IN THE
SUPREME COURT
OF THE UNITED STATES

No. 22-386

OCTOBER TERM 2022

STUART IVANHOE, SECRETARY OF THE INTERIOR, *et al.,*

Petitioners,

v.

JAMES AND GLENYS DONAHUE, AND THE STATE OF WEST DAKOTA,

Respondents.

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED:

I. Whether the Supreme Court should deem that the Placement Preference and Record-keeping Provisions of the Indian Child Welfare Act exceed Congress's Article I authority by forcing state officials to implement a burdensome set of standards in compliance with a federal regulatory scheme which is a clear violation of the anti-commandeering doctrine under the Tenth Amendment.

II. Whether the Supreme Court should deem the provisions of the ICWA unconstitutional under the Equal Protection Clause of the Fifth Amendment, given (1) congress's cherry picking as a means to target and inexplicably disadvantage a racial group with discerning characteristics and (2) the statute's unfair reliance on racial characteristics which warrants a strict scrutiny examination.

STATEMENT OF THE CASE:

Baby C, a child of Quinault and Cherokee parents, resided with her maternal aunt after her birth. R. at 2. Following Baby C's departure from her aunt's home, West Dakota state court proceedings removed Baby C's biological parents' guardianship rights. R. at 2-3. CPS thus notified both the Quinault and Cherokee Nations, as required by the ICWA, before removing Baby C and placing her in foster care with the Donahues ("Respondents"), where she remained for two years R. at 2. In January 2020, after state agents completed the ICWA requirements, West Dakota ("Respondents") finalized the Donahues' adoption of Baby C. R. at 3. In April 2020, the Donahues became foster parents to Baby S. R. at 3. Baby S's biological mother perished, leaving Baby S with their paternal grandmother R. at 3. While Baby S's mother belonged to an Indian tribe, it is unknown whether his father possessed any Indian genetics or racial ties. R. at 3. Eventually, the grandmother could not care for Baby S due to health conditions. R. at 3. With consent from the grandmother, the Donahues filed a petition to adopt Baby S. R. at 3**.**

Respondents and Petitioners reside in West Dakota, a state where precisely eighty-eight percent of adoption proceeding cases do not implicate children of Indian tribes. R. at 4. Despite the diminutive Indian adoption cases, Congress nevertheless enacted the Indian Child Welfare Act of 1978 (ICWA), which spotlights Indian children and their families. R. at 4. In theorizing that a high percentage of Indian families are separated through adoption or foster care, Congress fabricates the ICWA by rationalizing the preamble with the attempted preservation of Indian tribal cultural and social standards. R. at 5. In their preamble, Congress speculates that they are "protect[ing] the best interests of Indian children" and "Indian guardians" and that, in doing so, they "reflect the unique values of Indian culture." R. at 5. The West Dakota CPS published a

manual which specifically stated that in cases dealing with Indian children, "almost every aspect of the social work and legal case is affected." R. at 2. Congress hypothesizes that in cases dealing particularly with adoptive children of Indian tribes, states have been unable to adequately remedy such disputes. R. at 4-5. Congress members therefore designed their own means of presiding over and managing the deeply-personal issues that implicate all racial backgrounds. R. at 4.

Section 1903 ("Covered Children") precisely defines the statute's targets, Indian children, while sections 1911 and 1912 ("Intervention Rights") mandate the way in which Indian parents can intervene in state foster care or parental rights proceedings. R. at 5-6. In establishing guidelines as to how an Indian parent can retract their consent at certain points of the child's adoption decree, Congress enacted Section 1913 ("The Right to Withdraw Consent"). R. at 6. Section 1914 ("The Right to Petition to Invalidate a Decree") indicates that Indian parents or custodians must confront heightened and contingent standards to nullify state actions for foster care placement or termination of parental rights. R. at 6. The governing standards that Congress pre-selected for foster care placement, pre-adoptive placement, and adoptive proceedings are illustrated in Section 1915 ("Placement Preferences"). R. at 6. Sections 1915(a) and 1915(b) express the single opinion of congressmen, as they set forth a rigid periphery for foster care and adoptive placement of Indian children without consulting the intended beneficiaries. R. at 6-7. Lastly, Sections 1915(e) and 1951(a) ("Record-Keeping Requirements) mandate that the home placement and highly personal information of the Indian child be recorded. R. at 7. The established standards operationalize fixed methods that limit the ways Indian children and parents can adopt.

Respondents filed suit against Petitioners on June 29, 2020, alleging that the ICWA §§ 1913(d), 1914, and 1915(a)-(b) violated the Equal Protection Clause of the Fifth Amendment and

that certain provisions commandeer the states in violation of the Tenth Amendment R. at 4-5. On writ of certiorari to the Supreme Court, Respondents now seek injunctive and declaratory relief in violation of the anti-commandeering doctrine under the Tenth Amendment. Additionally, they seek to affirm the Circuit Court's decision and deem the contested the ICWA as unconstitutional in their deprivation of Equal Protection rights to Indian tribal members under the Fifth Amendment.

