**No. 22-386**

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 2022

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

*Petitioners*,

v.

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

*Respondents*.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

TEAM #2
*Counsel for Respondents*
October 10, 2022

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## QUESTIONS PRESENTED

I. Whether the Indian Child Welfare Act's provisions that require to give preference to Indian families in any adoptive, foster care or pre-adoptive placement of any Indian child and provisions that require states to maintain records of the child's placement constitute unconstitutional commandeering in violation of the Tenth Amendment.

II. Whether the Indian Child Welfare Act's classification of individuals according to ancestry-based tribal eligibility standards is a proxy for race and is thus subject to strict scrutiny under the Equal Protection Clause of the Fifth Amendment. Whether ICWA fails to survive strict scrutiny review by failing to both narrowly tailor or rationally link its policy to a compelling government interest

## STATEMENT OF THE CASE

### A. Summary of Facts

The state of West Dakota and two individuals, James and Glenys Donahue are the Respondents. R. at 1. West Dakota contains three Indian tribes within its borders. R. at 2. Annually, around twelve percent of West Dakota's child custody proceedings involve Indian children. R. at 2. The United States of America, the United States Department of the Interior and its Secretary, Stuart Ivanhoe, the Cherokee Nation and the Quinault Nation are the Petitioners. R. at 1-2.

Mr. and Ms. Donahue wanted to adopt Indian Child Baby C. R. at 2. Baby C lived with her maternal aunt after birth. R. at 2. But when Baby C was eight months old the West Dakota Child Protection Service ("CPS") removed her from her aunt's custody after receiving reports that the baby was often left without any attendance for extensive periods of time. R. at 2. Baby C was placed in foster care with Mr. and Ms. Donahue. R. at 2. Because Baby C's biological mother is from Quinault Nation and her biological father belongs to Cherokee Nation, CPS notified both Nations as provided by the Indian Child Welfare Act ("ICWA"). R. at 2. Baby C lived in Mr. and Ms. Donahue's family for two years. R. at 2.

In August 2019, Baby C's biological parents' parental rights were terminated in voluntary proceedings by a West Dakota state court, and Baby C became eligible for adoption under West Dakota law. R. at 3. In September 2019, Mr. and Ms. Donahue started adoption proceedings after receiving consent of both Baby C's biological parents and her maternal aunt. R. at 3. The Cherokee Nation and Quinault Nation were also notified as required by ICWA. R. at 3. However, on October 24, 2019, the Quinault Nation attempted an alternative placement for Baby C with non-relatives in Nebraska, but it fell through for undisclosed reasons. R. at 3. The

Quinault Nation and the Cherokee Nation agreed that Quinault Nation would be Baby C's tribe for the purposes of adoption proceedings. R. at 3. No one else formally expressed their wish to adopt Baby C. R. at 3. A settlement agreement between Mr. and Ms. Donahue and CPS and Baby C's guardian ad litem stated that "ICWA's placement preferences did not apply because no one else sought to adopt Baby C." R. at 3. In January 2020, West Dakota state court finalized the adoption of Baby C by Mr. and Ms. Donahue. R. at 3.

In April 2020, Mr. and Ms. Donahue became foster parents of another Indian Child, Baby S. R. at 3. In February 2020, Baby S's biological mother died of a drug overdose. R. at 3. She was a member of the Quinault Nation, and "the identity of Baby S's father is unknown." R. at 3. Baby S never lived with her biological parents, and from birth to April 2020 as in the custody of his paternal grandmother. R. at 3. However, because of her health problems she could not continue taking care of Baby S. R. at 3. Therefore, Baby S was placed into foster care with Mr. and Ms. Donahue. R. at 3. Mr. and Ms. Donahue wanted to adopt Baby S and in May 2020 filed a petition for adoption. R. at 3. Even though his own grandmother consented to adoption, the Quinault Nation raised its objections. R. at 3. The Quinault Nation notified CPS that it had found "two potential adoptive families for Baby S in a Quinault Tribe located in another state." R. at 3.

