S.C. § 1912(a) (emphasis added). The “active efforts” requirement in 1912(d) similarly applies to “[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child.” 25 U.S.C. § 1912(d) (emphasis added). In other words, to the extent ICWA’s provisions apply to or regulate state agencies, those provisions do not regulate the states in their capacities as sovereigns. West Dakota’s Child Protection Service (“CPS”) ICWA Compliance Manual sets forth CPS’s policies and procedures for implementing ICWA.” R. at 2. CPS avers that, when ICWA is implicated, “almost every aspect of the social work and legal case is affected.” *Id.* CPS’s self-imposed guidelines for enacting ICWA may very well affect nearly every part of West Dakota’s child custody proceedings. However, the same provisions of ICWA apply equally to private adoptions

involving Indian children as well as the private actors implicated in those voluntary proceedings. ICWA regulates state and private actors evenhandedly and the anticommandeering doctrine is not implicated.

3. *ICWA Properly Preempts Contrary State Law.*

Where Congress enacts a federal law affecting individual rights pursuant to its enumerated powers and does not impermissibly invade state sovereignty, the Supremacy Clause requires state courts to enforce federal law as the law of the land over contrary state law. *Murphy*, 138 S. Ct. at 1479; Matthew L.M. Fletcher & Randall Khalil, *Preemption, Commandeering, and the Indian Child Welfare Act*, 2022 Wis. L. Rev. 5 (2022) [hereinafter *Preemption*]. Indeed, even in *New York*, the cornerstone case upon which the foundation of the anticommandeering doctrine was built, this Court recognized that it was not a question of whether Congress could regulate how radioactive waste was disposed of, but instead a question of how Congress chose to regulate.

[U]nder the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating . . . Congress has impermissibly directed the States to regulate in this field.

New York, 505 U.S. at 160 (emphasis added).³

The Committee also considered whether Congress could validly displace state law under the Supremacy Clause. H.R. Rep. No. 95-1386, at 17. In concluding that it could, the Committee noted that the “failure of state officials, agencies, and procedures to take into account the special problems and circumstances of Indian families” gave Congress no choice to but to set “minimum

³ At issue in this case is what has been referred to as “conflict” preemption: where “Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.” *Murphy*, 138 S. Ct. at 1480 (citing *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 493 (2013)).

federal standards and procedural safeguards in state Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family, and the Indian tribe.” *Id.* at *19.

Additionally, record-keeping provisions imposed on states as part of a federal regulatory scheme have been held constitutional for centuries. *See* Matthew L.M. Fletcher & Randall Khalil, *Preemption*, 2022 Wis. L. Rev. 5, 25 (2022) (citing *Printz*, 521 U.S. at 905–909) (setting forth multiple instances where Congress has required states to keep records related to citizenship and naturalization). However, where a provision of a federal statute is found unconstitutional, this Court should salvage as much of the statute as possible. *See* *Murphy*, 138 S. Ct. at 1489 (Ginsburg, J. dissenting) (highlighting that in *New York* and *Printz*, the Court did not eliminate the federal statutes wholesale; instead, it only disposed of the parts of the statute that were found unconstitutional).

Finally, that a federal regulation requires some burden on the states to comply with federal standards cannot itself sustain a Tenth Amendment challenge. *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988) (noting that the fact that a state must “take administrative and legislative action. . . or raise the funds” to comply with federal standards “presents no constitutional defect”).

ICWA falls squarely within preemption’s constitutional crosshairs. First, as sufficiently explored above, ICWA was a valid exercise of congressional authority pursuant to Congress’ plenary power to legislate on behalf of Indian tribes. Second, the challenged ICWA provisions do not command control of state legislatures or state officials. Finally, ICWA confers rights on private parties, a fact the Thirteenth Circuit conceded. R. at 15. The placement preference provisions in Sections 1915(a) and (b) (as applied to adoption and foster care settings, respectively) protect the rights of Indian children by maximizing their chances of being raised in Indian homes. Similarly, Sections 1912(a), (d), (e), and (f) safeguard basic parental or custodial rights by requiring notice

of the threat to parental or custodial rights and a chance to intervene, and by setting legal standards that must be met prior to foster care placement or termination of parental rights. Lastly, Section 1951 imposes basic record-keeping requirements of the kind that have routinely been enforced under Supremacy Clause principles.⁴