SUMMARY OF THE ARGUMENT:

I.

The Thirteenth Circuit correctly determined that the Placement Preference and Record-Keeping Provisions of the ICWA violate the Tenth Amendment of the United States Constitution. Specifically, the provisions at issue violate the anti-commandeering doctrine of the Tenth Amendment by forcing states to implement a federal regulatory scheme. The provisions of the ICWA place a burdensome set of standards on state officials. Additionally, Congress exceeds its Commerce Clause authority by attempting to regulate activities that are non-economic and traditionally reserved to the states to regulate.

II.

In an invidious manner of suppressing the adoptions avenues available for Indian tribal members, Congress attempts to strip fundamental rights away from a group undeserving of such discrete treatment. Respondent now urges the Supreme Court to declare the contested provisions of the ICWA as unconstitutional under the Fifth Amendment Equal Protection Clause given (i) Congress's disparate treatment of Indian tribal members as to cherry-pick and disadvantage them and (ii) the necessity of the Court to analyze the inherently discriminatory behavior of Congress under a strict scrutiny standard.

ARGUMENT:

I. The Placement Preference and Record Keeping Requirements of the ICWA Issue a Direct Order to the States, Enforcing Them to Follow a Federal Regulatory Scheme, Violating the Tenth Amendment's Anti-Commandeering Doctrine.

The Tenth Amendment of the Constitution asserts that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X § I. The federal system of the United States confers limited powers to the National Government, while the remaining powers are retained by the States and the people. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012). The Constitution grants onto Congress only certain enumerated powers and any other legislative power is reserved to the States. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). The anti-commandeering doctrine is an expression of a fundamental structure incorporated into the Constitution to withhold Congress from issuing orders directly to the States. *Id*. at 1475. The liberties of all American citizens are best protected when the governmental power does not direct or control state actions. *Bond v. United States*, 564 U.S. 211, 222 (2011). When Congress attempts to use state agents to carry out a congressional goal, a violation of the Tenth Amendment occurs. The Placement Provision and Record-Keeping provision of the ICWA violate the anti-commandeering doctrine by conferring a direct order onto the States to enforce provisions and standards set forth by Congress in an area that is traditionally left to the States.

A. The ICWA Commands West Dakota's State Officials to Enforce a Burdensome Set of Standards and Procedures on Adoptions and Foster Care Proceedings for Indian Children Into Non-Indian Homes.

The Framers of the Constitution were persuaded that "using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict." *See Printz*

v. United States, 521 U.S. 898, 919 (1997). It is integral to the framework of this country that the federal government does not have the ability to intrude on the State's ability to govern its citizens. Further, when a federal law and a state law conflict, Art. I, § 8 of the Constitution provides that federal law is supreme. *M'Culloch v. State*, 17 U.S. 316 (1819). However, the Supremacy Clause is not an independent grant of Congress's legislative authority. *Murphy* 138 S. Ct. Congress is not granted the authority to regulate anything they wish. It has been established that Congress may not compel states to enact or administer a federal regulatory program. *New York v. United States*, 505 U.S. 144 (1992). The Court in *New York* considered the constitutionality of The Low-Level Radioactive Waste Policy Amendments Act's requirement that states provide for the disposal of low-level radioactive waste generated within their borders. Despite the federal government having a strong interest in the disposal of radioactive waste, the Court held that no matter the federal interest, the Constitution does not give Congress the authority to require the States to adopt said regulations. *Id*. at 178.

Congress enacted the ICWA as a way to address the increasing numbers of Indian children being separated from their families and/or tribes as a result of adoption or foster care proceedings. R. at 4. However, in order for the ICWA to be properly implemented to serve Congress's goal, a burdensome amount of the enforcement procedures are placed onto the states because state agents and officials are forced to abandon their normal procedures for adoption and foster care proceedings and implement federal standards and procedures when the child involved in the case is Indian. The West Dakota CPS published a manual which specifically stated that in cases dealing with Indian children, "almost every aspect of the social work and legal case is affected." R. at 2.

The Placement Preference of the ICWA is applicable to all adoptive placements of Indian children under State law. R. at 6. Essentially, it becomes the responsibility of state courts and state officials overseeing adoption proceeding to follow a set of standards set forth by the federal government. When the Donahues sought to adopt Baby C, this placed a burden on West Dakota to implement standards that ordinarily would not have existed but for the creation of the ICWA. Additionally, these standards are only applicable to Indian children, causing a separate procedural approach than every other case that state officials are working on. Every step of the process for Indian children requires state officials to follow a set of standards they ordinarily would not have had to follow. The Donahues had provided a loving home for Baby C and Baby S following tragedy and neglect in their prior homes. When it was time to formally adopt Baby C and Baby S, in accordance with the ICWA, West Dakota had to inform both the Cherokee and Quinault Nations, adding an extra step to the adoption process that would not exist if the children were not Indian. The entire adoption process is hindered when there are onerous steps and channels that the state is forced to engage in. Instead of finalizing the process of giving Baby S a loving and stable home, the State is forced to put this adoption proceeding on hold in anticipation of their being a potential placement option in another state. There is not a timeclock placed on Tribes to encourage expediency on their behalf, leading to a situation where a potential family remains potential for months on end. This would cause an overflow of state adoption and foster care cases. There is not a separate court system or agency that handles adoption proceedings solely for Indian children, thus whenever a case is pushed back or stalled it has the potential to cause a ripple effect onto the remainder of adoption and foster care cases. State agencies handling any adoption or foster care proceedings are opened up to a burdensome setback if they are unable to handle cases efficiently and are forced to abide by arbitrary standards.

