No. 22-386

In the Supreme Court of the United States

STUART IVANHOE, *et al.*, PETITIONERS
v.
JAMES AND GLENYS DONAHUE, AND THE STATE OF WEST DAKOTA, RESPONDENTS.

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

BRIEF FOR THE RESPONDENTS

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II. Under the Tenth Amendment, do ICWA's placement and recordkeeping requirements violate the anticommandeering doctrine by imposing federal policy on the states without specific funding?

II. STATEMENT OF THE CASE

This case is about certain requirements of the Indian Child Welfare Act ("ICWA"), which impose racial classifications in violation of the Fifth Amendment and commandeer state agencies by mandating burdensome requirements in violation of the Tenth Amendment. ICWA was passed in 1978 to address concerns over an increasing number of Native American children being removed from their Native American homes by state agencies and placed in non-tribal homes. R. at 4, 14. The purpose of ICWA is to preserve a tribe's culture and heritage by keeping children with their tribe to carry on traditions. R. at 5. There are 574 federally recognized tribes in the continental United States.[1]

ICWA is implemented through the states by requiring the placement of children based on the tribe's preferences. R. at 7. When relatives or tribal homes cannot be found, the child may be placed with any tribe anywhere in America or even a tribal orphanage. R. at 6. However, states are powerless to override a tribe if a tribe finds the child a Native American placement. R. at 5, 6. Additionally, ICWA not only applies to children who are members of tribes but also to children who are merely eligible for membership, regardless of their affiliation with the tribe. R. at 5. States have a mandatory duty to carry out ICWA's requirements; however, states do not receive any special funding for ICWA. R. at 2, 15.

In 2019, James and Glenys Donahue, the private-party Plaintiffs, sought to adopt a Native American baby ("Baby C") that had been removed from her aunt's custody after being left alone for long periods of time. R. at 2. Baby C was half Cherokee and half Quinault. R. at 2. The Quinault Nation intervened during the Donahue's adoption proceedings seeking to send the child to live with non-relatives in another state. R. at 3. After the placement fell through, the tribe did not

[1] Indian Entities Recognized by and Eligible to Receive Servs. from the U.S. Bureau of Indian Affs., 85 Fed. Reg. 5,462, 5,462 (Jan. 30, 2020).

oppose the Donahue's adoption. R. at 3. In 2020, the Donahues sought to adopt another Native American child ("Baby S") whose mother was a member of the Quinault Nation. R. at 3. The Quinault Nation again opposed the adoption and informed Child Protective Services it found two homes in another state that would take Baby S. R. at 3.

On June 29, 2020, the Donahues, along with West Dakota, the state Plaintiff, filed suit against the United States, the U.S. Department of Interior, and the Secretary of Interior, Stuart Ivanhoe, the government Defendants. R. at 1, 4. The Donahues claim they and Baby S are being denied their rights based on their race and seek to invalidate 25 U.S.C. § 1915(a)-(b). R. at 4. West Dakota alleges ICWA circumvents its sovereignty by forcing it to comply with burdensome placement requirements and usurps its state agencies under 25 U.S.C. § 1912(d), § 1915(e), § 1951(a). R. at 2. Shortly after suit was filed, the Cherokee Nation and the Quinault Nation successfully moved to intervene and joined as defendants. R. at 2.

On September 3, 2020, the parties filed cross motions for summary judgment. R. at 4. The district court granted the Defendants' motion and denied the Plaintiffs' motion. R. at 12. The Plaintiffs thereafter appealed. R. at 13. After oral arguments on December 28, 2021, the Thirteenth Circuit Court of Appeals reversed the district court's decision on Tenth Amendment grounds and remanded the case for entry of summary judgment in favor of the Plaintiffs. R. at 13, 15, 17. In his concurrence, Chief Judge Tower opined he would reverse on Fifth Amendment equal protection grounds. R. 17.

The Defendant-Petitioners then appealed for Writ of Certiorari on both Fifth and Tenth Amendment grounds, which this Court granted on August 5, 2022. R. at 20.[2]

[2] Defendants were identified as the Petitioners in the Writ of Certiorari because they originally filed the motion for summary judgment that the district court granted. The Donahues and West Dakota are therefore the Respondents.

III. SUMMARY OF THE ARGUMENT

The Thirteenth Circuit properly reversed the district court and granted the Plaintiffs' motion for summary judgment because certain provisions of ICWA violate the Fifth Amendment and Tenth Amendment. ICWA's placement requirements violate equal protection under the Fifth Amendment because they base the placement of the child on the child's race as well as the race of the placement family.[3] Further, the placement and recordkeeping requirements violate the Tenth Amendment because they commandeer state agencies by forcing them to implement federal directives without specific funding. Accordingly, this Court should affirm the Thirteenth Circuit's decision.