Each of these provisions further Congress' objective to create minimum federal standards and individual rights in order to divest the states of their ability to continue with harmful and abusive child welfare practices that led to a "growing crisis with respect to the breakup of Indian tribes." H.R. Rep. No. 95-1386, at 19. Congress carried out its objective to protect Indian children, families, and tribes pursuant to its constitutional authority, and did not commandeer state legislatures or state officials in the process. As such, ICWA validly preempts state law.

II. ICWA DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE THE ACT CONTAINS POLITICAL CLASSIFICATIONS THAT OVERCOME RATIONAL-BASIS REVIEW.

The Fourteenth Amendment's Equal Protection Clause prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Clause is implicitly incorporated into the Due Process Clause of the Fifth Amendment to protect against federal violations of equal protection. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). For decades, this Court has held that federal regulations governing Indian tribes give rise to political classification that are subject to rational-basis review. *See, e.g., United States v. Antelope*, 430 U.S. 641, 645 (1977) (emphasis added) ("The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not

⁴ Petitioners concede that Section 1915(e) is somewhat ambiguous as to whom the record-keeping directive applies. While Petitioners also question the rationale for any state's refusal to keep and provide such records, to the extent Section 1915(e) is found to violate the anticommandeering clause, the remaining provisions of ICWA—which clearly pass constitutional muster—should be salvaged.

based upon impermissible racial classifications.”). Respondents fail to present a compelling argument that this Court should deviate from its own well-established rule. The challenged provisions of ICWA are rationally related to Congress’ legitimate purpose “to promote the stability and security of Indian tribes and families[.]” 25 U.S.C. § 1902. The decision of the Thirteenth Circuit should be reversed, and this Court should further hold that ICWA withstands Respondents’ equal protection challenge.

A. An Undisputed Principle of This Court’s Jurisprudence is That Federal Regulations Governing Indian Tribes Give Rise to Political Classifications.

This Court reviews equal protection challenges by applying a level of judicial scrutiny determined by the nature of the classification at issue. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985). Strict scrutiny applies “only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.” *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). Intermediate scrutiny applies when the classification discriminates against a “quasi-suspect” class, such as gender or illegitimacy. *See id.* at 325 (Marshall, J., dissenting). All other classifications are subject to rational-basis review. *See City of Cleburne*, 473 U.S. at 440. This Court has applied rational-basis review in every challenge to regulations governing Indian tribes based on the understanding that a tribe is a quasi-sovereign political entity rather than a racial group. *See, e.g., Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (“It is settled that ‘the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.” (quoting *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974))).

Federal regulations governing Indian tribes, including those that benefit Indians over non-Indians, constitute political classifications that are subject to rational-basis review. *See Mancari*,

417 U.S. at 554 (citations omitted) (“On numerous occasions, this Court specifically has upheld legislation that singles out Indians for particular and special treatment.”). In *Mancari*, non-Indian employees of the Bureau of Indian Affairs (BIA) challenged an employment preference policy for tribe members with “one-fourth or more degree Indian blood.” *Id.* at 537, 553 n.24 (citing 25 U.S.C. § 472). This Court unanimously held that Congress’ plenary authority on matters pertaining to Indian tribes “has always been deemed a political one [that is] not subject to be controlled by the judicial department of the government.” *Id.* at 551. Thus, Congress can provide “special treatment” for Indian tribes because it has plenary power over tribal relations and federal law recognizes the “unique legal status” of tribes as a quasi-sovereign entity rather than a discrete racial class. *Id.* at 551–52; *see also id.* at 552 (“Literally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians.”). This Court recognized that if it were to view legislation that exclusively benefits Indians as racial discrimination against non-Indians, an entire Title of the United States Code would be invalidated. *Id.* at 552 (citing to Title 25 of the United States Code). Because tribal Indians constitute a political class rather than a racial one, this Court clarified that if “special treatment can be tied rationally to the fulfillment of Congress’ unique obligation towards the Indians, such legislative judgments will not be disturbed.” *Id.* at 555.

