No. 22-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

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

v.

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

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

BRIEF FOR PETITIONER

Team 26

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I. Whether the placement preference and record keeping provisions of the Indian Child Welfare Act exceed Congress's plenary power over Indian affairs under Article I, § 8 of the Constitution and violate the Tenth Amendment's anticommandeering doctrine.

II. Whether the Indian Child Welfare Act's political classification of "Indian" is rationally related to Congress's interest in maintaining tribal sovereignty, satisfying the Fifth Amendment's Equal Protection Clause?

IV. STATEMENT OF THE CASE

A. Statement Of The Facts

There are three Indian tribes within the State of West Dakota. R. at 2. Baby C's biological parents are both members of one of these federally recognized Indian tribes. R. at 2. Baby C's mother is a member of the Quinault Nation, while her father is a member of the Cherokee Nation. R. at 2. Following Baby C's birth, she resided with her aunt. R. at 2. Unfortunately, Baby C's aunt left her alone frequently. R. at 2. Baby C was only eight months old at the time. R. at 2. Following reports of the aunt's negligence, the West Dakota Child Protective Services (CPS) removed Baby C from her aunt's custody. Baby C was subsequently placed in the custody of a non-Indian family—the Donahues. R. at 2. Since the Donahues were not of Indian descent, but Baby C was, the State of West Dakota was required by federal law to notify both the Quinault Nation and the Cherokee Nation. R. at 2. The State complied with these requirements. R. at 2. Baby C then lived with the Donahues for the next two years. R. at 2.

In August 2019, the state of West Dakota terminated the rights of Baby C's biological parents through voluntary state court proceedings. R. at 3. This termination of rights made baby C eligible for adoption under state law. R. at 3. The following month, the Donahues began adoption proceedings; both Baby C's biological parents and the aunt consented to these proceedings. R. at 3. Again, the State notified both Indian tribes as required by federal law. R. at 3. October 24, 2019, the Quinault Nation, which had entered an agreement with the Cherokee Nation to act as Baby C's tribe for purposes of the ICWA, contacted the state court, notifying it that the tribe had located a potential alternative placement for Baby C. R. at 3. This would have placed Baby C with other members of the tribe in an effort to preserve Baby C's heritage. R. at 3. This alternative placement did not pan out, however. R. at 3. After this, no other tribe attempted to intervene in Baby C's

proceedings. R. at 3. The Donahues, thus, entered a settlement agreement with CPS and Baby C's guardian ad litem stipulating that the ICWA's federal placement preferences did not apply to Baby C because no other party sought to adopt Baby C. R. at 3. In January 2020, the Donahues' adoption of Baby C was finalized by West Dakota. R. at 3.

April 2020, the Donahues became foster parents of Baby S, who was another child of Indian descent. R. at 3. Baby S's mother was a member of the Quinault Nation but died two months prior to Baby S' fostering. R. at 3. That said, for Baby S's whole life, he rested in the care of his grandmother. Unfortunately, however, the grandmother's health began to fail, which is what led to the need for foster care. R. at 3. In May 2020, the Donahues filed a petition to adopt Baby S. R. at 3. Still sick, and without another known option for Baby S, the grandmother consented to the adoption. R. at 3. The Quinault Nation was not without other options for Baby S though. R. at 3. Therefore, the Quinault Nation exercised its right to oppose the adoption under the ICWA. R. at 3. The tribe informed CPS that it located two other potential adoptive families who were members of the Quinault Nation. R. at 3. Taking issue with the inconvenient intervener, this was the proverbial last straw for the Donahues and led to their filing an action against the Defendants. R. at 4.

B. Procedural History

On June 29, 2020, the United States of America, the United States Department of the Interior, and its Secretary, Stuart Ivanhoe, were all sued by Plaintiffs in the United States District Court for the District of West Dakota. R. at 4. Plaintiffs alleged that the Indian Child Welfare Act (ICWA) §§ 1912(a) and (d)–(f), 1915(a)–(b) and (e), and 1951 commandeer the states in violation of the Tenth Amendment and that ICWA §§ 1913(d), 1914, and 1915(a)–(b) violate the Equal Protection Clause of the Fourteenth Amendment. R. at 4. The Cherokee Nation and the Quinault

Nation filed an unopposed motion to intervene as Defendants, which the Court granted. R. at 2. On September 3, 2020, Plaintiffs and Defendants filed cross-motions for summary judgment. R. at 4. The Court granted the Defendants' motion for summary judgment, determining that ICWA does not violate the Tenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. R. at 1, 13.

After granting summary judgment for the Defendants, Plaintiffs appealed to the United States Court of Appeals for the Thirteenth Circuit. R. at 13. The Thirteenth Circuit reversed the District Court's grant of summary judgment for the Defendants, holding that the ICWA is unconstitutional because it violates the Tenth Amendment. R. at 16–17. Because the ICWA was held unconstitutional, the Thirteenth Circuit did not address its constitutionality as it relates to Equal Protection. R. at 17. The Thirteenth Circuit remanded this case for entry of judgment in favor of Plaintiffs. R. at 17. This Court then granted the Defendant's Petition for Certiorari. R. at 20.

V. SUMMARY OF THE ARGUMENT

The ICWA—specifically the placement preference and record keeping provisions therein—does not violate the anticommandeering doctrine because the Supremacy Clause preempts, and the Constitution gives Congress power to regulate all Indian affairs. The Constitution, combined the Court's jurisprudence, provides Congress with plenary power over Indian affairs, making the ICWA—as a whole—constitutional. Consistent with this finding, the minimum rights that were created by the placement preference and record keeping provisions of the ICWA properly preempt the State of West Dakota under the Supremacy Clause and do not commandeer the States. The placement preference provision found in § 1915 of the ICWA does not violate the anticommandeering doctrine because the provision is a conferral of rights on private

parties. Likewise, the record keeping provisions found throughout the ICWA do not violate the anticommandeering doctrine because these provisions give teeth to a right of petition under § 1914 and are merely a means of compliance by the precedent set in *Reno v. Condon*.

Additionally, under the settled precedent of *Morton v. Mancari*, the ICWA's "Indian" classifications, even if based in part on ancestry, satisfy rational basis review because they are political classifications rationally related to Congress's legitimate interests. The ICWA's "Indian" classification is not a racial classification. Congress possessed a legitimate interest in maintaining tribal sovereignty and ensuring the stability of Indian families. Therefore, rational basis review is satisfied regarding the challenged provisions. The ICWA's "Indian" classification is not based solely on ancestry. Therefore, strict scrutiny does not apply. Finally, *Adoptive Child v. Baby Girl* does not render the placement preferences set forth in § 1915 inapplicable here because the Quinault Nation identified reasonable alternatives within the tribe.