The district court improperly relied on *Mancari* in which this Court found the Bureau of Indian Affairs ("BIA") to be a political, quasi-governmental. Lower courts then used *Mancari* to broadly apply the "political" status to all Native American matters. Thus, the district court incorrectly applied the rational basis test by misinterpreting this Court's holding in *Mancari*.

Strict scrutiny is the proper standard because the placement provisions use "biological" and "ancestry" as a proxy for race. Further, the requirements deny rights to children and potential foster or adoptive families by basing placements solely on the race of the parties. These requirements fail strict scrutiny because they are not narrowly tailored to further the compelling governmental interest of preserving tribal culture and heritage. By sending a Native American child to live with any tribe anywhere in America, Congress treats all tribes as culturally interchangeable. Furthermore, Congress fails to consider the best interest of the child. Congress places the tribe's interests over the safety of the child by leaving a child in a dangerous home

[3] While both the Fifth and Fourteenth Amendments guard equal protection, only the Fifth Amendment applies to the federal government.

over placing them with a non-tribal family. Therefore, the Thirteenth Circuit correctly reversed the district court and held the placement requirements fail strict scrutiny.

Additionally, the Thirteenth Circuit found certain ICWA requirements violate the anti-commandeering doctrine under the Tenth Amendment. ICWA requires state agencies to perform "active efforts" by offering extensive remedial services to tribal families and, further, imposes burdensome recordkeeping requirements on the states. The sole purpose of these requirements is government oversight to ensure states comply with ICWA; however, the government provides no specific funding to support the directives.

The district court incorrectly held the placement and recordkeeping requirements merely confer rights on Native American children and families. However, this Court has held federal law unconstitutional when it requires states to administer a federal program without specific funding. Furthermore, a federal law is unconstitutional when it amounts to forced participation by a state's executive branch through the implementation of a federal program. Therefore, the Thirteenth Circuit properly reversed the district court and held these ICWA requirements commandeer state agencies through forced participation, resulting in tremendous costs and burdens on the states.

For these reasons, this Court should affirm this case because the Thirteenth Circuit properly found these provisions of ICWA to be a violation of the Fifth and Tenth Amendment.

IV. ARGUMENT

This Court should affirm the Thirteenth Circuit's decision because it correctly ruled that certain requirements of ICWA violated both equal protection and the anti-commandeering doctrine. U.S. Const. amends. V, X. When equal protection rights are implicated, the Fifth and Fourteenth Amendments coexist and carry the same requirements; however, the Fifth Amendment applies to the federal government. U.S. Const. amends. V, XIV; *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). ICWA compels state agencies to take certain measures when removing a Native American child residing off a reservation, even if the child is not a member of a tribe. 25 U.S.C. § 1903(4), § 1911(a). For foster care, states are required to place a Native American child in a tribe approved orphanage over a non-tribal family. 25 U.S.C. § 1915(b)(iv). For adoptive placements, states are required to place a Native American child with a Native American family of any tribe anywhere in America, if an alternative tribal home cannot be found. 25 U.S.C. § 1915(a)(3). Furthermore, states are then required to maintain voluminous records of all placement efforts, custodial rehabilitative efforts, and court documents for compliance with ICWA. 25 U.S.C. § 1915(e), § 1951(a).

This Court reviews questions of law de novo, meaning anew. *Costarelli v. Mass.*, 421 U.S. 193, 193 (1975). Thus, this Court need not give any deference to the district court's interpretation of federal constitutional law. *Id*. As discussed below, ICWA's placement requirements are based on racial classification and fail the strict scrutiny standard. Further, ICWA violates the anti-commandeering doctrine because it impermissibly imposes federal directives on state actors without proving appropriate federal funding. Thus, the states are compelled to use their tax dollars to implement federal law; however, states have a "compelling interest in assuring public dollars… do not serve to finance the evil of private prejudice." *Richmond v. J.A. Croson Co.*, 488 U.S. 469,

493 (1989). Therefore, this Court should affirm the Thirteenth Circuit's ruling and find these requirements unconstitutional.

I. ICWA violates equal protection under the Fifth Amendment because the placement requirements are based on race and fail strict scrutiny by conflating the cultural heritage of all Indian tribes.

The Thirteenth Circuit properly reversed the district court because the district court incorrectly relied on and misconstrued precedent. R. at 17; *Morton v. Mancari*, 417 U.S. 535 (1974). By misinterpreting *Mancari* and inaccurately assessing ICWA's constitutionality on a tribe's purported political classification, the district court improperly applied the rational basis test. R. at 11, 17; 417 U.S. at 535. Instead, the district court should have looked at the individual's Native American racial classification and applied the strict scrutiny standard. R. at 18.