The Placement Preference also requires the state court or agency to, "follow [the tribe's] order," if the tribe established a different order of preference in foster care or pre-adoptive placements. R. at 7. This is an arbitrary element of the provision because tribes can change the order and procedures of foster care proceedings at their discretion and state agents must abide by the new order despite the hardships it places on them and despite the standards and procedures that are already put in place. By allowing this provision to remain, it puts the job duties and responsibilities of state officials in the hands of Indian tribal leaders. The provision essentially allows a tribal leader authority to dictate state functions in accordance with furthering a congressional goal. Further, the Record-Keeping Requirements impose onto states the responsibility of maintaining and distributing records in accordance with the ICWA standards, not West Dakota standards. Both provisions require state officials to implement a goal set forth by Congress. The Court has established that Congress cannot force directly on the state its choices on how essential decisions regarding integral governmental functions are to be made. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976). (Holding that, although Congress has plenary power to regulate interstate commerce through the Commerce Clause, the Tenth Amendment reserves control of intrastate functions to the state.). The Record-Keeping requirement forces state agents to produce and maintain records in order to uphold the congressional goal of regulating Indian affairs. It is beyond the authority of Congress to force state agents to be burdened with recording keeping for a wholly congressional goal.

In the present case, no alternative party has formally sought to adopt Baby S. R. at 3. It has been established that when no alternative party has formally sought to adopt the Indian child, placement preferences are inapplicable. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). Rather, the Quinault nation took it upon themselves to find two potential families for Baby S. R.

at 3. There is nothing to suggest these potential families sought out the Quinault Nation in West Dakota but that rather the Quinault Nation has made efforts to find an alternative placement for Baby S. R. at 3. The entire adoption process is placed on standstill and state officials are unable to move forward with their responsibilities in order to comply with the ICWA standards. The Quinault Nation is not offering a guaranteed home for Baby S with a Quinault family, rather they are halting adoption finalization proceedings simply based on a potential placement. Additionally, there is always going to be a potential family in another Indian tribe in another state that could potentially foster or adopt an Indian child. This arbitrary provision places West Dakota state agents in a constant limbo in their adoption and foster care proceedings because there is nothing stopping Tribal Nations from always claiming to have a potential Indian home for an Indian child even when no family has formally sought to adopt or foster. If no family has formally sought to adopt Baby S, then the West Dakota state officials cannot be burdened by the potential placement in a different state.

B. The Indian Commerce Clause Does Not Give Plenary Authority to Congress to Regulate All Affairs with Indians Solely Because They are Indian.

Congress is granted broad authority to regulate Indian affairs under the Indian Commerce Clause, Art. 1, § 8, cl.3. *Morton v. Mancari*, 417 U.S. 535, 552 (1974). In order to succeed on a claim that congressional commerce power legislation is invalid under the Tenth Amendment, three requirements must be met: (1) the challenged statute regulates states as states, (2) the regulation must address matters that are indisputably attributes of state sovereignty, and (3) must be apparent that states' compliance with federal law would directly impair their ability to structure integral operations in areas of traditional functions. *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc*., 452 U.S. 264, 287 (1981). Congressional commerce power legislation will be found unconstitutional if all three requirements are satisfied. *Id.*

Petitioners argue that the ICWA does not violate the anti-commandeering doctrine because it regulates the actions of private individuals. R. at 7. It is not private individuals, however, who are forced to comply with the ICWA standard. Rather, it is State agencies that are required to implement federal standards to State adoption and foster care proceedings involving Indian children. R. at 7. In *National League of Cities*, the court found that it was appropriate for Congress to enact laws regulating private individuals subject to dual sovereignty between the Nation and the State, but that it is entirely different to direct congressional authority to States as States. *Nat'l League of Cities*, 426 U.S. at 845. Further, Congress may have legislative authority to reach a matter but the Constitution prohibits it from exercising its authority in that manner. *Id*. In *National League of Cities,* the Court stated that Congress was granted the legislative authority to enact the Fair Labor Standards Act (FLSA) through its commerce clause powers but that did not mean that Congress could regulate state employers through FLSA. Following the Court's decision, Congress has the authority to regulate Indian commerce but it does not have the authority to impose onto States the burden of carrying out their Commerce Clause authority. The Placement Preference and Record-Keeping provisions impose onto the states the burden of managing Indian affairs for Congress. It is a violation of the Constitution for Congress to impose onto the States the demands of managing Indian affairs.

