No. 19-619

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Petitioners,

v.

BRYCE CALDWELL, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS

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Oral Argument

QUESTIONS PRESENTED

1. Whether the Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (2018), and the Final Rule, 25 C.F.R. §§ 23.101–23.144 (2019), implementing the statute violate equal protection.

2. Whether the Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (2018), and the Final Rule, 25 C.F.R. §§ 23.101–23.144 (2019), implementing the statute violate the anti-commandeering doctrine.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Statutes

Rules

Other Authorities

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Ames Circuit is reproduced at page 2 of the Joint Appendix. The unreported order of the United States District Court for the District of Ames is reproduced at page 30 of the Joint Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Ames Circuit was entered on August 12, 2019. The petition for writ of certiorari was granted on September 6, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

All relevant provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

Our Constitution establishes a careful balance of federal and state power. To the federal government, it bestows the limited authority enumerated in the Constitution. To the states, it reserves all else. Included within the realm of traditional state authority is the ability to regulate domestic relations and, within that, the responsibility to find new homes for children when their biological parents are unable or unwilling to raise them. *See Ex parte Burrus*, 136 U.S. 586, 593–94 (1890).

In Ames, Child Protective Services in the Department of Family and Protective Services manages this process. J.A. 14. Ames family courts adjudicate child custody proceedings in accordance with state law. *See* Ames Fam. Code §§ 101.001–266.013. The Ames legislature requires that an individualized inquiry into the "best interest of the child" be the "primary consideration" in determining with whom to place a child during foster or adoption proceedings. Ames Fam. Code § 153.002.

Congress has long respected states' exclusive authority in this domain. But Congress departed from this tradition in 1978 when it passed the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963 (2018).

The Indian Child Welfare Act

Congress enacted ICWA to address the disproportionate removal of children from Indian homes and to ensure that those removed would be placed in homes that "reflect the unique values of Indian culture." 25 U.S.C. § 1902; *see also* 25 U.S.C. § 1901. In 2016, the Bureau of Indian Affairs issued accompanying regulations for the first time. *See* 25 C.F.R. §§ 23.101–23.144 (2019) ("Final Rule"). Together, the Act and the Final Rule impose federal standards on state custody proceedings for Indian children. 25 U.S.C. § 1902; 25 C.F.R. § 23.101.

ICWA defines an "Indian child" broadly as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). A child's connection to "[t]ribal cultural, social, religious, or political activities" is not relevant to whether the law applies, and states are expressly forbidden from considering those connections when identifying appropriate foster and adoptive placements. 25 C.F.R. § 23.103(c).

ICWA applies in all state custody proceedings concerning Indian children. *See* 25 U.S.C. § 1923. Custody proceedings may not begin until at least ten days after the party notifies the child's parents and the relevant tribe of the pending proceedings and of their procedural rights, including the right to intervene. 25 U.S.C. § 1912(a). In proceedings for

foster care placement and for the termination of parental rights, the party seeking placement or termination "shall satisfy the court that active efforts have been made . . . to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d); *see also* 25 C.F.R. § 23.2 (defining "active efforts"). Active efforts "requires substantial and meaningful actions by agencies to reunite Indian children with their families." Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38778, 38790 (June 14, 2016).

State courts may not order the termination of parental rights "in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f); *see also* 25 C.F.R. § 23.121. Where the state court orders the termination of parental rights or a child is otherwise removed for alternative placement, ICWA mandates that the court place the child according to Congress's preference list. *See* 25 U.S.C. § 1915(a)–(b). The list dictates a particular placement order: first, with a member of the child's extended family; second, with other members of the Indian child's tribe; and third, with "other Indian families." 25 U.S.C. § 1915(a). Courts may depart from this preference order only if "good cause" exists. 25 U.S.C. § 1915(a)–(b). However, the Bureau of Indian Affairs has defined "good cause"

narrowly such that it excludes the child's attachment or bond with a foster family. *See* 25 C.F.R. § 23.132. The birth parents of an Indian child can challenge the validity of an adoption decree for up to two years after the end of the proceeding. 25 U.S.C. § 1913(d).[1]

Congress's Constitutional Authority

As the basis for its power to enact ICWA, Congress cited the Indian Commerce Clause and "other constitutional authority." 25 U.S.C. § 1901(1). The Indian Commerce Clause authorizes Congress to "regulate Commerce with . . . the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Since the 1800s, courts have also recognized that Congress has plenary power over Indian affairs. *See, e.g.*, *United States v. Kagama*, 118 U.S. 375, 383–84 (1886). This plenary power is limited by the constraints on Congress's power in the Constitution. *See Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996).

Historically, the federal government has had a trust relationship with Indian tribes. *See Cohen's Handbook of Federal Indian Law* 418–422 (Nell Jessup Newton ed. 2005) (describing the development of the trust responsibility doctrine). Accordingly, Congress has passed dozens of laws affecting Indian affairs. The majority of these laws directly

[1] ICWA also requires state courts to maintain and provide access to reports and other documents, 25 U.S.C. § 1912(c); 25 C.F.R. §§ 23.134, 23.137, and to accept consent to the termination of parental rights only in accordance with certain standards, 25 U.S.C. § 1913(a); 25 C.F.R. §§ 23.125–23.128.

regulate tribes, tribal lands, or tribal assets and thus are justified by Congress's constitutional powers. *See, e.g.*, Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (2018) (facilitating tribal gaming in their territories); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2018) (establishing the ownership of tribal cultural items discovered on federal or tribal lands). ICWA, by contrast, regulates states' regulation of non-tribal Indians off tribal lands. This case exemplifies ICWA's broad reach.

Facts of This Case

In February 2014, A.W. gave birth to a baby boy named C.J. J.A. 4. Four months later, Ames Child Protective Services (CPS) removed C.J. from A.W.'s care. *Id.* C.J.'s biological father, P.J.—who was never a part of C.J.'s life nor married to A.W.—could not be located. *Id.* CPS placed C.J. in foster care with Bryce and Candace Caldwell, a non-Indian couple in Ames. *Id.* In December 2016, an Ames judge sought to officially terminate A.W. and P.J.'s parental rights. *Id.* During the proceedings, the parties learned that P.J. is an enrolled member of the Akava Nation, an Indian tribe with a reservation in Ames. *Id.* C.J. never had any contact with the Akava Nation or with his father. *Id.* But the fact that he has one-eighth Indian blood and that his father is a registered tribal member makes C.J. eligible for membership in the

Akava Nation. *Id.* (citing AKAVA NATION CONST., art. III(B)). It also means he qualifies as an "Indian child" under ICWA. *Id.*

In accordance with ICWA, CPS provided the Akava Nation with the opportunity to identify a placement for C.J. in a tribal home, but the tribe could not find one. J.A. 4–5. As a result, C.J. remained with the Caldwells. J.A. 5. In February 2017, the Caldwells filed a petition to adopt C.J. *Id.* Shortly thereafter, the Akava Nation identified an alternative adoptive couple. *Id.* The couple—members of the Sousetta tribe, another tribe with a reservation in Ames—intervened in C.J.'s adoption proceedings. *Id.* C.J. is not eligible for Sousetta membership and has no connection to the tribe. *Id.* Nonetheless, under ICWA, Ames still had to favor the Indian couple, regardless of their tribal affiliation, over the non-Indian Caldwells, with whom C.J. had lived for almost his entire life. *See id.*

The Caldwells sought to establish good cause for the court to depart from ICWA's placement preferences. *Id.* An expert testified that C.J. "would suffer severe emotional and psychological harm if he were removed from [the Caldwells'] home," and the Caldwells testified about "their bond with and deep love for C.J." *Id.* The Ames court did not question the Caldwells' fitness to serve as C.J.'s adoptive parents. *Id.* But under ICWA, a court may not consider emotional connections or psychological harm to depart from the placement preferences, *see* 25

C.F.R. § 23.132, so the testimony did not establish good cause, *see* J.A. 5. As a result, the court denied the Caldwells' adoption petition. J.A. 5. Following the court's decision, however, the Sousetta couple withdrew their petition to adopt C.J. due to unanticipated health issues. *Id.*

Had C.J. not qualified as an "Indian child" under ICWA, the court would have applied the rules Ames established for all other children. It is likely that, under those rules, the Caldwells' petition would have been approved.