VI. ARGUMENT

"We must protect the forests for our children, grandchildren and children yet to be born. . . ." Chief Qwatsias, *Quatsias Quotes*, AllGreatQuotes https://www.allgreatquotes.com/protect-the-forests-for-our-children/. It is well-documented that American Indian tribes have faced countless attacks on their culture ever since the Europeans landed in the Americas. But the modern-day attack on American Indian culture is much different than the geographic attack that Chief Qwatsias originally fought.

The original attack came from colonists, who attempted to completely assimilate American Indians. Wendy Therese Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 San Diego L. Rev. 381 (1997). When this wholesale assimilation failed, the next threat to the American Indian's existence came from the Indian

Removal Act of 1830. *Id.* at n.3 (citing Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice 6–7 (1983)). This Act forced thousands of American Indians to abandon their homelands in the South and travel to the West. *Id.* This walk became known as the "Trail of Tears" *Id.* Over 16,000 in the Cherokee Nation were marched from their lands and the Choctaw Nation was "forced to surrender ten million acres of ancestral homelands." *Id.* Any American Indian who chose not to travel to the West sacrificed its tribal membership and was forcefully assimilated into European culture. *Id.* That was not the end of the forced assimilation of the American Indians, however. The General Allotment Act of 1887 gave power to the President to allot individual tribal members particular reservation lands. *Id.* at 381–82 n.4 (citing Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice 9 (1983)). The policy behind this Act was to assimilate American Natives to European culture through private land ownership and farming. *Id.* But many of the lands provided were either not suitable for farming, or the lands were quickly sold to those outside of the American Indian culture. *Id.* Therefore, Congress eventually deemed the Act a failure and attempted to reverse its effects by implementing the Indian Reorganization Act in 1934. *Id.* This Act marked a shift in the United States' relationship with the American Indians—a grand gesture intended to show gratitude for the American Indians' contributions during World War I. *Indian Reorganization Act*, Britannica (May 19, 2020) https://www.britannica.com/topic/Indian-Reorganization-Act. The Reorganization Act "curtailed the future allotment of tribal communal lands to individuals and provided for the return of surplus lands to the tribes rather than to homesteaders." *Id.* It also encouraged the creation of charters, constitutions, and other necessary documents so the American Indians could manage their internal affairs. *Id.* Finally, the Reorganization Act created a credit program that financially aided in "tribal land purchases,"

"educational assistance," and "tribal organization." *Id.* This Act has since become the foundation for much of the federal legislation of American Indians and their affairs. *Id.*

Understanding this background, the Court can proceed to the case before it. Congress passed the Indian Child Welfare Act (ICWA) in 1978 to address research presented that the American Indian tribal membership was eroding at an exponential rate. *See* Parnell, *supra*, at 382. The new threat came from a complete removal of American Indians from tribal culture. *Id.* According to two separate studies conducted in 1969 and 1974, somewhere between twenty-five and thirty-five percent of American Indian children were being removed from their home families and tribes and placed in the foster care system, adoptive homes, or other institutions. *Id.*; *see also* 25 U.S.C. § 1901(4). For purposes of comparison, American Indian children were being removed from their families at a rate up to 1,600% greater than Caucasian children were being removed from their families. Parnell, *supra*, at 382. This research, and much more, persuaded Congress to act, using the plenary power over Indian affairs granted to it by Article I, § 8, clause 3 of the U.S. Constitution. Thus, the ICWA was born.

The intention was to provide a set of minimum federal standards before a child could be removed from its parents and, ultimately, its cultural heritage. *Id.* Congress also attempted to place removal decisions in the hands of the party who both had the most to lose as well as the party who best knew the culture these children were coming from—the tribes. *Id.* To reach this end, the ICWA granted each child's tribe with either exclusive or concurrent jurisdiction in child custody proceedings. *Id.* If a state court retains jurisdiction, then the ICWA creates minimum federal standards to protect the child, parent, and tribe. *Id.*

This posture is exactly what is present today. Therefore, in deciding to give deference to American Indian Tribes in custody matters, Congress rightfully evaluated the power given to it by

the Constitution—and the Court's entire Indian Commerce Clause jurisprudence. ICWA's Indian classifications do not violate the Equal Protection Clause of the Fifth Amendment. ICWA's Indian classifications are constitutional and satisfy the Equal Protection Clause of the Fifth Amendment. Therefore, the Petitioner asks this Court to reverse the Thirteenth Circuit's holding and find the ICWA constitutional.

A. The ICWA—Specifically The Placement Preference And Record Keeping Provisions Therein—Does Not Violate The Anticommandeering Doctrine Because The Supremacy Clause Preempts, And The Constitution Gives Congress Power To Regulate All Indian Affairs.

Congress rightfully acted under the enumerated powers given by the U.S. Constitution. Under Article I, § 8 clause 3 of the United States Constitution, Congress possesses the authority to negotiate and protect foreign nations and Indian Tribes. U.S. Const. art. I, § 8, cl. 3 ("Congress shall have the power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . "). This provision also gave Congress the power to regulate how states interact with the resources of Indian tribes. 25 U.S.C. § 1901(2) (stating "that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources"). In its findings created while drafting the Act, Congress determined "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, *as trustee*, in protecting Indian children who are members of or are eligible for membership in an Indian tribe[.]" 25 U.S.C. 1901(3) (emphasis added). The description of "trustee" not only stems from Article I, § 8 of the Constitution, but also stems from the Supreme Court's Indian Commerce Clause jurisprudence. *See e.g.*, *United States v. Lara,* 541 U.S. 193, 200. Therefore, Congress acted within its jurisdiction when passing the ICWA. As such, the Plaintiffs' claims of unconstitutionality are incorrect.

1. The Constitution, combined with the Court's jurisprudence, provides Congress with plenary power over Indian affairs. This makes the ICWA—as a whole—constitutional.

The Indian Commerce Clause is different from the Interstate Commerce Clause and provides Congress with plenary power over Indian affairs. The Thirteenth Circuit doubts that the Indian Commerce Clause provides Congress with the power "to regulate child custody cases [because] children are not persons in commerce, nor do such cases have any impact on commerce with Indian Tribes." R. at 16. But the Thirteenth Circuit is incorrect in its evaluation that the Indian Commerce Clause "is arguably coextensive with the Interstate Commerce Clause." *Id.* Addressing this concern is critical in the Court's analysis because there must be a constitutional power given to Congress before a preemption analysis may begin. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018). Therefore, the analysis below is crucial to answering the question on certiorari.