The states possess a sovereignty that is concurrent with the Federal Government because the Constitution establishes a system of dual sovereignty between the States and the Federal Government. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The ability to regulate state court proceedings is an attribute of state sovereignty and thus Congress lacks authority to regulate it. Each state has their own adoption proceedings and standards which clearly establish that adoption proceedings are not subject to congressional interference. The Court established in

Printz that Congress cannot require states to adopt federal standards because doing so would constitute commandeering of traditional state functions. *Printz v. United States*, 521 U.S. 898, 919 (1997). There, the Court found provisions of the Brady Handgun Violence Prevention Act (Brady Act), which required state and local officers to conduct background checks on prospective gun buyers, to violate the anti-commandeering doctrine because it placed the State in the position of absorbing the costs and burdens of implementing the federal standard. *Printz*, 521 U.S. at 930. The Court reasoned that it should be the state and local officers standing in-between a prospective gun owner and their ability to purchase a gun, not the federal government. By following the standards set forth in the *Printz* court and the ICWA, it is the state officials involved in adoption and foster care proceedings that are forced to stand between prospective adoptive and foster care parents and the children in which they seek to provide a stable and loving home for.

Following the ICWA would require State courts to abandon their adoption and foster care procedures in order to adopt standards that are set forth by the Federal Government. This is a clear violation of West Dakota's sovereignty because it forces all persons involved in family court proceedings in West Dakota to follow a set of standards and regulations that are federally mandated, not State mandated. The ICWA essentially governs states' own administrative and judicial proceedings. *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021). In *Brackeen,* the Court of Appeals found that the Placement Preference and Recordkeeping Provisions of the ICWA did not violate the anti-commandeering doctrine because the provisions direct state judges to enforce the federal standards and are thus mandated through the Supremacy Clause. *Id*. at 317. This was, however, an incorrect conclusion because it is not state judges that are responsible for carrying out the burdens of implementing the ICWA but rather the state officials involved in child

custody cases. Respondents have contended that West Dakota's CPS is burdened with setting forth the policies and procedures that must be followed to properly implement the ICWA standards. R. at 2. It is not state judges who are charged with ensuring that the ICWA requirements are followed but rather state agencies. The mere fact that CPS is tasked with publishing and distributing a Compliance Manual setting forth the ICWA policies and procedures is sufficient to establish that it is not state judges that are tasked with implementing the ICWA but the state agents.

States do not get to decide whether or not to follow the requirements set forth in the ICWA. State officials do not get to pick and choose which adoption and foster care cases come onto their desk. If a case involving an Indian child is given to a state official, they are forced to change their ordinary procedures in order to adhere to the ICWA. This coerces them into implementing federal standards to state proceedings. Areas of family law and domestic relations have long been held as a virtually exclusive province of the States. *Sosna v. Iowa,* 419 U.S. 393, 404 (1975). Further, governance over domestic relationships, such as husband and wife, parent and child, belong to the State and not to the United States. *In re Burrus*, 136 U.S. 586, 593–94 (1890). Undoubtedly, this is an area in which the states have had traditional authority to regulate and govern without the interference of federally mandated programs. Forcing the states to comply with the ICWA is directly in opposition with the state's ability to carry out integral operations in state domestic affairs.

In order for Congress to act pursuant to its Commerce Clause authority, the activity they are seeking to regulate must be economic. *United States v. Lopez*, 514 U.S. 549, 561 (1995). It has been well established that when it comes to regulating commerce, goods are the subject of commerce, people are not. *Gibbons v. Ogden, 22 U.S. 9 (Wheat.)* 1, 189 (1824). Just because an

Indian child is involved in adoption, a state regulated proceeding, does not mean that Congress can excercise its Commerce Clause authority. In *Lopez,* the Court rejected the proposition that possession of a handgun constituted an economic activity sufficient to allow Congressional regulation pursuant to the Commerce Clause. *Id*. The *Lopez* Court feared that allowing Congress to regulate anything, simply because it had a tenuous economic factor, would ultimately lead to Congress regulating activity related to economic productivity of individual citizens in marriage, divorce, and child custody cases. *Id*. at 564. If possession does not constitute an economic activity then surely it would be an overreach for Congress to be able to regulate adoption and foster care proceedings which are most definitely not economic activities. Further, the Court has established that it would be dangerous to allow Congress to utilize their commerce clause authority too broadly because then any activity by an individual would be subjected to congressional authority. *Id*. Congress's commerce clause authority does not grant it the authority to regulate individual actions in family law.

While Congress does have authority to regulate affairs with the Indian tribes, this does not grant them authority to regulate all affairs involving Indian people. This Court should adopt the standard put forth by Justice Thomas in his concurring opinion in *Adoptive Couple*. Thomas concludes that Congress is given the power to regulate "with the Indian tribes" and that the clause does not give Congress the power to regulate commerce with all Indian persons. *Adoptive Couple, supram* at 660, 133 S. Ct. 2552 (THOMAS, J., concurring). It would be egregious for Congress to assume authority over all actions involving Indian persons because this would ultimately grant Congress an unregulated power. The Placement Preference and Record-Keeping provisions are put in place to regulate adoption and foster care proceedings of individuals that just so happen to be Indian. Adoption and foster care proceedings are not an economic activity.

