No. 22-386

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2022

STRAUT 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

QUESTIONS PRESENTED

I. Under the Indian Child Welfare Act, do the placement preferences and recordkeeping provisions violate the Anti-Commandeering Doctrine when they require state actors to implement and execute a federal regulation scheme involving Indian children in adoption proceedings?

II. Under the Indian Child Welfare Act, does the Indian classification violate the Equal Protection Clause when it is deemed a racial classification subject to strict scrutiny review ?

STATEMENT OF THE CASE

This is an appeal from the opinion of the United States Court of Appeals for the Thirteenth Circuit in which the Thirteenth Circuit reversed the district courts grant of summary judgment in favor of the defendants on the grounds that the statute at issue violates the Tenth Amendment. Plaintiff-Respondents are James and Gleny Donahue (Donahue's), a non-Indian couple seeking to adopt an Indian child, and the State of West Dakota (State Respondent). Defendant-Appellants are the United States of America, the United States Department of the Interior, the Department of the Interiors Secretary, in his official capacity (Federal Defendants), the Cherokee Nation, and the Quinault Nation (Tribal Defendants).

The plaintiff-respondents, James and Gleny Donahue, previously sought to adopt Baby C, an Indian child, following a West Dakota state-courts voluntary termination of Baby C's mothers' parental rights. R. 2-3. Baby C's father and mother are enrolled members of the Cherokee Nation and Quinault, respectively. R. 2. Baby C's parents' enrollment status puts Baby C under the Indian Child Welfare Act (ICWA) jurisdiction. 25 U.S.C. §1903(4). West Dakota Child Protective Services (CPS) removed Baby C from her maternal aunt's custody and placed Baby C in the Donahue' custody for two years following the aunt's negligent supervision. R. 2-3. Under ICWA, CPS notified both tribes of the foster care placement and the voluntary termination of Baby C's biological parents. *Id.* Both Baby C's parents and maternal aunt consented the Donahue's to begin adoption proceedings. R. 3. Neither tribal nation formally intervened in the proceedings but a Quinault-organized placement for Baby C fell through, finally allowing the Donahue's to consummate their adoption of Baby C. R. 3.

Following the successful adoption of Baby C, the Donahue's became foster parents to three-month old Baby S, an Indian child. *Id*. Baby S's mother was a member of the Quinault Nation but passed away following a drug overdose two months after Baby S was born. *Id*. Baby

S was left in the care of Baby S's maternal grandmother from birth until her failing health led to his foster placement with the Donahues. *Id*. After having fostered Baby S for approximately one month, the Donahues filed a petition for adoption. *Id*. Baby S's maternal grandmother agreed to the adoption by the Donahues; however, the Quinault Nation opposed the adoption by the Donahues in favor of placing Baby S with another Quinault family outside of West Dakota. *Id.* Subsequently, the Donahues initiated this proceeding to dispute the Quinault nation's opposition. R. 4.

SUMMARY OF THE ARGUMENT

I. THE COURT SHOULD AFFIRM THE GRANT OF SUMMARY JUDGMENT BECAUSE THE ICWA COMPELS STATE OFFICIALS TO IMPLEMENT A FEDERAL REGULATORY SCHEME IN VIOLATION OF THE ANTICOMMANDEERING DOCTRINE.

The Tenth Amendment of the United States Constitution underscores a foundational principle of our system of governance; the separation of powers. The anti-commandeering doctrine furthers this principle by offering courts a guide when determining whether the federal government has superseded its enumerated powers. According to the anti-commandeering principle, Congress may not force state governments or their agents to implement a federal regulatory scheme, which the ICWA does. The preference provisions and the recordkeeping provisions restrict the ability of state legislatures to fulfill their law-making duties and impose duties on state agents that they would not otherwise have. For those reasons, Respondents urge the court to grant their motion for summary judgment and strike down the recordkeeping and placement provisions of the ICWA as unconstitutional.

II. THE COURT SHOULD AFFIRM THE GRANT OF SUMMARY JUDGMENT FOR WEST DAKOTA AND THE DONAHUE'S BECAUSE THE ICWA'S 'INDIAN CLASSIFICATION' VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT.