**B. Procedural History**

The state of West Dakota (State Plaintiff) and the Donahues (Private Plaintiffs) filed suit against the Federal Government – the U.S. Department of the Interior and Secretary Stuart Ivanhoe – on June 29, 2020. R. at 2-4. The Plaintiffs sought injunctive and declaratory relief for what they allege to be unconstitutional provisions of the Indian Child Welfare act – specifically that §§ 1913(d), 1914, and 1915(a)-(b) violate the Equal Protection Clause of the Fourteenth

Amendment and that §§ 1912(a) and (d)-(f), 1915(a)-(b) and (e), and 1951 violate the Tenth Amendment and commandeer the states. R. at 4. Both the Cherokee Nation and the Quinault Nation then filed a motion to intervene in the case as well; the court granted this unopposed motion and added them as Tribal Defendants. R. at 2. On September 3, 2020, the parties filed cross-motions for summary judgment since there was no genuine dispute as to any material facts. R. at 4.

The District Court concluded that none of ICWA's provisions commandeer West Dakota agencies since the provisions regulate private individuals and "simply confers minimum federal protections on Indian children, parents, and tribes in state custody proceedings." R. at 9-10. Furthermore, the court held that Congress was exercising its enumerated powers in passing ICWA, so the matter was never for the states to direct, and that any conflicts in law would be preempted by the Supremacy Clause. R. at 14. Additionally, the court found that ICWA's classifications are based on political categorizations rather than racial groupings of Indian tribes, subjecting the statute to rational basis review–which the District Court held it passes. R. at 10-11. The Plaintiffs then appealed to the Thirteenth Circuit, which reviewed the District Court's grant of summary judgment de novo. R. at 13-14.

The Thirteenth Circuit reversed the court below and held that ICWA *unconstitutionally* requires courts and executive agencies of the states to apply federal standards to state-created claims. R. at 15. It further stated that it doubts the legality of using the Indian Commerce Clause as rationale for assuming Congress has the power to regulate child custody cases since those matters have no impact on commerce with Indian Tribes and that "children are not persons in commerce." R. at 16. Additionally, the Chief Judge in his concurrence stressed that the Equal Protection claims were also decided incorrectly by the District Court, which erred in construing

precedent regarding racial classifications. R. at 17. The Thirteenth Circuit thus corrected to clarify that ICWA's classifications are based on Indian ancestry, *not* tribal membership, making it a proxy for race and thus subject to strict scrutiny. R. at 17-18. As such, ICWA must be narrowly tailored to further a compelling state interest, which it failed since giving "preference to any Indian, regardless of tribe, is not narrowly tailored to maintaining the Indian child's relationship with his tribe." R. at 19.

This Court granted Writ of Certiorari on August 5, 2022. R. at 20.

## SUMMARY OF THE ARGUMENT

This case presents two vital constitutional issues. First, it examines the relationship between anti-commandeering doctrine and the preemption concept analyzing whether the Indian Child Welfare Act (ICWA) violates anti-commandeering doctrine under the Tenth Amendment by forcing the state of West Dakota to administer a federal program. On this issue, the Court should uphold the Thirteenth Circuit's decision to approve the Respondents' motion to remand.

The standard in assessing whether ICWA constitutes unconstitutional commandeering or a constitutional preemption is the *Murphy* Test outlined by the Supreme Court in *Murphy v. NCAA*. For a federal law to preempt state law, it must (1) be an exercise of the Constitutionally granted power, and (2) be best interpreted as regulating private actors rather than states. In this case ICWA fails both prongs. First, it is not an exercise of power granted by the Constitution because the power of the Indian Commerce Clause is limited to regulation of trade with Indian tribes. Adoption and foster care go beyond the scope of this clause and should not be regulated by Congress. Second, ICWA regulates states, not private actors. It directly compels state agencies and courts to administer numerous provisions under ICWA when placing any Indian

child into custody. Such provisions directly command the States breaching the anti-commandeering doctrine.

Second, this case highlights that ICWA contains unconstitutional provisions that violate the Equal Protection Clause of the Fifth Amendment by making racial classifications that do not stand up to strict scrutiny review. ICWA uses ancestry as a proxy for race, highlighting the blood-line connection between parents and children who are then potentially eligible for tribal membership, but not yet actually enrolled in the tribe and recognized in that political capacity. Furthermore, ICWA provisions are not narrowly tailored to the purpose Congress expressed in § 1902 – "to promote the stability and security of Indian tribes and … reflect the unique values of Indian culture." Instead, ICWA is overly broad in its placement preferences, opting to place Indian children in homes of "other Indian families" which may not even be from the same tribe as the child, thus making them ineligible for future membership. Additionally, children may never opt to become official tribe members, making ICWA's assumptions based purely on race and too far reaching to argue the situation qualifies as political classification.

