No. 22-386

IN THE
SUPREME COURT OF THE UNITED STATES

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

BRIEF FOR THE RESPONDENTS

Team # 19

QUESTIONS PRESENTED FOR REVIEW

I. Whether Congress violates the Tenth Amendment through the Indian Child Welfare Act by exceeding its Indian Commerce Clause authority and improperly commandeering state action in child custody proceedings.

II. Whether the Indian Child Welfare Act violates the Equal Protection Clause of the Fifth Amendment by granting special privileges to Indians solely on the basis of race and ancestry.

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STATEMENT OF THE CASE

The Indian Child Welfare Act

Believing it had power to enact the Indian Child Welfare Act ("ICWA") under the Indian Commerce Clause, Congress granted special privileges to Indians by forcing states to strictly comply with procedural and substantive requirements in child custody proceedings involving Indian children.[1] Substantively, ICWA requires states to submit to the placement preferences of Indian tribes. Procedurally, ICWA mandates state courts to indefinitely keep and maintain records of any and all proceedings where ICWA is applicable.

The Adoptions

In January of 2020, West Dakota residents James and Glenys Donahue ("The Donahues") adopted an Indian child, known as "Baby C." R. at 3. In April of that same year, the Donahues became foster parents of and sought to adopt an infant Indian child, "Baby S." *Id.* Baby S only has one known biological parent who was enrolled as a member of the Quinault Nation. *Id.* Prior to Baby S's placement in the Donahues' home, Baby S was exclusively in the custody of his paternal grandmother. *Id.* However, due to her failing health, Baby S's paternal grandmother voluntarily placed Baby S in a foster home with the Donahues. *Id.* In May 2020, the Donahues filed a petition to adopt Baby S. *Id.* Despite Baby S's grandmother consenting to the Donahues' adoption of Baby S, the Quinault Nation opposed the adoption. *Id.* The Quinault Nation then informed West Dakota Child Protective Services that it had identified two potential adoptive families for Baby S in a Quinault Tribe in another state. *Id.*

[1] Under ICWA, an Indian child is classified 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(5).

Procedural History

On June 29, 2020, after learning of the Quinault Nation's opposition, the Donahues and the state of West Dakota filed suit against the Secretary of the Interior, Stuart Ivanhoe, in the United States District Court for the District of West Dakota. *Id.* at 4. Specifically, Plaintiffs sought declaratory and injunctive relief on the grounds that ICWA §§ 1913, 1914, 1915, and 1951 violate the Fifth and Tenth Amendments of the United States Constitution. *Id.* The District Court granted summary judgment in favor of Defendants, finding ICWA did not violate the Fifth or Tenth Amendments. *Id.* at 12. However, Thirteenth Circuit reversed the District Court and found that ICWA violated the anti-commandeering doctrine of the Tenth Amendment. *Id.* at 16. Further, the Thirteenth Circuit doubted whether Congress could have enacted ICWA under the Indian Commerce Clause. *Id.* Lastly, in a concurring opinion, Chief Judge Tower declared that ICWA also violated the Equal Protection Clause of the Fifth Amendment. *Id.* at 19. At this juncture, Petitioners seek to restore the invalidated findings of the District Court. *Id.* at 20.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit correctly questioned whether Congress possesses the power to regulate state child custody proceedings under the Indian Commerce Clause because Indian children are not people in commerce, nor do the outcomes of these proceedings substantially affect interstate commerce. Congress can only regulate three spheres of activity under the Commerce Clause: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and (3) activities that substantially affect interstate commerce. *U.S. v. Lopez*, 514 U.S. 549 (1995). Here, children do not constitute any of the aforementioned factors of interstate commerce, thus ICWA falls outside Congress's Commerce Clause powers.

Additionally, even if this Court finds that Congress can regulate state child custody proceedings under their Article I Commerce Clause authority, ICWA still violates the Tenth Amendment because it improperly commandeers the states by forcing them to implement significant procedural and substantive requirements. Specifically, Congress cannot (1) regulate the states as states, (2) regulate activities that are indisputably an attribute of state sovereignty, or (3) unjustifiably exceed a state's sovereignty interest. *Garcia v. San Antonio Metro. Transit Author.*, 469 U.S. 528, 537 (1985). First, ICWA regulates the states as states by forcing states to comply with ICWA's placement preference and recordkeeping requirements. Second, state child custody proceedings are indisputably an attribute of state sovereignty. Third, ICWA overhauls the state judiciary's decision-making ability. Thus, this Court should affirm the Thirteenth Circuit's holding that ICWA violates the anti-commandeering doctrine of the Tenth Amendment.