Congress is not granted, through its commerce clause powers, authority to regulate over adoption and foster care proceedings for Non-Indian children in state courts. Just because some of the children involved in West Dakota adoption and foster care proceedings are Indian, does not automatically make the act of adoption or foster care an economic one. Congress, under its Commerce Clause authority, exceeds its power when it attempts to regulate individuals rather than commerce or activities of commerce.

Congress violated the Tenth Amendment's anti-commandeering doctrine by forcing state agents to implement standards and regulations that are part of a federally regulated scheme. The Placement Preference and Record Keeping provisions of the ICWA place an undue burden on state agents by commanding them to adhere to a different set of standards in adoption and foster care proceedings involving Indian children. Further, Congress exceeds its Commerce Clause authority when it seeks to regulate the non-economic actions of people. The Court should grant Respondents injunctive relief and declare the Placement Preference and Record-Keeping provisions unconstitutional.

II. Given Congress's Usage of Suspect Classifications and the Alteration of Routine Adoption Procedures Under the *Village* Factors, the Court Should Utilize Strict Scrutiny and Recognize the Statute's Failure to Equally Protect Indian Tribal Members Under a Political Verbiage Pretense.

Mirroring the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. The Fifth Amendment's rudimentary language directs that race discrimination be eliminated from all federal government official acts and proceedings. *United States v. Ovalle*, 136 F.3d 1092, 1103 (6th Cir. 1998). The Supreme Court interprets laws explicitly distinguishing between individuals

on racial grounds as falling within the specific shelter of the Fifth Amendment's Equal Protection Clause prohibition. *Id.* at 1109. While the Fifth Amendment lacks an Equal Protection Clause specifically associated with federal entities, its Due Process Clause has been expounded to include an equal protection element to which racial discrimination is given identical weight to the Fourteenth Amendment's Equal Protection Clause. *Bakhtari v. Spauling*, No. 1:17-CV-00016 2017 U.S. Dist. LEXIS 99460 at *39 (M.D. Pa. Jun. 27. 2017). Where classifications are implemented exclusively on the condition of race, the Supreme Court has held that these classifications demand particularly careful inspection under strict scrutiny, since they directly conflict with American traditions and are therefore constitutionally suspicious. *Boiling v. Sharpe*, 347 U.S. 497, 499 (1954). Thus, under the Fifth Amendment and relevant case law precedent, the ICWA violates the Fifth Amendment Equal Protection Clause by implementing rules that apply independently to Indians and condition its application on ancestry and bloodlines.

A: The Contested Provisions of the ICWA Fail the Constitutional Guidelines Set Forth by the Supreme Court in the *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.

Where African American plaintiffs challenged the defendant village's denial of their request to rezone by arguing their denial was racially discriminatory, the Supreme Court held that plaintiffs did not adequately carry their burden of proving discriminatory purpose. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977). In *Village*, unlike the present case, the circumstances of the area's prior zoning for multiple family classifications and the surrounding single-family homes verified a direct correspondence between the village's prescribed regulations and its intended safety objectives. There, the Supreme Court set forth a thorough, but non-exclusive list of factors that helped ascertain when a government action has an invidious factor as its motivation. *Id.* at 265. The *Village* factors, of which the third and fourth

factors tip the scale tremendously in respondent's favor, allow the court to strip away the statute's basic language and Congress's publicized intentions, demonstrating a statute rooted in fundamental discrimination. The factors include (i) historical background of the decision (ii) the specific sequence of events leading up to the challenged decision (iii) significant departures from normal procedural sequence or substantive departures from the factors usually considered important by the decision maker (iv) whether the effect of the action bears more heavily on one race than another (v) the legislative history of the statute. *Id.* at 254. This analysis merely requires a sensitive inquiry into the circumstantial and direct evidence of intent in relation to what is accessible, but does not demand a balancing of the factors. *Id.* at 266.

The third *Village* factor helps examine the specific distinction between adoption methods provided for Indians and for non-Indian individuals, as the contrasting procedures expose Congress's discriminatory intentions. Whereas adoption proceedings are conventionally uniform amongst all races, political entities, and individuals across a given state, sections 1911 and 1912 ("Intervention Rights") provide for a reconstructed manner of intervening in state proceedings that uniquely concerns Indian parents. R. at 6-7. Section 1913 ("The Right to Withdraw Consent") also singles out Indian parents by deliberately dictating the selective methods and procedures Indian parents can utilize in retracting their consent. This section further demonstrates Congress's departure from conventional adoptive procedures, as the ICWA limits foster care, pre-adoptive placement, and adoptive proceeding routines as only applied to Indian parents and their children. These seemingly preferential requirements do not apply to or concern other racial or ancestral groups, therefore lacking the affordance of equal protection to Indian tribal members.