This Court should affirm the Appellate Court's grant of summary judgment in favor of the Donahue's and West Dakota. The Indian Child Welfare Act's Indian classification contains race-based classifications that require it to be reviewed under strict scrutiny. The classification would ultimately fail strict scrutiny because they are not narrowly tailored to a compelling government interest instead, the classifications are overinclusive and used for a racial purpose of providing unequal treatment to Indian children.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE GRANT OF SUMMARY JUDGMENT BECAUSE THE ICWA COMPELS STATE OFFICIALS TO IMPLEMENT A FEDERAL REGULATORY SCHEME IN VIOLATION OF THE ANTICOMMANDEERING DOCTRINE.

Former President and Chief Justice of this court, William Taft, once wrote, "The good sought in unconstitutional legislation in an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards." *Child Labor Tax Case*, 259 U.S. 20, 28 (1922). This statement provides a succinct summary of the context in which the ICWA stands today. In service of a good purpose, preventing the breakup of Indian families to protect the Tribal Nations within America, the ICWA unconstitutionally breaches one of the fundamental principles upon which the covenant of our Constitution relies, the separation of state and federal powers.

The anticommandeering doctrine stands for the principle of the separation of powers by preventing the federal legislature from utilizing the state governments to further Congressional acts in spheres of power left to the states. The ICWA does just this through its placement preferences and recordkeeping provisions. The pertinent provisions, 25 U.S.C § 1915(a), (b), and (e), 25 U.S.C. § 1912(a),(e), and (f), and 25 U.S.C § 1951(a), all require states to alter their preexisting child welfare laws to accommodate the federal regulatory scheme set forth in the ICWA. As explained below, these provisions, while present for good reasons, go well beyond Congress's powers and are therefore unconstitutional.

A. The Anti-commandeering Doctrine Prevents Congress From; Forcing State Legislatures or Executive Agents to Implement a Federal Regulatory Scheme, Conscripting State Officers to Enforce a Federal Regulatory Scheme; and Issuing Direct Orders to State Legislatures.

The 10th amendment of the United States Constitution states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. In furtherance of this principle, courts have developed the "anticommandeering doctrine." *Murphy v. NCAA,* 138 S. Ct. 1461, 1471 (2018). First espoused in *New York v. United States*, the anti-commandeering principle provides that the "Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). Initially, this doctrine only applied to Congressional coercion of a state's legislature to pass legislation, subsequent cases have held the doctrine to further apply to federal actions that conscript state officials to implement federal regulatory schemes and to direct orders from Congress to state legislatures. See *Printz*, 521 U.S. at 925; see also *Murphy*, 138 S. Ct. at 1471.

In *New York v. United States*, the state of New York challenged the constitutionality of a Congressional act passed to address the issue of low-level radioactive nuclear waste disposal. *New York v. United* States, 505 U.S. 144, 150-151 (1982). The Low–Level Radioactive Waste Policy Amendments Act of 1985, provided three "incentives" designed to get states to join into regional compacts with other states. *Id.* at 151. The compacts allow for the member states to exclude nuclear waste that was generated inside of non-member states. *Id*. At issue was the "take title incentive" contained in § 2021e(d)(2)(C), which mandated that a state unable to provide for the disposal of low-level radioactive waste generated within its borders had to either regulate according to Congress's direction or take title to and possession of the nuclear waste and be liable for all damages directly or indirectly incurred by the generator. *Id.* at 173

Analyzing whether Congress could supply a state with such an incentive scheme, the court looked at whether Congress could enact either option by itself. *Id*. at 175-176. The court found that the first option, regulating according to Congress's direction, would be unconstitutional because it presents, "a simple command to state governments to implement legislation enacted by Congress" which would be a violation of the longstanding principle that the Constitution empowers Congress to legislate on individuals and not on states. *Id.* at 176. The court found that the second option requiring states to take title to and possession of the waste would, in principle, amount to a "congressionally compelled subsidy from state governments to radioactive waste producers." *Id.* at 175.

Given that neither option, standing alone, could pass constitutional muster, giving states the option between the two would represent an unconstitutional choice that was not a choice. *Id.* at 176. The court acknowledged that while responsible nuclear waste disposal was a proper object of Congressional action under the Commerce Clause, Congress could not utilize the state governments to achieve that end but would have to legislate directly. *Id.* at 178.