The United States Constitution provides fundamental guarantees that protect individuals from unfair laws based on race. U.S. Const. amends. V, XIV § 1. In short, ICWA requires the placement of Native American children based solely on their race and the placement families' race by demanding children go to a member of any tribe or a Native American orphanage over a non-tribal family. 25 U.S.C. § 1915(a)(3), § 1915(b)(iv). To survive strict scrutiny, these laws must be narrowly tailored to further a compelling governmental interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Claims of a "legitimate" purpose for racial classification are entitled to little or no weight. *Richmond*, 488 U.S. at 500. Because ICWA's placement requirements are based solely on the fostering or adoptive family's race and deny the best interest of the child based solely on the child's race, the requirements fail strict scrutiny and should be found unconstitutional.

A. This Court should not consider *Mancari* in this case because ICWA applies to Native American children and families and not political BIA matters.

This Court should not consider the rationale of *Mancari* in determining the constitutionality of ICWA. *Mancari* was specific to the BIA as a political, quasi-governmental unit and was not

intended to apply outside of that context. 417 U.S. at 550. Therefore, *Mancari* is not applicable to ICWA because the Act deals with the placement of children in dangerous situations and does not affect political tribal matters.

At the time *Mancari* was decided, affirmative action and many other civil rights laws were dramatically altering the ways our country addressed claims of discrimination. See, *e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The *Mancari* Court furthered these anti-discrimination policies by allowing the BIA to hire and promote Native American tribal members[4] over non-Native Americans in its agency. 417 U.S. at 546-47. The purpose of this policy was to correct the previous denial of political roles to Native Americans and make the BIA more responsive to its own peoples' needs. *Id*. The Court even analogized the preferential selection of Native Americans to the requirement that elected representatives be an inhabitant of the state where they were elected. *Id*. at 554. In doing so, the Court established the BIA as a political unit able to make preferential hiring selections similar to the federal government. *Id*. However, this Court never stated individual Native Americans were to be classified as a political unit instead of by ancestry or race. Despite that, lower courts have applied this Court's rationale in *Mancari* to a variety of Native American matters, including ICWA. *See U.S. v. Antelope*, 430 U.S. 641, 645-47 (1977); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 690 (2013).

In contrast, ICWA was established to right the wrongs the government committed against Native Americans. 25 U.S.C. § 1901. This Act, passed four years after this Court's decision in *Mancari*, was intended to keep Native American children with their tribe to help preserve the tribe's heritage and culture. 25 U.S.C. § 1902; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). In doing so, Congress enacted requirements based on preferential consideration

[4] Defining qualified Native American as one who has one quarter or more Native American blood with membership in a federally recognized tribe. *See Mancari*, 417 U.S. at 554.

of the child's blood relatives and tribal ancestry to determine where the child could be placed. 25 U.S.C. § 1903(4), § 1915(a)-(b).

The primary purpose of ICWA is different from the scenario in *Mancari*. In *Mancari*, this Court was considering government employment of an overtly political, Native American agency; however, ICWA deals with the family unit and the presumptive best interest of the Native American child. The BIA's preference for hiring Native Americans supports the overall governing of tribes as a political group, but ICWA's purpose is based on individual children and family units. Lastly, the BIA seeks to hire and promote only tribal members for political reasons, whereas ICWA purports to apply to children who may not even tribal members.

Thus, the *Mancari* ruling was typical of its time when laws were passed to assist minorities who had been subject to discrimination in the aftermath of a troubling period in the Nation's history. The courts following that holding applied it too broadly and well beyond its purpose. Just as affirmative action and other laws passed during that time have been scaled back in response to ever developing conditions, so too should *Mancari's* application on all Native American matters be curtailed. Because the BIA preference selection was "a specific provision applying to a very specific situation," 417 U.S. at 550, this Court should not consider *Mancari* when deciding the constitutionality of these ICWA requirements.

B. Because tribal membership is based on blood and ancestry, ICWA's placement requirement is based on race and is therefore subject to strict scrutiny.

When viewing ICWA without the shades of *Mancari* skewing its perception, the express intent of Congress to preserve Native American culture must be acknowledged as a policy based solely on race and thus subject to strict scrutiny. ICWA applies to all children with a Native American ancestry, regardless of whether they are members of a tribe or the remoteness of their connection to a tribe. 25 U.S.C. § 1903(4). Where social or cultural relationships are nonexistent

or remote, the only foundation for applying ICWA is based on the child's ancestral heritage, or in other words race. *In re Santos Y.*, 92 Cal. App. 4th 1274, 1308 (2001); *see Rice v. Cayetano*, 528 U.S. 495, 514 (2000). However, this Court has held that denying rights to anyone because of their race denies them the right to exist as equals among the rest. *Richmond*, 488 U.S. at 493.