The third *Village* factor further implores an examination into customary adoption proceedings. While adoption laws vary from state to state, two types of adoptions standardly occur: agency adoptions and private or independent adoptions. Typically, a foster parent or relative of the child in a foster care system can partake in adoption, if the biological parents cannot parent safely and the child is in foster care for a lengthy period. American Bar, *Adoption* (Dec. 04, 2020), https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center. In the present case, however, Congress puts forth their own knowledge of Indian familial relations to establish an entirely new mechanism of adoption. Generally, in cases where individuals suited for parenting commence adoption processes, a legislature will rationally determine that state involvement in the provision of its services is unnecessary. *In re Interest of Skinner*, 97 Wn. App. 108, 118 (Wash. Ct. App, 1999). As the Donahues are inexplicably suited to take care of Baby C and Baby S, as evidenced by their prior adoption, their adoptive proceedings should not be impeded upon simply because the federal government possesses their own objectives. Similar to all individuals who seek adoption, the Donahues should be able to take advantage of conventional adoption routine measures, regardless of the adoptee's racial background. Despite routine adoption procedures that apply consistently across all members of a state, the ICWA sets forth a rule that recognizably alters conventional adoptive measures for Indian child adoption in isolation. As such, the divergent circumstances of the ICWA, namely its alteration of adoption norms, inexplicably fails the third *Village* factor.

The fourth *Village* factor, which focuses on a statute's isolated effects on a respective race, highlights the sharp discrepancy between treatment of non-Indian and Indian individuals in the context of adoption rights. This can be evidenced through the contested portions of the

ICWA that only mention Indian tribal members as a collective body of individuals, selecting Indian tribal members as a defined group targeted under the statute. Individuals who do not fall under the category of Indian tribal members remain unaffected by the ICWA, as Congress's desired result solely centers on Indians as a focal point. Being that Congress restricts the avenues available for Indians in terms of adoption, the ICWA effectively partitions Indians off from the rest of society, diminishing their courses of action as citizens.

An assessment of the first two *Village* factors -historical background, and prior events- warrants an examination of Congress's purpose in enacting the ICWA. Congress justifies implementing the ICWA by pointing to misrepresentative statistics, such that Indian tribal members comprise twelve percent of U.S. adoption cases. R. at 4. However, Congress effectively skews this quantitative evidence to paint Indian child adoption cases as an overwhelming majority, whereas, in fact, such cases do not even cover one fourth of U.S. adoption litigation. R. at 4. The prior events and historical background Congress points to in their ICWA preamble discusses the significance of protecting Indian tribal relations, but this generalized objective lacks any reference to the vague "relations" that rationalize their discriminatory behavior. In turn, the fifth *Village* factor concerning legislative history, can be bridged with the first two factors, historical background and events preceding the statute's enactment. Congress's preamble, which sharply concentrates on protecting the best interests of Indian children, demonstrates a legislative history that fundamentally draws a recognizable difference between non-Indians and Indians.

B. ICWA §§ 1913(d), 1914, and 1915(a)-(b) Fail to Compel Congress's Stated Goal of Preserving Indian Culture by Means of Restricting Indians from Accessing Conventional Adoption Procedures.

In *U.S v. Singleterry*, the First Circuit held that where a statute mandated increasingly severe sentences for predominantly Black-users of cocaine, appellant lacked evidence to demonstrate his absence of equal protection under the Fifth Amendment due to racially discriminatory intent. *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994). The First Circuit held that "where evidence of disparate impact leads most naturally to an inference of discriminatory purpose, the governmental classification may be subject to strict scrutiny under equal protection principles." *Id.* at 741. Although the First Circuit found no equal protection violation, the present case differs. The *Singleterry* legislature provided convincing evidence that cocaine-based issues deeply consumed low-income urban communities and that the statute would act as a solution. In the case at bar, Congress is engaging in arbitrary and groundless assumption making by imparting their own unintelligible conception of sustaining Indian tribal culture through adoption policing procedures that merely inhibit access to the process. In turn, although Congress presents a statute that appears as a remedy for Indian tribal members, it nonetheless deeply harms them as a direct consequence of its implementation.

Congress's lack of thorough evidence in sustaining their racially discriminatory statute can moreover be evidenced through a series of defective observations that attempt to imitate and put forward their own groundless understanding of the values and culture underlying Indian tribes. The means and ends of the ICWA would fail under a rationality analysis that questions whether a statute will improve the efficiency of government enforcement of laws that promote public welfare. *Bolden v. City of Topeka*, 546 F.Supp.2d 1210, 1218 (D. Kan. 2008). A rational basis test under the equal protection clause of the Fourteenth Amendment would be satisfied if there is a plausible policy reasoning, the facts are truthful to a governmental decision maker, and the relationship of the classification is not arbitrary or attenuated. *Fitzgerald v. Racing Ass'n*,