In *Printz v. United States.,* this court took up the issue of whether certain provisions of the Brady Handgun Violence Prevention act mandating local law enforcement officers to conduct background checks on potential handgun purchasers violated the Tenth Amendment. *Printz*, 521 U.S. at 902. The provisions at issue required gun dealers to submit a form to the local chief law enforcement officer who, upon receiving the form, was required to, "make a reasonable effort to ascertain within 5 business days whether receipt or possession would violate the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." *Id*. at 903. The two law enforcement officers who brought suit argued that "congressional action compelling state officers to execute

federal laws is unconstitutional." *Id*. at 905. After surveying the historical record of legislative acts, the court found, "no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization." *Id*. at 909.

Given the lack of evidence that Congress could direct the actions of the state executive branch, the limitations on Congressional power in the Tenth Amendment, and past precedent that Congress could not coerce states into enforcing a federal regulatory scheme, the court struck down the "reasonable efforts" provision of the Brady act. *Printz*, 521 U.S. at 933. The court held in *New York. v. United States*, "Congress cannot compel the States to enact or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. at 935 (quoting *New York v. United States*, 505 U.S. at 188). Building upon that proposition, the court in Printz held that "that Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Printz v. United States*, 521 U.S. at 935.

In *Murphy v. NCAA*, the Supreme Court addressed the issue of whether a federal law, which made it unlawful for a state to authorize sports gambling, violated our system of dual federalism. *Murphy v. NCAA*, 138 S. Ct. at 1468. The Professional and Amateur Sports Protection Act (PASPA) made it unlawful for a state to authorize sports gambling. *Id*. The National Collegiate Athletic Association and major professional sports leagues brought suit after New Jersey passed a law repealing its ban on sports gambling. *Id.* at 1472.

Looking at the reasoning outlined in *New York* and *Printz*, the Court identified three principal reasons why the anti-commandeering principle plays such a fundamental role in protecting federalism. *Murphy*, 138 S. Ct. at 1477. The first is that the anticommandeering principle, "serves as one of the Constitution's structural protections of liberty." *Id.* (internal

quotation marks omitted). The rule does so by reinforcing the separation of powers between the dual sovereigns thereby preventing the encroachment of a sovereign upon an individual's liberty. *Id*. The second reason is that the anticommandeering principle promotes political accountability by holding the line between acts of Federal and State officials, thereby letting voters know which officials to hold accountable at the ballots for the consequences of their political decisions. *Id*. The third reason identified is that the "anticommandeering principle prevents Congress from shifting the costs of regulation to the States." *Id*. The court found that the order contained within PASPA prevented a state from authorizing sports gambling. It was unconstitutional because it "unequivocally dictate[d] what a state legislature may and may not do." *Id*. at 1478.

It is against this well-formed mountain of Supreme Court jurisprudence that the provisions of the Indian Child Welfare Act stand.

B. The Placement Preference Provisions of the ICWA Violate the Anti-commandeering Doctrine by Forcing State Legislatures to Adopt a Federal Regulatory Scheme That Alters Their Preexisting Child Welfare Laws and Run Directly Undercut the Reasons Why the Anti-commandeering Doctrine Exists.

The ICWA imposes a plethora of duties on state child welfare agency agents. 25 U.S.C. § 1915(a) provides that, "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." 25 U.S.C. § 1915(a). 25 U.S.C. § 1915(b) takes these preferences provisions a step further by stating that:

"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

(iv) 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." 25 U.S.C. § 1915(b).

These provisions are a federal regulatory scheme because they, unlike a state's child welfare laws, do not apply to all foster care or preadoptive placements within a state but rather to select situations that Congress has chosen. The provisions only apply to Indian children, thus mandating that courts depart from their standard application of state child welfare laws and apply the federal ICWA standards. State legislatures, and the laws enacted by them, are therefore superseded by the ICWA. This is analogous to the statute at issue in Murphy because Congress is essentially issuing a direct order to the state legislatures in that they cannot pass laws that present different placement preferences than the ICWA in cases involving Indian children.

The placement provisions also require state courts and executive agencies to implement them. As mentioned above, under the ICWA, state courts have to utilize different standards when situations identified by Congress are before them. While analogous to other legal situations, such as when state courts decide federal law, these provisions are different because they directly impede an area implicitly left to the states. State executive agencies, namely child welfare agencies, are also obligated to go above and beyond to enforce these provisions because the

provisions require identification of Indian tribes or families, Indian foster homes, and institutions approved by Indian tribes where, under state law, they would not have to deviate from their standard practices. This is analogous to the duties imposed on the law enforcement officers by the unconstitutional provisions of the Brady Handgun Violence Prevention Act in Printz who had to go above and beyond their normal state duties to enforce the law the same way state child welfare agencies do under the ICWA.

