No. 22-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

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

Petitioner,

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

QUESTIONS PRESENTED

I. Do the placement preference and recordkeeping provisions of the Indian Child Welfare Act exceed Congress's Article I authority and violate the anti-commandeering doctrine under the Tenth Amendment when Congress used its lawful power pursuant to the Indian Commerce clause to pass legislation to protect children and when there is not a valid cause of action relating to preemption because no state law is cited to be in conflict with the federal law at issue?

II. Do the Indian Child Welfare Act's Indian classifications violate the Equal Protection Clause of the Fifth Amendment when racially classifying Indians; using ancestry as a proxy for race; and granting preference to Indians over non-Indians in the context of Indian child adoption proceedings?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

STATEMENT OF FACTS

The petitioner is Stuart Ivanhoe (the "Petitioner"), Secretary of the Interior of the Federal Government of the United States of America. Respondents are James and Glenys Donahue and the State of West Dakota (the "Respondents"). (R. at 1-2.)

The Donahues adopted Baby C. and seek to adopt Baby S. Petitioner alleges that the Indian Child Welfare Act of 1978 ("ICWA") is unconstitutional because it removes the Donahue's custody of Baby C and Baby S and forces these children to be relocated across state lines. Generally, the ICWA ensures that children of Indian descent are kept within Indian tribes to the extent that they can be whether that be placing these children in the custody of extended family, other families within their tribes, or other tribes in different states. (R. at 4). Congress enacted the ICWA in response to increased uneasiness over offensive child welfare standards, seeking to put the best interest of children first. Many Indian American children were being taken away from their families and respective tribes via adoption or foster care placements. This usually resulted in Indian American children being re-homed into non-Indian families. *Id.*

The Donahue family sought to adopt an Indian child, Baby C. Baby C was first placed in foster care with the Donahues after being removed by Child Protective Services ("CPS") from her biological mother due to a lack of adequate care. Baby C's biological mother and father were members of the Quinault Nation and Cherokee Nation, respectively. Baby C subsequently lived with the Petitioner's family, the Donahue's for two years. (R. at 3-4). Per ICWA procedure, the Quinault Nation and Cherokee Nation were adequately notified of Baby C's family status. *Id.*

In August 2019, a state court in West Dakota terminated the parental rights of Baby C's biological parents. Under West Dakota law, this court's action made Baby C eligible for

adoption. (R. at 4). In September 2019, with the consent of both of Baby C's biological parents and maternal aunt who briefly cared for Baby C, the Donahues initiated an adoption proceeding. In accordance with the ICWA, the Cherokee Nation and Quinault Nation were notified of this action. To comply with the ICWA in state courts, the Cherokee Nation agreed to the Quinault Nation's designation as Baby C's tribe for legal reasons. *Id.* This has no material impact on this litigation. On October 24, 2019, the Quinault Nation contacted the West Dakota state court saying that it had a potential placement for Baby C. For undisclosed reasons, however, the placement fell through. The Donahues entered into an agreement with CPS and Baby C's guardian stating that the placement preferences in ICWA did not apply because there were no other interested parties who sought to adopt Baby C. The Donahue's adoption of Baby C was finalized in West Dakota state court in January of 2020. *Id.*

In February of 2020, Baby S's biological mother, a member of the Quinault Nation died of a drug overdose. There is no known identity of Baby S's biological father. Baby S's paternal grandmother had custody of Baby S from January of 2020 to April of 2020. *Id.* Due to the paternal grandmother's poor health, Baby S was re-homed with the Donahues, who acted as a foster family. In May of 2020, the Donahues filed to adopt Baby S. Baby S's paternal grandmother consented to this adoption, but the Quinault Nation opposed it. The Quinault Nation notified CPS that it recognized two potential alternative families for Baby S in the Quinault Tribe; this proposition abided by the statutory regulations in the ICWA. *Id.*

SUMMARY OF THE ARGUMENT

This Court should overturn the appellate court's decision. The ICWA does not violate the Tenth Amendment. The ICWA is constitutional because Congress was within its Article I powers when it passed the law and the law does not commandeer states since it does not unlawfully utilize state resources. The ICWA is deeply rooted in this nation's history and traditions because the federal government has jurisdiction over Indian affairs. *McGirt v. Oklahoma,* 140 S. Ct. 2463 (2020). ICWA creates procedural regulations that were created in the best interest of private individuals, using the expansive authority under the Indian Commerce Clause. *Gibbons v. Ogden*, 22 U.S. 79 (1824).