Three years later, this Court reaffirmed *Mancari*’s central holding in *United States v. Antelope*, 430 U.S. 641, 669–70 (1977). In *Antelope*, members of the Coeur d’Alene tribe were charged with robbing and murdering a non-Indian woman in her home on the tribe’s reservation in Idaho. *Id.* at 642. Two of the tribe members were convicted for felony murder under federal law, but they appealed claiming that their convictions were the product of racial discrimination. *Id.* at 642–44 (citing 18 U.S.C. § 1153). The appellees pointed out that state law would have

governed if a non-Indian was charged with murdering another non-Indian on tribal land. *Id.* at 644. Idaho did not have a felony murder statute, so the state would need to prove premeditation and deliberation under a first-degree murder theory—neither of which were requirements under the federal felony murder statute. *Id.* Accordingly, because appellees were tribe members and charged with committing the offense on tribal land, the federal felony murder statute governed.

This Court began its analysis in *Antelope* with a clear assertion: “The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications.” *Id.* at 645. This Court further emphasized that the laws and history of this country have always treated Indian tribes as a “unique aggregation” of individuals. *Id.* Federal legislation directed at these unique aggregations have “repeatedly been sustained by this Court against claims of unlawful discrimination.” *Id.* Because the appellees were subject to federal laws on account of their connection to a tribe rather than their race, this Court held that that the application of federal law was “based neither in whole nor in part upon impermissible racial classifications.” *Id.* at 646–47.

It is axiomatic that federal regulations governing Indian tribes give rise to political classifications rather than race-based classifications. *See Antelope*, 430 U.S. at 645 (alteration in original) (“Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a “racial” group consisting of “Indians””) (quoting *Mancari*, 417 U.S. at 553 n.24)). Notwithstanding this Court’s consistent affirmation of this principle, Respondents attempt to pull the rug out from under settled precedent. Respondents’ argument is premised on the erroneous assumption that ICWA “uses ancestry as a proxy for race,” R. at 18; an assumption that disregards decades of precedent and misunderstands ICWA’s purpose “to promote the stability and security of Indian tribes.” 25 U.S.C. § 1902.

The challenged provisions of ICWA involve political classifications that must be subject to rational-basis review. *See Mancari*, 417 U.S. at 554–55. Chief Judge Tower claimed in his concurrence below that the district court “misconstrued controlling precedent regarding racial classifications” by establishing a rule that “all classifications involving Indians are merely political.” R. at 17. It would be true that if Congress enacted legislation that was entirely unconnected to Indian tribes and regulated individuals who are racially Indian but have no connection to or a relationship with a tribe, such legislation could give rise to race-based classifications. Where the Chief Judge is wrong, however, is that ICWA does not fall into this hypothetical category of purely race-based legislation.

ICWA is even less racially dependent than the statute in *Mancari*. *See* 417 U.S. at 553 n.24. The BIA’s hiring preference was extended only to individuals who possessed “one-fourth or more degree Indian blood.” *Id.* Despite an express reference to race, this Court still found that rational-basis review was appropriate because Congress designed the employment preference policy “to further the cause of Indian self-government.” *Id.* at 554. Unlike the BIA’s policy, ICWA contains no blood quantum or race requirement. Instead, ICWA applies only to members of tribes and to “Indian children who possess a potential but not-yet-formalized affiliation with . . . a federally recognized tribe.” *See Brackeen v. Haaland*, 994 F.3d 249, 339 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022). The district court recognized that this was a permissible course of conduct for Congress to take because ICWA’s protection of Indian children and the continued survival of Indian tribes is “tied rationally to the fulfillment of Congress’ unique obligation towards the Indians.” *See Mancari*, 417 U.S. at 555.

B. ICWA’s Protection of Children Who Are Not-Yet Tribe Members but Are Eligible for Membership and Have a Tribal Parent Does Not Transform the Political Classification into a Race-Based Classification.