If one of the child's "biological" parents is a member of a recognized tribe, then ICWA governs and imposes onerous burdens on everyone involved. 25 U.S.C. § 1903(4); *Adoptive Couple*, 570 U.S. at 646-47 (considering the absent, biological father's tribal membership in determining custody of a child who had no other connection to the tribe). The tern "biological" is defined as "connected by [a] direct genetic relationship rather than by adoption or marriage."[5] Similarly, ancestry is defined as "persons comprising a line of descent," and synonyms to ancestry are blood and bloodline.[6] Furthermore, many Native American tribes have blood quantum requirements[7], such as the Quinault Tribe and Navajo Nation, which require one-quarter tribal blood for tribal membership. Const. of the Quinault Indian Nation art. 2 § 1; Navajo Nation Code Ann. tit. 1, § 701 (2010). Thus, in using the term "biological," the plain language of the statute along with tribal blood requirements indicates the intent of Congress to impose ICWA's mandates based solely on the child's race as Native American. Furthermore, this Court signaled in *Adoptive Couple*, its willingness to consider the constitutionality of ICWA based on equal protection grounds because it recognized these statutes were based on biology and race rather than the political status of the tribe itself. 570 U.S. at 656.

[5] "Biological," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/biological (last visited Oct. 1, 2022).
[6] "Ancestry," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/ancestry#synonyms (last visited (Oct. 1, 2022).
[7] Indian Child Welfare Act Procs., 81 Fed. Reg. 38,778, 38,383 (June 4, 2016) (codified as 25 C.F.R. pt. 23).

In further support of this analysis is this Court's holding in *Rice*. 528 U.S. at 514. In that case, the Hawaiian Constitution limited the right to vote for the Office of Hawaiian Affairs ("OHA") trustees to only Native Hawaiians. *Id*. at 498-99. OHA was established to benefit Native Hawaiians after a long history of abuses by Caucasian explorers. *Id*. at 508. The law defined Native Hawaiians based on their ancestorial line and their blood quantum. *Id*. at 499.

The petitioner in *Rice* sued because he was denied the right to vote based on his racial classification of not being Native Hawaiian despite being a legal citizen of the state. *Id*. at 499, 510. The district court granted summary judgment for the State by applying the rational basis test and found a trust-like relationship existed between Congress and Hawaii similar to that of the United States and Native American tribes. *Id*. at 499, 511. After the court of appeals affirmed, this Court reversed because, in its view, ancestry was used as a proxy for race, and the statute used ancestry as a racial definition and for a racial purpose. *Id*. at 514-15. The Court stated that since the Reconstruction era, racial discrimination is that which singles out people solely because of their ancestry or ethnic characteristics. *Id*. (citing *Saint Francis Coll. V. Al-Khazraji*, 481 U.S. 604, 613 (1987).

In the present case, like in *Rice*, ICWA requirements are based on a child's Native American ancestry. R. at 17. Unlike *Rice*, however, ICWA governs not only those children who are members of a tribe but also those who are simply eligible for tribal membership. R. at 18. Thus, ICWA's clear overreach makes the link to ICWA's stated purpose more attenuated because there is even less of a connection with the tribe in many cases. R. at 18. The purpose of ICWA, like the purpose of OHA in *Rice*, seeks to recompense for past wrongs by singling out a specific race for special treatment. R. at 4. Similar to *Rice*, the Donahues sued the federal government for denying

not only their rights to adopt a child based on their race but also the denial of the child's rights based on their Native American ancestry. R. at 3-4.

If the goal of ICWA is to keep children with their specific tribes, then it does not follow that a tribe should be able to compel a child to live with members of another tribe to the exclusion of members of another race. R. at 19. The stated goal of preserving the tribe's heritage and culture cannot be accomplished by a child being raised by a different tribe. R. at 19. In fact, it is offensive to Native Americans to presume one tribe's culture is interchangeable to another tribe in another state. Because ICWA gives no other rationale for why a Native American child should be placed in a home other than by the race of that child and of that family, it is clear the statute uses ancestry as a proxy for race, as in *Rice*. R. at 17-18. The inescapable conclusion is that any such law should be subject to strict scrutiny.

Although this case may not be about the right to vote, the Plaintiffs contend it is about something more important, the best interest of Native American children. When a child gets lost in the system, shuffled around to different homes, or their placement unreasonably delayed because of ICWA's burdensome mandates, the child's future is affected more negatively than any cultural preservation issue. Furthermore, a specific tribe cannot maintain its culture by insisting that children grow up with members of other tribes to the exclusion of members of other races. Congress has in effect put its perception of the betterment of Native American tribes over the best interests of the children. Stated another way, in passing ICWA, Congress created a conclusive presumption that the "best interests" of Native American children are *always* met by placing them with members of *any* tribe to the exclusion of members of other races. Such a law merits strict scrutiny. Therefore, this Court should hold that ICWA's requirements based on race must be evaluated under a strict scrutiny standard.