The ICWA does not commandeer states because it provides rights to Indian children and their families and does not exclusively control state executive branches. The ICWA creates a floor, or minimum standards for Indian children, in child custody proceedings. States are not mandated to provide greater rights than the ICWA. The Respondent's argument regarding preemption is flawed because it fails to cite any substantive conflict among state laws or regulations. For the above reasons, the Petitioner requests that ICWA be upheld because it withstands any challenge relating to the 10th Amendment.

Furthermore, the ICWA does not violate the Fifth Amendment Equal Protection Clause because it does not classify Indians based on race. Indian classifications such as those in ICWA are deeply rooted in the unique status of Indians as quasi-sovereign entities and applies only to Indians. *Morton v. Mancari*, 417 U.S. 535, 554 (1974). To apply these classifications to any other group besides Indians would allow for unjust racial classification. *Rice v. Cayetano,* 528 U.S. 495, 520 (2000). ICWA's definition of "Indian children" should be read considering Congress' goal of protecting individuals under eighteen years old who are eligible for tribal

membership or are currently members of a tribe. *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Because of this, ICWA should be subjected to rational basis review.

Because ICWA is rationally related to Congress' legitimate interest of ensuring that the long-term survival of Indian children is not impacted by their removal from Indian tribes and placement in non-Indian homes, it survives rational basis review. *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 32 (1989). Additionally, studies and recent state court decisions have shown that ICWA continues to serve these interests, evincing the need for the statute to stay in place. Thus, Petitioner's argument should be rejected and ICWA sustained.

ARGUMENT

I. THE INDIAN CHILD WELFARE ACT IS CONSTITUTIONAL BECAUSE IT DOES NOT USURP INDIAN TRIBES AS IT DOES NOT ENAGE IN COMANDEERING AND FALLS WITHIN CONGRESS'S AUTHORITY

Congress's authority to legislate is limited to its enumerated power under the Constitution. *Murphy v. Nat'y Coll. Athletic Ass'n,* 138 S. Ct. 1460 (2018). "[T]he 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.*

Congress holds its maximum legislative authority when such is delegated to an independent body, such as a federal agency, over the subject matter. *United States* v. *Curtiss-Wright Export Corp*., 299 U.S. 304, 329 (1936). ICWA, enacted in 1978, provides Indian tribes with the independence to have discretion over children living in Indian Tribes. ICWA § 1915(c).

Congress is within its lawful authority of the non-delegation doctrine when providing laws, like ICWA, to sovereign entities, like the Quinault Nation. *United States v. Sharpnack*, 355 U.S. 294 (1958). "Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject." *Gibbons,* 22 U.S. at 1. The ICWA, specifically, § 1915(c), does not usurp Indian sovereignty over child custody, but provides individual customization to each tribe to adapt the law as they wish. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 169, (1982).

A. ICWA Does Not Commandeer States Because It Only Provides Minimal Protections to Indian Children and Tribes in Child Custody Proceedings.

Congress may not force state or local governments to enforce federal law via state or local resources. *Printz v. United States*, 521 U.S. 900, 933 (1997) (holding that a federal law was unconstitutional because it required a state to use its police officers to conduct background-checks on handgun purchases). State courts must view federal law as the highest-ranking law of the land. Further, Congress may not provide directives to state governments mandating action or inaction to a state legislative or executive branch. *Id* at 118. Rather, when Congress uses appropriate statutory authority from the Constitution, it may enact laws that may affect states indirectly by granting rights or protections to residents of the states.

State courts and administrative agencies play different roles and hold different responsibilities. It is the role of state courts to enforce laws that expand beyond the applicable state's laws where the court is located. Conversely, state agencies are solely responsible for actions that occur within the border of a state. Further, state agencies possess distinct differences in authority from state courts. In *South Carolina v. Baker*, the court said "[t]hat 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." 485 U.S. 505, 506 (1988). The Supremacy Clause is understood "to permit [the] imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for judicial power." *Printz,* 521 U.S. at 907.