## ARGUMENT

### I. ICWA goes far beyond Congress's Article I authority and violates the anti-commandeering doctrine under the Tenth Amendment

The Thirteenth Circuit correctly held that ICWA violates the Tenth Amendment's anti-commandeering doctrine. The anti-commandeering doctrine follows from the core constitutional principle that the Constitution "confers upon Congress the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). The anti-commandeering doctrine is "one of the Constitution's structural protections of liberty." *Printz v. United States*, 521 U.S. 898, 921 (1997). It "promotes political accountability" and "prevents Congress from shifting the costs of regulation to the States." *Id.* The essence of the anti-commandeering doctrine is that

"[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188. Congress violated this rule when it enacted ICWA.

Petitioners claim that ICWA merely preempts West Dakota law under the Supremacy Clause and, therefore, does not constitute unconstitutional commandeering. This argument does not stand any scrutiny. The preemption concept is derived from the Supremacy Clause of the Constitution, which states that federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Preemption and anti-commandeering doctrines "are mirror images of each other" as they both concern the same issue of "division of authority between federal and state governments." *New York*, 505 U.S. at 156. The Supremacy Clause does not independently give legislative power to Congress but "simply provides 'a rule of decision.'" *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015)).

Therefore, for the federal law to preempt state law, it should fulfill two conditions. *Murphy*, 138 S. Ct. at 1479. First, such law should "represent the exercise of a power conferred on Congress by the Constitution" and just referring to the Supremacy Clause is not enough. *Id.* Second, it must be "best read as [a law] that regulates private actors," not states. *Id.* "When a federal law fails this second step by directly commanding . . . state government[,]" it breaches the anti-commandeering doctrine. *Brackeen v. Haaland*, 994 F.3d 249, 299 (5th Cir. 2021). Therefore "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States" even if sometimes the language used by Congress or the Court might suggest otherwise. *Murphy*, 138 S. Ct. at 1481. Thus, the Supremacy Clause does not exempt Congress from the prohibition to commandeer the States. *See id.* In this case, ICWA fails

both prongs of the *Murphy* test. First, it does not constitute the constitutional exercise of federal power. Second, it unconstitutionally commandeers the state.

***A. ICWA is not an exercise of power conferred on Congress by the Constitution***

Plaintiffs contend that ICWA is enabled by the Indian Commerce Clause, but this clause only grants power "[t]o regulate Commerce . . . with the Indian Tribes" and "the individuals composing those tribes." U.S. Const. art. I, § 8; *United States v. Holliday*, 70 U.S. 407, 417 (1865); *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020). Therefore, Congressional power under this clause is limited to, first, commercial activity and, second, relationship with *Indian tribes* rather than all Indians. *See* U.S. Const. art. I, § 8; *United States v. Kagama*, 118 U.S. 375, 378-79 (1886).

In *Kagama*, the Supreme Court held that the Indian Commerce Clause cannot authorize a statute "establish[ing] punishments for the common-law crimes . . . without any reference to their relation to any kind of commerce." 118 U.S. at 378-79. And even though in *Cotton Petroleum Corp. v. New Mexico*, the Court stated that the Indian Commerce Clause confers "Congress with plenary power to legislate in the field of Indian affairs," 490 U.S. 163, 192 (1989), Justice Thomas in his concurring opinion in *United States v. Lara* argued that the assumptions of inherent sovereignty of Indian tribes and Congressional power to "virtually every aspect of the tribes" contradict each other. 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

The Indian Commerce Clause grants federal authority only over commerce with Indian tribes, which should be narrowly tailored. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 665 (2013) (Thomas, J., concurring). The history and tradition of the Indian Commerce Clause's drafting does not support "anything resembling plenary power over Indian affairs." *Id*. Moreover, a careful reading of the ratification history reveals that the drafters were concerned

about “protecting the power of the States to regulate Indian persons who were politically incorporated into the States.” *Id.* at 662. During the drafting process some members of the Committee proposed to grant the Federal Government the power “[t]o regulate *affairs* with the Indians as well within as without the limits of the U. States.” *Id.* at 663 (quoting 2 Records of the Federal Convention of 1787 at 324 (M. Farrand rev. 1966) (J. Madison)). However, that proposal was rejected, and the final draft which was adopted included the phrase “and with the Indian tribes.” *Id.* (quoting 2 Records of the Federal Convention of 1787 at 493 (M. Farrand rev. 1966) (J. Madison)). The Framers of the Constitution therefore were aware of “the difference between the power to regulate trade with the Indians and the power to regulate all Indian affairs” and chose to give Congress only the former power. *Id.* Therefore, the Indian Commerce Clause gave Congress a “narrower power to regulate trade with Indian tribes — that is, Indians who had not been incorporated into the body-politic of any State.” *Id.* at 660.