C. Because ICWA places children with any tribe anywhere in America, the placement requirement fails strict scrutiny by not preserving tribal culture.

The placement requirement is not narrowly tailored to further a compelling governmental interest. ICWA's purpose of preserving tribal culture is not accomplished by sending a child of one tribe to live with a different tribe in another part of the country. 25 U.S.C. § 1915(a)(3). Congress has essentially codified the view that all Native American tribes are culturally the same even to the point of preferring to place a child in a Native American orphanage rather than with a loving non-tribal family. 25 U.S.C. § 1915(b)(iv).

The Fifth and Fourteenth Amendments prohibits the government from denying any person equal protection under the law. U.S. Const. amends. V, XIV § 1; *Bolling*, 347 U.S. at 498-99. When analyzing claims under these amendments, strict scrutiny applies to any law predicated on racial classifications. *Bolling*, 347 U.S. at 499. Strict scrutiny requires the government to prove the law is narrowly tailored to further a compelling governmental interest. *Grutter*, 539 U.S. at 326. This requires the compelling goal to fit so closely to the means that there is little to no possibility of racial prejudice. *Richmond*, 488 U.S. at 493. When a law establishes race as the sole criterion in an aspect of public decision-making, a person's equal protection rights are implicated, and the law is highly suspect. *Id*.

In *Richmond*, the city adopted an ordinance that required city officials to award at least thirty percent of construction contracts to minority owned businesses. *Id*. at 477. Minority included African Americans, Hispanics, and Native Americans. *Id*. at 478. The purpose of the ordinance was "remedial" for past discrimination against minorities. *Id*. at 478, 484. The plaintiff, a contractor, won a bid for a city contract but failed to meet the ordinance requirement. *Id*. at 484. After the city reopened the contract for new bidders and denied his waiver, the plaintiff sued claiming the ordinance was unconstitutional. *Id*. This Court affirmed the court of appeals decision

striking the ordinance for failing both prongs of the strict scrutiny standard. *Id*. at 486. This Court found the thirty percent figure was chosen arbitrarily, and the law was not narrowly tailored to accomplish the remedial purpose. *Id*. The law also failed because it sought to remedy *social* discrimination instead of one imposed by the government. *Id*. This Court held a nexus must exist between the factual basis for the law's enactment and the scope of that law. *Id*. at 494-95.

Here, as in *Richmond*, Congress adopted ICWA, which mandates the placement of Native American children in any tribe anywhere in America if a family member or tribal family cannot take the child. R. at 18-19. ICWA defines a Native American child not only as one that is a member of a tribe but also one that is merely eligible for membership. R. at 18. The purpose of ICWA is remedial, like *Richmond*, because Congress expressed its intent to right grievous wrongs committed against the Native Americans in the past. R. at 4. Similar to *Richmond*, the Plaintiffs here are challenging the constitutionality of ICWA because it singles out Native American children by restricting the races of people who can foster and adopt them. This is discriminatory against the child because it does not take the best interests of that particular child into account. They could end up having to move to another state to live with strangers in another tribe even though they themselves have no affiliation with any tribe. It further discriminates against the potential foster or adoptive families because it denies them rights based solely on race (i.e., not being Native American). Like *Richmond*, once a tribe has picked a family for the child to live with, the state and fostering families have no say to override the decision, regardless of the best interests of the child. R. at 5-6.

Similar to this Court's rationale in *Richmond*, the placement of a Native American child in any tribe or in an orphanage to the exclusion of a willing non-tribal family is arbitrary and not narrowly tailored to meet the strict scrutiny standard. The requirement is arbitrary because it allows

the tribe to find any family with race being the only prerequisite. R. at 19. If the purpose of ICWA is preserve a tribe's culture by keeping a child with his particular tribe, then sending a child to another tribe or an orphanage defeats that purpose. R. at 4. Furthermore, Congress has discriminated against the unique characteristics of each 574 Native American tribes recognized in the United States by conflating their distinct cultural heritage and making them essentially interchangeable. Thus, Congress's failure to narrowly tailor ICWA requires this Court to find these specific placement requirements unconstitutional.

Not only is ICWA not narrowly tailored, but it fails to further a compelling governmental interest. ICWA sought to right previous wrongs by the government, but it's policy now takes children from safe foster and adoptive homes and sends them to strangers merely because the strangers are of the same race as the child. Although ICWA was passed because of discrimination by the government, unlike *Richmond*, these laws continue to do more harm than good by focusing on what is best for a tribe instead of what is in the best interest of the child. Thus, there is no nexus between the factual basis for these requirements and the scope that ICWA attempted to implement.

Even if there is a compelling governmental interest for ICWA as a whole, the law's placement requirements fail that interest by separating children, not only from the tribe, but potentially from the same state they were raised. Instead of furthering a compelling interest by helping children in dangerous situations, Congress has focused solely on righting wrongs for the tribes as a whole. If the children matter too, ICWA does nothing to protect them. Thus, the second prong of the strict scrutiny test fails.