As sovereign entities of the state, state judiciaries regularly apply federal law without violating principles of anti-commandeering. *Id. at 930.* In *Baker*, this Court declined to find a federal tax statute that regulated state activity to be a violation of the Tenth Amendment. *Baker,* 485 U.S. at 509. Federal law may require states to engage in compliance obligations when a state activity is involved, this does not violate the anti-commandeering doctrine. *Id*. Here, the ICWA does not "conscript[] the state's officers directly," which is distinguishable from *Printz.* 521 U.S. at 935. In *Printz*, the Court looked to the substance of the law entirely to identify if a federal action sought to govern, in some part, any part of the state executive branch. *Id*. The ICWA provides a private right to Indian children and families and thus governs private individuals. While the ICWA guides state agencies to some degree, the ICWA is written to prioritize the best outcomes for private individuals. In some instances, state agencies or courts may be a party to such procedures though the state is not compelled to use its resources to act or not act on such matters. R. at 7.

When the text of the ICWA is read on its face, it is clear that there is sufficient evidence to support Indian children being re-homed – it is also undisputed that children are private individuals. Specifically, ICWA § 1912(e) mandates that a state court may not provide a foster care placement without a "determination, supported by clear and convincing evidence, including the testimony of a qualified expert witness, that the continued custody of the child by parent or Indian custodian is likely to result in serious emotional or physical damage to the child." R. at 7. Further, ICWA § 1912(f) does not provide a means to terminate the right of a biological parent in a state court except for when evidence is proven beyond a reasonable doubt. ICWA § 1912(f). Congress did not specifically commandeer states by requiring compulsory action. The ICWA should be interpreted so that "any party" refers to a state or private individual that terminates or seeks to become the guardian of an Indian child. *See* ICWA § 1912(d*). See also Reno v. Condon*, 528 U.S. 141, 152 (2000). The ICWA creates procedural regulations for state activity without requiring the state to use its resources to enforce an ordinance or statute; this is distinctly not commandeering. *Id.* at 151. The ICWA is merely a procedural statute that prioritizes the way in which Indian children in custody proceedings are placed.

The contention of commandeering is unmerited and unestablished. This Court should find that the ICWA does not commandeer, any other finding will re-work long-standing precedent and create the possibility that much of federal law will be invalidated in the name of 'commandeering.' The ICWA clearly defines its breadth and depth, emphasizing its oversight over private individuals within the bounds of the Indian Commerce Clause. Respondent blanketly admits that ICWA is limited in scope, as tribes still contain sufficient authority to prevent a child from being re-homed in a placement at odds with the child's best interests. When the ICWA is read without any pretextual opinions, it is clear that the federal government was

comfortable and reasonable in its authority and intent to create the ICWA. Any such different interpretation will create irreparable harm for Indian children today, and for generations to come, because of the grave risk that Indian children become wrongly separated from their families and tribes as demonstrated by history.

B. ICWA Maintains the Non-Delegation Doctrine With the Rights of Indian Tribes

The ICWA acknowledges that Indian tribes are unique governing bodies and, accordingly, acknowledges their sovereign status as territories and tribal members. *United States v. Mazuire* 419 U.S. 555 (1975). ICWA § 1915(c) mandates for a tribe to have discretion and authority to change the placement preferences of Indian children, as set forth by Congress in the ICWA, when done through the tribal legislative process. R. at 8. In *Mazuire*, this Court held that a federal law that granted authority to an Indian tribe to control the sale and distribution of alcohol by non-Indians on tribal grounds was permissible. 419 U.S. 557. The federal law in *Mazuire* is analogous here because the ICWA is the federal law that provides authority to Indian tribes with discretion, if they choose so, to alter the placement preferences of children in adoption and foster care situations. *Id*. This precedent emphasizes that federal authority that grants Indian tribes the option to tailor a statute to their preferences is fully lawful and applicable to both the Indian territory and members of an Indian tribe, even if they do not reside on the tribal property. *Id.* at 556.

C. The ICWA, As a Federal Law, Preempts West Dakotan State Law Because There is a Conflict with Relevant State Law in Child Guardianship Cases.

Federal law is the "supreme Law of the Land…anything in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. Art. VI, cl. 2. When "[C]ongress enacts a law that imposes restrictions or confers rights that conflict with the federal law . . . the federal law takes precedence and the state law is preempted." *Murphy v. National Collegiate Athletic*

Ass'n,, 138 S.Ct. 1461, 1480 (2018). First, Congress may only exercise its legislative authority when it is acting on the power that is expressly conferred in the Constitution. Second, Congressional laws must be interpreted to regulate private individuals through the creation of restrictions or by creating rights. *Id*.