Proceedings Below

The Caldwells obtained an order staying any change in C.J.'s placement pending appeal of their adoption petition. *Id.* They then filed this suit, joined by the state of Ames, challenging ICWA and the Department of the Interior's accompanying Final Rule under the Fifth and Tenth Amendments. *Id.*

In the district court proceedings, the plaintiffs (Respondents here) first challenged the Act as a violation of the Fifth Amendment's equal protection principle. This principle forbids the federal government from discriminating between individuals on the basis of race in all but the most exceptional circumstances. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Equal protection recognizes that laws cannot be fair if they "mean one thing when applied to one individual and something else

when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 289–290 (1978) (opinion of Powell, J.).

The plaintiffs also challenged ICWA as a violation of the anti-commandeering doctrine. The anti-commandeering doctrine encapsulates the Founders' decision to create a federal government of limited powers and prohibits the federal government from enlisting the states to act on its behalf. *New York v. United States*, 505 U.S. 144, 155–56 (1992).

The district court granted summary judgment to the defendants. The Court of Appeals for the Ames Circuit reversed, holding that ICWA violates both equal protection and the anti-commandeering doctrine. J.A. 2. This decision created a split with the decision of the Court of Appeals for the Fifth Circuit in *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019). This Court granted certiorari to resolve both the equal protection and the anti-commandeering questions. J.A. 1.

SUMMARY OF THE ARGUMENT

I. The Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963 (2018), violates equal protection. The Fifth Amendment guarantees to all persons equal protection under the law. U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (reverse incorporation). Laws that use racial classifications and apply differential treatment based on those classifications offend this principle. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995). Accordingly, courts evaluate such laws under strict scrutiny and presume them unconstitutional unless they are narrowly tailored to serve compelling governmental interests. *Id.* at 230.

A. ICWA requires strict scrutiny because it discriminates against individuals on the basis of race. The law classifies children based on ancestry, a proxy for race, and treats those children differently in child custody proceedings, *see, e.g.*, 25 U.S.C. § 1915. Despite Petitioners' assertion that the rational basis test from *Morton v. Mancari*, 417 U.S. 535 (1974) applies here, that case governs only where the law is directed at enrolled members of federally recognized tribes and focuses on tribal self-governance. *See* 417 U.S. at 553 n.24. ICWA does neither; it applies to non-tribal Indians, and its goals are unrelated to tribal governance. Therefore, ICWA must be strictly scrutinized.

B. Because racial classifications must be narrowly tailored to a compelling governmental interest, *Adarand*, 515 U.S. at 230, ICWA is unconstitutional. Petitioners' asserted governmental interests are not compelling. First, the Court has never held that the trust obligation is compelling in the context of legislation affecting non-tribal Indians who do not live on or near reservations. *Cf. Mancari*, 417 U.S. at 552. Second, remedying historical discrimination is not compelling without evidence that the federal government engaged in the discriminatory conduct Congress tried to redress. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986). But even if these interests are compelling, ICWA is overinclusive and thus not narrowly tailored. Therefore, the law creates an impermissible racial classification.

C. Even if ICWA creates a political classification, it is unconstitutional under any standard of review. While the *Mancari* standard governs political classifications, the group classified by ICWA deserves more searching review. ICWA's classification applies to a group defined by immutable characteristics and subject to historical discrimination. Moreover, ICWA burdens this group's significant rights to maintain intimate family relationships. The Court has subjected laws that create such classifications and burden such rights to more searching constitutional review. Regardless, laws are unconstitutional where they bear no rational relationship to the government's legitimate

interests. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487–88 (1955). Because ICWA fails to serve the government's legitimate interests, ICWA violates equal protection no matter the level of scrutiny.

II. ICWA violates the anti-commandeering doctrine, which stands for the proposition that Congress "may not compel the States to enact or administer a federal regulatory program," *New York v. United States*, 505 U.S. 144, 188 (1992). The law conscripts state executive officers, legislatures, and courts into federal service and does not validly preempt state law. It thereby invades state sovereignty, blurring lines of political accountability and eroding the Constitution's structural protections of liberty.

A. ICWA commandeers state actors to implement a federal regulatory program. It requires state executive officers to take "active efforts" to prevent the breakup of Indian families and to provide notice to multiple parties, exceeding requirements previously held unconstitutional. *See Printz v. United States*, 521 U.S. 898, 933 (1997). The law prevents states from legislating contrary to its placement preferences, violating the Court's mandate in *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), that Congress may not "dictate[] what a state legislature may and may not do." 138 S. Ct. at 1478. Furthermore, by imposing federal procedures on state courts adjudicating state law proceedings, ICWA violates states' sovereign

power over their judicial systems and directs state judges in a way this Court has never upheld. *Cf. Testa v. Katt*, 330 U.S. 386, 394 (1947). By pressing state actors into federal service, ICWA commandeers.

B. ICWA does not validly preempt state law because it does not "represent[] the exercise of a power conferred on Congress by the Constitution" and is not "best read as [a law] that regulates private actors," *Murphy*, 138 S. Ct. at 1479. Because it regulates states' regulation of their citizens rather than regulating tribes, ICWA exceeds Congress's powers in the field of Indian affairs under both the Indian Commerce Clause and a theory of plenary power. Even if ICWA were construed as regulating tribes, plenary power is not absolute and does not justify violations of the Constitution. Further, ICWA is not "best read" as regulating private actors because the core activities it regulates are ones in which only states engage. That the law also regulates some private actors and confers private rights does not change this. ICWA thus is not valid preemption.

III. Each of the challenged provisions is not severable from ICWA. While the presence of a severability provision creates a presumption in favor of severability, that presumption can be overcome when Congress would not have enacted the unconstitutional provisions alone. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). ICWA creates a comprehensive scheme of procedural guarantees "obviously meant to

work together," *Murphy*, 138 S. Ct. at 1483. Here, the presumption is overcome, and the unconstitutional provisions are not severable.

This Court should affirm.

ARGUMENT

I. ICWA VIOLATES EQUAL PROTECTION.

The Fifth Amendment guarantees equal protection under the law by restricting the federal government's ability to classify on the basis of race. U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The Constitution is "color-blind," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), and thus the government bears a heavy burden to justify breaching this promise of race neutrality. Because race "so seldom provide[s] a relevant basis for disparate treatment," all race-based classifications are subject to strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995) (citation omitted). Under this standard, racial classifications are tolerable only if "precisely tailored to serve a compelling governmental interest." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.).

Morton v. Mancari, 417 U.S. 535 (1974), which contemplates equal protection in the context of Indian tribes, represents a delicate balance between this Fifth Amendment guarantee and the federal government's "trust obligation" to tribes. 417 U.S. at 541. *Mancari* recognizes that laws about Indian tribes create a political classification and thus are subject to a lesser form of constitutional scrutiny. *See id.* at 555.

By contrast, the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963 (2018), does not concern tribes as political units but rather classifies persons based on their race. Like every other racial classification, ICWA requires the most demanding form of judicial review. Petitioners have asserted no compelling governmental interest that justifies such a racial classification. And even if they had, the law is not narrowly tailored and thus fails strict scrutiny.