Moreover, both the textual and originalist interpretations support the conclusion that “commerce” in the Indian Commerce Clause should be understood only to include matters concerning trade. *See* U.S. Const. art. I, § 8, cl. 3. When the “Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.” *United States v. Lopez*, 514 U. S. 549, 585 (1995) (Thomas, J., concurring). The Supreme Court repeatedly stated that without evidence to the contrary, the Court should presume consistent usage of a term. *See*, *e.g.*, *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2177 (2021); *Reno v. Bossier Parish Sch. Bd*., 528 U.S. 320, 329 (2000). Therefore, “commerce” should mean the same thing throughout the Constitution. *See gen. id.; see also* Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149,1149-50 (2003). In. *Lopez*, the Court held that

Gun-Free School Zones Act was invalid because it was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. In *New York v. Miln*, the Court explicitly stated that "the goods are the subject of commerce, the persons are not." 36 U.S. 102, 136 (1837). Therefore, "[t]he term 'commerce' did not include . . . noneconomic activity such as adoption of children." *Adoptive Couple*, 570 U.S. at 659.

Thus, there are two main limitations on the Indian Commerce Clause—first, it regulates commerce, which should be understood as trade; second, it regulates commerce with tribes, which does not include Indian persons who live outside of established Indian communities. *Adoptive Couple*, 570 U.S. at 660 (Thomas, J., concurring). ICWA regulates adoption of all Indian children who must not even be members of an Indian tribe. R. at 5. Such legislation exceeds the power of the Indian Commerce Clause because this Clause does not grant Congress power over children who are not members of any tribe. Furthermore, same as in *Lopez* and *Miln*, in this case the federal law has nothing to do with commerce because adoption and child custody are not "commerce" under the Constitution. Therefore, the Indian Commerce Clause does not authorize Congress to enact ICWA.

***B. ICWA violates anti-commandeering doctrine because it commandeers states rather than private actors***

Sections 1912(a) and (d)–(f), 1915(a)–(b) and (e), and 1951 of ICWA violate the anti-commandeering doctrine by demanding West Dakota executive agencies to enforce federal policy. The main principle of Congressional legislative power is that it is not unlimited. *Murphy*, 138 S. Ct. at 1476. On the contrary, the Constitution grants Congress "only certain enumerated powers," whereas "all other legislative power is reserved for the States." *Id.* The power to issue

direct orders to the states is not among the exhaustive list of powers conferred on Congress by the Constitution. *Id.*

There are several Supreme Court decisions that explained the anti-commandeering doctrine. In *New York v. United States*, the Supreme Court held that a federal law requiring states to either "take title" to radioactive waste or to implement Congressional instructions was unconstitutional as it violated the anti-commandeering doctrine. 505 U. S. at 175. In *Printz*, the Court held that provisions of the statute that required the state law enforcement officers to screen a person purchasing a handgun unconstitutionally commandeered the states. 521 U.S. at 935. The Court stated that "Congress cannot circumvent that [commandeering] prohibition by conscripting the State's officers directly." *Id.* In *Murphy*, the Supreme Court held that the statute provision prohibiting states to authorize sports gambling was not a constitutional preemption "because there is no way in which this provision can be understood as a regulation of private actors." *Id*. Therefore, it was "a direct command to the States, and that is exactly what the anti-commandeering rule does not allow." *Id.* The Court stated that anti-commandeering doctrine is "the expression of a fundamental structural decision incorporated into the Constitution," meaning the conscious decision of the drafters "to withhold from Congress the power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475. The Court rejected any distinction between affirmatively commanding state action and precluding it. *Id.* at 1478.