ICWA defines an “Indian child” as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4). Chief Judge Tower asserted that *Mancari* cannot control the analysis of ICWA because subsection (b) “uses ancestry as a proxy for race.” R. at 18. For two reasons, this argument is without merit: (1) Chief Judge Tower erroneously omitted subsection (b)’s two requirements from his analysis; and (2) Indian children are not automatically granted tribal membership at birth, and Congress reasonably recognized that custodians of Indian children have legitimate reasons to not immediately submit tribal membership applications.

1. *The Two Requirements to Qualify as an Indian Child Under 25 U.S.C. § 1903(4)(b) Ensure That Application of ICWA Turns on a Political Classification Rather Than a Racial Classification.*

Chief Judge Tower agreed with Respondents after relying on *Rice v. Cayetano*, 528 U.S. 495 (2000); however, his reliance was misplaced. This Court explicitly stated in *Rice* that regulations governing Indian tribes are distinguishable from legislation based exclusively on native Hawaiian ancestry. *Id.* at 519–20. In *Rice*, this Court held that a Hawaiian statute restricting voter eligibility to “native Hawaiians” and restricting positions at a state agency to individuals with Hawaiian ancestry violated the Fifteenth Amendment. *Id.* at 519. Because the statute classified citizens solely based on ancestry, this Court found that the purpose for the legislation was to use ancestry as a proxy for race. *Id.* at 514–17. Although Hawaii claimed that *Mancari*’s reasoning should apply, this Court disagreed. *Id.* at 519–20. *Mancari* could not control because native Hawaiians are not entitled to Indian tribes’ quasi-sovereign political status. *Id.* at 522. Even though

Mancari involved a “classification [with] a racial component,” this Court recognized that the legislation was directed at federally recognized tribes, and ““the preference [was] political rather than racial in nature.”” *Id.* at 519–20 (quoting *Mancari*, 417 U.S. at 553, n.24).

ICWA’s definition of “Indian child” is not a race-based classification because subsection (b) ensures that ICWA will not apply to all children who are racially Indian. *See* 25 U.S.C. § 1903(4)(b); *see also Brackeen*, 994 F.3d at 340 (“[B]ecause ICWA does not single out children ‘solely because of their ancestry or ethnic characteristics,’ . . . *Rice* is inapposite.” (quoting *Rice*, 528 U.S. at 515)). Subsection (b) has two requirements: (1) the child must have one biological parent that is a tribe member; and (2) the child must satisfy a tribe’s eligibility requirements. *Id.* Ironically, Chief Judge Tower claimed that *Mancari*’s reasoning is inapplicable to ICWA because, unlike subsection (b), the BIA’s policy in *Mancari* “resulted in the exclusion of ‘many individuals who are racially to be classified as “Indians.””” R. at 17 (quoting *Mancari*, 417 U.S. at 552, 555 n.24). To justify this assertion, the Chief Judge misstated the text of subsection (b) by claiming that ICWA applies if a “child is related to a tribal ancestor by blood.” *Id.* at 18. This claim is overgeneralized and simply not accurate.

Based on subsection (b)’s two requirements, ICWA will result in the exclusion of “many individuals who are racially to be classified as ‘Indians.’” *See Mancari*, 417 U.S. at 552, 555 n.24. For example, if a child has two parents who are racially Indian but neither parent is a tribe member, ICWA will not apply. *See* 25 U.S.C. § 1903(4)(b). Additionally, some children who are racially Indian will not satisfy tribes’ eligibility requirements. Eligibility requirements vary across tribes, but some impose blood quantum requirements. Accordingly, if a tribe requires members to have one-fourth Indian blood, ICWA would not apply to a child who has a parent that is one-fourth Indian because the child would only be one-eighth Indian. Even if the parent was a tribe member,

ICWA still would not apply. Thus, contrary to Chief Judge Tower’s findings, ICWA’s application does not turn solely on race or ancestry. Because ICWA turns on tribal membership or a “not-yet-formalized affiliation” with a tribe, the Act gives rise to political classifications, and rational-basis review must apply. *See Brackeen*, 994 F.3d at 339–40 (“ICWA’s definition of ‘Indian child’ is a political classification subject to rational basis review.” (citing *Mancari*, 417 U.S. at 555)).