Apart from Tenth Amendment violations, ICWA also offends the Fifth Amendment's Equal Protection Clause. Chief Judge Tower correctly concurred that ICWA violates the Equal Protection Clause of the Fifth Amendment because ICWA makes classifications based on race and does not pass strict scrutiny review. This Court has repeatedly held that laws based on race merit strict scrutiny review. *Loving v. Virginia,* 388 U.S. 1, 10 (1967); *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 307 (1978); *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984). Laws based on ancestry also merit strict scrutiny review because "[a]ncestry can be a proxy for race." *Rice v. Cayetano*, 528 U.S. 495, 514 (2000). Here, ICWA merits strict scrutiny review because ICWA grants special privileges to Indians by allowing them to invalidate child custody proceedings involving children who are only racially Indian, but not politically Indian. What separates Indians from being a mere race group is the fact that Congress has recognized Indian tribes as being quasi-sovereign entities. *Plains Com. Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008). So, by applying

to non-tribe members, ICWA impermissibly grants Indians privileges based on race because political affiliation is no longer a factor. Even more, ICWA § 1915 requires states to give preferential placements in adoptions and foster proceedings to *any* Indian family—regardless of tribe—above non-Indian persons merely because a child is racially Indian. Thus, because ICWA makes classifications based on race and ancestry, this Court should apply strict scrutiny review.

Under strict scrutiny review, a race-based law must be narrowly tailored to fulfill a compelling governmental interest to pass constitutional muster. *Palmore*, 466 U.S. at 429. Here, ICWA fails under strict scrutiny review because it is not narrowly tailored to fulfill a compelling governmental interest. Specifically, ICWA is not narrowly tailored because it does not have a durational limit. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). ICWA was enacted to solve the problem of Indian children being adopted and placed away from Indian tribes in the 1970's, but has not been re-evaluated to see if it has conclusively remedied the specific harm that it was designed to address. When race-conscious laws lack a durational limit, they turn into vehicles of reverse discrimination, as is the case here because the Donahues' adoptions of Baby C and Baby S stand to be invalidated merely because the children are racially Indian. ICWA also could be more narrowly tailored to apply to children that are tribal members only, i.e., eliminating the race-based requirement while still fulfilling Congress's goal of preserving Indian tribes. Thus, because ICWA is not narrowly tailored to apply only to Indian tribe members and has no durational limit, ICWA fails strict scrutiny review and violates the Equal Protection Clause.

Lastly, even if this Court finds that ICWA does not make race-based classifications, ICWA still violates the Equal Protection Clause under rational basis review. Laws that do not make race-based classifications are subject to rational basis review. *Morton v. Mancari,* 417 U.S. 535, 552 (1974). Under rational basis review, a law only needs to rationally relate to a legitimate

government interest in order to pass constitutional muster. *Id.* Here, Congress had an interest in preserving Indian tribes when it enacted ICWA. However, federally recognized tribes cannot be preserved without adding members to tribe rosters. Despite Congress's intentions, ICWA does not add tribe members to tribe rosters when ICWA involves non-tribe members. Thus, by forcing racially Indian children to live with *any* Indian family, ICWA does not fulfill Congress's interest because the child may never become a tribe member nor are tribe rosters preserved or increased through ICWA. Thus, even under rational basis review, this Court should find that ICWA violates the Equal Protection Clause.

ARGUMENT

I. ICWA violates the Tenth Amendment because Congress lacks Commerce Clause authority to regulate state court child custody proceedings.

The Commerce Clause prescribes Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."[2] U.S. Const. Art. I § 8, cl. 3. Specifically, commerce includes (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and (3) activities having a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 558. However, this Court "has never doubted that there are limits upon the power of Congress to override state sovereignty." *Nat'l League of Cities v. Usery*, 426 U.S. 833, 842 (1976). One such limit is the Tenth Amendment which requires the states to retain sovereignty over areas of the law in which the federal government lacks enumerated constitutional authority. U.S. Const.

[2] In his concurrence in *Adoptive Couple v. Baby Girl*, Justice Thomas noted that the Indian Commerce Clause has been expanded well past its original intended meaning. Justice Thomas explicitly noted that the Indian Commerce Clause only grants Congress the authority to regulate *commerce* with Indian tribes and at the time of the ratification of the Constitution, "commerce consisted of selling, buying, and bartering, as well as transporting for these purposes." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring). Furthermore, Justice Thomas explained that the "Clause does not give Congress authority to regulate commerce with Indian *persons* any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States." *Id.* at 660. As such, it is reasonable to presume the Indian Commerce Clause is coextensive with the Interstate Commerce Clause.

amend. X. Thus, Congress exceeds its Commerce Clause powers and violates the Tenth Amendment by regulating anything outside the three recognized spheres of commerce.