Because *Mancari* is not applicable outside of tribal political units, this Court should apply the strict scrutiny standard to ICWA and hold these requirements unconstitutional based on equal protection. For "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to

personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Richmond*, 488 U.S. at 505-06. Therefore, this Court should affirm the Thirteenth Circuit's decision in this case.

II. ICWA's placement and recordkeeping requirements commandeer states agencies in violation of the Tenth Amendment because they impose federal directives without specific funding.

The Thirteenth Circuit properly reversed the district court because the district court inaccurately held that ICWA does not impose unconstitutional mandates on state governments but merely confers rights to Native American children and families. Although Congress has authority over Native American affairs, a problem arises when the laws passed by Congress unconstitutionally conscript state governments as federal agents in the implementation of those laws. *N.Y. v. U.S.*, 505 U.S. 144, 178 (1992). To prevent the federal government from commandeering state agencies, the Tenth Amendment declares that powers not delegated to the federal government are reserved to the states. U.S. Const. amend. X. This Amendment is the foundation of the anti-commandeering doctrine because it shows the Framer's intent to deny Congress the authority to pass laws directly applicable to state actors. *See Printz v. U.S.*, 521 U.S. 898, 935 (1997) (stating the federal government cannot compel states to enforce a federal regulatory program).

Despite a presumption that legislation, such as ICWA, is a constitutional exercise of Congress's legislative power, the Plaintiffs seek only a finding that certain ICWA requirements violate the anti-commandeering doctrine. *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883). Specifically, ICWA imposes costs and burdens associated with enforcing federal directives on the states by mandating (1) arduous placement of the child based on the desires of the tribe and (2) onerous recordkeeping requirements, which are only imposed on Native American child

placements. 25 U.S.C. § 1915(a)-(b), (e), § 1951(a). Thus, striking these requirements as unconstitutional supports a healthy balance of power between the states and federal government, which reduces the risk of tyranny and abuse, just as the Framers intended. *Printz*, 521 U.S. at 921.

Although Congress provides general funding under Title IV to states for foster care and adoption programs, there is not direct funding provided to carry out ICWA requirements. 42 U.S.C. § 670. Native American tribes within a state may also apply to the federal government to seize the state's Title IV funds for their own use in similar programs. 42 U.S.C. § 677(j)(4). Furthermore, the Secretary of the Interior has the power to enter into agreements with tribes to appropriate funds for programs under ICWA, but no such power exists for agreements with the states. 25 U.S.C. § 1931, § 1933. Therefore, without proper funding, Congress not only commandeers the state agencies but also puts a direct financial burden on the states to implement these federal directives, which this Court has found unconstitutional. *Murphy v. NCAA*, 584 U.S. __; 138 S. Ct. 1461, 1477 (2018).

The Plaintiffs do not seek to chip away at tribal sovereignty but only to remove specific requirements that cause an undue burden on the states through the commandeering of its agencies. As the Secretary of the Interior stated, "Congress intended to require States to affirmatively provide Indian families with substantive services."[8] Thus, the requirements in question violate the anti-commandeering doctrine, and this Court should affirm the Thirteenth Circuit's decision.

A. The placement requirement commandeers state agencies because "active efforts" force state agencies to carry out federal legislation without funding.

This Court should find ICWA's placement requirements unconstitutional because state agencies must perform "active efforts" before any foster or adoption placement can take place. "Active efforts" means the state must provide remedial and rehabilitative services designed to keep

[8] Indian Child Welfare Act Procs., 81 Fed. Reg. 38,778, 38,791 (June 4, 2016) (codified as 25 C.F.R. pt. 23)

Native American families together; however, such services are unduly costly and burdensome on the states. 25 U.S.C. § 1912(d). Remedial and rehabilitative services provided by the state to the Native American custodian include in-home training, parenting classes and coaching, psychological evaluations, and transportation. 25 C.F.R. § 23.2 (2022); *In re I.B.*, 255 P.3d 56 (Mont. 2011). The state must then prove these active efforts were unsuccessful before the state agency places a child. 25 U.S.C. § 1912(d).

Not only are active efforts expensive and time consuming to perform, but the state is also required to determine which, if any, of the 574 federally recognized tribes a child is affiliated with before making a placement. *See, e.g., In re L.A.G. & N.L.*, 429 P.3d 629, 635 (Mont. 2018). Furthermore, removal of a Native American child from a Native American home is only permissible if custody "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e). Thus, children are potentially left in dangerous situations. Consequently, ICWA seemingly mandates children remain in potentially abusive situations as long as the abuse causes only some emotional or physical damage.