The ICWA satisfies the two-prong inquiry for a federal law to preempt state law by creating a floor of standards for Indian child adoption. ICWA satisfies the first prong of the *Murphy* analysis since Congress acted pursuant to its powers under the Indian Commerce Clause of Art. I Sec. VII Const. *Id*. The text of the ICWA acknowledges that Congress created the law to "establish[] 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." ICWA § 1902. While states may create additional laws or regulations pertaining to the removal of Indian children and their families, they may not go below ICWA's minimum standard. Second, under *Murphy,* federal preemption is proper when a federal statute is regulates private actors. *Murphy,*138 U.S. at 1479. The placement of Indian children regulates private individuals which render preemption of state law since the second prong of the *Murphy* analysis is satisfied. Congress acted under their express constitutional authority via the Indian Commerce Clause and ICWA created private regulations specifically for Indian children. Ultimately, ICWA satisfies the *Murphy* analysis and federal preemption applies.

The doctrine of conflict preemption dictates that federal law takes precedence over state law. *Mutual Pharmaceutical Co. v. Bartlett* is illustrative. 570 U.S. 472 (2013). There, a federal law passed under the Commerce Clause regulated generic drug manufacturers' labeling requirements, specifying that labels or the composition of the drugs could not be altered after approval by the Food and Drug Administration ("FDA"). *Id.* at 485. Though a state law required

manufacturers to supplement FDA warnings, this Court held that the state law was preempted because, as a matter of conflict preemption, federal law is supreme when there is a regulation of private actors. *Id* at 490. The ICWA looks out for the best interests of children and their families, who are private individuals, by creating a floor of minimum standards regarding Indian child adoption. Conflict preemption indicates that federal law must apply. R. at 6.

a. The ICWA Falls within Congress' Authority Under the Indian Commerce Clause to Regulate Indian Children's Adoption.

Congress has broad authority to regulate Indian tribes by way of the Indian Commerce Clause. *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474 (1974). "The plenary power of Congress to deal with the special problems of Indians is brawn both explicitly and implicitly from" the Indian Commerce Clause. *Id*. In *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico,* this Court noted that Congress' power over Indian tribes is derived both implicitly and explicitly from the Indian Commerce Clause. 458 U.S. 832, 837 (1982). Congress' authority and intent in the ICWA provides greater rights to individuals, specifically Indian children and their families, in quest of promoting a solid family unit within Indian tribes. The Indian Commerce Clause suggests that there is clear textual authority for the creation of ICWA due to the broad control it provides over Indians. R. at 8.

D. West Dakota Fails to Raise A Valid Cause of Action Relating to Preemption Because No State Law is Cited in Conflict with the ICWA.

This Court has held that it does not provide advisory opinions on unused state authority. *Fast v. Cohen*, 392 U.S. 83, 94 (1968) (holding that federal courts are restricted to ruling on cases and controversies that are justiciable and that federal courts will not rule on abstract or hypothetical issues). It is unclear if the respective West Dakotan state agency has even promulgated regulation regarding the adoption of Indian children since the record does not

specify. R. at 3. A ruling by this court in favor of the Respondent would likely breach U.S. Const. art. III. because it would constitute a ruling by this Court on a matter in which the state has not taken any regulatory action, as it would provide an advisory opinion. The respondents' claim rests relies on unused authority and is an irresponsible use of judicial resources because it is hypothetical. The doctrine of conflict preemption suggests that ICWA is constitutional; a finding of anything else would be unprecedented and open the floodgates to a more adversarial judicial system by future claimants who may seek advisory opinions.

II. THE INDIAN CHILD WELFARE ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE ITS CLASSIFICATIONS ARE POLITICALLY, NOT RACIALLY BASED.

In order to restore stolen civic rights and powers, Congress has repeatedly enacted general and specific preferences to Indians that consistently survive constitutionally based equal protection challenges. *See Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-80 (1976) (granting Indians immunity from sales tax on cigarettes); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692-93 (1979) (granting Indians specific fishing rights not allotted to non-native Indians); *Doe v. Kamehameha Schs.*, 470 F.3d 827, 846 (9th Cir. 2006) (granting private schools the ability to prefer students of Indian ancestry over non-Indians). It follows that the ICWA, which is politically based and furthers Congress' goal of ensuring that Indian culture is preserved, should survive constitutionally based equal protection challenge.