A. Congress exceeds its Commerce Clause powers through ICWA because ICWA does not regulate instrumentalities of interstate commerce.

Under the Commerce Clause, Congress has the authority to regulate "instrumentalities of interstate commerce, or persons or things in interstate commerce." *Lopez*, 514 U.S. at 549. Instrumentalities are "the *means* of commerce such as airplanes, trains, or automobiles." CONG. RSCH. SERV., IF11971, CONG. AUTH. TO REGUL. INTERSTATE COM. (2021). Additionally, the Commerce Clause can extend to persons transported by an instrumentality. [3] *Id.*

In *Gibbons v. Ogden*, the Court analyzed the language of the Commerce Clause emphasizing that commerce is "the commercial intercourse between nations . . . and is regulated by prescribing rules for carrying on that intercourse.". *Gibbons v. Ogden*, 22 U.S. 1, 189–90 (1824). In *Gibbons*, Congress had the authority to regulate steamboats navigating waters within the state of New York because it was a commercial activity and "[c]commerce, undoubtedly, is traffic.". *Id.* at 189. Additionally, in *Jones & Laughlin Steel Corp.* this Court upheld a congressional statute regulating employee unionization under the Commerce Clause because the conflicts between employers and employees had potential to create an upset that would disturb national commercial activities and the economy. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 1 (1937).

Here, unlike the commercial activity in *Gibbons* and *Jones & Laughlin Steel Corp*., ICWA regulates state court custody proceedings which do not involve selling, buying, or producing commodities. The regulation of nationally navigable waters and employee unionization are clearly

[3] The Thirteenth Circuit Court noted that the authority on the Commerce Clause is "far from clear," and stated their doubts that the Indian Commerce Clause "confers on Congress the power to regulate child custody cases when children are not persons in commerce." R. at 16.

distinguishable from the court proceedings in the instant matter that regulate domestic child custody affairs. Baby S's adoption is completely disjointed from the national economy, and court proceedings are never characterized as a commercial activity. As such, Congress's ability to regulate instrumentalities does not extend to child custody proceedings.

B. Congress exceeds its Commerce Clause powers through ICWA because state child custody proceedings do not substantially affect interstate commerce.

To date, this Court has only recognized that economic activities—and nothing else—can substantially affect interstate commerce. *See, e.g.*, *FERC v. Mississippi*, 456 U.S. 742 (1982) (recognizing utilities regulation as an economic activity); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018) (sports gambling regulation); *Lane County v. Oregon*, 74 U.S. 71 (1868) (tax regulation); *U.S. v. Darby*, 312 U.S. 100 (1941) (employee wage regulation); *Jones & Laughlin Steel Corp*., 301 U.S. 1 (national labor relations standards); and *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat production regulation). More specifically, "'[e]conomics' refers to 'the production, distribution, and consumption of commodities.'" *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (quoting Webster's Third New International Dictionary 720 (1966)).

For example, in *Raich*, this Court held that a product (i.e., marijuana) sold nationally, even when produced intrastate and regulated locally, is an economic activity substantially affecting interstate commerce because it is part of an "established, and lucrative, interstate market" that "poses a threat to the national market." *Id.* at 17 (2005). Here, *unlike Raich*, state court child custody proceedings are not an economic activity because nothing is being produced or sold.

On the other hand, in *Lopez*, this Court found that Congress *lacked authority* to prohibit the possession of firearms within proximity to a school-zone under its Commerce Clause powers because gun possession in school zones was *not* an economic activity. *Lopez*, 514 U.S. at 561.

Like *Lopez*, state child custody proceedings here do not involve the buying, selling, or even possessing items. *Id.*

Also, in *Morrison*, this Court noted the economic activity requirement as the dispositive factor for why Congress lacked authority under the Commerce Clause to include a civil suit requirement in the Violence Against Women Act. *U.S. v. Morrison*, 529 U.S. 598, 611 (2000). In fact, this Court explicitly advised against extending Congress's interstate commerce authority to non-economic activities for fear that such an extension may allow Congress to usurp traditional state power in areas such as child custody proceedings. *Id.* at 613. Here, ICWA illustrates the excess Congressional power that this court warned about in *Morrison* because ICWA is exclusively about child custody proceedings.