2. *Congress Understood That ICWA Must Protect Children Who Are Eligible for Tribe Membership and Have a Tribal Parent Because Tribe Membership is Not Automatic, and Custodians Need Time to Submit the Child’s Application.*

Because tribal membership is not automatically granted upon birth, subsection (b) is necessary to promote the stability and security of Indian tribes and families. 25 U.S.C. § 1903(4)(b); *see also* Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 Mich. L. Rev. 1755, 1785 (2022) (“Indian children are not born tribal members; they must apply for membership.”). Congress recognized that Indian custodians have legitimate reasons to not immediately submit their child’s application for tribal membership. *See* H.R. Rep. No. 95-1386, at 17 (“[A] minor perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedures necessary to become enrolled in his tribe.”). Among these reasons is that Indian children may be eligible for membership in more than one tribe, and the custodians may need time to choose the tribe or may want the child to select the tribe. Moreover, refusing to rush into this decision is reasonable when considering that most tribes prohibit dual enrollment, and the federal government generally requires Indians to select one tribe for purposes of federal law. *See, e.g., LaRock v. Dep’t of Revenue*, 621 N.W. 2d 907, 915 (Wis. 2001) (“The tribes do not grant dual-memberships.”); *Akers v. Hodel*, 871 F.2d 924, 933 n.16 (10th Cir. 1989).

Subsection (b) is particularly necessary in jurisdictions where courts have held that automatic tribal membership upon birth is prohibited by law. *See, e.g., Nielson v. Ketchum*, 640

F.3d 1117, 1124 (10th Cir. 2011). ICWA’s purpose to “protect the best interest of Indian children and promote the security and stability of Indian tribes and families” would be meaningless if the Act failed to protect infants who are eligible for tribal membership but whose parents have not yet submitted the child’s tribal application. *See* 25 U.S.C. § 1902. Congress contemplated the hurdles that custodians of Indian children would face and recognized that subsection (b) was necessary to mitigate the “alarmingly high percentage of [Indian] children [that] are placed in non-Indian foster and adoptive homes and institutions.” *See id.* at § 1901(4).

C. The Challenged Provisions of ICWA Withstand Rational-Basis Review Because They Provide Special Treatment That is Tied Rationally to the Fulfillment of Congress’ Unique Obligation Toward Indian Tribes.

Under rational-basis review, a statute “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational-basis for the classification.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). Application of rational-basis review ensures that a statute comes to this Court “bearing a strong presumption of validity” and that the burden is on “those attacking the rationality of the classification . . . ‘to negative every conceivable basis which might support it.’” *Id.* at 314–15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Moreover, rational-basis review constrains this Court’s ability to second-guess Congress’ policy decisions. *See Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). When a federal statute grants Indians special treatment over non-Indians, the statute “will not be disturbed” when “the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation towards the Indians.” *Mancari*, 417 U.S. at 555.

Respondents challenge four provisions of ICWA on equal protection grounds: §§ 1913(d), 1914, 1915(a)–(b). R. at 4. Because rational-basis review must govern this Court’s analysis of

ICWA, the provisions will withstand constitutional scrutiny if these benefits “can be tied rationally to the fulfillment of Congress’ unique obligation towards the Indians.” *Mancari*, 417 U.S. at 555. Because all four provisions are rationally related to Congress’ obligation “to promote the stability and security of Indian tribes and families[,]” 25 U.S.C. § 1902, Respondents’ claim cannot stand.

1. *Sections 1913(d) and 1914 Are Rationally Related to Congress’ Obligation to Ensure That Indian Parents and Tribes Receive at Least Minimal Due Process Protection.*

Under § 1913(d), if an Indian parent’s consent to a voluntary adoption was obtained through fraud or duress, the parent may petition to withdraw consent within two years after the final decree. 25 U.S.C. § 1913(d). If the court finds fraud or duress, the court must vacate the decree and return the child to the parent. *Id.* Under § 1914, an Indian child, a parent or custodian of the child, or the child’s tribe may petition a state court to invalidate a foster care placement or termination of parental rights upon showing that the action violated any provision of 25 U.S.C. §§ 1911, 1912, or 1913. 25 U.S.C. § 1914.