The Supreme Court has authored its own jurisprudence for the Indian Commerce Clause that is separate and distinct from the Interstate Commerce Clause. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191–92 (1989). In fact, it is "well established" by the Supreme Court that the two clauses are not only separate and distinct in the way Article I, § 8 is authored, but also in its application. *Id.*

In *Cotton*, the Court claimed "probable jurisdiction" over a case in which Cotton Petroleum Corporation leased lands on a tribal reservation to produce gas and oil. *Id.* at 163. Both the tribe and the State of New Mexico assessed a severance tax on the Corporation's production. *Id.* The Court held that the State properly imposed the tax, reasoning that "on-reservation oil and gas production by non-Indian lessees is subject to nondiscriminatory state taxation unless Congress has expressly or impliedly acted to pre-empt the state taxes." *Id.* (citing *Helvering v. Mountain Producers Corp.,* 303 U.S. 376, 386–387). And there was no evidence of such pre-emption of the

federal legislature. *Id.* Most importantly for the discussion here, however, was the Court's invitation to both parties to brief and argue the issue of "whether the Commerce Clause requires a tribe to be treated as a 'State'" in this context. *Id.* at 191.

Following the briefing and arguments, the Court evaluated the text and application of both the Indian Commerce Clause and the Interstate Commerce Clause. Textually, the Court cited Chief Justice Marshall's comparison of the clauses from *Cherokee Nation v. Georgia,* "The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct." *Id.* at 192 (internal citations omitted). Therefore, the Court held that the text of the Commerce Clause draws a clear distinction between the Interstate Commerce and the Indian Commerce portions. *Id.* at 191–92.

Second, the Court discussed the application of the two clauses. To properly evaluate this, the Court was required to review its entire Indian Commerce Clause jurisprudence. A concise statement of the law can be found in a separate case heard by the Northern District Court of New York. In its 2009 opinion, the district court found that the Supreme Court is clear about the power Congress holds over Indian affairs, citing numerous Supreme Court cases as precedent.

> As the Supreme Court has repeatedly noted, Congress possesses plenary authority to legislate in matters involving Indian affairs. *See, e.g., United States v. Lara,* 541 U.S. 193, 200 (describing Congress' powers to legislate in respect to Indian matters as "plenary and exclusive"); *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs[.]") (citing *Morton v. Mancari,* 417 U.S. 535, 551-52 (1974)). "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of New York,* 470 U.S. 226, 234 (1985).

Town of Verona v. Salazar, No. 6:08-CV-647 LIK GJD, 2009 WL 3165556, at *3 (N.D.N.Y. Sept. 29, 2009), *aff'd sub nom. Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016).

Echoing this sentiment, the Court in *Cotton* evaluated the heart of the Indian Commerce Clause, above, compared to the Interstate Commerce Clause, explaining that the two "have very different applications throughout history." *Cotton*, 490 U.S. at 192. When reviewing its Interstate Commerce Clause jurisprudence, the Court summarized that "the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation," whereas "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* (internal citations omitted). The Court finished its discussion on this point by reiterating its conclusion from *White Mountain Apache Tribe v. Bracker*, stating that "[t]ribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Therefore, the proper framing of the question in this case is whether the ICWA falls under the definition of "the field of Indian Affairs." The Defendant urges that it does.

As evinced by Congress' findings in 25 U.S.C. § 1901, the purpose of the ICWA was to ensure that tribes were protected from both individuals and States. *See* 25 U.S.C. § 1901. There is no question that the ICWA solely applies to members of Indian tribes or those children who would qualify for tribal membership. The record even shows this when it states that "[t]he CPS Manual states that if an Indian child is taken into CPS custody, 'almost every aspect of the social work and legal case is affected.'" R. at 2. The only difference between a normal child custody case and the one before the Court today is that this case involves Indian children. R. at 2. For this reason, the

ICWA does not reach further than Congress' "plenary authority" over Indian affairs. Additionally, the Thirteenth Circuit's application of the Interstate Commerce Clause doctrine to the case today is inappropriate. The Indian Commerce Clause—and ensuing jurisprudence—provides Congress with authority over all Indian affairs.

Addressing the Court's potential policy concerns regarding an unlimited power given to Congress within "the field of Indian affairs," this Court has, in fact, given past guidance on the point. The Court stated in *Perrin v. United States* that Congress's authority in the field requires "the presence of the Indians and their status as wards of the government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis." *Perrin v. United States*, 232 U.S. 478, 486 (1914). To supplement this point, the Court in *Morton v. Mancari* stated that "legislative judgments" providing special treatment of Indian tribes are proper "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians[.]" *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Therefore, the Court must merely find a rational relationship between the statutes in question and the powers conferred upon Congress by the Indian Commerce Clause and accompanying jurisprudence. If this relationship is found, then the ICWA is a proper exercise of Congress' plenary power over Indian affairs. For these reasons, an unchecked federal legislature should not be a concern of the Court.

2. The minimum rights that were created by the placement preference and record keeping provisions of the ICWA properly preempt the State of West Dakota under the Supremacy Clause and do not commandeer the States.

Since Congress possessed authority to enact the ICWA in the first place, the ICWA can—and does—take priority over state law through valid preemption. The ICWA's provisions control because the Constitution granted the power to Congress and the provisions confer rights to private actors. As mentioned above, the Supremacy Clause should not be described as an affirmative

power granted to Congress by the Constitution. The Court in *Murphy v. Nat'l Collegiate Athletic Ass'n* made this clear. *See Murphy*, 138 S. Ct. at 1479 (emphasizing that "[p]reemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress[]"). The Supremacy Clause is solely a "rule of decision." *Armstrong v. Exceptional Child Center, Inc.,* 135 S.Ct. 1378, 1383 (2015). Valid preemption of a state law, thus, requires three elements: (1) Congress passes a law; (2) that law "confers rights on private actors"; and (3) a state enacts a law that "confers rights or imposes restrictions" in conflict with that federal law. *Murphy*, 138 S. Ct. at 1480. Valid preemption does not require that the federal law exclusively govern private actors; the law simply must do more than usurp a state's legislative decision-making, and that must be effectuated through the conferral of rights upon private actors. *Id.* Finally, Congress may not shift the cost of implementing a regulatory scheme onto states or their agencies to avoid the burden of implementing the scheme. *See id.* at 1479. Here, all elements are present for the Court to find that federal law should control.

a. The placement preference provision found in § 1915 of the ICWA does not violate the anticommandeering doctrine because the preferences are a conferral of rights on private parties.