Lastly, in determining whether Congress regulates an economic activity, this Court may consider the Congressional record for guidance. *Lopez*, 514 U.S. at 552. Here, when drafting ICWA, Congress presumed its Commerce Clause authority and never even discussed whether state child custody proceedings affected economic activity in any way. S. Rep. No. 95-597 (1977). Even more, Congress's only probe into whether they had authority to enact ICWA under the Commerce Clause was after ICWA was passed. *See* Memorandum from the Cong. Rsch. Serv. Am. L. Division on the Power of Cong. To Regul. Custody Proc. Involving Indian Child to Sen. Select Committee on Indian Aff. (1978). Thus, ICWA violates the Tenth Amendment because Congress lacks authority to regulate child custody proceedings under the Commerce Clause.

II. ICWA violates the Tenth Amendment because ICWA's placement preferences and recordkeeping provisions improperly commandeer state courts.

Independent of this Court's determination of the Commerce Clause analysis, ICWA still violates the Tenth Amendment because "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel

the states to require or prohibit those acts." *Printz v. U.S.*, 521 U.S. 898, 924 (1997). Specifically, a federal statute violates the anti-commandeering doctrine by meeting three requirements: (1) "the federal statute at issue must regulate the States as States;" (2) "the statute must address matters that are indisputably attributes of state sovereignty;" and (3) "the relation of state and federal interests must not be such that the nature of the federal interest . . . justifies state submission."[4] *Garcia*, 469 U.S. at 537. So, if ICWA meets all of these factors, ICWA improperly commandeers the states in violation of the Tenth Amendment.

A. ICWA's placement preference and recordkeeping provisions regulate the states as states because ICWA compels states to substantively and procedurally comply with ICWA.

ICWA's placement preference and recordkeeping mandates do not regulate private individuals, but rather, "regulate the States as States." *Hodel v. Va. Surface Min. and Reclamation Ass'n, Inc.* 452 U.S. 264, 265 (1981). An act of Congress regulates the "States as States" when a federal Act allows the federal government to usurp the state's "regulatory roles" by establishing mandatory substantive or procedural federal standards on a state's legislature or judiciary. *Id.*

In *Nat'l League of Cities v. Usery*, this court found that Congress regulated the states as states, rather than regulating private entities, in implementing the 1974 amendments to the Fair Labor Standards Act, which extended minimum wage and maximum hour provisions from only encompassing private employees to include all state employees, because the Act required the *state*,

[4] The placement preferences provision of ICWA mandates in adoptive placements and foster care or preadoptive placements "of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915. On the other hand, the recordkeeping provision of ICWA mandates that "any state court entering a final decree or order in any Indian child adoptive placement . . . shall provide the Secretary [of the Interior] with a copy of such decree or order together with such other information as may be necessary to show-- (1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and addresses of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placements." The state courts must keep and maintain these records indefinitely. 25 U.S.C. 1951.

rather than *private businesses*, to comply with congressional directives and placed burdens on the *state* to enforce the act. *Nat'l League of Cities*, 426 U.S. at 845 (1976). Additionally, in *Va. Mining & Reclamation Ass'n Inc.*, the Act in question required the state of Virginia to consider adopting the federal regulatory program setting environmental standards for coal mining. *Va. Surface Min. and Reclamation Ass'n, Inc.* 452 U.S. 264. This Court found the statute did not violate the Tenth Amendment of the Constitution because rather than imposing mandates on the state of Virginia, the Act simply requested the state evaluate the potential of adopting such standards. *Id.*

Rather than guaranteeing rights to individuals or requiring the compliance of private entities, ICWA compares to the statute in *Nat'l League of Cities* because it compels the states to substantively and procedurally alter state court custody proceedings once a child is deemed to qualify as an Indian child under the Act. 426 U.S. at 837. Additionally, ICWA is also distinguishable from the voluntary Act in *Va. Surface Mining & Reclamation Ass'n Inc.* because once ICWA has been imposed on a state child custody court, the state is mandated to follow the recordkeeping and placement preference provisions of the Act and has no choice whether to comply with the requirements. In violation of this Nation's constitution, ICWA allows the federal government to usurp state decision making power especially in the placement preferences provisions. 25 U.S.C. §§ 1951, 1915.

B. Adoption and foster care proceedings are indisputably an attribute of state sovereignty because every state regulates its own adoption and foster care proceedings.

"The States unquestionably do retain a significant measure of sovereign authority" in our current federalist system. *Garcia*, 469 U.S. at 549. Specifically, this Court recognized that one example of sovereign authority is "family law" and "child custody." *Lopez*, 514 U.S. at 564. An inquiry into whether an activity is an indisputable attribute of state sovereignty requires this Court

to "single out particular features of a state's internal governance that are deemed to be intrinsic parts of state sovereignty." *Id.* at 548. Additionally, this Court may turn to the Constitution to find the answer to this inquiry; "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." *New York v. U.S.*, 505 U.S. 144, 156 (1992). Thus, a law improperly interferes with an indisputable attribute of state sovereignty when Congress lacks constitutional authority to regulate an area that a state has exclusive authority over.