Further, implementing the ICWA placement preferences runs afoul of the anticommandeering doctrine for the exact reasons espoused in Murphy. The first reason, being a structural protection of liberty, cuts in favor of finding the ICWA provisions unconstitutional because they allow Congress to legislate in an area of law that the Constitution does not empower them to and is therefore left to the states via the 10th Amendment, family law. The second reason, promoting political accountability, also cuts in favor of finding the placement provisions unconstitutional because a couple who is seeking to foster an Indian child but is unable to do so would not know who to hold accountable at the ballots. Much like the potential gun transferee in Printz who cannot acquire a handgun due to the federal scheme, the couple who is unable to foster would likely, and reasonably, blame state legislatures given that the area of family law is a matter typically to state lawmakers. The final reason, that the anticommandeering principle keeps Congress from shifting the cost of regulation, also cuts in favor of finding the ICWA provisions unconstitutional because state courts and child welfare agencies must bear the burden of implementing and recording how these preferences were utilized. Were the placement preferences utilized by a federal agency, say the Bureau of Indian Affairs for example, that would not be the case, and the federal government would bear the cost.

The placement provisions in the ICWA present a federal regulatory scheme in child welfare by requiring state courts and child welfare agencies to deviate from the standard child welfare laws passed by elected state officials. Further, the application of the three reasons in Printz shows why implementing the ICWA placement provisions violates the anticommandeering doctrine.

C. The recordkeeping provisions of the ICWA violate the anticommandeering doctrine by conscripting state court agents and child welfare agency agents by imposing duties onto them that they would not otherwise have under state law.

The pertinent recordkeeping provisions of the ICWA; 25 U.S.C. § 1915(e), 25 U.S.C. § 1912(a),(e), and (f), and 25 U.S.C. § 1951(a), all impose duties on state executive agents and require them to spend more time and effort to implement them than the officials would have under state law. The provisions in § 1912(a), (e), and (f) require, among other things, that state officials; utilize certified mail to notify the Indian child's parents and tribe, automatically grant extensions, make active efforts to provide remedial services and rehabilitative programs, and present qualified expert testimony before placing an Indian child in foster care. 25 U.S.C. § 1912(a), (e), and (f). § 1915(e) requires courts to keep records of how the placement provisions in § 1915(a) and (b) were met as well as requiring the court to provide those records upon demand by the Secretary of Indian Affairs or by the Indian child's tribe. 25 U.S.C. § 1915(e). § 1951(a) mandates state officials to provide the Secretary of Indian Affairs with any decree or order placing an Indian child in foster care as well as information pertaining to; the name and tribal affiliation of the child; the names and addresses of the biological parents; the names and addresses of the adoptive parents; and the identity of any agency having files or information relating to such adoptive placement. 25 U.S.C. § 1951(a).

The provisions are not self-executing. Each provision imposes duties upon the agents of either state courts or child welfare agencies that would not otherwise exist under state law. The provisions under § 1912 require state officials to present expert witnesses and implement rehabilitative and remedial services that may not be required by state law. Whether state agents would have to perform these same duties under state law is irrelevant because that would be a decision made by the duly elected state representatives, not Congress. The chief law enforcement officials in Printz had to run background checks to comply with their duties under the law there; whereas the state courts and child welfare agents must send numerous notices and various other documents to comply with their duties under the ICWA provisions identified. The court in Printz struck down the background check provision for the same reason that the court should grant summary judgment for the respondents today, the laws conscript state agents to implement a federal regulatory scheme.

Further, the actions do not happen without a cost borne by the state. The third reason the court in Murphy identified why the anti-commandeering principle is important was that it kept Congress from shifting the cost of regulation onto the states, which is exactly what is happening here. One cost would be the rehabilitative and remedial services. Both services require actions involving state agents who are presumably being paid and spending time to render those services at the expense of the state rather than the federal government. § 1912 requires that parties present evidence by an expert witness, who is also presumably being paid by the state. While certified mail costs roughly only a few dollars to send, with extra charges imposed for return receipts which the ICWA also requires, it can quickly become an extraordinary expense when multiple parties must be notified about multiple progressions in every case involving an Indian child. There is also a cost associated with recordkeeping as it requires some individual, presumably a

state agent, to create the record, maintain it as proceedings progress, and store it. These all represent costs shift from the federal government to state governments. The federal government has alternative means to achieve these same ends by, for example, empowering the Bureau of Indian Affairs to deal with cases involving Indian children. Yet it has not. Instead, Congress has imposed these costs on the states through unconstitutional legislation.