Federal statute 25 U.S.C. § 1915 is lawful because it confers rights upon private actors through minimum requirements placed on states. These placement preferences do not unconstitutionally commandeer states' legislative authority, but instead, provide Indian tribes a *preferential right* to adopt or foster any children who qualify for membership. *See* 25 U.S.C. § 1915. These provisions do not constitute Congressional commandeering of legislative authority from states, as was seen in *Murphy* (the Supreme Court's most recent case addressing the anticommandeering doctrine).

In *Murphy*, the Supreme Court was presented with the question of whether the Professional and Amateur Sports Protection Act (PASPA) violated the Constitution under the Tenth

Amendment's anticommandeering doctrine. *See Murphy*, 138 S. Ct. at 1468. The state statute in question derived from New Jersey's desire to legalize sports gambling. *Id.* This directly conflicted with PASPA, which federally outlawed sports gambling (allowing for few exceptions). *Id.* Ultimately, the Court held that PASPA violated the anticommandeering doctrine and that the state of New Jersey should not be enjoined from legalizing sports gambling. *Id.* at 1485. The Court stated that "PASPA 'regulate [s] state governments' regulation' of their citizens," and that "[t]he Constitution gives Congress no such power." *Id.* (internal citations omitted). It further reasoned that PASPA unconstitutionally violated federalist principles by "dictat[ing] what a state legislature may and may not do." *Id.* at 1478. Ultimately, the case turned on whether Congress is allowed to "prohibit[] a state from enacting new laws[.]" *Id.* The Court was adamant that Congress may not prohibit, nor compel legislation from the states. *Id.*

Here, there is no such compelling of the West Dakota legislature. The placement preferences of § 1915 merely provide that Indian Tribes shall be provided deference in state court adoption proceedings. *See* R. at 6. This does not commandeer the state's legislature, nor does it commandeer the resources of the state or its agencies. Instead, Congress used the plenary power provided to it under Article I, § 8 to confer a minimum standard of rights upon four classes of individuals: (1) All Indian children (2) an Indian child's extended family, (3) other members of the Indian Child's tribe, and (4) other Indian families. R. at 6. The State of West Dakota is free to pass its own legislation that further explicates placement preferences for Indian children, so long as those state statutes do not violate the minimum rights provided to the classes of individuals specified in § 1915.

b. The record keeping provisions found throughout the ICWA do not violate the anticommandeering doctrine because they give teeth to a right of petition under § 1914 and are merely a means of compliance under the precedent set in *Reno v. Condon*.

The record keeping provisions of the ICWA are merely a means of compliance with federal law and do not unreasonably shift the financial burden onto the States. These provisions speak to the last requirement of a preemption analysis—the shifting of costs onto states to avoid the burden of implementing a regulatory scheme. The Court addressed this problem in a string of cases: *New York v. United States*, *Printz v. United States*, *South Carolina v. Baker*, and ultimately, *Reno v. Condon*.

In *New York v. United States*, the Court heard a case in which a federal law mandated states to either "take title" to certain radioactive waste or, alternatively, to "regulat[e] according to the instructions of Congress." *New York v. United States,* 505 U.S. 144, 175 (1992). Congress issued orders to state governments to act in accordance with this statute. *Id.* The Court held that this statute was unconstitutional because the Constitution did not "empower Congress to subject state governments to this type of instruction." *Id.* at 176. The Court further reasoned that the Constitution "confers upon Congress the power to regulate individuals, not States[,]" and that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 161, 166.

The Court carried this important policy point into its analysis in *Printz v. United States*. In *Printz*, the Court heard a case where Congress commanded "state and local enforcement officers to conduct background checks on prospective handgun purchasers." *Printz v. United States*, 521 U.S. 898, 902 (1997). The Court held that this provision violated the Tenth Amendment. *Id.* at 935 It reasoned that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political

subdivisions, to administer or enforce a federal regulatory program." *Id.* This expanded the Court's holding from *New York* to apply both directly—through a state's legislature or executive branch—and *indirectly*—through a state's officers and agents.

These decisions do not completely bar Congress from regulating certain state functions, however. In *South Carolina v. Baker*, the Court ruled on a case where Congress prohibited states from issuing unregistered bonds. *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988). The Court upheld this statute, reasoning that the law "regulate[d] state activities," instead of "seek[ing] to control or influence the manner in which States regulate private parties." *Id.* The Court further noted the following:

> The [National Governor's Association] nonetheless contends that § 310 has commandeered the state legislative and administrative process because many state legislatures had to amend a substantial number of statutes in order to issue bonds in registered form and because state officials had to devote substantial effort to determine how best to implement a registered bond system. *Such 'commandeering' is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance.* That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Id. (emphasis added). This precise reasoning was critical to the Court's decision in the ensuing *Reno v. Condon*.

In *Reno*, the Court ruled upon a case where Congress passed a federal statute that restricted "the disclosure and dissemination of personal information provided in applications for driver's licenses." *Murphy*, 138 S. Ct. 1461, 1479. The Court upheld the federal statute, reasoning that the statute did not require states to "regulate their own citizens." *Reno v. Condon*, 528 U.S. 141, 151 (2000). Instead, "[t]he [federal statute] regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes *regulating private individuals*." *Id.* (emphasis added).

The record keeping provisions in the case today are akin to the statutes in *Baker* and *Reno*. 25 U.S.C. §§ 1915(e) and 1951(a) are no more than statutes to ensure compliance. Also, none of these statutes create a regulatory scheme that would require the state to regulate private individuals. Section 1914 provides that "[a]n Indian child, a parent or Indian custodian from whose custody the Indian child was removed, or the child's tribe may file a petition in any court of competent jurisdiction to invalidate an action in state court for foster care placement or termination of parental rights if the action violated any provision of §§ 1911–13." R. at 6. These rights of petition require certain information to be kept by the State of West Dakota. Specifically, the classes of individuals listed in § 1914 must know who possesses the right and ability to invalidate a decree. *See* R. at 6. Therefore, the State must take certain actions to comply with Congress' conferral of rights upon individual parties, i.e. keep records of its state proceedings. These provisions are, thus, "commonplace" administrative actions, just like the statutory provisions in *Baker* and *Reno*.