In *New York*, this Court found the Low-Level Radioactive Waste Policy Act's provision mandating states to regulate radioactive waste according to Congress's instructions violated the Tenth Amendment's anti-commandeering doctrine. *New York*, 505 U.S. at 173. This Court determined that because Congress did not have constitutionally derived power for imposing these mandates, the power was reserved exclusively to the state of New York. *Id.* Here, like *New York*, Congress lacks the authority to regulate state child custody proceedings because no constitutional provision grants Congress such authority. Further, ICWA's encroachment upon state child custody proceedings compares to how the federal statute encroached upon state waste regulation in *New York* because both items have been traditionally associated with state sovereignty. Thus, because Congress lacks enumerated constitutional authority to regulate state child custody proceedings and is forcing the states to regulate these proceedings pursuant to Congress's requirements, ICWA regulates an indisputable attribute of state sovereignty.

C. No federal interest could possibly override West Dakota's sovereignty because ICWA overhauls the functioning of the state's courts.

A balancing test of federal and state interest is usually employed to determine whether a state should submit to federal prerogatives; however, the balancing test is not always necessary to making such a determination. *Printz*, 521 U.S. at 900. In *Printz*, this Court determined "a

balancing test is inappropriate" when "the whole *object* of the law is to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty; it is the very principle of separate state sovereignty that such a law offends." *Id.* Thus, when Congress seeks to overhaul a branch of state government, it is impossible for a federal interest to override the state's sovereignty.

In *Printz*, this Court struck down the Brady Handgun Violence Prevention Act ("Brady Act") which imposed limitations on a state's ability to regulate guns. *Id.* Specifically, the Brady Act mandated all "chief law enforcement officer[s]" in local state jurisdictions conduct background checks on individuals seeking handguns before a handgun could be administered, a requirement which was both substantive and procedural. *Id.* at 934. This Court held the background check provision of the Brady Act *unconstitutional* because the requirements created such a significant imposition into state functions and state-level decision-making ability that there could be no possible federal interest that would justify such a severe usurpation of state sovereignty. *Id.*

Like *Printz*, ICWA imposes substantial substantive and procedural requirements on state courts. Rather than allowing states to make their own decisions in an essential area of state sovereignty, ICWA unconstitutionally permits the federal government to gut the state decision-making process in relation to Indian children. Similar to the Brady Act forcing state officers to conduct background checks, ICWA forces state courts to keep and maintain court records indefinitely. Additionally, ICWA has an effect on the substantive result of state child custody proceedings, similar to *Printz* where the outcome of a background check would substantively alter whether the state could allow a citizen to purchase a handgun. Significantly, while the Brady Act only imposed one significant imposition into state decision-making, ICWA entirely overhauls state decision-making ability and state court procedures in an area of law that is essential to state

sovereignty. Given ICWA's overwhelming number of burdensome requirements, ICWA overhauls the judicial branch of West Dakota. Thus, because all three elements of the anti-commandeering analysis are met, ICWA violates the Tenth Amendment.

III. Apart from Tenth Amendment violations, ICWA violates the Equal Protection Clause because ICWA makes classifications solely on the basis of race and is not narrowly tailored to achieve a compelling government interest.

The Equal Protection Clause of the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1; *see also Loving,* 388 U.S. at 10 ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination . . . ."). While the Fifth Amendment does not have an equal protection clause, this Court reverse incorporated the Clause into the Fifth Amendment to address federal government actions. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1955); *see also Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 224 (1995) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.") (quotation and citation omitted).

Under the Equal Protection Clause, laws solely classifying "persons according to their race . . . are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be necessary to the accomplishment of their legitimate purpose." *Palmore*, 466 U.S. at 431 (citations and quotations omitted); *see also Bakke,* 438 U.S. at 307 ("[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."). For example, in *Palmore*, this Court found that a Florida court violated the Equal Protection Clause by taking away a Caucasian mother's custody rights and giving them to the child's biological father—a Caucasian man—merely because the mother's subsequent marriage to a Black man could cause "damaging

impact[s]" if the child "[remained] in a racially mixed household." *Palmore*, 466 U.S. at 432. Even more, the Florida court "made no effort to place its holding on any ground other than race" because the court found that the interracial couple presented no other issues that would have jeopardized the best interests of the child. *Id.* Thus, any government action granting a privilege to one group of persons over another group of persons solely on the basis of *race* merits strict scrutiny review. *Bakke* 438 U.S. at 289–90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.").