A. Rational Basis Review Should Apply to the Indian Child Welfare Act because it is a Political, not Racial Classification

The Supreme Court has consistently held that classifications expressly singling out Indians are not racially discriminatory. *Morton v. Mancari*, 417 U.S. 535, 554 (1974); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500

(1979). This rule stems from "the origin and nature of the special relationship" shared between the United States and the quasi-sovereign nature of Indian tribal entities. *Id*. at 544, 552. Indeed, this Court has emphasized that if legislation of this type is deemed racially discriminatory, "an entire Title of the United States Code (25 U.S.C.) would be effectively erased." *Id*. at 552. In *United States v. Antelope*, this Court quoted Justice Blackmun's words from *Morton v. Mancari*: "such regulation is rooted in the unique status of Indians as 'separate people' with their own political institutions; [...] it is not to be viewed as legislation of a 'racial group' consisting of 'Indians.'" *United States v. Antelope,* 430 U.S. 641, 646 (1977) (quoting *Mancari*, 417 U.S., 553).

A common theme found in legislation involving Indians is the intention to ensure the protection of their quasi-sovereign status. For example, in *Morton* v. *Mancari*, this Court held that an employment preference for members of a federally recognized tribe was "not racial," rather, it was "reasonably designed to further the cause of Indian self-government." *Mancari,* 417 U.S. at 554. The Court further reasoned that the purpose of this type of legislation was, "as variously expressed in the legislative history, [intended] to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect tribal life." *Id.* at 541. Similarly, in *United States v. Antelope*, this court held that prosecution of Indian defendants under federal law and not state law in accordance with the Major Crimes Act did not deny them of equal protection because legislation with respect to Indian affairs "is governance of once-sovereign political communities." *Antelope*, U.S. 641 at 646.

The *Mancari* principle applies to adoption proceedings as well. For example, in *Fisher v. District Court of Sixteenth Judicial Dist. of Montana, in and for the County of Rosebud*, this

Court held that the Indian Tribal Court's exclusive jurisdiction over adoption proceedings did not constitute racial discrimination because the "exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." *Fisher v. District Court of Sixteenth Judicial Dist. of Montana*, 424 U.S. 382, 390 (1976). It follows that labeling this type of legislation as racially discriminatory would undermine the political and legal status of Indians and directly violate congressional efforts.

In accordance with *Mancari,* the ICWA classifies Indian tribal members in accordance with their status as "members of quasi-sovereign tribal entities" who should be entitled to participate in the adoption proceedings of Indian children both for the preservation of their culture and the well-being of Indian children. *Id.* at 554. The ICWA grants preference to Indian tribes "[via] the establishment of minimum Federal standards for the removal of Indian children from their families and [enabling the facilitation of] placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C.A. § 1902. Doing so ensures the protection of "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in society." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (quoting House Report, at 23, U.S. Code Cong. & Admin.News 1978, at 7546).

In the Thirteenth Circuit Court of Appeals' concurring opinion, Chief Justice Tower incorrectly interprets this Court's holding from *Rice v. Cayetano*, arguing that it limited the *Mancari* holding to a specific governmental agency, namely, the Bureau of Indian Affairs. (R 18). In *Rice,* this Court struck down a Hawaiian election scheme which allotted trustee positions for a state agency only to those with "Hawaiian ancestry" and restricted voter eligibility for those

positions to "native Hawaiians." *Rice v. Cayetano,* 528 U.S. 495, 508-11 (2000). This Court reasoned that the *Mancari* principle did not apply because Congress cannot authorize a State to establish a voting scheme that limits positions for its public officials to a class of native Hawaiians, excluding all non-native Hawaiians. *Id.* at 520. Accordingly, Chief Justice Tower argues that *Mancari* should bar ICWA because like the classifications made in *Rice*, ICWA classifies Indians based on their Indian ancestry ("Indian children"), and not tribal membership. In his view, *Mancri* only applied to Bureau of Indian Affairs hiring practices, and therefore "'only applied to members of federally recognized tribes' who lived on or near reservations." R. at 17 (quoting *Morton v. Mancari,* 417 U.S. 535, 522, 555).