Additionally, the record keeping provisions do not signify an improper attempt by Congress to shift the cost of compliance onto the states. The context of this Act is to confer minimum rights in state custody proceedings. This means that the federal government is not capable of keeping records of the state proceedings until the State transfers those records to the federal government, which is mandated in § 1951(a). R. at 7. At that point, the federal government shares the burden of record-keeping within this regulatory scheme. R. at 7. This sharing is proper under the policy of "cooperative federalism."[1]

[1] Cooperative federalism provides that, if a state wishes to avoid bearing the full weight of a regulatory scheme, it has the ability to shift that cost onto the federal government. *See Hodel v. Virginia Surface Min. and Reclamation Ass'n*, 452 U.S. 264, 288 (1981). Schemes containing the ability for this kind of shifting do not violate the anticommandeering doctrine. *Id.*

For these reasons, the ICWA is constitutional in its entirety. Additionally, the placement preference and the record keeping provisions of the ICWA preempt state laws because they confer rights on private individuals and merely require certain, low-level compliance from the States.

B. Under The Settled Precedent Of *Morton v. Mancari*, The ICWA's "Indian" Classifications, Even If Based In Part On Ancestry, Satisfy Rational Basis Review Because They Are Political Classifications Rationally Related To Congress's Legitimate Interests. Under The Facts Presented, *Adoptive Child v. Baby Girl* Is Inapplicable.

Under this Court's jurisprudence in *Morton v. Mancari*, the ICWA's "Indian" classifications, even if partially based on ancestry, satisfy rational basis review because they are political classifications rationally related to Congress's legitimate interests in maintaining tribal sovereignty and stability of Indian families. *See Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). This Court first begins by applying the same standard as the Due Process Clause of the Fourteenth Amendment to the Fifth Amendment's Equal Protection component. *Adarand Constructors v. Pena*, 515 U.S. 200, 217 (1995); U.S. Const. amend. XIV, §1. This Court held that the ICWA's "Indian" classifications are subject to rational basis review because they are considered political preferences, as opposed to forms of racial discrimination. *Mancari*, 417 U.S. at 553.

Additionally, this Court held that legislation singling out Indians is rationally related to Congress's unique obligation to American Indians to authorize power to regulate its own affairs as a political sovereign. *See id*. at 554–55. Congress's interests, outlined in the ICWA, stem from the history between the United States and American Indian tribes since this country's inception. *See Brackeen v. Haaland*, 994 F.3d 249, 339–40 (5th Cir. 2021). Furthermore, should not apply the findings *Adoptive Couple* because the facts presented do not render Section 1915's placement preferences inapplicable. *See Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013). Therefore, all challenged provisions of the ICWA are thus constitutional and satisfy the Equal Protection Clause of the Fifth Amendment.

1. ICWA's "Indian" classifications are political classifications subject to rational basis review and its provisions are rationally related to Congress's legitimate interest.

This Court has recognized that when a statute's classifications based on membership in a federally recognized Indian tribe, are considered political classifications, rather than racial classifications. *Mancari*, 417 U.S. at 553; *Fisher v. Dist. Ct. of Sixteenth Jud. Dist.*, 424 U.S. 382, 391 (1976); *United States v. Antelope*, 430 U.S. 641, 645 (1977). The first step in analyzing an Equal Protection Challenge under the Fifth Amendment is by evaluating what standard of review applies. *Adarand*, 515 U.S. at 217. In *Morton v. Mancari*, this Court held that the ICWA's "Indian" classifications are subject to rational basis review because they are considered political preferences, as opposed to forms of racial discrimination. *Mancari*, 417 U.S. at 553. The United States Court of Appeals for the Fifth Circuit held that the ICWA's "Indian" classifications are rationally related to Congress's interests in maintaining tribal sovereignty and stability of Indian families. *See Brackeen*, 994 F.3d at 341. Therefore, the ICWA's "Indian" classifications are political classifications rationally related to Congress's legitimate interests in maintaining tribal sovereignty and stability of Indian families.

a. ICWA's "Indian" classification is subject to rational basis review.

The Equal Protection Clause of the Fourteenth Amendment conditions that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Due Process Clause of the Fifth Amendment contains an equal protection component that parallels the Fourteenth Amendment's Equal Protection Clause. *Adarand*, 515 U.S. at 217; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975); *see also Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The United States Supreme Court steadily holds that the "[e]qual protection analysis [under] the Fifth Amendment is the same as that under the Fourteenth Amendment." *Adarand*

Constructors, 515 U.S. at 217; *Buckley*, 424 U.S. at 93 (per curiam). To determine the constitutionality of a statute under the Equal Protection Clause, one must determine what level of review shall be applied to the statute's classification(s). *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439–440 (1985).

A statute is presumed constitutional if it is rationally related to a legitimate governmental interest. *See Cleburne*, 473 U.S. at 440. The burden is thus on the challenger to prove that the means is not rationally related to a legitimate governmental interest. *See id*. at 440. A statute survives rational basis review "if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Brackeen*, 994 F.3d at 342; *see Romer v. Evans*, 517 U.S. 620, 632 (1996) (citing *New Orleans v. Dukes*, 427 U.S. 297 (1976)). It "does not violate the Equal Protection Clause merely because [its] classifications are imperfect." *Brackeen*, 994 F.3d at 343; *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 592 (1979).

Furthermore, rational basis review applies to statutes regulating immigration and naturalization. *See Mathews v. Diaz*, 426 U.S. 67, 78–80 (1976); U.S. Const. Art. I, § 8, cl. 4. This type of disparate treatment is not by itself invidious. *Mathews*, 426 U.S. at 80. However, when a statute classifies on the basis of race, alienage, or national origin, it is presumed unconstitutional. *Cleburne*, 473 U.S. at 440. Because this type of "discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *Id*. at 440; *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365, 375–76 (1971).

In the seminal case of *Morton v. Mancari*, this Court specifically held that "legislation that singles out Indians for . . . special treatment can be tied rationally to the fulfillment of Congress'

unique obligation toward the Indians." *Mancari,* 417 U.S. at 554-55. This is because Congress recognizes tribes on the basis of their political status, rather than their race or national origin, which affords Indian classifications rational basis review rather than strict scrutiny. *See id.* at 554.

Similar to the issue of regulation of aliens and nationality in *Diaz*, here, the issue revolves around the status of federally recognized Indian tribes. R. at 4. Likewise, disparate treatment on the basis of tribal membership is not by itself invidious. Here, like the decision to apply rational basis review in *Mancari*, the application of rational basis draws upon the individual's participation in a federally recognized Indian tribe. ICWA's definition of "Indian child" highlights its desire to differentiate on the basis of political classification, rather than racial classification. R. at 5. This definition is in line with Congress's authority to designate more power in the hands of federally recognized Indian tribes because of their distinction as political sovereigns.