539 U.S. 103, 107 (2003). The method by which Congress attempts to reach their goal of preserving Indian tribal relations is extremely attenuated, as restricting adoption methods will plausibly lead to illegitimate adoptions and limitless disagreements. In relation to the holding in *Bolden*, which dealt with a demolition threshold, the ICWA fails to promote public welfare, as it only affects those looking to adopt and Indian tribal members. In doing so, Congress randomly picks and chooses a singular ethnic group that, like other groups, are entitled to their own lifestyle decisions. Particularly, Congress engages in a deceitful attempt to "protect the best interests of Indian children" and "reflect the unique values of Indian culture," all while obstructing their ability to engage in conventional adoption affairs. R. at 5. In attempting to manage and reflect Indian culture, Congress hides their blatantly discriminatory objective so as to make adoption processes an entirely governmentally controlled process. As such, the ICWA will in no manner provide the remedial effects Congress purports to establish.

C: The Provisions of the ICWA Rely on Immutable Characteristics of Race, Thereby Demanding a Strict Scrutiny Review.

The District Court heavily relies on the holding in *Morton v. Mancari* to bolster their opinion of the ICWA as a political statute, but fails to consider the factual discrepancies that fundamentally distinguish the two matters. *Morton v. Mancari*, 417 U.S. 535, 537 (1974). In *Morton v. Mancari*, the Court opined that Congress administered the Indian Reorganization Act of 1934 (IRA), which imposed an employment preference for qualified Indians in the Bureau of Indian Affairs, to Indians as members of a quasi-sovereign tribal entity whose lives were entirely regulated by the Bureau of Indian Affairs. *Id*. The Court thus held that the IRA governed Indians as a political institution, not as a discrete racial group. *Id.* at 554. While the two cases concern individuals of similar identities, the two statute's contrasting subject matter bears no resemblance. Whereas *Mancari* concerns employment preferences, the contested sections of the

ICWA refer specifically to “Indian children" and “Indian guardians” in the context of conventionally undisturbed and private familial relations. R. at 4. As such, in administering the ICWA, Congress is effectively overstepping their prescribed lawmaking boundaries and entrenching upon a private, matrimonial sphere that traditionally lacks governmental interference: the home. (*See Griswold v. Connecticut*, 381 U.S. 479 (1965)). The *Mancari* court further held that legislative judgment in the form of special treatment towards Indians would be left undisturbed if the purpose was rationally tied to the fulfillment of Congress. *Id.* at 1277. However, Congress’s rationale for implementing the ICWA in the present case fails the rational basis test provided by the *Mancari* court, as Congress merely bases their enactment on a vague and undefined effort to preserve “Indian culture.” R. at 5. As such, the ICWA fails to fall within the confines of a political matter as the specific facts of *Mancari* articulate.

Mancari demonstrates that to hold the ICWA as constitutional would permit Congress to meddle into the deeply private affairs of mothers and fathers without substantial need. For instance, Congress employs generalized terminology that handpicks a particular subset and racial class of society. In doing so, Congress labels Indian tribal members as a suspect classification group, for which the First Circuit has defined as “classifications created along lines of race or national origin.” *In re Estate of Webster*, 214 Ill. App. 3d 1014, 1020 (1st Cir. 1991). In cases where statutes similarly discriminate against one group, the Supreme Court has emphasized that when a State utilizes suspect classifications, they must demonstrate that its purpose or interest falls permissibly and substantially under Equal Protection standards, in addition to its use as necessary in the exercise of its purpose. *In re Griffiths*, 413 U.S. 717, 722 (1973). Despite Indian children being the subject of a trivial amount of adoption proceedings, vast numbers of other racial and ethnic groups comprise the total sum of nationwide adoptive proceedings. Even with

this measurable incongruity, Congress chooses to specifically focus on the immutable characteristics of one group as opposed to other races that compose eighty-eight percent of adoptive proceedings. R. at 4. While the ICWA purportedly aims to conserve Indian culture, the statute merely places obstacles and arduous rules that, if applied, would unjustly single out a racial class.

Additional Supreme Court cases garner support for use of strict scrutiny in the case at bar. Particularly, in *Adarand Constructors v. Pena,* the secretary of transportation implemented a federal government racial classification that concerned contract terms providing that a company would receive supplementary compensation if it hired disadvantaged individuals. 515 U.S. 200, 205 (1995). The Supreme Court held that since petitioner's denial of a contract resulted from a presumptive preference given to minority business entities, all racial classifications, imposed by federal, state, or local governmental actors, must be analyzed by reviewing the enactment under strict scrutiny. *Id.* at 220. A statute will survive a strict scrutiny test if its purpose can be found as narrowly tailored to serve a compelling state interest. *Id.* However, this heightened standard can be utilized only in instances where fundamental rights are implicated. *State v. Lowe*, 112 Ohio St. 3d 507, 510 (Ohio, 2007). In *Adarand*, a prime contract was administered to a company in adherence with the statute, but the Court opined that "more than good motives should be required when the government seeks to allocate its resources by way of an explicit racial classification system." *Id.* at 226. Here, while Congress attempts to validate the ICWA by painting it as an entirely remedial and beneficial statute, the affirmative grounds stated within the preamble only carry diminutive weight in an equal protection analysis. The case at bar similarly exemplifies a statute that on its surface benefits a discrete group of individuals but ultimately singles them out. In particular, the *Adarand* statute sets forth a scheme that presents itself on its face as beneficial

towards minority business entities, but nonetheless presents obstacles and disadvantages to non-protected parties.