Ancestry-based laws also merit strict scrutiny review because "[a]ncestry can be a proxy for race." *Cayetano*, 528 U.S. at 514; *see also Hirabayashi v. United States,* 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."). For example, in *Cayetano*, this Court held that ancestry-based voting requirements concerning a state agency's board of trustee elections violated the Fifteenth Amendment's Equal Protection Clause—which is analogous to the Fourteenth Amendment's Equal Protection Clause—because the state agency was an "affair of the State of Hawaii," yet only a few privileged Hawaiians of certain ancestry could vote.[5] *Cayetano,* 528 U.S. at 520. Thus, any government action granting a privilege to one group of persons over another group of persons solely on the basis of ancestry, when used as a proxy for race, merits strict scrutiny review.

Here, ICWA §§ 1913(d), 1914, and 1915 merit strict scrutiny review because ICWA allows Indians to invalidate child custody proceedings of non-Indians only because the children involved

[5] Hawaii's voting requirement gave voting privileges to two groups of people: (1) "Hawaiians" and (2) "Native Hawaiians." *Cayetano,* 528 U.S. at 495. In short, "Hawaiians" included Native Hawaiians insofar as "Hawaiians" referred to descendants of aboriginal peoples inhabiting the Hawaiian Islands in or before 1778. *Id.*

are racially Indian, not politically Indian. Further, ICWA fails strict scrutiny review because it is not narrowly tailored to solve a forty-year-old problem in a non-racial way. Thus, this Court should hold that ICWA violates the Equal Protection Clause because ICWA fails strict scrutiny review.

A. ICWA makes classifications using ancestry and race because ICWA involves non-tribe member children, grants special privileges only to Indians, and mandates preferred child custody placements with *any* Indian family.

ICWA applies to children that are non-members of Indian tribes. 25 U.S.C. § 1903 (defining an Indian child as someone "*eligible* for membership in an Indian tribe [i.e., not *actually* a member] and is the biological child of a member of an Indian tribe.") (emphasis added); *but see Mancari,* 417 U.S. at 552 ("Literally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations."). Considering that background, ICWA §§ 1913(d) and 1914 make impermissible ancestry-based classifications because those statutes allow Indian tribes to invalidate domestic relation proceedings involving children who are only tied to the tribe by ancestry and not political affiliation.[6] 25 U.S.C. § 1914 ("the Indian child's tribe may petition any court of competent jurisdiction to invalidate [a foster care placement or parental rights termination] action upon showing that such action violated . . . [§] 1913 . . . .").

"As part of their residual sovereignty, tribes retain power . . . to determine tribal membership . . . and to regulate domestic relations *among members* . . . ." *Plains Com. Bank*, 554 U.S. at 327 (emphasis added). Indian political affiliation is comparable to the concept of birthright citizenship. 8 U.S.C. § 1401 ("a person born in the United States to a member of an Indian [tribe]"

[6] Respondent does not dispute that parents can intervene on behalf of their own children under ICWA §§ 1913(d) and 1914 because notwithstanding ICWA, parents, unlike tribes, have unique *legal* ties to their children. *Santosky v. Kramer,* 455 U.S. 745, 758 (1982) ("[A] natural parent's desire for and right to the companionship, care, custody, and management of his or her children is [a fundamental liberty] interest far more precious than any property right.") (quotations and citation omitted); *see also* 59 Am. Jur. 2d Parent and Child § 14 ("There are two classes of parents in the eyes of the law: natural parents and adopting parents. The relation of parent and child may exist as a natural fact but not as a legal relationship or vice versa.").

is a national and citizen "at birth."); *see also* 41 Am. Jur. 2d Indians; Native Americans § 18 ("Membership in an Indian tribe is a *formal status* as the term 'Indian' is not interchangeable with 'tribal member.'") (emphasis added). Hence, ICWA §§ 1913(d) and 1914 make classifications based on ancestry—as a proxy for race—because the statutes allow Indians to invalidate domestic relations cases involving children who are only ancestrally, but not politically tied to the tribe.

Here, concerning Baby C, ICWA §§ 1913(d) and 1914 do not make classifications on the basis of ancestry because "the Quinault Nation was designated as Baby C's tribe for purposes of ICWA's application in the state proceedings."[7] R. at 3. Unlike Baby C, Baby S, is only *eligible* for tribal membership because the record does not indicate that he is enrolled in the Quinault Nation.[8] At best, the record only indicates that Baby S has one Quinault parent. R. at 3. As such, considering Baby S is not a member of the Quinault Nation, ICWA §§ 1913(d) and 1914 allow the Nation to invalidate the Donahues' adoption of Baby S only because of Baby S's ancestry. The Nation's ability to invalidate mirrors *Cayetano*, where only a select group of descendants could vote, because but for Baby S's ancestry, the Nation would not have invalidation privileges. Thus, because ICWA §§ 1913(d) and 1914 grant special privileges to the Nation on the basis of ancestry concerning Baby S's adoption proceeding, strict scrutiny applies.[9]