Because ICWA classifies a group defined by immutable characteristics and a history of discrimination and burdens their significant rights, it deserves more than perfunctory review. Even if *Mancari*'s standard governs, ICWA still must be "tied rationally" to a legitimate state interest. *Mancari*, 417 U.S. at 555. Under any standard, ICWA is an irrational response to the government's interests. Because it violates equal protection, it must be invalidated.

A. ICWA Uses a Race-Based Classification and Therefore Is Subject to Strict Scrutiny.

ICWA subjects certain children to a distinct set of child custody procedures based on their Indian ancestry. *See* 25 U.S.C. § 1903(4). For decades, the Court has rejected laws that similarly regulate on the basis of ancestry, deeming them racial classifications. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967). It is well established that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227. Because ICWA classifies based on

race, it is subject to strict scrutiny. ICWA provides no justification for this Court to apply anything less.

1. ICWA Discriminates Against Individuals on the Basis of Race.

ICWA requires state officials to treat children with Indian ancestry differently from those without Indian ancestry. This case, therefore, is not a straightforward application of *Mancari*, despite Petitioners' assertion otherwise. Petitioners proffer two reasons why *Mancari* governs: (1) *Mancari* applies to "statutes that provide for the special treatment of Indians affiliated with federally recognized tribes," and (2) "ICWA classifies individuals on the basis of affiliation with a federally recognized tribe." Pet'rs' Br. at 11.[2] Neither is persuasive. The law in *Mancari* "applie[d] only to members of 'federally recognized' tribes," *Mancari*, 417 U.S. at 553 n.24, not those merely "affiliated." Pet'rs' Br. at 11. In fact, the word "affiliated" does not appear in the *Mancari* opinion. *See generally Mancari*, 417 U.S. 535. And ICWA is not limited to members of federally recognized tribes because it applies to children with Indian ancestry who are not tribal members. *See* 25 U.S.C. § 1903(4). Because the law uses a racial rather than a political classification, it requires strict scrutiny.

[2] We do not argue that *Adarand* overruled or narrowed *Mancari*. *Cf.* Pet'rs' Br. at 18 (responding to that point).

a. ICWA Applies to Children Based on Their Ancestry.

Under the equal protection doctrine, race and ancestry are treated the same. *See, e.g.*, *Loving*, 388 U.S. at 11. ICWA prescribes differential treatment based on ancestry. It sets "minimum Federal standards" for custody proceedings that apply only to "Indian children," 25 U.S.C. § 1902, and defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," 25 U.S.C. § 1903(4). As Section 1903(4)(b) underscores, the law applies based on biological descent.

Petitioners' argument that ICWA is not a racial classification because it "makes no mention of race, blood quantum, or ancestry," Pet'rs' Br. at 20, fails for two reasons. First, while tribes may craft their own membership requirements, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978), eligibility turns on ancestry. American Indian tribes almost exclusively define eligibility as requiring individuals to have a blood quantum or proof of lineal descendancy from a past member.[3] While a small number of tribes make direct descendants of former slaves eligible for membership,[4] a law need not completely

[3] Jessica Bardill, Nat'l Cong. of Am. Indians, *Tribal Sovereignty and Enrollment Determinations*, http://genetics.ncai.org/tribal-sovereignty-and-enrollment-determinations.cfm (last visited Oct. 15, 2019).
[4] *See* H.R. 2761, 111th Cong. (2009). Many of the former slaves may have had some Indian blood, but the Dawes Commission omitted this information in governmental membership registration records in the

segregate races to qualify as using a racial classification. For example, in redistricting cases, racial discrimination has been found even when not every member of a majority-minority district is a racial minority. *See Miller v. Johnson*, 515 U.S. 900, 917 (1995). As such, ICWA still uses a racial classification even if some current tribal members do not have Indian ancestry.

Second, Petitioners' argument also fails because the law applies to any "biological child of a member of an Indian tribe" who is not an enrolled member, 25 U.S.C. § 1903(4)(b). Consequently, one must look to the child's ancestry to determine her eligibility under ICWA. Petitioners allege that a child "shares her parent's political affiliation with a tribe," Pet'rs' Br. at 21, but provides no evidence to support this conclusion. In fact, children can and do form different associations than their biological parents. ICWA does not allow state courts to "consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities," *see* 25 C.F.R. § 23.103(c), but instead requires inquiry into the child's ancestry.

b. ICWA Is Not a Political Classification.

Unlike the law in *Mancari*, ICWA is not a political classification for two reasons: first, it is not limited to individuals with formal tribal membership, and, second, it does not concern the self-governance of a

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early 20th century, *see id.*, making it impossible to know whether descendants of these individuals have any Indian blood.

political unit. *See, e.g.*, *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (differentiating political classifications, which manage "the legal relationship between political entities," from racial classifications, which "concern[] the rights of individuals") (discussing *Rice v. Cayetano*, 528 U.S. 495 (2000)).

The law in *Mancari* "applies only to members of 'federally recognized' tribes," making it "political rather than racial in nature." *Mancari*, 417 U.S. at 553 n.24. *Mancari*'s precedential value is therefore limited to "legislation singling out tribal Indians." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979) (noting that legislation not focusing on tribal Indians "might otherwise be constitutionally offensive"). The Court has confirmed that *Mancari* applies only to members of federally recognized Indian tribes, not to any larger group. *See Rice v. Cayetano*, 528 U.S. 495, 519–520 (2000) (citing *Mancari*, 417 U.S. at 553 n.24).[5] The Ninth Circuit has similarly declared that *Mancari* applies when laws "expressly relate only to tribes, not to individual Indians." *See Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 734, 735 (9th Cir. 2003) (emphasis omitted).

[5] *Rice* did not narrow *Mancari*'s test but rather showed the outer contours of *Mancari* and confirmed that the decision was limited to tribal members. *See Rice*, 528 U.S. at 519–22.

By contrast, ICWA extends beyond the tribe. The law is not restricted to those who are members of tribes; it also applies to tribal members' children who have no formal connection to tribes themselves. *See* 25 U.S.C. § 1903(4).[6] The law in *Mancari* contained no such provision. *See Mancari*, 417 U.S. at 553 n.24. Moreover, by allowing children to be passed across tribal boundaries to "other Indian families," 25 U.S.C. § 1915(a), ICWA's placement preferences make clear that the law is not primarily concerned with tribes as "distinct" nations, *Worcester v. Georgia*, 31 U.S. 515, 519 (1832), but treats them as a monolith.

ICWA further differs from the law at issue in *Mancari* because it does not focus on tribal self-governance. The *Mancari* Court upheld the underlying law in part because it was intended to allow tribes "to assume a greater degree of self-government, both politically and economically." *Mancari*, 417 U.S. at 542. Cases following *Mancari* have similarly emphasized the centrality of Indian self-governance when concluding that a law establishes a political classification. *See, e.g.*, *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997) (finding that

[6] ICWA's provisions also affect the parents of Indian children, who may not be Indian. This raises fundamental due process concerns. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

legislation classifies on a political basis only where it "relates to Indian land, tribal status, self-government or culture").[7] Because ICWA often applies to children who have no relation to Indian reservations and who are not even tribal members, it cannot be justified as a means to strengthen Indian self-governance. Therefore, ICWA is unlike other laws that establish a political classification.