ICWA violates the anti-commandeering doctrine because it forces states to administer a federal rule. However, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162. ICWA does not "evenhandedly regulate[] an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. The Court of Appeals was correct in finding that the

placement preferences, the placement-record requirement, the notice requirement, the expert witness requirements, and the recordkeeping requirement unconstitutionally commandeer the state. R. at 14.

ICWA's active-efforts requirement commands state and local foster care agencies "to provide remedial services and rehabilitative programs" as a requirement before placing an Indian child in foster care. 25 U.S.C. § 1912 (d). Same as in *Pritz*, such provision directly commandeers state agents to undertake additional work to comply with the federal law requirements, and therefore violates an anti-commandeering principle. The same applies to sections 1912 (e)-(f), which require parties to provide evidence, "including testimony of qualified expert witnesses," that leaving a child in the parent's custody will likely cause the child "serious emotional or physical damage." *Id.* § 1912(e)–(f). This federal rule burdens state agencies with an obligation to spend time and resources on finding expert witnesses with relevant qualifications each time they want to place an Indian child in foster care, effectively changing the whole foster care placement process in the state.

Furthermore, placement preferences in section 1915 require that children should first be tried to be placed with their extended family, then with other members of the same tribe, and then with "other Indian families." *Id.* § 1915(a), (b). ICWA affects "almost every aspect of the social work and legal case" in West Dakota. R. at 2. It commands state agencies to follow specific procedures of placing children in certain families as well as forces the state to change its policy on child placement. Basically, it asks states to enforce federal understanding of what "best interest" of a child is. *See id.* § 1901(3)–(5). As a result, the West Dakota Child Protection Service ("CPS") issues an ICWA Compliance Manual which includes CPS' policies and procedures for implementing ICWA. R. at 2.

Finally, the recordkeeping requirement commands the state to "maintain records of the placement" and make them "available at any time upon request by the Secretary of the Interior or the child's tribe." 25 U.S.C. § 1915(e). Moreover, it compels state courts to provide the Secretary "with a copy of the decree or order" of the child placement decision as well as child's personal information. *Id.* § 1951(a). The ICWA's recordkeeping requirements apply expressly to state agencies and state courts and cannot even hypothetically be construed as applying to private persons. These provisions constitute direct orders to the state, which is prohibited by the Constitution. The statute directs States to assist in the implementation of ICWA. In, *Pritz*, the court held that requiring states to make background checks of prospective fire-arm buyers including "research in whatever State and local recordkeeping systems are available" violated anti-commandeering doctrine. *Printz*, 521 U.S. at 933. Even though the Court did not address the constitutionality of the requirement to create and provide such records, the only logical conclusion that could be made is that they are also unconstitutional because they force state agents to spend time and effort to comply with them. Therefore, record-keeping provisions commandeer state officers, which was expressly prohibited by the Court in *Printz*.

Lastly, this case is distinguishable from *Reno v. Condon* where the Court upheld Driver's Privacy Protection Act of 1994 that restricted the disclosure and resale of drivers' personal information. 528 U.S. 141, 151 (2000). In Reno, the law did not violate the anti-commandeering doctrine because it was a law of general applicability and did "not require the States in their sovereign capacity to regulate their own citizens.'" *Id.* This was the case because the law applied to activity states engaged in as market participants rather than sovereigns. *See id.* Therefore, the federal law only incidentally regulated the states and only so long as they did not act in their sovereign capacity. *Id.* However, regulation of foster care and child placement is not a market

activity. ICWA requirements are targeting the state not as a private actor but as a sovereign. Such things as evaluation of additional evidence, upholding placement preferences and keeping and making available records of child placement even theoretically cannot be fulfilled by private actors. Therefore, the Thirteenth Circuit correctly held that ICWA is unconstitutional because it violates the anti-commandeering doctrine.

## II. ICWA is not a political classification, but rather a racial one, and is thus subject to strict scrutiny under the Equal Protection Clause of the 14th Amendment as extended to the 5th Amendment – a review which it fails.