Likewise, in *in re Petition of R.M.G*, the D.C. Court of Appeals analyzed an adoption statute that utilized race as a categorizing factor under a strict scrutiny standard of review. *In re Petition of R.M.G.*, 454 A.2d 776 (D.C. 1982). While the *R.M.G.* court held that the statute did not deny equal protection of the law, the Court analyzed the adoption statute by discerning whether it could be directly tailored to the best interest of the adopted child as to survive a review under strict scrutiny or otherwise suffer from a broad application that indicates blatant discrimination. *Id* at 788. The case at bar lacks resemblance to *in re Petition of R.M.G.*, given that the ICWA provides guidance as to how the court should take race into account and the statute in *R.M.G.* did not. The D.C. Circuit maintained that where an adoption statute does not *per se* reflect an unconstitutional denial of equal protection, the Court's inquiry may not conclude. *Id.* While the ICWA does not, on its face, demonstrate a lack of equal protection for Indians, benign classifications must be justified under a significant and articulated purpose for its enactment. Thus, the purposes within the ICWA preamble fail this justification.

Additionally, while Indian tribal members are historically considered political entities, the guiding principles for the ICWA's implementations infringe upon Indian tribal members' fundamental rights by limiting their access to courts and monitoring their interests in a manner unlike any other similarly situated citizens. The Supreme Court has defined Indian tribes "as a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272 (9th Cir. 2004). The *Kahawaiolaa* court further rejected the notion that racial classifications and distinctions conditioned on Indian or tribal status can never be

subject to strict scrutiny. *Id.* at 1279. While the Ninth Circuit utilized a rational basis review given native Hawaiian's attempt to seek federal acknowledgment as an Indian tribe, the Court nonetheless debunked the notion that issues implicating Indian tribes de facto fall under a political category and are therefore scrutinized exclusively under rational basis review. As such, the circumstances of the present case, namely Indian adoption, open the gates to a strict scrutiny analysis by considering Indian tribal members as a racial class.

Congress attempts to masquerade their intentions of cherry picking one portion of society through seemingly advantageous and sympathetic lingo. The affirmative jargon as evidenced in the statute's preamble (§1901(3)-(5)), outwardly appears to aid Indian families and those seeking adoption, but nonetheless acts as a veil between Congress's inherently prejudicial intentions and the statute's deceitful appearance as a legitimate federal interest. R. at 5-7. Specifically, Section 1915 ("Placement Preferences") provides three preferences for placements of Indian children, however, these three categories fail to consider the Indian family's own ability to make decisions for their children. R. at 6. Indian families may prefer to place their children in a home not regarded in the three categories, thus requiring them to demonstrate a good cause to the contrary. R. at 6. As such, while Congress attempts to put forth an effortless means of placing Indian children in adoptive homes, the provided measures inhibit and complicate the process for Indian families. In such circumstances, the Ninth Circuit has held that in cases where legislation that reveals itself as facially neutral is susceptible to equal protection attack, an investigation into the distinct treatment on the basis of racial consideration is necessary. *Valeria v. Davis*, 307 F.3d 1036, 1039 (9th Cir. 2002). Congress emphasizes their goal of "promot[ing] the stability and security of Indian tribes and families" in reflection of Indian tribe's unique values, but nevertheless puts forth a preamble that fails to enumerate specific Indian customs. In an

extension of prior Supreme Court holdings, the *Branch v. Du Bois* court stated that where a facially neutral classification disproportionately effects a particular group, it amounts to discrimination toward that group and is legally actionable. *Branch v. Du Bois*, 418 F.Supp 1128, 1132 (N.D. Ill. 1976). Thus, an inquiry into the separate treatment afforded to non-Indian individuals and Indian tribal members would not be exhaustive of the court and the case at bar thus demands the utilization of a strict scrutiny standard.

CONCLUSION:

Petitioner now seeks to maintain that the ICWA §§ 1913(d), 1914, and 1915(a)-(b) violated the anti-commandeering doctrine of the Tenth Amendment by forcing states to implement a federal regulatory scheme. Additionally, that the ICWA violated the Equal Protection Clause of the Fifth Amendment in its restriction of freedom exclusively towards Indian tribal members. The Court should resolve this matter in consideration of the Fifth Amendment's inviolable requirement of equal protection under the law, as well as prior case law determinations emphasizing the necessity of a strict scrutiny review in circumstances of facially neutral racial discrimination and unequal treatment. The Court should consequently declare the contested ICWA provisions as unconstitutional.