2. ICWA Must Be Examined Under Strict Scrutiny.

ICWA establishes a racial classification and thus must be evaluated in light of consistent judicial recognition that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (internal quotations omitted). Holding otherwise would be anathema to our equal protection jurisprudence. The Court has repeatedly affirmed that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) (internal quotations omitted). This principle applies no less in

[7] Very few cases have involved laws that create political classifications on the basis of cultural preservation. The few that do exclusively concern traditional cultural practices. *See, e.g.*, *United States v. Nuesca*, 945 F.2d 254, 257 (9th Cir. 1991) ("The Endangered Species Act does not differentiate between aboriginal groups based on race. The Act's exemption is based upon food supply and culture. Some native Alaskans depend upon hunting certain species for their livelihood; hunting is engrained in their culture."). Citing the goal of protecting culture to save unique, long-standing cultural practices is one thing; citing it to justify creating new families is entirely another.

the context of child custody. *See Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984).

Even if ICWA uses a benign racial classification to remedy past discrimination, the standard of review may not be lowered. When the government for any reason treats an individual differently because of her race, "that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S. at 229–230. Consequently, courts must always apply strict scrutiny to determine whether that injury is justified. *See id.* at 230. ICWA is a racially discriminatory law and thus must be subject to the same constitutional review as any other race-based law. Applying the *Mancari* standard here would grant the federal government vast powers to discriminate on the basis of race.

B. ICWA Fails Strict Scrutiny Because It Is Not Narrowly Tailored to a Compelling Governmental Interest.

Laws that establish racial classifications are presumed unconstitutional unless they pass strict scrutiny. *Adarand*, 515 U.S. at 227. To prove that ICWA survives this high standard, Petitioners must satisfy a two-pronged test: (1) they must identify a compelling governmental interest, and (2) they must prove that the law is narrowly tailored to that interest, *id.* at 235. They have accomplished neither task. Equal protection does not require a perfect fit between the ends and the means, but neither does it tolerate the use of a "blunt

instrument" when constitutional injury is at stake. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214 (2016). Because ICWA fails both prongs of strict scrutiny, it must be struck down.

1. Petitioners' Asserted Governmental Interests Are Not Compelling Here.

Strict scrutiny mandates that the federal government articulate a governmental interest that is compelling. *See In re Griffiths*, 413 U.S. 717, 722 n.9 (1973) (citations omitted). Petitioners name two bases for this interest: (a) that "ICWA serves to fulfill the federal government's trust obligation to tribes" and (b) that "ICWA serves to remedy past government discrimination." Pet'rs' Br. at 22, 24. Neither is compelling in this context.

a. The Federal Government's Trust Obligation, Without More, Is Not a Compelling Governmental Interest.

In citing the trust obligation alone, Petitioners fail to establish a compelling governmental interest for legislation that applies to non-tribal Indians. The Court has never held that the trust obligation is compelling where the legislation at issue is aimed at individuals who are not tribal members and do not live on or near reservations. *Cf. Mancari*, 417 U.S. at 552 (noting that Title 25 of the United States Code "single[s] out for special treatment a constituency of tribal Indians living on or near reservations"). It should not do so here.

Petitioners' corollary argument that protecting Indian culture is a compelling governmental interest, Pet'rs' Br. at 23, fares no better because it is too vague. Courts must consider specific interests implicated by a particular law, not generalized assertions of government powers, lest they "fail to detect an illegitimate racial classification." *Adarand*, 515 U.S. at 236 (discussing the absence of a "detailed examination" into the government's interest in *Korematsu v. United States*, 323 U.S. 214 (1944)). While courts have occasionally recognized the protection of Indian culture as a compelling interest, they have only done so where the government cites a particular traditional cultural practice. *See Babbitt*, 115 F.3d at 664 (rejecting the interest asserted to support the Reindeer Industry Act because the reindeer industry "is not uniquely native"); *United States v. Nuesca*, 945 F.2d 254, 257–58 (9th Cir. 1991) (finding preservation of native Alaskan hunting practices compelling because "hunting is engrained in their culture"). ICWA does not protect any particular cultural practice; instead it places children into tribes with which they have no cultural connection. In so doing, ICWA does not preserve the culture of those tribes but rather creates new Indian families where they might not have existed. Generalized references to culture cannot constitute a compelling interest here.

b. Redressing Past Discrimination, Without More, Is Not a Compelling Governmental Interest.

Petitioners' second alleged compelling interest "'in remedying past discrimination for which it is responsible,'" Pet'rs' Br. at 24 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 317 (2013) (Thomas, J., concurring)), also fails. The Court has consistently held that, without more, remedying past discrimination cannot serve as a compelling governmental interest. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 308 (2013) (majority opinion) (discussing *Bakke*, 438 U.S. at 315). Instead, the government must make "some showing of prior discrimination by the governmental unit involved" to establish a compelling governmental interest. *Wygant*, 476 U.S. at 274. Petitioners point only to discrimination by other governmental units—namely, state and private agencies that disproportionately removed children from Indian homes—to support their claim. *See* Pet'rs' Br. at 24. Discrimination by the state cannot be imputed to the federal government. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

2. Even if Petitioners Have Asserted a Compelling Governmental Interest, ICWA Is Not Narrowly Tailored.

Regardless of whether ICWA furthers a compelling governmental interest, it is not narrowly tailored and therefore fails strict scrutiny. A race-based classification is not narrowly tailored when the law is

overinclusive because it classifies more individuals than is necessary to achieve its compelling interest. *See id.* at 506 (citing *Wygant*, 476 U.S. at 284 n.13).

ICWA is overinclusive because it covers children who are not tribal members and who have no cultural connection to any Indian tribe. While the law purports to advance "the unique values of Indian culture," 25 U.S.C. § 1902, ICWA forbids state courts from considering whether parents or children are connected to the "cultural, social, religious, or political activities" of the intervening tribe, 25 C.F.R. § 23.103(c). Petitioners assert that these children are all somehow "affiliated with federally recognized tribes," Pet'rs' Br. at 20, but the only "affiliation" ICWA allows courts to contemplate is race.

Petitioners claim that this result is acceptable because some children are too young to have applied for tribal membership. *Id.* at 25. However, this argument obscures the wide range of children ICWA covers, including those who might never become tribal members. Enrolling in a tribe is an inherently political act requiring each individual to make a choice. Yet, through ICWA, the government removes that choice and assumes all children with Indian ancestry would choose to join tribes. *Cf.* 25 U.S.C. § 1902 ("[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes.").

Moreover, ICWA is not narrowly tailored because it allows tribes to move children to tribal communities with which they have no ancestral connection. ICWA thus treats tribes as fungible and ignores the common understanding that each Indian tribe is a "distinct, independent political communit[y]." *Worcester*, 31 U.S. at 519. Because it places children into the culture of a tribe with which they have no cultural or ancestral connection, it is not narrowly tailored to a compelling governmental interest.

While the federal government may legislate on tribal self-governance, its authority is limited to only those race-based remedies narrowly tailored to achieve specific compelling interests. ICWA sweeps too broadly and thus is an unconstitutional denial of equal protection.

C. Even Absent Strict Scrutiny, ICWA Is Unconstitutional.

Even if ICWA uses a political classification, it still deserves searching review. The *Mancari* standard is inapplicable to laws that classify individuals with immutable characteristics and a history of discrimination and that burden that class' significant rights.[8] Regardless of the standard of review, however, ICWA must be struck down because it bears no rational connection to the government's legitimate interests, *see Williamson v. Lee Optical of Oklahoma, Inc.*,

[8] Discriminatory laws implicating federalism concerns also require extra judicial consideration. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 768 (2013).

348 U.S. 483, 487–88 (1955). Petitioners' suggestion that this Court can engage only in rubber-stamp review outside the ambit of strict scrutiny, *see* Pet'rs' Br. at 11–12, ignores the distinctive nature of the class to whom ICWA applies and the Court's ability to engage in meaningful scrutiny.