The Thirteenth Circuit properly held various ICWA provisions unconstitutional for violating the Equal Protection Guarantee of the Fifth Amendment by having unequal standards for "Indian families" and "Indian children" that failed to rationally link children to tribes in a way that furthered the government's asserted interests. The Equal Protection Clause of the Fourteenth Amendment establishes that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States … *nor deny to any person within its jurisdiction the equal protection of the laws*." U.S. Const. amend. XIV, § 1 (emphasis added). *Bolling v. Sharpe* held that the rights of due process and equal protection are not mutually exclusive, thus recognizing that the Fifth Amendment contains an equal protection component as well that allows individuals to bring claims against federal actors. 347 U.S. 497, 498-99 (1954). "Fifth Amendment equal protection claims against federal actors are analyzed under the same standards as Fourteenth Amendment equal protection claims against state actors." *Butts v. Martin*, 877 F.3d 571, 490 (5th Cir. 2017).

When the classifications are based on the use of suspect traits like race and ancestry –as is the case with ICWA – the court must apply a strict scrutiny standard of review in order to evaluate whether there is a compelling government interest that necessitates the use of race and

that the legislation is as narrowly tailored as possible to serve its purpose. ICWA uses ancestry as a proxy for race and then fails to narrowly tailor its provisions to further Congress's asserted interest in "promot[ing] the stability and security of Indian tribes." § 1902.

### *A. ICWA's focus on blood lines and ancestral relations – which are a proxy for race – is a racial classification, not a political classification where membership is determined by established enrollment in a particular federally recognized tribe.*

"One of the principal reasons race is treated as forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Petitioners incorrectly assert that ICWA adopts political classifications that should be subject to simple rational basis review because it covers Indian children who are eligible for tribal membership – a thinly veiled attempt to get around racial classification by claiming the provisions are tied to political matters of self-government while in reality it turns children into resources.

#### *i. The purpose of ICWA and the adoption provisions of Indian children are not intricately tied into self-government policies of federally recognized Indian tribes.*

Petitioners incorrectly interpret *Morton v. Mancari* by asserting that ICWA follows a similar political classification regime as the Indian Reorganization Act of 1934 – which gave employment preference for qualified Indians in the Bureau of Indian Affairs (BIA). *See* 417 U.S. 535, 537 (1974) (citing 25 U.S.C. § 472). *Mancari* is easily distinguishable from ICWA because the "Indian preference statute is a specific provision applying to a very specific situation" with the BIA that allows tribes to "[a]ssume greater degree of self-government *both* politically and economically." 417 U.S. 535, 542, 550 (highlighting that the Indian Reorganization Act's purpose was to "reduce negative effect of having non-Indians administer matters that affect Indian tribal life"). The BIA situation is a political not racial distinction because the preference

is directed specifically to *members* of "federally recognized tribes," excluding many individuals who are racially classified as "Indians." *See Mancari* at 553 n. 24.

*Mancari* is political because it is based on tribal enrollment and intricately tied to self-government. This is comparable to *United States v. Antelope*, where defendants were "not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of [a tribe]." *See Antelope* 430 U.S. 641, 643, 646 n. 7 (1977) (noting that the Major Crimes Act specifies that federal jurisdiction "does not apply to many individuals who are racially to be classified as Indians," but rather the provisions were "made applicable to *enrolled* Indians by 18 U.S.C. § 1153." (emphasis added)). These cases operate under distinctions based on membership in a federally recognized Indian tribe – meaning individuals who are officially enrolled to be categorized as such on a political basis. ICWA fails to specify such a requirement, but instead mentions potential future eligibility to enroll in a tribe, while the sole requirement instead is ancestry – a proxy for race.

The statute at issue in *Mancari* is a preference that is "reasonable and rationally designed to further Indian self-government," a factor which is not present at the case in hand. *Mancari* at 555. The court in *Antelope* emphasized this fact when it came to its own statutes and those in *Mancari*, declaring that such regulations were "rooted in the unique statue of Indians as 'a separate people' with their own political institutions" – which is different than child adoption cases that are unaffiliated with political tribal memberships and future government interests. *Antelope* at 646.

*ii. ICWA defines "Indian child" on the basis of blood line and a potential eligibility of tribal enrollment in the future, not existing registered status to a recognized tribe – meaning it is not a political classification.*

ICWA's definition of "Indian child" specifies an unmarried individual under eighteen who 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." § 1903(4) (emphasis added). This provision states the blood line is necessary to qualify – and that they may be eligible for future tribal membership. However, ancestry is the term being used, not *actual* enrollment in a tribe – therefore it is based on race and not political affiliation. Adoption is not about self-government in the present, but rather a potential future…for the children. Yet Congress and ICWA approaches children as resources that can lead to the political growth of a tribe *if and when* these children mature into adults and then decide to officially become a tribal member. potential future members is not relevant to the topic at hand. There are a variety of factors that would contribute to an individual never entering the political fray, yet ICWA chooses to preserve this potential future instead of focusing on the best interests of the child in the present.