ICWA § 1915(a)–(b) also merits strict scrutiny review because the statute mandates preferred placements of Indian children in adoption and foster care placement cases solely on the

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[7] On the other hand, if Baby C was only *eligible* for tribal membership like Baby S—the record is silent as to Baby S's tribal membership status—then the same conclusion of Baby S's analysis would apply to Baby C's case, i.e., ICWA §§ 1913(d) and 1914 make classifications on the basis of ancestry concerning non-tribe member children.

[8] The Quinault Nation does not publish its Constitution online, but the Nation's website notes that an individual is entitled to membership "so long as he or she [meets the blood quantum] . . . [and] is not a member of any other tribe" or if the person does not meet the blood quantum, he or she can still apply "for adoption into the [Nation] . . . the term "Quinault" now refers to an individual *who identifies with* the Quinault Nation." Quinault Tribal Council, *https://www.quinaultindiannation.com/councilmembers.htm* (last visited Oct. 9, 2022). Thus, membership into the Nation does not necessarily occur at birth.

[9] Respondent concedes that ICWA §§ 1913(d), 1914, and 1915 would be constitutional if it only involved children that are tribe members. *See Plains Com. Bank,* 554 U.S. at 327.

basis of ancestry and race. 25 U.S.C. § 1915(a) ("In any adoptive placement of an Indian child . . . a preference shall be given . . . to 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."); *see also Id.* at (b) (mandating a similar placement preference regarding foster care or preadoptive placements). Like ICWA §§ 1913(d) and 1914, ICWA § 1915 gives people who are the same race as an Indian child a higher status than non-Indians in the adoption or foster placement process. *Id.* At least in *Palmore*, the Florida court tried to justify a similar placement preference under the guise of "damaging impacts" to the child for living in a non-white home; but here, regardless of tribal affiliation, ICWA § 1915 mandates that a racially Indian child should be placed with *any* Indian family merely because Indian homes "reflect the unique values of Indian culture." 25. U.S.C. § 1902. Thus, strict scrutiny applies to ICWA § 1915(a)-(b) because the statute mandates preferred placements based on race, and not political affiliation.

Concerning Baby C, ICWA § 1915 would not apply because Baby C was adopted by the Donahues in January 2020. R. at 3. However, ICWA § 1915 applies to Baby S because the Quinault Nation has intervened in the Donahues' adoption proceedings involving Baby S. *Id.* at 13. Considering that background, ICWA § 1915 discriminates on the basis of race concerning Baby S because ICWA § 1915(a), absent good cause to the contrary, mandates that Baby S be placed with one of two Quinault adoptive families in another state above the Donahues, solely because of Baby S's biological ties to the Quinault Nation. Thus, ICWA § 1915(a) merits strict scrutiny review concerning Baby S.

B. Under strict scrutiny review, ICWA violates the Equal Protection Clause because it is not narrowly tailored to preserve Indian tribes.

Congress enacted ICWA to protect and preserve Indian tribes. 25 U.S.C. § 1901. More specifically, Congress enacted ICWA to remedy the effects of many Indian children being adopted

away from tribes "at an alarming rate" in the 1970's. *Id.* Thus, Congress's interest in keeping Indian children with Indian tribes constitutes a compelling government interest similar to how the Florida court in *Palmore* sought to place the child in the best possible environment during custody proceedings.[10]

Having outlined Congress's interest, ICWA §§ 1913(d), 1914, and 1915(a)–(b) are not narrowly tailored to preserve Indian tribes in a racially-neutral manner because Congress failed to bridle ICWA by imposing a stopping point to a racial remedy designed to fix a problem forty years ago. Generally, in determining whether race-conscious legislation is narrowly tailored, this Court considers whether race-based legislation is "appropriately limited such that it [would] not last longer than the discriminatory effects it [was] designed to eliminate." *Adarand Constr., Inc.,* 515 U.S. at 238 (citation and quotation omitted); *see also U.S. v. Paradise,* 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including . . . the *flexibility and duration* of the relief . . . .") (emphasis added).

For instance, in the context of higher education, this Court noted in *Grutter* that "[the] durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary . . . ." *Grutter* 539 U.S. at 342. Also, in the context of public schools, this Court recognized in *Parents Involved* that instances exist where race-conscious remedies have conclusively fulfilled a compelling government interest. *Parents Invol. in Com. Schs. v. Seattle School Dist. No. 1,* 551 U.S. 701, 720-21 (2007) (Recognizing that a historically segregated public school system "had eliminated the vestiges" of racial discrimination and achieved "unitary status" over a period of twenty-five years).