1. Even if ICWA Creates a Political Classification, It Still Merits Searching Constitutional Review.

Laws that classify individuals with immutable characteristics who have historically suffered discrimination and that burden that group's significant rights deserve searching constitutional review. *See* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2079, 2086, 2089 (2015). ICWA does just that. By encouraging this Court to apply the *Mancari* standard if it rejects strict scrutiny, *see* Pet'rs' Br. at 12, Petitioners ignore the "continuum of judgmental responses" available to the Court, *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring), and threaten the strength of the equal protection doctrine.

ICWA requires more searching review because it applies to individuals whose shared racial traits are immutable, *see* Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169, 185 (2011) (stating that race is a "classic example[]" of a "biologically determined characteristic[]"). And it is precisely these

traits that have served as the basis for discrimination for centuries. *See* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 246 (1984) (discussing historical discrimination against American Indians). The Court has applied more searching review to laws classifying a variety of groups who share these characteristics. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686–88 (1973) (women); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972) (illegitimate children); *cf. Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (denying more stringent review where the group neither was "subjected to discrimination" nor "exhibit[ed] obvious, immutable, or distinguishing characteristics"). Because ICWA classifies individuals with these traits, this Court should apply a searching analysis.

ICWA is distinguishable from past Indian laws upheld under *Mancari*, *see, e.g.*, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976) (concerning federal tax immunities for tribal members), because ICWA burdens the significant rights of Indian children to maintain intimate human relationships. Children have liberty interests in "preserving relationships" complementary to the "significant parental liberty interests" the Court has already recognized. *Troxel v. Granville*, 530 U.S. 57, 87–88 (2000) (Stevens, J., dissenting). ICWA prevents Indian children from being adopted by families with whom they have a stable relationship, *see, e.g.*,

J.A. 4–5, thereby infringing upon the liberty of these children to "preserv[e] established familial or family-like bonds," *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

That these significant rights belong to children—not adults—makes ICWA's intrusion especially concerning. *See, e.g.*, *Weber*, 406 U.S. at 175–76 (striking down a statute because "no child is responsible for his birth"). In *Plyler v. Doe*, 457 U.S. 202 (1982), for instance, the Court applied a "quasi-suspect-class and quasi-fundamental-rights analysis" to a law concerning undocumented children's right to education, explicitly noting that undocumented children should not be treated differently based on their parents' actions. 457 U.S. at 244 (Burger, C.J., dissenting) (characterizing the majority opinion).

2. Under Any Level of Review, ICWA Is Unconstitutional.

ICWA cannot be upheld under any variant of constitutional review. Even the most basic form of review requires "that the particular legislative measure [be] a rational way to correct" the problem. *Lee Optical*, 348 U.S. at 487–88. While the federal government's interests may be legitimate, *see* Pet'rs' Br. at 20–21, ICWA in many cases bears no rational relationship to these interests.

ICWA fails to protect Indian children as Congress intended. Because of ICWA, Indian children do not receive the individualized assessment of their best interests that non-Indian children do. *Compare*

25 U.S.C. §§ 1915(a)–(b), *with* Ames Fam. Code §§ 153.002, 161.001(b)(2); *see also In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) (noting ICWA's "presumption that it is in an Indian child's best interests to be placed in conformance with the preferences"). Consequently, the law can, and in fact does, lead to the removal of Indian children from the only homes they have ever known. *See, e.g.*, J.A. 4–5 (finding baby C.J.'s "emotional and psychological harm" insufficient to overcome placement preferences and inadequate to trigger the "good cause" exception). While remaining within a tribal community could benefit *some* children, ICWA prevents *all* Indian children from receiving the individualized multi-factor determination used to protect the best interests of non-Indian children, creating an "ICWA trump card," *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013).

Additionally, ICWA is not rationally linked to the government's legitimate interest in preserving Indian families. ICWA transfers a deeply personal family right—a parent's choice of who should care for her child—to the tribe, though it was intended to give Indian tribes rights that would "complement" those of Indian parents, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 57 (1989) (Stevens, J., dissenting). But while Congress may have sought to ensure the "continued existence and integrity of Indian tribes," 25 U.S.C. § 1901(3), ICWA irrationally facilitates the placement of children into tribes with

which they have no connection, *see, e.g.*, J.A. 5. Rather than preserving Indian families, ICWA gives tribes the power to create new families tied only by race.

* * *

ICWA is an unconstitutional denial of equal protection. Under any standard of review, it must be struck down.

II. ICWA COMMANDEERS STATES.

Our Constitution creates a federal government of limited powers. Absent from those powers is the ability to "directly [] compel the States to require or prohibit" certain acts or otherwise "regulate state governments' regulation" of their residents. *Printz v. United States*, 521 U.S. 898, 924 (1997). Indeed, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). The anti-commandeering doctrine, grounded in the Tenth Amendment, honors these principles by prohibiting the federal government from forcing states to carry out its will. *Id*. at 149.

In *New York*, the Court struck down a law that "'commandeer[ed]' state governments" by requiring them either to provide for the disposal of or to take title to nuclear waste. 505 U.S. at 175. Five years later, in *Printz*, the Court rejected Congress's effort to "command[] state and local law enforcement officers to conduct background checks on

prospective handgun purchasers." 521 U.S. at 902. And just last year, in *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), this Court held that Congress could not dictate "what a state legislature may and may not do" by prohibiting the state legislature from legalizing sports gambling. *Id.* at 1478.

These cases identify policy rationales that underlie the anti-commandeering doctrine, including the preservation of structural protections of liberty and clear lines of political accountability. They recognize that state sovereignty is both an end in itself and a critical component of the "double security" that protects individual liberty. *See* THE FEDERALIST NO. 51 (James Madison). Our system of dual sovereignty is key to ensuring clear lines of political accountability between citizens and their representatives. *Murphy*, 138 S. Ct. at 1477. Because this division of power is itself crucial, laws that violate the anti-commandeering doctrine "cannot be ratified by the 'consent' of state officials." *New York*, 505 U.S. at 182.

ICWA—like the laws struck down in *New York*, *Printz*, and *Murphy*—commandeers state actors in violation of the Constitution. It requires states to regulate their child welfare proceedings pursuant to Congress's instruction, enlisting state legislators, executive officers, and judges in pursuit of federal regulatory goals. In doing so, it does not

validly preempt state law. Because ICWA threatens our system of dual sovereignty, ICWA violates the anti-commandeering doctrine.

A. ICWA Commandeers State Actors to Implement a Federal Program.

ICWA conscripts state executive officers, legislators, and judges to carry out federal policy goals. The law dictates how state executive officers act in custody proceedings, prohibits states from legislating as they wish on matters of state law, and requires courts to follow federal procedures when deciding state law cases. But "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162. No matter how much power Congress has in a particular area—including in Indian affairs—it can never commandeer states to carry out its will.

1. ICWA Commandeers State Executive Officers.

ICWA's implementation depends on state executive officers. It mandates that "[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to . . . prevent the breakup of the Indian family." 25 U.S.C. § 1912(d).[9] Employees of

[9] ICWA also mandates that state executive officers follow placement preferences when placing children of Indian descent in foster or adoptive homes, 25 U.S.C. §§ 1915(a)–(b), instructs them to follow certain procedures if a child is removed from a home on an emergency

the Ames Department of Family and Protective Services are tasked with placing children in foster and adoptive care. *See* J.A. 14. "Active efforts" includes, but is not limited to, eleven separate commands to state executive officers. *See* 25 C.F.R. § 23.2 (definition of "active efforts"). The law found unconstitutional in *Printz* demanded much less. *See* Brady Handgun Violence Prevention Act of 1993, Pub.L.No.103-159, 107 Stat. 1536. It only required officers to check a database to determine whether a potential firearm purchase would be lawful. *Id.* Moreover, those requirements were temporary, *see Printz*, 521 U.S. at 932; ICWA's burdens have no expiration date.