However, this Court did not narrow the scope of the *Mancari* decision regarding Indian classifications – it only warned of extending the scope to non-Indian entities. *Id*. Indeed, in *Rice,* Justice Kennedy noted that while Hawaiians may have a status that is *analogous* to Indians, they do not share the same status of a "separate quasi-sovereign" entity. *Id.* at 522. Extending this "limited exception" to Hawaiians would allow for a state, "by racial classification, to fence out whole classes of its citizens from decision making in critical state affairs." *Id.* Accordingly, granting Hawaiians – a group that shares their own unique relationship with the United States – the same preferences as Indians would blur the distinctions between the two and "frustrate to at least some degree Congress' intent to treat the two groups differently." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004). That being said, *Rice* did not limit the possible application of *Mancari*, rather, it reaffirmed the idea that preferences allotted to Indians – and only Indians – are constitutional as long as they rationally relate to Congress' legitimate goal of preserving Indian quasi-sovereign tribal status.

Furthermore, the interpretation of ICWA's definition of "Indian children" as being a proxy for race is misguided. (R. at 18). Courts have a "judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question.'" *United States v. Bornstein,* 423 U.S. 303, 310 (1976). The congressional intent behind ICWA is to preserve the survival of Indian tribes by reducing the amount of "Indian children" – any person under eighteen years old who is either eligible for tribal membership or is a member of an Indian tribe – being denied exposure to the "ways of their People" through being raised in non-Indian homes. *Mississippi Band of Choctaw Indians*, 490 U.S. at 34 (quoting Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong.m 2d Sess (1978)); 25 U.S.C.A. § 199. It follows that the definition of "Indian children" provided by ICWA should be read in light of Congress' concern "with the rights of Indian families and Indian communities." *Mississippi Band of Choctaw Indians*, 490 U.S. at 34. Accordingly, it should not be as a proxy for race, but rather, as a political classification that facilitates congressional incentives.

Ultimately, ICWA is yet another legislative act which shows that Congress recognizes the tumultuous relationship between Indians and the United States and the consequences which arose in light of this relationship. As this Court held in *Mancari*, legislation surrounding Indians usually seeks to modify situations where non-Indian entities have "plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes." *Mancari*, 417 U.S. at 542-3. Thus, because this legislation is not only provided for by the Constitution, but also by the United States Code and by this Court's precedent, ICWA should remain the governing law with regard to adoption proceedings of Indian children.

B. Because the Indian Child Welfare Act is Rationally Related to a Legitimate Governmental Interest, it Should Survive Rational Basis Review

In general, a statute will survive rational basis review if it is designed to serve a legitimate governmental interest and there exists a rational relationship between the statute's classifications and this interest. *See*, *e.g., Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); *Railway Express v. New York,* 336 U.S. 106 (1949), (Jackson, J., concurring). Even in its most stringent application, this Court will dismiss claims against a statute if there is an actual fit between the statute itself and the purpose the statute was created. *Cleburne v. Cleburne,* 473 U.S. 432 (1985). This Court will speculate a public governmental interest if necessary when applying rational basis standard. *Railroad Retirement Board,* 449 U.S. at 176. Further, if classifications of Indians can be "rationally tied to the fulfillment of Congress' unique obligations toward the Indians, such legislative judgements will not be disturbed." *Mancari*, 417 U.S. at 555. *See also, Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S at 501 (citing *Massachusetts Bd. Of Retirement v. Murgia,* 427 U.S. 307, 314 (1976)) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)), ("Legislative classifications are valid unless they bear no rational relationship to the state's objective. State legislation 'does not violate the Equal Protection Clause merely because the classification [it makes] are imperfect'").

This Court has held that ICWA rationally relates to Congress' legitimate interest in preserving Indian culture because its statutory provisions help enforce implementation of Indian socio-anthropological standards in state court adoption proceedings. *Mississippi Band of Choctaw Indians*, 490 U.S. at 36, (holding that ICWA was rationally related to the legitimate governmental interest of protecting Indian children and culture). In *Mississippi Band of Choctaw Indians,* this Court considered "numerous examples, statistical data, and expert testimony" – accumulated through multiple Senate oversight hearings – that showed the consequences of

separation of Indian children from their families and tribes through adoption placement in non-Indian homes. *Id.* at 32. This Court decided that ICWA, by establishing provisions regarding Indian child adoption proceedings, solved the issue surrounding the "massive removal of [Indian] children." *Id.* at 36. State courts have gone on to adopt this standard; for example, in *In re. A.B.*, where a seven-year-old Indian child was removed from her home and placed in a non-Indian foster home, the Supreme Court of North Dakota denied an equal protection challenge against ICWA, holding that "ICWA is rationally related to the protection of the integrity of American Indian families and tribes and is rationally related to the fulfillment of Congress' unique guardianship obligation toward Indians." *In re. A.B.*, 663 N.W.2d 625, 636 (N.D. 2003).