This court should grant summary judgment to the respondents and strike down the recordkeeping and notice provisions of the ICWA because they unconstitutionally conscript state agents to enforce a federal regulatory scheme.

II. THE COURT SHOULD AFFIRM THE GRANT OF SUMMARY JUDGMENT FOR WEST DAKOTA AND THE DONAHUE'S BECAUSE THE ICWA'S 'INDIAN CLASSIFICATION' VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT.

The Indian classification of the Indian Child Welfare Act is unconstitutional in violation of the Fifth Amendment. The Equal Protection Clause under the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This clause is incorporated implicitly through the Fifth Amendment due process clause and under either claim where the government imposes a race classification, courts must review under strict scrutiny. *Grutter v, Bollinger,* 593 U.S. 306, 326 (2003). Race classification can be constitutional if narrowly tailored to a compelling government interest. *Id.* If the classification is deemed political, then rational basis review applies. *Morton v. Mancari,* 417 U.S. 535, 555 (1974).

A. The 'Indian Classification' is a racial not political and is subject to strict scrutiny.

Any classification subjecting an individual to unequal treatment based on their race is subject to the strictest judicial review, strict security. *Adarand Constructors, Inc v. Pena*, 515

U.S. 200, 224 (1995). The ICWA defines an 'Indian Child" as any minor that is either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). It is unconstitutional to have a classification based on ancestry because an "ancestral tracing . . . employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). However, the Indian classification may be deemed if the special treatment given can be linked to Congress obligation towards Indians. *Mancari*, 417 U.S. at 555.

In *Rice,* the Court ruled that a Hawaiian statute specifying "native Hawaiian" as the only individuals who could vote for the trustee of the Office of Hawaiian Affairs violated the Fifth Amendment. *Rice,* U.S. at 510. The statute classified native Hawaiians as "any descent of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778. *Id.* The Court concluded that the legislature used ancestry as a proxy for race to single out a specific group of individuals, violating the Fifth Amendment, Equal Protection Clause. *Id*. at 514.

In *Mancari*, the court rejected an equal protectional claim to the Bureau of Indian Affairs who gave employment preference to Indians over non-Indians. *Mancari,* 417 U.S. at 535. The court deemed the classification within the Statue under review as political because they were members of quasi- sovereign entity instead of a discrete racial group. *Id.* at 554. The political classification promoted "the Indian self-government and [made] the BIA more responsive to the needs of its constituent group" by favoring Indian over non-Indian. *Id.* Additionally, the statue only applied to members of "federally recognized tribes, " excluding many that are classified as "Indians" allowing for a political classification rather than racial. political. *Id.* at 552, 555 n.24.

The ICWA classification of a "Indian Child" is racially based not political. The two-part definition identifies children with a direct blood line to an Indian tribe. In our case, Babs S is deemed an Indian child under §1903(4) because his biological mother was a member of the Quinault Nation. Without the ancestry link, the child would not be subject to the ICWA requirements. Similar to *Rice,* where the Hawaiian government used ancestry to single out 'native Hawaiians' for voting restriction on others; the ICWA is subjecting only "Indian children' to a higher burden of proof for termination and placement proceedings. *See* 25 U.S.C. §1913, 25 U.S.C §1914, 25 U.S.C.§1915. The ICWA does not only apply to children who are members of a tribe, but also to those who would qualify for membership indicating that it is a racial classification. Eligibility for tribal membership typically requires blood quantum or ancestry; without it, membership is denied. *See* NAJO NATION CODE § 701. Since a child must have Indian' blood, the classification uses ancestry as a proxy for race.

Further, the ICWA cannot be political because it is not within the narrow exception in *Mancari*. *Mancari* did not state that all classification involving Indians would be political, instead they created an exception to the racial classification as it applied only to a to federally recognized tribes and employment preference within the Bureau of Indian Affairs. The ICWA is unlike *Mancari* because it applies to all children, members of an Indian tribe and any child that may be eligible. The membership is tied back to the ancestry and is perquisite to being a member of quasi sovereignty.