The facts in this case most closely resemble the classifications in *Rice*, where the Court held that the state of Hawaii had "used ancestry as a racial definition and for a racial purpose" in enacting legislation restricting voter eligibility. *Rice* at 515. The Hawaiian statute employed the terms "native Hawaiian" and "Hawaiian" in such a way that ancestry became a blatant proxy for racial classification. *Id*. at 514-16 (highlighting the legislative history which "stressed that this change [from 'peoples' to 'races'] is non-substantive, and that 'peoples' does mean 'races'" for purposes of classification – simply put, "[a]ncestry can be a proxy for race"). "Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries as laws or statutes that use race by name." *Id*. at 518.

Most notably, the Court stated that "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Id*. at 516-17. ICWA similarly uses ancestry as a proxy for classification, posing a biological requirement as an initial hurdle that is based purely on race, not the political categorization of being an actual tribal member.

***B. ICWA fails strict scrutiny review since it is not narrowly tailored to furthering Congress's policies for the best interest of the child, but rather uses children as a resource for a political group's potential future interests.***

The standard of review in equal protection cases varies depending on whether the government is classifying based on race, gender, socio-economic status, or other traits. Gender and sex are subject to intermediate scrutiny, meaning there needs to be an "exceedingly persuasive justification" for use of that classification and that gender classifications must be substantially related to an important governmental interest. *See generally Craig v. Boren,* 429 U.S. 190 (1976); *Mississippi University for Women v. Hogan* 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996). Things like age, income, and political classifications are considered "non-suspect" and thus subject to rational basis scrutiny, where the law must be "rationally related to a legitimate governmental purpose." *See generally United States Dept. of Agriculture v. Moreno* 413 U.S. 528 (1973) (holding that a "bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest); *United States v. Windsor* 570 U.S. 744 (2013).

Classifications based on race, ethnicity, and national origin – or as in the present case, ancestry – require strict scrutiny to be applied. *See generally Bolling*. "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect… courts must subject them to the most rigid scrutiny." *Korematsu v. US,* 323 U.S. 214 (1944) (addressing race-

specific classifications *disadvantage* racial and ethnic minorities); *see also Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Board of Education*, 347 U.S. 483 (1954). Race-neutral classifications that have a *disparate impact* on racial and ethnic minorities should also be viewed with strict scrutiny. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Washington v. Davis*, 426 U.S. 229 (1976). Even race-specific classifications intended to *benefit* racial and ethnic minorities, like affirmative action programs, are subject to strict scrutiny as well because racial classification is always "suspect." *See generally Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)*; Grutter v. Bollinger*, 539 U.S. 306 (2003).

Plaintiffs bringing equal protection claims must show both discriminatory effect and discriminatory purpose—which can be shown by express reliance on a suspect trait, such as race. Laws, such as ICWA, which meet these criteria by using ancestry as a proxy for race are subject to *strict scrutiny* since it is a constitutionally suspect method of classifying individuals. *See Johnson v. California*, 543 U.S. 499, 505 (2005) ("[A]ll racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny."). The government should use race neutral methods that are the least restrictive option to achieve their claimed objectives, and strict scrutiny review is necessary to smoke out whether the government is relying on invidious or appropriate racial classifications. *See Grutter* at 309 (emphasizing that strict scrutiny is necessary to assure that the government "is pursuing a goal important enough to warrant use of a highly suspect tool").

*i. ICWA fails to align with the Congress's stated purpose and policy interest in drafting the provisions, drawing distinctions that are overly broad and not narrowly tailored to "promote the stability and security of Indian tribes."*

The government's asserted compelling interest and overriding policy when enacting ICWA was to "protect the best interests of Indian children and to promote the stability and

security of Indian tribes" – which would be to place children in adoptive or foster homes which "reflect the unique values of Indian culture." *§ 1902*. By combining this with the placement preference during just adoptions of just "other Indian families," Congress has failed to recognize the unique nature of each individual Indian tribe in this overly broad provision that creates a standard that does not focus on a particular tribal interest. Children can be placed in tribes where they may never be eligible for membership upon reaching eighteen years of age. Furthermore, the cultural and linguistic background could differ greatly from the tribe of their actual ancestry. If the purpose of the statute is to promote the stability and security of Indian tribes – which looks at children in these cases as merely resources versus autonomous beings – placing Indian children with "other Indian families" fails to rationally relate to this given purpose.