Indeed, studies have shown that ICWA has, in many ways, fulfilled its intended congressional effects. Ann E. MacEachron, Nora S. Gustavsson, Suzanne Cross & Allison Lewis, *The Effectiveness of the Indian Child Welfare Act of 1978,* 3 Soc. Serv. Rev. 451, 459 (1996). Less than a decade after ICWA passed, the once extraordinarily high adoption rate for Indian children declined to almost reflect the rate for non-Indian children. *Id.* Further, Indian foster care placement appeared to have decreased while the number of Indian foster care children placed in Indian homes increased. *Id*. More current studies reflect a continued need for the statute:

> Although ICWA has helped to prevent the wholesale separation of Tribal children from their families in many regions of the United States … Nationwide, based on 2013 data, Native American children are represented in State foster care at a rate 2.5 times than their presence in the general population … In some States, including numerous States with significant Indian populations, Native American children are represented in State foster-care systems at rates as high as 14.8 times their presence in the general population of the State. While this disproportionate overrepresentation of Native American children in the foster-care system likely has multiple causes, it nonetheless supports the need for this rule.

Indian Child Welfare Act Proceedings, 81 FR 38778-01, 38784, citing The National Council of Juvenile and Family Court Judges, Disproportionality Rates for Children of Color in Foster Care tbl. 1 (June 2015).

Recent decisions that use ICWA to justify preclusion of Indian child placement in non-Indian homes also emphasize this sentiment. *See Matter of Dependency of G.J.A.,* 197 Wash.2d 868, 894 (Wash. 2021) (holding that The Department of Children, Youth, and Families failed to provide active efforts to prevent the breakup of Indian mother's family); *In re A.J.S.,* 288 Kan. 429, 442, (Kan. 2009) (holding that ICWA applies to state court child custody proceeding involving Indian child and that Cherokee nation must be permitted to intervene in adoption proceedings and termination of parental rights); *People ex rel. A.R.,* 310 P.3d 1007, 1012 (Colo. App. 2012) (holding that the trial court "erroneously deviated from the ICWA's placement preferences when, in granting the [Department of Human Services] guardianship," it denied the department from permission to place an Indian child with her maternal Indian uncle and his wife for purposes of adoption).

Overall, ICWA survives rational basis review. It is clear that ICWA was created to aid congressional concern regarding preservation of Indian tribes through the regulation of Indian child adoption proceedings and, evidentially, has and continues to serve this purpose. *See Mississippi Band of Choctaw* Indians, 490 U.S. at 44-5 ("[...]it is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities"). If this Court were to strike down ICWA, congressional intention to rectify "the rights of Indian families and Indian communities vis-à-vis state authorities" will no longer be addressed on a federal level. *Id.* at 44. This would open the door to thousands of Indian children being legally removed from their families and placed in non-Indian adoptive homes. Accordingly, this Court should

find that because ICWA is rationally related to a legitimate governmental interest, it survives Petitioner's constitutional challenges.

CONCLUSION

The lack of any substantive Fifth amendment claim is ruinous to the respondents' claim because ICWA falls within Congress' scope of authority and in no way commandeers states as it provides discretion to tribes to customize the placement preferences of child custody proceedings. The Tenth Amendment claim fails because ICWA should be subject to rational basis review as it classifies Indian on political grounds. The Equal Protection argument fails because the ICWA is a political classification that is subject to rational basis review. ICWA clearly passes because it is rationally related to the overwhelmingly deep congressional interest

in preserving Inidan cultrual and society. For the aforementioned reasons, the petitioner requests that this Court uphold the ICWA.

Respectfully submitted,

Team 7

Counsel for Petitioner

22ND ANNUAL LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW

MOOT COURT COMPETITION:

BRIEF CERTIFICATION FORM

We hereby certify that the Petitioner's brief of Team 7 is the work