Appellants may argue that the ICWA classification is rationally linked to congress intent of "protect[ing] the best interest of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C § 1902. However, the Indian classification subject Indian children to unequal treatment and can cause great harm because it creates a higher burden on

termination and placement simply because of their race. See *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). (Baby Girl, an 'Indian Child', was in the process of being adopted by a couple. Her father abandoned her before birth but tried to use the ICWA to gain custody on the eve of the adoption*).* Patricia M. Ward, Assistant Attorney General in a letter to the Honorable Morris K. Updall recognized that the ICWA provisions raise constitutional problems because the special treatment of "Indians' based solely on race. Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. Indian Affs. & Pub. Land, 95th Cong. 2, pg. 217 (1978) (Statement of Patricia M. Ward, Assistant Attorney General).

This Court should conclude that the Indian Classification cause disparate treatment on Indian Child for a racial purpose inconsistent with the equal protection requirements of the Fifth and Fourteenth Amendments.

B. <u>The ICWA 'Indian classification' provision fail strict scrutiny.</u>

Strict scrutiny "smokes out illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool". *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). To survive strict scrutiny the classification must be narrowly tailored to a compelling government interest. *Id.*

The ICWA provisions fail strict scrutiny because they are all encompassing therefore not tailored to meet a compelling government interest. The Federal defendants offer no challenge to the classification failing strict scrutiny, as their only argument is the classifications are political and are subject to rational review. The Tribal defendants argue the classifications help keep the child's relationship with the tribe, but this argument ultimately fails. § 1915 states, "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. § 1915(a). Similar standards govern foster care or pre-adoptive placements. § 1915(b). By allowing placement of a child with any Indian family it is not keeping the relationship with the child actual tribe.

Here, the Quinault nation found two placements for Baby S, but they were in another state. The purpose of the ICWA was to promote the relationship with the child's tribe. Placing Baby S in another state, although they are a part of Quinault nation, deprives Baby S of the relationship with the tribe in the only state he knows. This placement preference applies also to all Indian Children who may not be placed with members of their tribe. By placing the child with any Indian family there is not a compelling government interest that is being met, instead they are using a racial classification to provide unequal treatment.

Furthermore, the ICWA applies to potential members of an Indian tribes. The mere fact that potential members of an Indian tribe can be subject to the provision in § 1915 signifies that the classifications and the provision are all-encompassing and have no intention of promoting the relationship with the child's tribe. A child may not know they could be a member before the proceeding begins.

The ICWA provision fails strict scrutiny because they are not narrowly tailored to a compelling government interest.

C. Not finding that the ICWA violates the equal protection clause will continue to cause further harm to Indian children and those that try to adopt them.

The ICWA creates a higher burden on termination and adoption proceedings concerning Indian children. *See* §1911-1915. The creation of the higher burden causes a delay or denial in placement of the Indian child simply because of their ancestry. *See Adoptive Couple v. Baby Girl*, 570 U.S. 637. The unequal treatment that the ICWA generates makes it harder for non-Indian families to adopt children and provide them with a loving home.

The Donahue's are a prime example of the delay and harm that the ICWA produces. In their adoption proceeding with Baby C, after living with them for two years and with the consent of the biological parents, their proceeding was still delayed because of the requirements under the ICWA. If Baby C was anything besides an 'Indian child' there would have been no delay and Baby C would have been adopted into the loving and caring Donahue family sooner.

Now with the adoption of Baby S, the Donahue's are still trying to overcome the ICWA requirements for Indian children. Baby S's grandmother, due to failing health, is unable to care for him. The Donahue's want to adopt Baby S and provide a loving and caring home for him but are being delayed because of his ancestry. The ICWA would mandate that a child be taken to an Indian family, despite the location, over a family that has already given their love and support to the child.

Placing higher burdens for placement and termination may leave many Indian children in worse situations. For instance, a parent may wish to override ICWA and agree to an adoption of their child by a non-Indian couple. Since the child was deemed an Indian child, the tribe can overrule the parents' wishes and have the adoption vacated, causing great harm to the child. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37-38 (1989).

These are only just a few examples of how the unequal treatment of the ICWA causes harm to a child. The list could go on and on and by declaring the ICWA a violation of the equal protection clause can prevent greater harm from occurring to Indian children.

CONCLUSION

For the foregoing reason, the Donahue's and West Dakota respectfully request that this Court affirm the decision of the Appellate Court in reversing the grant of summary judgment.

Respectfully submitted this 10th day of October, 2022,

/s/ Team 27_____ _____
Attorneys for Respondent