While the ICWA's "Indian" classifications make work to the disadvantage of non-Indian families, this does not mean that Congress lacks a legitimate interest in promoting the affairs of Indian tribes and families. R. at 5. The ICWA's classifications of "Indian" or "Indian child" may be considered imperfect and still be upheld on the basis that there is a conceivable, legitimate interest. Because "Indian" in the context of the ICWA is based on affiliation with an Indian tribe, rather than one's race as Indian, the challenged provisions are subject to rational basis review. Therefore, the ICWA is presumed constitutional, and the burden is on the Respondent to prove that ICWA's "Indian" classification is not rationally related to a legitimate governmental interest.

b. ICWA's "Indian" Classifications Are Political Classifications, Not Racial Classifications.

This Court has consistently held that a statute's classifications based on membership in a federally recognized Indian tribe, are considered political classifications, rather than racial classifications. *Mancari*, 417 U.S. at 553; *Fisher*, 424 U.S. at 391; *Antelope*, 430 U.S. at 645. This

Court's jurisprudence stems from the unique status of Indian tribes as self-governing political entities. *Brackeen v. Haaland*, 994 F.3d 249, 336 (5th Cir. 2021). The ICWA's "Indian" preferences are political classifications, not invidious forms of racial discrimination.

A statute's "preference [based on membership in a federally recognized Indian tribe] does not constitute 'racial discrimination[,]' . . . it is not even a 'racial' preference." *Mancari*, 417 U.S. at 553. In *Mancari*, non-Indian employees of the Bureau of Indian Affairs (BIA) alleged that an employment preference for qualified Indians in the BIA violated the Due Process Clause of the Fifth Amendment. *Id.* at 293; *see* 25 U.S.C. § 5116. The statute stated, "[s]uch qualified Indians shall hereafter have the preference to appointment vacancies in any such positions." 25 U.S.C. § 5116. Even in spite of *Mancari*'s requirement of "one-fourth or more degree Indian blood," this Court held that due to "'the unique legal status of Indian tribes [as political sovereigns] under federal law' [] the Federal Government [is permitted] to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." *Id.* at 551-52, 553 n.24. This Court reasoned that this preference was an employment criterion reasonably related to further the government's interest in maintaining Indian self-government and to make the BIA more responsive to the needs of its constituent groups. *Id*. at 554.

Since *Mancari*, this Court has consistently held that "Indian" classifications are political classifications, not forms of racial discrimination. *See e.g., Fisher*, 424 U.S. at 391 (holding that denying Indians access to state courts does not constitute impermissible racial discrimination); *Antelope*, 430 U.S. at 645 (holding that 18 U.S.C. § 1111, which subjects criminal defendants to a felony conviction when committing first-degree murder in a federal jurisdiction, does not violate the Due Process Clause of the Fifth Amendment. To hold otherwise, would invalidate an entire

title of the United States Code and other legislation singling out Indians based on their tribal status. *Mancari*, 417 U.S. at 552–53; *See Simmons v. Eagle Seelatsee*, 384 U.S. 209 (1966).

Consistent with *Mancari*'s holding that Indian classifications are political in nature; the Fifth Circuit Court of Appeals recognized that Indian tribes are self-governing political communities. *Brackeen v. Haaland*, 994 F.3d 249, 336 (5th Cir. 2021); *United States v. Wheeler*, 435 U.S. 313, 322–23 (1993). In *Brackeen*, A.L.M., an Indian child, was removed from his biological grandmother's custody and placed in foster care with the Brackeens. Eventually, the Brackeens petitioned to adopt A.L.M. but were reluctant to adopt other Indian children in the future because of how difficult their experience was. *Brackeen*, 994 F.3d at 288. This didn't stop the Brackeens from seeking adoption of A.L.M.'s sister, Y.R.J., which was contested by the Navajo Nation. *Id*. at 288–89. The court held, in accordance with *Mancari*, that the challenged classification in § 1915(a) was sufficiently a political classification, even if it was based in part on ancestry. *Id*. at 340. The court's reasoning was based on the historical context of Indian tribes in the United States and case law that has recognized the political nature of Indians and Congress's unique obligation to them. *See id*. at 336.

The relationship between the government and the tribes has always been considered a relationship between political entities. *Id*. at 337; *see Cherokee Nation v. Georgia*, 30 U.S. 1, 16, (1831) (describing Indian tribes as "domestic dependent nations"); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1278 (9th Cir. 2004) (stating that the relationship between the United States and Indian tribes has been political, rather than race-based.) Simply because a tribe uses ancestry as part of its criteria for determining membership eligibility does not change that ICWA does not classify in this way; instead, ICWA's Indian child designation classifies on the basis of a child's connection

to a political entity based on whatever criteria that political entity may prescribe. *Brackeen*, 994 F.3d at 338–39; *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

Furthermore, the court in *Brackeen*, looked at the unique rights granted to Indian Tribes by the United States Constitution. *Brackeen*, 994 F.3d at 271; *See* U.S. CONST. art. I, § 8, cl. 3 (empowers Congress to regulate commerce with the Indian Tribes.) Even though tribal membership is due in part to ancestry, tribal sovereignty centers on a group's status as a continuation of a historical political entity. *See* 25 C.F.R. § 83.11(c), (e). In order for a tribe to recognized by the federal government, it must maintain political influence over its members. *Brackeen*, 994 F.3d at 337. Indians are "unique aggregations" possessing the power of "regulating their internal and social relations.'" *Brackeen*, 994 F.3d at 339–340; *United States v. Mazurie*, 419 U.S. 544, 557 (1975) citing *Worcester v. Ga.*, 31 U.S. 515, 557 (1832); *United States v. Kagama*, 118 U.S. 375, 381–82; *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 173 (1973).

Here, the ICWA's classification of Indian is not as grounded in ancestry as the BIA's employment preference of Indian in *Mancari*. While the BIA requires having at least "one-fourth" of a degree of Indian blood, the ICWA focuses on the membership and eligibility of membership in an Indian tribe. It does not solely rely on a child's ancestry or blood percentage to determine whether the child is qualified under the ICWA and thus warrants certain protections under the law. ICWA's provisions are grounded more so in descendancy, as evidenced by the language of § 1903's first prong, "biological child of a member of an Indian tribe." R. at 5. Descendancy laws have not been categorized as classifying on the basis of race. However, similar to the BIA's preference for "qualified Indians," the ICWA conveys certain rights based on an individual's membership in a recognized Indian tribe.