The Record does not go into detail regarding the Respondents’ equal protection challenge to §§ 1913(d) and 1914. *See generally* R. at 10–12, 17–19. Presumably, Respondents allege that these sections impose regulatory burdens on non-Indian families seeking to adopt an Indian child that are not similarly imposed on Indian families seeking to adopt an Indian child. Despite this allegation, §§ 1913(d) and 1914 are rationally related to Congress’ unique obligation to the Indians. Congress recognized that states’ social service programs and courts were failing to protect the interests of Indian tribes, parents, and children. *See* 25 U.S.C. § 1901(5) (“States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”). Consequently, Indian parents and tribes suffered extreme due process violations at the hands of the states. *See* H.R. Rep. No. 95-

1386, at 11 (“The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law.”) To remedy this wrong, Congress carefully crafted procedural safeguards to ensure that, at the bare minimum, Indian families and tribes receive adequate notice and can avoid being the victims of fraud or duress. In light of the historical injustices that belied Congress’ decision to enact ICWA, §§ 1913(d) and 1914 are undoubtedly “tied rationally to the fulfillment of Congress’ unique obligation towards the Indians.” *Mancari*, 417 U.S. at 555.

2. *Congress Rationally Concluded That ICWA’s Placement Preferences Were Necessary to Contribute to the Continued Existence of the Indian Tribes.*

Section 1915(a) outlines placement preferences for the adoption of Indian children by giving preference, “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). Section 1915(b) provides a similar standard that governs foster care and preadoptive placement preferences. *Id.* at § 1915(b).

Congress emphasized that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.” 25 U.S.C. § 1901(3). After engaging in extensive deliberation, Congress determined that raising a child in a home that practices and respects Indian traditions would increase the likelihood that the child would become a tribe member.

By providing a preference for placing Indian children with a family that is part of a formally recognized Indian political community that is interconnected to the child’s own tribe, ICWA enables that child to avail herself of the numerous benefits—both tangible and intangible—that come from being raised within this context.

Brackeen, 994 F.3d at 345. In light of this recognition, Congress could rationally determine that ICWA’s placement preferences for Indian children would “promote the stability and security of Indian tribes.” *See* 25 U.S.C. § 1902; *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 689 (2013)

(Sotomayor, J., dissenting) (“A tribe’s interest in its next generation of citizens is adversely affected by the placement of Indian children in homes with no connection to the tribe.”).

Additionally, Congress’ decision to include a placement preference for “other Indian families” does not change this analysis. Because many modern tribes descended from larger tribes, it is common for tribes to have shared cultural, linguistic, and religious values. *See, e.g.*, Greg O’Brien, *Chickasaws: The Unconquerable People*, Miss. History Now (May 2003), https://libres.uncg.edu/ir/uncg/f/G_O%27Brien_Chickasaws_2003.pdf (explaining the “nearly identical” cultural similarities between Chickasaw and Choctaw Indians). Thus, even if the child is placed with a different tribe, the child may nonetheless be raised in an environment that follows “nearly identical” traditions and values to the tribe that the child is eligible for. *See id.* Moreover, Congress could rationally conclude that placing Indian children with other Indian families would “promote the stability and security of Indian tribes,” 25 U.S.C. § 1902, because it will “contribut[e] to the continued existence of the Indian tribes as a whole,” *Brackeen*, 994 F.3d at 345. Thus, ICWA’s placement preferences “can be tied rationally to the fulfillment of Congress’ unique obligation towards the Indians,” and these provisions must “not be disturbed.” *See Mancari*, 417 U.S. at 555.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that the ruling of the Thirteenth Circuit be reversed and that this Court find that ICWA passes constitutional muster under both the Tenth Amendment and the Equal Protection Clause.

Date: October 10, 2022

 /s/ Team 13
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