A federal law requiring states to administer a federal program that directs the way the state executive functions is unconstitutional. *Printz*, 521 U.S. at 932. In *Printz*, Congress passed a handgun law that required every jurisdiction's chief law enforcement officer to perform background checks on prospective gun purchasers. *Id*. at 902. The program required the officer to make reasonable efforts to ascertain whether the purchase would violate the law. *Id*. at 903. Reasonable efforts included searching county, state, and federal systems for information on the purchaser and returning results within five business days. *Id*.

A county sheriff sued challenging the constitutionality of the requirements imposed on him by the program. *Id*. at 904, 930. The sheriff claimed it was his office that stood between the gun

purchaser and possession, not a federal official, it was his office that bore the costs of the program, and it was his office that would take the blame for errors. *Id*. This Court held the requirement unconstitutional based on dual sovereignty because Congress cannot enact laws that effectually pass Executive Branch duties onto states. *Id*. at 918, 922.

Further, this Court found the program required the officer to implement new policy by deciding how much resources should be diverted for the program. *Id*. at 927-28. However, this Court previously found a similar requirement unconstitutional in *New York*. *Id*. at 927-28 (citing *N.Y. v. U.S.*, 505 U.S. 144, 178-79 (1992) (holding a federal nuclear waste policy unconstitutional because it coerced states into compliance by creating new policy to accept the waste or assume liability). Thus, by forcing states to absorb a financial burden by implementing a federal regulatory program, Congress takes credit for solving a problem without using federal tax dollars. *Id*. at 930.

Here, like *Printz*, ICWA forces states to implement federal policy by incorporating the placement and recordkeeping requirements into state agencies handling Native American children. R. at 15. As in *Printz*, Congress passed a federal law that essentially requires state actors to do "background checks" on the children and potential foster or adoptive families to ensure they comply with the placement requirements. R. at 6. Like *Printz*, ICWA requires state actors to use active efforts to ascertain whether removal from the Native American home is necessary while also imposing demanding obligations on the agency to find a home within the tribe's preferences. R. at 6, 15. As in *Printz*, active efforts put state actors on the front lines because state actors go into the homes to do welfare checks, deal with neglectful or abusive parents, and find placement homes for the children. R. at 15. Furthermore, the state actors get all the blame when the active efforts fail to comply with ICWA. R. at 15.

Additionally, Congress imposed the costs and burdens of implementing ICWA onto the states by not providing any additional funding for the program, as in *Printz*. R. at 15. Like *Printz*, this means the states must enact new policy to divert state funds to implement the ICWA requirements, but Congress gets all the credit for solving the problem. R. at 15. Thus, the placement requirements mandating active efforts by state actors violate the anti-commandeering doctrine and force states to implement new policy to comport with federal law. Therefore, similar to this Court's holding in *Printz*, these requirements are unconstitutional.

Although this Court has confirmed the constitutionality of federal law imposed on state courts, state courts are only secondary actors under ICWA because the primary burden is on state actors working the front lines to ensure the safety of children. *Printz*, 521 U.S. at 907; 25 U.S.C. § 1901(5). Congress attempted to circumvent the anti-commandeering doctrine by stating that state courts, instead of state agencies, are required to carry out ICWA's "active efforts," but this is unrealistic. In fact, it is state agencies, like Child Protective Services, not state courts, that utilize their employees to remove children from dangerous homes and find foster or adoptive homes for placement. It is not until adoption proceedings have begun that a court even becomes aware of a case. *Adoptive Couple*, 570 U.S. at 643-646.

Furthermore, the Tenth Amendment is violated when federal law requires states to regulate its private individuals. Although Congress may constitutionally regulate state and private actors evenhandedly, Congress cannot force a state to ensure its citizens comply with ICWA. *Murphy*, 138 S. Ct. at 1478; *Reno v. Condon*, 528 U.S. 141, 149-50 (2000). In *Reno*, Congress passed a regulation preventing parties, including states, from reselling personal information from the department of motor vehicles' databases. 528 U.S. at 143. This Court held the law constitutional

because it did not require state actors to enforce federal statutes, the states to enact policy, or the states, in their sovereign capacity, to regulate their citizens. *Id*. at 151.

However, *Reno* is distinguishable from the current case because ICWA does not regulate both state and private actors. R. at 15. Just as state courts are not involved in the removal or placement process, neither are the private actors who seek to foster or adopt the child. Thus, state actors alone are left to remove the child from a home, perform active efforts, identify any potential tribal link in the child, and find placement for the child. It would not comport with the policy of this government to think Congress intended to impose on foster or adoptive parents the duty of getting a neglectful custodian counselling and transportation. Unlike *Reno*, ICWA is not a law that prevents a party from performing an act, but instead, it imposes costly and burdensome obligations on the state alone to carry out. R. at 15. Thus, even if this Court finds ICWA evenhandedly regulates both state and private actors, the ICWA requirements still fail because states, in its sovereign capacity, cannot be forced by the federal government to regulate its citizenry. R. at 15.