Under ICWA, state executive officers must notify the child's parents and the relevant tribe of the pending proceedings and of their right to intervene. *See* 25 U.S.C. § 1912(a). Unlike notice provisions that just require officers to submit information already in their possession to a known party,[10] ICWA's provisions require officers to take additional action: they must first identify and locate the child's parents and the relevant tribe. *See id*. That task can be impossible; indeed, the statute

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basis, 25 U.S.C. § 1922, and requires them to find qualified expert witnesses, 25 U.S.C. §§ 1912(e)–(f).

[10] Courts have raised questions about whether information-sharing provisions alone can violate the anti-commandeering doctrine. *See City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 869 (N.D. Ill. 2018) (suggesting a statute demanding states share immigration status information with the federal government would "run[] afoul of the Tenth Amendment"). This Court does not need to reach that question here, however, because the information-sharing provisions add to the directives Congress impermissibly issues to states.

builds in alternative notice procedures for when the officers try and fail to locate the relevant parties.[11] *See id*. ICWA's notice requirements—and the additional actions state officers must take to comply with them—stack on top of ICWA's other impermissible directives to state officers.

By directing state executive officers, ICWA repudiates the policy rationales underlying the anti-commandeering doctrine. It presses state officers into federal control, thereby severing a connection that "lies at the heart of state sovereignty," *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 869 (N.D. Ill. 2018). Furthermore, it blurs lines of political accountability. Because it is Ames officers, not federal agents, who manage child custody proceedings, potential adoptive parents who are denied the opportunity to adopt a child might improperly blame the state. ICWA thus transfers to Ames the political costs of implementing a policy that it has not designed and has no ability to change.

2. ICWA Commandeers State Legislatures.

As this Court reaffirmed last year, federal laws may not "dictate[] what a state legislature may and may not do." *Murphy*, 138 S. Ct. at 1478. ICWA does exactly that. By prescribing rules for "Indian child[ren]," ICWA prevents Ames from legislating as it wishes. *See* 25

[11] The procedures require officers to notify the Secretary of the Interior of ongoing proceedings. 25 U.S.C. § 1912(a).

U.S.C. § 1903. For all other children, Ames can and has enacted laws establishing that the "primary consideration" in child custody proceedings should be the "best interest of the child" as the law defines it. *See* Ames Fam. Code §§ 153.002, 263.307(b) (describing factors of the "best interest" inquiry, including the ability of a child's parents to provide a safe home, adequate food, clothing, and medical care). But with regard to "Indian child[ren]," the Ames legislature may not instruct its courts and its executive officials to deviate from ICWA's generalized placement preferences. *See* 25 U.S.C. § 1915. These placement preferences directly conflict with Ames's conception of a child's best interest[12]: they control even when a child has spent the majority of her life with a non-Indian family and even when placing her with a new family risks severe emotional and psychological harm. *See* J.A 5.

Because ICWA sets standards within state law, it impresses on constituents that the state legislature should be held politically responsible. And yet, ICWA deprives state policymakers of the ability to shape those laws in accordance with their electorate's preferences. State legislators are thus mere "puppets of a ventriloquist Congress." *Printz*, 521 U.S. at 928.

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[12] ICWA's good cause exception, 25 U.S.C. §§ 1915(a)–(b), does not resolve this conflict. Under any interpretation of "good cause," the exception can never be so broad as to allow for the prioritization of each child's best interest as defined by Ames law.

3. ICWA Commandeers State Courts.

ICWA commandeers state courts by requiring them to follow federal procedures in state law child custody proceedings, an area of traditional state concern, *see Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Because operating a judicial system is a core aspect of state sovereignty, ICWA's procedural impositions run afoul of the anti-commandeering doctrine.

By its own terms, ICWA applies in "proceeding[s] under State law." 25 U.S.C. § 1912(c). It does not create federal child custody proceedings. Rather, it imposes federal procedures on proceedings initiated under and otherwise governed by state law. ICWA thus relies on the existence of state law to operate.

ICWA imposes onerous requirements—not "procedural minima," Pet'rs' Br. at 33 (citations omitted)—onto state courts adjudicating child custody proceedings. For example, it changes the burden of proof for terminating parental rights from "clear and convincing evidence," Ames Fam. Code § 161.001(b), to "beyond a reasonable doubt," 25 U.S.C. § 1912(f); 25 C.F.R. § 23.121. It also requires courts to maintain and provide access to reports and other documents, 25 U.S.C. § 1912(c); 25 C.F.R. § 23.134, and sets standards for the acceptance of consent in voluntary proceedings, 25 U.S.C. § 1913(a); 25 C.F.R. §§ 23.125–23.126. Additionally, it extends timelines for when a parent may voluntarily

relinquish rights, *compare* Ames Fam. Code § 161.103(a)(1) (48 hours after birth), *with* 25 U.S.C. § 1913(a) (11 days after birth), and when the parent of an Indian child may challenge the validity of an adoption decree, *compare* Ames Fam. Code § 162.012(a) (6 months), *with* 25 U.S.C. § 1913(d) (2 years).

These procedural requirements direct state judges in a way this Court has never upheld. In *Testa v. Katt*, 330 U.S. 386 (1947), this Court recognized that Congress may create federal causes of action that state courts must adjudicate. 330 U.S. at 394. While the Court approved a requirement that may, "in a sense, direct state judges," *New York*, 505 U.S. at 178, it did not hold that Congress may stipulate how those federal causes of action are adjudicated by state courts.[13] Furthermore, it said nothing about dictating how state courts adjudicate state law claims. Indeed, this Court has avoided the question of whether Congress may impose procedures on state law proceedings in the two cases where the issue was presented. *See Pierce Cty. v. Guillen*, 537 U.S. 129, 148 n.10 (2003); *Jinks v. Richland Cty.*, 538 U.S. 456, 464–65 (2003).[14] For

[13] The Court has occasionally permitted imposition of federal procedures onto state courts adjudicating federal law claims; however, those cases said nothing about state courts adjudicating state law claims. *See, e.g.*, *Dice v. Akron, Canton, & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (when procedural rules were "part and parcel" of the claim).

[14] While the Court has left the question unresolved, Justices of the Court, Justice Department officials, and commentators have expressed consistent skepticism about the constitutionality of such federal action. *See, e.g.*, *F.E.R.C. v. Mississippi*, 456 U.S. 742, 774–75 (1982) (Powell,

example, in *Jinks v. Richland County*, 538 U.S. 456 (2003), this Court characterized a federal statutory provision tolling state statutes of limitations as substantive rather than procedural to avoid "hold[ing] that Congress has unlimited power to regulate practice and procedure in state courts." 538 U.S. at 464–65. By straining to characterize the tolling provision as substantive, this Court implicitly recognized that procedural impositions on state courts raise Tenth Amendment concerns. *Id.*

Petitioners may not recharacterize ICWA's procedural impositions as substantive to evade similar constitutional concerns. Even if ICWA is understood as conferring "federally protected rights," Pet'rs' Br. at 32 (citations omitted), it grants those "rights in the form of procedural guarantees," *id.* at 33. Any substantive right ICWA creates is realized only through Congress dictating state court procedures. While the same could be said of the tolling provision at issue in *Jinks*, ICWA's procedural impositions alter not just *when* state courts may hear claims under state law but *how* those judges conduct adjudicatory proceedings. *See supra* pp. 38–39. In this way, ICWA contravenes the "general rule. . . that federal law takes the state courts as it finds them,"

J., concurring in part); Cong. Auth. to Require State Courts to Use Certain Procedures in Prods. Liab. Cases, 13 Op. O.L.C. 372 (1989); Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001).