[10] Pretermitting that race was a bad reason for taking the mother's custody, the Florida court nonetheless had a compelling government interest in making sure the best interests of the child were met.

Outside the context of education, this Court has also found that a district court judge's race-conscious order requiring the Alabama Department of Public Safety to engage in a one-to-one hiring practice of blacks and whites was narrowly tailored because "most significantly, the one-for-one requirement [was] ephemeral" and lasted "only until the Department [came] up with a procedure that [did] not have a discriminatory impact on blacks . . . " *Paradise,* 480 U.S. at 178. Thus, across various areas, race-conscious legislation is not narrowly tailored when it lasts indefinitely. As this Court warned, when race-conscious laws do not include durational requirements, "a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson Bd. Of Educ.,* 476 U.S. 267, 276 (1986); *see also Parents Involved*, 551 U.S. at 767 ("[a] democratic interest, limitless in scope and timeless in its ability to affect the future . . . cannot justify government race-based decisionmaking.") (Thomas, J., concurring).

Here, ICWA is not narrowly tailored because it has no durational time limit even though it was designed to remedy a specific problem forty years ago. Congress enacted ICWA in 1978 to help address the problem of a growing number of Indian children being taken away from their families, but in forty-four years, unlike *Grutter*, Congress has not reevaluated whether ICWA has remedied the problem that it was designed to remedy. Because of this lack of reevaluation, the Court cannot know if ICWA has conclusively remedied the problem it was designed to solve, like how the school system in *Parents Involved* sufficiently remedied the effects of racial segregation in twenty-five years. 25 U.S.C. § 1901. Indeed, ICWA's seemingly infinite duration does not resemble the "ephemeral" nature of the district judge's narrowly tailored race-conscious order in *Paradise* that was contingent upon specific results. *Paradise*, 480 U.S. at 178. Thus, this Court

should hold that ICWA violates the Equal Protection Clause because it is not narrowly tailored to solve a problem that occurred forty years ago.

IV. Even under rational basis review, ICWA violates the Equal Protection Clause because forcing non-tribe member children to live with *any* Indian family does not rationally preserve Indian tribes.

Laws that do not classify persons solely based on race are subject to rational basis review. *Mancari*, 417 U.S. at 554. Under rational basis review, a law only needs to rationally relate to a legitimate government interest to pass constitutional muster. *Id*. In *Mancari*, this Court found that a hiring preference by the Bureau of Indian Affairs for Indian persons concerning "positions . . . in the administration of functions or services affecting any Indian tribe . . . " did not violate the Equal Protection Clause because the preference "[was] granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities . . . [and, the preference] reasonably and directly related to a legitimate, nonracially based goal." *Id.* at 538, 554. Specifically, the nonracially based goal this Court identified in *Mancari* was "Indian self-government." *Id.* at 541. On the other hand, laws that do not rationally further a legitimate government interest fail rational basis and thus violate the Equal Protection Clause. *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding that a law denying food stamps to people who cohabitated did not further Congress's interests in preventing fraud and alleviating hunger and malnutrition and thus violated the Equal Protection Clause). Thus, under rational basis review a law must rationally further a legitimate government interest.

Respondent concedes that concerning actual tribe members, ICWA rationally furthers Congress's interest in protecting and preserving Indians because self-government would not exist without actual members. However, ICWA does not rationally relate to self-government and thus *Mancari* would not apply because ICWA extends *beyond* actual members to potential members.

If Congress's goal is to preserve Indian tribes, ICWA should foremost add actual members to Tribe rosters, not mere potential candidates. Thus, increasing the pool of potential tribe members by forcing Indian children to live with *any* Indian family does nothing to preserve Indian tribes, i.e., add actual members to tribe rosters given actual members are needed for self-governance. ICWA's inability to add tribe members to rosters insofar as non-member children are concerned does not rationally further the preservation of Indian tribes similar to *Moreno*, where cohabitation did nothing to prevent fraud or alleviate hunger as to justify denying food stamps to people. Thus, under rational basis review, ICWA violates the Equal Protection Clause because ICWA's extension to non-tribe member children does nothing to preserve Indian tribes given self-governance involves actual tribe members.

CONCLUSION

For the foregoing reasons, Respondents urge this Court to affirm the findings of the Thirteenth Circuit and declare that ICWA unconstitutionally violates the Fifth and Tenth Amendments.

Respectfully submitted this 10th day of October, 2022,

s/ Team 19

ATTORNEYS FOR RESPONDENT