Despite the noble intent to preserve Native American heritage, the practicality of active efforts actually does more harm than good by leaving a child in a dangerous situation. Additionally, the state is left severely underfunded and understaffed. Thus, this Court should affirm the Thirteenth Circuit's decision because these requirements fail under *Printz* and *Reno* by violating the anti-commandeering doctrine.

B. The recordkeeping requirements commandeer state agencies by forcing them to expend state funds to implement extraneous procedures.

This Court should find the recordkeeping requirements unconstitutional because it amounts to forced participation of a state's executive branch in the implementation a federal program. Under ICWA, states are required to maintain a record of each placement of each Native American child including the efforts to comply with the tribe's placement preferences, and such records must

be made available for federal inspection at any time. 25 U.S.C. § 1915(e). Additionally, states are required to provide the federal government a copy of adoption decrees of any Native American child, which include the tribal affiliation of the child, the biological parents' and adoptive parents' information, and the identity of any agency having files on the adoption. 25 U.S.C. § 1951(a). This compares to the placement reporting required under Title IV for non-Native American children because Title IV only requires bi-yearly reporting regarding foster programs. 42 U.S.C. § 674.

While the mere relaying of information is not a violation of the anti-commandeering doctrine, the ICWA recordkeeping requirements go far beyond mere communication. *Printz*, 521 U.S. at 918. ICWA's requirements result in vast amounts of records a state must maintain. Every record must contain (1) the petition or complaint, (2) all substantive orders, (3) the complete record of the placement determination, and (4) detailed documentation of all the efforts to comply with the tribe's placement preferences. 25 C.F.R. § 23.141 (2022). Because a child may be placed in multiple foster homes, there is a possibility of voluminous records per child that the state is required to create and maintain.

When the sole purpose of a law is for government oversight and based on outdated data, the law is unconstitutional. *Shelby Cnty. v. Holder*, 570 U.S. 529, 556-57 (2013). In *Shelby County*, a county challenged the constitutionality of the Voting Rights Act of 1965 under the Fifteenth Amendment. *Id*. at 534. The law required certain states and counties to obtain preclearance before they changed voting procedures; however, the law was based on data more than forty years old. *Id*. at 544, 551. This Court determined there was no valid reason to "insulate" old data from review and sought to address whether the purpose of the law still required the law's continued use. *Id*. at 540, 556. This Court stated "[o]ur country has changed over the past forty years, and while racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy

that problem speaks to the current conditions." *Id*. at 557. Accordingly, this Court found the preclearance requirement unconstitutional and invalidated those specific provisions of the law. *Id*. at 556-557.

Here, as in *Shelby County*, the recordkeeping requirements are for the sole purpose of government oversight, and the purpose of ICWA is based on wrongs occurring almost half a century ago. R. at 4, 7. Additionally, the Plaintiffs seek a review of ICWA's constitutionality because the purpose of these requirements are no longer necessary to fulfill the federal government's covenant with Native Americans. R. at 1-4. Similar to *Shelby County*, the recordkeeping requirements are like the preclearance requirement because they both fall under government oversight, and the only purpose of them is so the federal government can ensure states follow federal law. R. at 7. The violation of the Fifteenth Amendment in *Shelby County* is similar to the Tenth Amendment violation here in that both laws sought to control the states through implementation of federal regulation. R. at 15. In this case, the control takes the form of commandeering state agencies by forcing them to maintain unnecessarily voluminous records and make them available for federal inspection. R. at 15.

As this Court held in *Shelby County*, there is no reason to protect ICWA just because it was passed over forty years ago. R. at 1. Furthermore, this country has changed, and the atrocities of the past have largely been curtailed. While racial discrimination against Native Americans is an ugly and unfortunate part of this Nation's history, the purposes for which ICWA was enacted no longer exist. It is time to re-evaluate the necessary components of this Act and excise the requirements that unconstitutionally commandeer the states and their agencies.

The Plaintiffs recognize the important obligation the federal government has to Native American tribes. However, Congress can still fulfill its promises without imposing such

burdensome requirements on states. Furthermore, as established above, the requirements in question are based solely on race and are not narrowly tailored to further a compelling governmental interest. ICWA fails to keep children with their tribes and treats all 574 federally recognized tribes as culturally interchangeable. For these reasons, this Court should affirm the Thirteenth Circuit's decision and find these ICWA requirements unconstitutional.

V. CONCLUSION

For the forgoing reasons, this Court should affirm the Thirteenth Circuit's decision and find ICWA''s placement and recordkeeping requirements unconstitutional under the Fifth and Tenth Amendments.

Respectfully Submitted,

/s/ *Team 29*
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