Howlett v. Rose, 496 U.S. 356, 372 (1990) (internal quotation marks omitted).

As the Department of Justice recognized during ICWA's consideration in Congress, dictating procedures in state law proceedings intrudes into state sovereignty and implicates the same federalism concerns animating the anti-commandeering doctrine. *See* H.R. REP. NO. 95-1386, at 38–41 (1978) (Letter of Patricia M. Wald, Asst. Attorney General) (positing that the "10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated"). ICWA is a particularly egregious intrusion because it applies to state family law proceedings, an area of traditional state concern. In this way, ICWA endangers "one of the Constitution's structural protections of liberty," *Printz*, 521 U.S. at 921. The anti-commandeering doctrine prohibits such federal action.

B. ICWA Does Not Validly Preempt State Law.

ICWA can survive an anti-commandeering challenge if it validly preempts state law. The doctrine of federal preemption recognizes that, under the Supremacy Clause, federal law is supreme when it conflicts with state law. *See Murphy*, 138 S. Ct. at 1479. To constitute valid preemption, a federal law must satisfy two conditions. First, it must "represent the exercise of a power conferred on Congress by the Constitution." *Id.* at 1479. Merely "pointing to the Supremacy Clause

will not do." *Id*. Second, because the Constitution "confers upon Congress the power to regulate individuals, not States," *New York*, 505 U.S. at 166, the law must be "best read as one that regulates private actors," *Murphy*, 138 S. Ct. at 1479. If a statute fails either of these prongs, it is not valid preemption. ICWA fails both. It exceeds Congress's powers and is not best read as directly regulating private actors.

1. ICWA Falls Outside of Congress's Power.

ICWA regulates an area traditionally left to the states. Family law, including child custody proceedings, falls within the "virtually exclusive province of the States." *Sosna,* 419 U.S. at 404; *see also United States v. Windsor*, 570 U.S. 744, 766–67 (2013). Congress may regulate in areas of traditional state domain only when the Constitution grants it power to do so. *See* U.S. CONST. amend. X. While Congress has power to regulate in the field of Indian affairs under the Indian Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3, and under a theory of plenary power, *see, e.g.*, *United States v. Kagama*, 118 U.S. 375, 383–84 (1886),[15] this power is limited to the regulation of tribes. Because ICWA goes beyond this grant of power and regulates states' regulation of individuals, the first condition for valid preemption is not satisfied.

[15] Some argue that Congress lacks any authority beyond the Indian Commerce Clause. *See, e.g.*, *Baby Girl*, 570 U.S. at 658–59 (Thomas, J., concurring); *see generally,* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. L. REV. 201 (2007).

a. ICWA Exceeds Congress's Power Because It Does Not Regulate Tribes.

Through ICWA, the federal government dictates how states regulate their citizens, including non-tribal individuals. First, because ICWA defines Indian children as those persons "eligible" for tribal membership, 25 U.S.C. § 1903(4), its remit includes children who have neither seen a reservation nor met a tribal member. Second, by forbidding states from allowing a non-Indian parent to choose which family adopts her child, *see* 25 U.S.C. § 1915(a), ICWA regulates how states regulate single-parent adoptions. *See, e.g.*, *In re T.S.W.,* 276 P.3d 133, 143 (Kan. 2012) (holding that ICWA forbids a non-Indian mother from selecting a non-Indian adoptive family because her child is Indian). Lastly, ICWA regulates how states regulate non-Indian couples, like the Caldwells, who foster an Indian child and may be prevented from adopting that child. *See* J.A. 12. Because the citizens it affects are not limited to tribal members, ICWA falls outside the government's power to regulate tribes.

That tribes may benefit from ICWA does not mean the law regulates tribes and does not, without more, create a valid basis for congressional authority. After all, were the existence of a tribal benefit enough to justify legislative action, Congress would need only cite tribal benefits to eviscerate the anti-commandeering doctrine.

b. Even if ICWA Regulates Tribes, It Still Exceeds Congress's Power.

Even if ICWA is construed as principally regulating tribes, Congress does not have a valid basis to legislate. Congress proffers two bases for its power to enact ICWA: the Indian Commerce Clause and "other constitutional authority." *See* 25 U.S.C. § 1901. Neither supports congressional action here. Child custody proceedings do not qualify as commerce under the Indian Commerce Clause, and no "other constitutional authority," *id.*, enables Congress to circumvent the Tenth Amendment.

At the Founding, the phrase "commerce with Indian tribes" in the Indian Commerce Clause meant trade with Indians. *Baby Girl*, 570 U.S. at 659 (Thomas, J., concurring). ICWA does not regulate trade but rather regulates family relations. When Congress passed ICWA, it did not explain how the adoption of children qualified as "commerce" under the Indian Commerce Clause, aside from asserting that children of Indian ancestry are "resources" for Indian tribes. 25 U.S.C. § 1901(3). However, finding that ICWA involves commerce because children are "resources" would raise the question of whether the adoption of *any child* is commerce—a question the Court has never answered in the affirmative. *See Baby Girl*, 570 U.S. 637; *Holyfield*, 490 U.S. 30. Indeed, to conclude adoption is commerce would be a dramatic departure from current doctrine since the Court has not traditionally regarded

"commerce" as applying to family relations at all. *Cf. United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting the government's argument under the Interstate Commerce Clause because it implied Congress could regulate family law). Even if commerce is interpreted differently under the Indian Commerce Clause and the Interstate Commerce Clause, the Court has never held that the Indian Commerce Clause applies to family relations.[16]

By citing "other constitutional authority," Congress invokes its plenary power as an alternative basis to justify ICWA. 25 U.S.C. § 1901(1). Yet Congress's "plenary power" over Indian tribes is not "absolute." *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 54 (1946); *United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935). Plenary power cannot be used to overcome the Constitution. *See Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (declining to address whether plenary power justified congressional action after finding the Indian Gaming Regulatory Act violated the Eleventh Amendment). Because ICWA commandeers the states to administer a federal program, ICWA violates the Tenth Amendment. Referencing plenary

[16] The Court's cases discussing the Indian Commerce Clause deal principally with the federal government's power to expand tribal jurisdiction and the imposition of state taxes on tribal land and activities. *See, e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

power does not salvage the law. Since Congress lacks power to enact ICWA, it does not qualify as valid preemption.

2. ICWA Is Best Read as a Statute That Regulates States, Not Private Parties.

To preempt state law, ICWA must also be "best read as [a law] that regulates private actors," *Murphy*, 138 S. Ct. at 1479. A law is best read this way when its principal aim is to "impose[] restrictions or confer[] rights on private actors." *Id.* at 1480. Because ICWA restricts activities performed either exclusively or largely by states in their sovereign capacity, it is not best read as regulating private actors. Though individuals receive procedural guarantees through ICWA, they obtain those guarantees directly from states, not from the federal government.