Additionally, no one is forced to enroll in a tribe, so outside of the realm of eligibility to register, the government is assuming this to be a given feature that should be weighed heavily upon in adoption. Political interests (which arise with official enrollment in a federally recognized tribe) are overriding what should be the primary concern, the best interest of the child. Congress instead looks to children as a potential resource for tribes, which is not appropriate in the context of adoptions.

*ii. ICWA conflates all Indian tribes together as if they are a homogenous group without distinctive cultural practice – so prioritizing the placement of children with any Indian family, regardless of whether the child is eligible for membership in that person's tribe, is not narrowly tailoring the statute's provisions of seeking to "reflect the unique values of Indian culture."*

The adoptive placement preferences set forth in ICWA are as follows – placing the Indian child with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *§1915(a)*. Applying preference to any Indian family – regardless of tribe – is *not* narrowly tailored to maintaining an Indian child's relationship with

his or her tribe. The provisions lay room open for a child to be adopted by any Indian tribe, not just the one they may be eligible for membership in the future – so blatantly arguing that it preserves the culture is an inaccurate depiction of the situation. While the government may have a compelling interest in preserving Indian culture through laws like ICWA, the court in *Regents of Univ. of Cal. v. Bakke* held that remedying a past or present *societal* discrimination is too broad a reason to qualify as a compelling interest for using racial classifications. *See* 438 U.S. 265, 289-90 (1978) (opining that race neutral alternatives should be considered or narrow remedial purposes are more appropriate as opposed to a blanket quota). Per the standard set forth in *Grutter* and *Gratz v. Bollinger*, in the case of compelling interests to pursue diversity, there must be a holistic review of applicants – race can be *a* factor, but not the determinative one. *See generally Grutter; Gratz v. Bollinger*, 539 U.S. 244 (2003). Similarly, while race may be a consideration in the best interest of a child, it should not be the determinative factor when making adoption selections – especially in cases like that of the Donohues, where the children have already spent time with a foster family. The court in *Wygant v. Jackson Board of Education* held that providing "role models" (by maintaining a certain number of representative diverse teachers) for minority children was not a compelling interest, nor was societal discrimination in general. 476 U.S. 267, 274-75 (1986). While an Indian family may provide some chances for exposing the adopted child to his or her original tribal culture, that does not necessarily outweigh the value of other dedicated foster families who could equally prioritize teaching Indian children about their roots. When it comes to defending policies along the lines of an affirmative action plan, the government should consider race-neutral alternatives that shows it furthers the compelling interest of benefitting a *narrow* group; plus, the plan cannot continue into perpetuity, but rather requires a time-frame.

Considering this situation a matter of political classification would be a disservice to all involved, applying a standard that is just not fit for the situation at hand. Ordinary rational basis review (meaning the law is "rationally related to a legitimate governmental interest") allows too deferential a look at what is a racial classification situation. When designing ICWA, officials were to be considering the best interest of the child – which means holding matters to the highest standards and a strict review. Allowing officials to proceed one step at a time in furthering governmental interests, permitting laws to be supported by any conceivable purpose or state of facts, and having provisions drawn unartfully yet still not be considered invalid evades abiding by the Fourteenth Amendment Equal Protection Clause.

## CONCLUSION

On the first claim, this Court should uphold the Thirteenth Circuit decision that ICWA violates the anti-commandeering doctrine because ICWA directly forces state agencies and courts to administer a federal program. Petitioner's claim that ICWA constitutionally preempts conflicting state law should be rejected because ICWA (1) is not an exercise of the Constitutionally granted power, and (2) it cannot be best interpreted as regulating private actors rather than states. This Court should uphold the Thirteenth Circuit's decision on the Equal Protection Clause claims as well because ICWA is a racial classification that cannot survive strict scrutiny because the provisions are not narrowly tailored to a compelling government interest.

Therefore, the Court should affirm the Thirteenth Circuit decision to grant the Respondent's motion to remand.

Respectfully submitted,

/s/ Team No. 2
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