Congress continued to recognize the sovereignty of tribes in the ICWA by its inclusion of the second prong in § 1903. Section 1903's definition of "Indian child" does not cover children who choose not to join their respective tribe, so membership is not necessarily conferred at birth like how race is. R. at 5. Additionally, the "eligibility" component of this provision is at the discretion of each Indian tribe acting as sovereign over its community. A tribe can choose to deny membership to an individual whose biological parent is a member of the tribe. The ICWA's deferral to the judgment of the tribe reinforces that its classification of Indian is political in nature.

c. ICWA's Challenged Provisions Are Rationally Related To Congress's Legitimate Interest In Maintaining Tribal Sovereignty And Ensuring The Stability Of Indian Families. Therefore, Rational Basis Review Is Satisfied.

The United States Court of Appeals for the Fifth Circuit held that the ICWA's "Indian" classifications are rationally related to Congress's interests in maintaining tribal sovereignty and stability of Indian families. *See Brackeen*, 994 F.3d at 341. Congress's interests are directly set forth in the Constitution and statutes predating the ICWA, as well as 25 U.S.C. § 1901. *See Brackeen*, 994 F.3d at 337; U.S. CONST. art. I, § 8. Therefore, the ICWA's "Indian" classifications satisfy rational basis.

The ICWA's "Indian" classification is rationally related to Congress's legitimate interest in maintaining tribal sovereignty and ensuring stability of Indian families. *See Brackeen*, 994 F.3d at 341. In *Brackeen*, the court evaluated the stated purposes of the ICWA's provisions. *Id*. at 341. The court noted that Congress enacted the ICWA in response to the high percentage of Indian children are removed from their homes and broken up by nontribal agencies. *See id.*

It further established that the states failed to honor the sanctity of Indian tribes' sovereignty over its people and community. *See id.*; 25 U.S.C. § 1901(5). Keeping Indian families together, in order to promote the cultural and social standards of the Indian tribal community, is at the center of why Congress enacted the ICWA, not to mention the adverse effects resulting from Indian

children being catapulted from their families to individuals unfamiliar and ignorant to their cultural norms through adoption or foster placement. *See Brackeen*, 994 F.3d at 285; 25 U.S.C. § 1901. The ICWA sought "to protect the best interests of Indian children and to promote the stability and security of tribes and families." *Brackeen*, 994 F.3d at 341; 25 U.S.C. § 1902; *see Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 (1989).

Additionally, the United States Court of Appeals for the Fifth Circuit recognized Congress's prescription of power to Indian tribes in regulating their own affairs, even before the ICWA's enactment. *Brackeen*, 994 F.3d at 337; U.S. CONST. art. I, § 8. Congress has treated Indian tribes as quasi-sovereigns from its inception of the Indian Commerce Clause. Moreover, the Indian Reorganization Act recognized the importance of tribal self-governance by authorizing tribes to apply for federal recognition status. *Brackeen*, 94 F.3d at 337; *see* 25 U.S.C. § 5101. Furthermore, "[t]he Constitution also preserves to tribes' certain powers and privileges – e.g., to prosecute their members, invoke sovereign immunity, and enter into treaties - that no group united solely by race possesses." *See Brackeen*, 994 F.3d at 341; *see, e.g., Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). The Fifth Circuit recognizes the importance of singling out Indians based on political classification in order to advance Congress's legitimate interest in furthering tribal sovereignty and cultural development, in addition to maintaining security and stability of Indian tribes and families.

Here, ICWA's Indian classifications are rationally related to its outlined purposes in the statute. *See* 25 U.SC. §§ 1901, 1902. When applied to §§ 1913, 1914, and 1915, the Indian classifications provide preference to Indian tribal members who have been the subjects of familial instability at the hands of the state. Sections 1913 and 1914 provide preferences for Indian families and tribes during adoption and foster care proceedings. Likewise, § 1915(a) and (b) further

Congress's interest in maintaining stability and security of tribes and tribal families by preferencing the placement of Indian children with Indian family members or in another tribe.

Congress continues to recognize tribal sovereignty through the ICWA's provisions declaring preference to an Indian child's placement with the child's family, an Indian tribe, or another Indian family. R. at 5–6. Congress intended ICWA to further both tribal self-government and the survival of tribes. The ICWA prioritizes the desires of Indian tribes and families regarding the removal of Indian children from their homes. The policy behind these challenged provisions is that Indian children, if they so choose, will one day be leaders of the tribe, in charge of regulating the affairs of its fellow members. For these reasons, ICWA's Indian classifications are rationally related to Congress's legitimate interests in maintaining tribal sovereignty and promoting the stability and security of Indian tribes and families. Therefore, the ICWA's Indian classifications satisfy rational basis review.

2. ICWA's "Indian" classification is not based solely on ancestry. Therefore, strict scrutiny does not apply.

When a classification is based in part on ancestry or race, it is not subject to strict scrutiny. *Rice v. Cayetano*, 528 U.S. 495, 519–20 (2000). Therefore, the ICWA's "Indian" classifications, even if based in part on ancestry, are not subject to strict scrutiny. Rational basis applies to the ICWA's "Indian" classifications.

In *Rice v. Cayetano*, this Court stated that Indian classifications based in part on ancestry or race are not considered racial classifications subject to strict scrutiny when the classification applies "only to members of 'federally recognized' tribes." *Rice*, 528 U.S. at 519–20. The petitioner was a citizen of Hawaii but was neither a native Hawaiian nor a Hawaiian as defined by the statute. *Id.* at 498. When petitioner applied to vote in the trustee election for the Office of

Hawaiian Affairs he was denied because he lacked the requisite Hawaiian ancestral component. *Id*. at 498.

This Court held that the Hawaiian classification was based solely on ancestry, determining that the statute's purpose was to use ancestry as a proxy for race. *Id*. at 514–517. This Court, in fact, reaffirmed Mancari's holding that Indian classifications based on membership are "not directed towards a 'racial' group" because they apply only to federally recognized tribal members. *Id*. at 519–20 (quoting *Mancari*, 417 U.S. at 553 n.24). This Court stated that ICWA does not single out children "solely because of their ancestry or ethnic characteristics." *Id.* at 515.

Here, the challenged Indian classifications do not classify individuals solely because of their ancestry. Section 1903(4) of the ICWA makes clear that "'[i]ndian child' means 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." R. at 5; 25 U.S.C. § 1903(4). To be considered Indian under the ICWA, one must either be a member already or be eligible for membership where their biological parent is a member of the Indian tribe.