ICWA is not best read as regulating private actors because the core activities it regulates—for example, involuntary child custody proceedings—are activities in which only states can engage. *See, e.g.*, 25 U.S.C. §§ 1911(b)–(c), 1912(a)–(d), 1912(f); Ames Fam. Code §§ 161.001–161.005 (discussing how state agencies and state courts terminate parental rights in involuntary proceedings). While parts of the statute do regulate both private and state groups, these provisions do not render this statute best read as regulating private actors given states' outsized role in implementing ICWA. Not only do states bear primary responsibility for child custody proceedings, J.A. 14, they control

whether and how private agencies operate within their borders, AMES HEALTH AND HUMAN SERVS. COMM'N, MINIMUM STANDARDS FOR CHILD-PLACING AGENCIES, (2018)[17]; Pet'rs' Br. at 35 n.3 (acknowledging that some states do not permit private agencies to provide foster care services). Where states allow private foster agencies to operate, they still "manage children's long-term outcomes, such as reunification or adoption." Mimi Kirk, *Does Privatized Foster Care Put Kids at Risk?*, CITYLAB (June 15, 2018).[18]

When it passed ICWA, Congress explicitly cited the failure of states, not of private parties, to consider the "cultural and social standards prevailing in Indian communities and families" when conducting child custody proceedings. 25 U.S.C. § 1901(5). Likewise, the Department of the Interior understood ICWA as Congress's remedy for states' failures to preserve Indian families. *See, e.g.*, Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38790 (June 14, 2016) (citing H.R. REP. NO. 95-1386, at 12 (1978)) (discussing how Congress conceived of the "active efforts" requirement as a substantial obligation on states to remedy their inability to preserve Indian families). That ICWA may affect private actors and that private actors must abide by

[17]https://hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/protective-services/ccl/min-standards/chapter-749-cpa.pdf.
[18]https://www.citylab.com/life/2018/06/does-privatized-foster-care-put-kids-at-risk/562604/.

some of its provisions does not alter the best reading of the law as one regulating states.

While ICWA undoubtedly confers rights on private actors in the form of procedural guarantees, *see, e.g.*, 25 U.S.C. § 1914, the provision of private rights is not dispositive when deciding how a law is best read. Instead, the relevant inquiry is whether the rights are provided directly by the federal government or by the states via federal mandate. Through ICWA, Congress compels states to provide private rights. Despite Petitioners' suggestion otherwise, Pet'rs' Br. at 34, the statute found unconstitutional in *Printz* provided individuals with procedural guarantees: the right to request and receive a written explanation when the state officer declared them ineligible to purchase a gun, 521 U.S. at 903. The existence of this private right did not render the law best read as regulating private actors. Similarly, here, that ICWA provides individual procedural rights does not alter the fact that Congress instructed states to provide them.

Moreover, because ICWA "require[s] the States in their sovereign capacity to regulate their own citizens," *Reno v. Condon*, 528 U.S. 141, 151 (2000), it does not constitute a law of general applicability, as Petitioners contend, *see* Pet'rs' Br. at 34–35. A statute qualifies as a law of general applicability when it "evenhandedly regulates an activity in which both States and private actors engage." *Murphy,* 138 S. Ct. at

1478 (citing *Reno*, 528 U.S. at 120). But among the core activities ICWA regulates are activities only states can perform. *See supra* p. 46. ICWA thus is not a law of general applicability. The analogy Petitioners draw to *South Carolina v. Baker*, 485 U.S. 505 (1988), Pet'rs' Br. at 35, is inapposite. That case involved a tax law that altered the way the federal government treated private investments. *See Murphy*, 138 S. Ct. at 1478. It did not order states to "enact or maintain any existing laws"; rather, it "simply had the indirect effect" of pressuring the states to act. *Id*. By contrast, ICWA targets every branch of state government directly and compels them to treat individuals of Indian ancestry differently than they treat their other citizens. In *Murphy*, this Court found that the statute commandeered and thus rejected the applicability of *Reno* and *Baker*. *Murphy*, 138 S. Ct. at 1478–79. Because ICWA commandeers, this Court must reject Petitioners' assertion here.

Because Congress possesses no authority to regulate state child custody proceedings and because ICWA is not best read as regulating private actors, the law cannot survive on a theory of preemption. ICWA thus commandeers states.

* * *

ICWA conscripts state government officials into federal service and does not validly preempt state law. It violates the anti-commandeering doctrine and must be struck down.

III. THE CHALLENGED PROVISIONS CANNOT BE SEVERED.

Each of ICWA's provisions is not severable because the law creates a comprehensive scheme where all provisions must operate together. Unconstitutional provisions may not be severed when it is "evident" that Congress would not have enacted the remaining constitutional provisions without the unconstitutional ones. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). To determine whether Congress would have done so, courts look to "whether the law remains 'fully operative' without the invalid provisions." *Murphy*, 138 S. Ct. at 1482 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477, 509 (2010)). While a severability clause, like the one in ICWA, 25 U.S.C. § 1963, creates a presumption in favor of severability, *see Alaska Airlines*, 480 U.S. at 686, the Court has long recognized that this presumption can be overcome, *see, e.g.*, *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 361–62 (1935).

Because ICWA's provisions are inextricably tied together for the full operation of the law, the presumption is overcome here. Each challenged provision of ICWA is a component of a larger scheme through which Congress sought to remedy the disproportionate removal of Indian children. On its own, each component makes only negligible progress towards this goal. Without each of the challenged provisions, ICWA could not operate "consistent with Congress' basic objectives in

enacting the statute," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012) (citations omitted). In this way, the provisions are "obviously meant to work together." *Murphy*, 138 S. Ct. at 1483. Congress would not have enacted any remaining constitutional provisions without the unconstitutional ones. No challenged provision can be severed.

CONCLUSION

The judgment of the United States Court of Appeals for the Ames Circuit should be affirmed.

October 18, 2019 Respectfully submitted,

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APPENDIX

Select Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3 provides:

> The Congress shall have the power . . .
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. X provides:

> 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.

Select Provisions from The Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such

children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) “Indian” means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43;

(4) “Indian child” means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) “Indian child’s tribe” means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

. . .

(8) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;

(9) “parent” means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) “reservation” means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

. . .

(12) “tribal court” means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Subchapter I – Child Custody Proceedings

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

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

§ 1914. Parental rights; voluntary termination

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

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.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

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

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement

was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the

reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Subchapter IV – Miscellaneous Provisions

§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

Selected Provisions from The Indian Child Welfare Act Proceedings, 25 C.F.R. §§ 23.101–23.144

25 C.F.R. § 23.103. When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

25 C.F.R. § 23.121. What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

§ 23.132—How is a determination of "good cause" to depart from the placement preferences made?

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

25 C.F.R. § 23.2. Definitions

. . .

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of

removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

. . .

Child-custody proceeding.

(1) "Child-custody proceeding" means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

(i) Foster-care placement, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) Termination of parental rights, which is any action resulting in the termination of the parent-child relationship;

(iii) Preadoptive placement, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or

(iv) Adoptive placement, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several

child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

. . .

Indian means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

Indian child means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

. . .

Indian child's Tribe means:

(1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

(2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in § 23.109.

. . .

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3 (c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602 (c).

. . .

Involuntary proceeding means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of

parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

. . .

Parent or parents means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.

State court means any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

. . .

Tribal government means the federally recognized governing body of an Indian tribe.

. . .

Voluntary proceeding means a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

Select Provisions from the Ames Fam. Code §§ 101.001–266.013

Ames Fam. Code § 153.002. Best Interest of Child

The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.

Ames Fam. Code § 263.307. Factors in Determining Best Interest of Child

(a) In considering the factors established by this section, the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.

(b) The following factors should be considered by the court and the department in determining whether the child's parents are willing and able to provide the child with a safe environment:

(1) the child's age and physical and mental vulnerabilities;

(2) the frequency and nature of out-of-home placements;

(3) the magnitude, frequency, and circumstances of the harm to the child;

(4) whether the child has been the victim of repeated harm after the initial report and intervention by the department;

(5) whether the child is fearful of living in or returning to the child's home;

(6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;

(7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;

(8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;

(9) whether the perpetrator of the harm to the child is identified;

(10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;

(11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;

(12) whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with:

(A) minimally adequate health and nutritional care;

(B) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;

(C) guidance and supervision consistent with the child's safety;

(D) a safe physical home environment;

(E) protection from repeated exposure to violence even though the violence may not be directed at the child; and

(F) an understanding of the child's needs and capabilities; and

(13) whether an adequate social support system consisting of an extended family and friends is available to the child.