This provision, which applies to the Indian classifications in §§ 1913, 1914, and 1915, does not render Indian tribal membership on the sole basis of ancestry acting as a racial proxy. Because the ICWA's classifications are not solely on the basis of ancestry, its provisions are subject to rational basis review. Therefore, this Court need only find that the ICWA's provisions advance a legitimate governmental interest.

3. *Adoptive Couple v. Baby Girl* does not render the placement preferences set forth in § 1915 inapplicable here.

This Court held that Section 1915(a)'s placement preferences do not apply when no alternative party has sought adoption of the Indian child. *Adoptive Couple v. Baby Girl*, 570 U.S.

637, 642, 656 (2013); *see* 25 U.S.C. § 1915(a). This Court held that when there is alternative party available, Section 1915 defers to the judgment of the Indian child's tribe. *Adoptive Couple*, 570 U.S. at 656. This Court's findings in *Adoptive Couple* do not apply to the facts presented here because the Quinault Nation identified two Quinault families willing to adopt Baby S.

More recently in *Adoptive Couple v. Baby Girl*, this Court addressed the procedure applied when an Indian child, whose parents have attempted to relinquish their parental rights, is being sought for adoption by a non-Indian family. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013). This Court interpreted 25 U.S.C. § 1915(a) to mean that a non-Indian family could adopt a child classified as Indian, based on 1.2% Cherokee blood contained in her DNA, when no other eligible candidates have sought to adopt the child. *Adoptive Couple*, 570 U.S. at 642. In Adoptive Child, neither members of the Cherokee nation nor other Indian families sought to adopt Baby Girl, even though the Cherokee intervened in the proceedings. *Id*. at 655.

This Court held that § 1915(a)'s placement preferences, normally left to the discretion of the Indian child's tribe, do not apply when no alternative party has sought to adopt the Indian child. *Id*. at 642, 656. This Court did not address the constitutionality or statutory interpretation of classifications addressed in 25 U.S.C. §§ 1913, 1914, 1915(b). *See e.g., id*. at 655. Moreover, this Court merely stated that interpreting § 1912(d) and (f) to mean that an Indian parent could abandon his child, refuse to support the child's mother, and then come in at the eleventh hour to override the mother's decision; would raise equal protection concerns. *Id*. Lastly, § 1915(c) provides that "if the Indian child's tribe [] establish[es] a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in [§1915(b)]." *Id*. at 655, n.11.

This Court additionally held that interpreting § 1912(d) and (f), not challenged by Respondents here, to mean that an Indian parent could come in at the last minute to invalidate adoption proceedings *would* raise equal protection concerns, not that it was a violation of the Equal Protection Clause. Furthermore, because there were two Quinault families identified by the Quinault Nation who were willing to adopt Baby S, *Adoptive Couple*'s finding is in applicable to the facts here. R. at 3. Even if this Court were to find that Baby C's placement is valid, this Court cannot find that Baby S's placement is workable because there were two Quinault families who were willing to adopt Baby S. R. at 3. Furthermore, so long as placement is the least restrictive setting appropriate to the needs of the child and there is an alternative party seeking adoption of the Indian child, this Court must defer to placement preferences outlined in § 1915(b), unless the Quinault Nation states otherwise.

Here, placing Baby S with another Quinault family is imperative to preserving the cultural identity and heritage of Indian tribes. R. at 3–5. Preserving Baby S's connection to her tribe is even more important than the child's connection in *Adoptive Couple* because Baby's S's mother was a member of the Quinault Nation. R. at 3. Baby S is a direct descendant of the Quinault Nation, while the child in *Adoptive Couple* was a mere 1.2% Cherokee. R. at 3. Placing Baby S with a neighboring tribal family, even if in a different state, directly aligns with Congress's intent to preserve Indian heritage. Therefore, *Adoptive Couple*'s finding that the does not apply because there were alternative parties who sought adoption of Baby S, and discretion as to placement of the child lies with the discretion lies with the discretion of the child's tribe.

VII. CONCLUSION

Overall, the ICWA is constitutional in its entirety. Article I, § 8 of the Constitution, combined with the Court's jurisprudence, gave Congress plenary power over all Indian affairs, not

just commerce. Through this constitutional power, Congress rightfully enacted the ICWA. Because this Act is federal law, the ICWA preempts state law through the Supremacy Clause. Addressing the statutes for which the Court granted certiorari, the placement preference provisions properly confer rights onto individuals. Conferring rights is a proper use of Congress' authority and does not commandeer West Dakota's legislature. Similarly, the record keeping provisions are necessary compliance provisions, which ensure that the rights conferred onto individuals are protected and actionable by private parties. These provisions do not unnecessarily burden the State of West Dakota and do not require the state to pay the complete cost of implementing a federal regulatory scheme. The federal record keeping provisions also do not force the state to "regulate its own citizens," meaning the state government has not been commandeered.

Likewise, the ICWA's Indian classifications do not violate the Equal Protection Clause of the Fifth Amendment. Since 1974, this Court has subjected the ICWA's Indian classifications to rational basis review, as opposed to strict scrutiny. This is because the ICWA's Indian classifications are political classifications, rather than racial classifications. This conclusion stems from the long history between the United States and Native Indian tribes that is supported by Congress's interests in providing political sovereignty to federally recognized tribes and maintain stability among tribal families. This Court should follow the precedent set forth in *Mancari* and recognize that *Adoptive Couple* does not render Section 1915(a)'s placement preferences inapplicable here. All challenged provisions of the ICWA are thus constitutional and satisfy the Equal Protection Clause of the Fifth Amendment. Therefore, we respectfully request this Court to reverse the Thirteenth Circuit's decision and affirm the District's Court's decision.

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The work product contained in all copies of Team 026's brief is in fact the work product of only the team members. Team 026 has complied fully with its school's governing honor code. Team 026 acknowledges that it has complied with all Rules of the Competition.

/s/ Team 026.

VIII. APPENDIX

Relevant Constitutional and Statutory Provisions

U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

25 U.SC. § 1901:

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—
>
> (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
>
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.SC. § 1902:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.SC. § 1903(3)–(8):

> (3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689);
>
> (4) "Indian child" means 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;
>
> (5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;
>
> (6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;
>
> (7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;
>
> (8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended;

25 U.SC. § 1913(d):

> (d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 U.SC. § 1914:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections, 101, 102, and 103 of this Act.

25 U.SC. § 1915(a), (b):

(a) In any adoptive placement 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.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

i. a member of the Indian child's extended family;

ii. a foster home licensed, approved, or specified by the Indian child's tribe;

iii. an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.