No. 12-399

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,
Petitioners,
v.
BABY GIRL, A MINOR
UNDER THE AGE OF FOURTEEN, *et al.*,
Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF OF *AMICI CURIAE* CURRENT AND FORMER MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Senator James Abourezk of South Dakota served in the U.S. Senate from 1973 until 1979, and during that time initiated the creation of the predecessor to the Senate Committee on Indian Affairs and served

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. On February 11 and 19, 2013, all parties filed letters with the Clerk of Court reflecting their blanket consent to the filing of *amicus* briefs.

as its first chairman. He also served as the chairman of the American Indian Policy Review Commission, and he sponsored the Senate version of the bill that became the Indian Child Welfare Act ("ICWA").

Senator Daniel Akaka of Hawaii served in the U.S. House of Representatives from 1976 until 1990 when he became a U.S. Senator, a position he held until 2013. In 2011, Senator Akaka became the Chairman of the Senate Committee on Indian Affairs.

Senator Mark Andrews of North Dakota served in the U.S. House of Representatives from 1964 until 1981 when he became a U.S. Senator, a position he held until 1987. Starting in 1983, Senator Andrews served as the Chairman of the Senate Committee on Indian Affairs.

Senator Max Baucus of Montana served in the U.S. House of Representatives from 1975 until 1978 when he became a U.S. Senator, a position he holds today. As a Representative, Senator Baucus co-sponsored the House version of the bill that became ICWA.

Senator Maria Cantwell of Washington has served in the U.S. Senate since 2000. She is the current Chairwoman of the Senate Committee on Indian Affairs.

Senator Byron Dorgan of North Dakota served in the U.S. House of Representatives from 1981 until 1992 when he became a U.S. Senator, a position he held until 2010. Starting in 2007, Senator Dorgan served as the Chairman of the Senate Committee on Indian Affairs.

Senator John Melcher of Montana served in the U.S. Senate from 1977 until 1989. He served as the Chairman of the Senate Committee on Indian Affairs from 1979 to 1981.

Senator Ben Nighthorse Campbell of Colorado served in the U.S. House of Representatives from 1987 to 1993 when he became a U.S. Senator, a position he held until 2005. Senator Nighthorse Campbell served as Chairman of the Senate Committee on Indian Affairs from 1997 to 2001, and again from 2003 to 2004. He is an enrolled citizen in the Northern Cheyenne Tribe.

Representative Michael Blouin of Iowa served in the U.S. House of Representatives from 1975 until 1979. Representative Blouin co-sponsored the House version of the bill that became ICWA.

Representative Yvonne Burke of California served in the U.S. House of Representatives from 1973 until 1979. Representative Burke co-sponsored the House version of the bill that became ICWA.

Representative Milton Robert Carr of Michigan served in the U.S. House of Representatives from 1975 to 1981, and again from 1983 to 1995. Representative Carr co-sponsored the House version of the bill that became ICWA.

Representative Donald Fraser of Minnesota served in the U.S. House of Representatives from 1963 until 1979. Representative Fraser co-sponsored the House version of the bill that became ICWA.

Representative Robert J. Lagomarsino of California served in the U.S. House of Representatives from 1974 until 1992. Representative Lagomarsino was the Republican Floor Manager when the House voted on ICWA, and he spoke in favor of the House bill that became ICWA.

Representative Edward J. Markey of Massachusetts has served in the U.S. House of Representatives

since 1976. Representative Markey currently serves as the Ranking Democratic Member on the Committee on Natural Resources, the committee in the House with primary authority over Indian affairs. Representative Markey has led an ongoing congressional inquiry into State compliance with ICWA since 2011.

Representative George Miller of California has served in the U.S. House of Representatives since 1975. From 1991 through 1994, Representative Miller served as the Chairman of the Committee on Natural Resources. Representative Miller co-sponsored the House version of the bill that became ICWA.

Governor Bill Richardson of New Mexico served in the U.S. House of Representatives from 1983 until 1997. From 1993 to 1994, Governor Richardson served as the Chairman of the Committee on Natural Resources. He was subsequently elected Governor of New Mexico in 2002, a position he held until 2011.

Representative Don Young of Alaska has served in the U.S. House of Representatives since 1973. From 1995 to 2000, Representative Young served as the Chairman of the Committee on Natural Resources.

These former and current members of Congress, all of whom have taken an active role in legislation concerning Indian affairs, have a collective interest in the issues raised in this case because those issues implicate Congress's exclusive authority to legislate concerning Indian affairs, as well as the ability of Congress to effectuate the United States's duties and obligations as trustee of the Indian tribes and their peoples.

SUMMARY OF ARGUMENT

For hundreds of years, pursuant to its constitutional authority, Congress has enacted legislation targeted at Indian tribes and their enrolled citizens. This Court long ago recognized that Congress is the branch of the federal government with both the power and the duty to define the relationship between the United States and tribal nations. In 1978, Congress enacted the Indian Child Welfare Act ("ICWA") in direct response to state adoption policies that were draining Indian tribes of their future citizens. Such practices threatened the very existence of Indian tribes. Without children to grow up as their citizens, tribes would be left with no one to speak their language, carry on their traditions and culture, or participate in their tribal governments. Congress's purpose in enacting ICWA was to ensure the continued sovereign and political existence of the Indian tribes.

ICWA constitutes a constitutional exercise of Congress's exclusive authority over Indian affairs derived from the Constitution and from its historical duties as trustee. This Court has never found that any congressional act directed toward Indian tribes and their enrolled citizens violates either the Tenth Amendment or equal protection principles. Instead, this Court has repeatedly concluded that, when Congress uses the classification of "Indian" to signify membership in a federally recognized tribe, such classifications are political, not racial. In this instance, ICWA's narrow definition of "Indian child" makes the application of ICWA contingent upon citizenship in a tribe. Because the Act requires that either the child or the parent be an enrolled citizen of

the tribe, ICWA's classification constitutes a political, not racial, classification.

Ultimately, any decision limiting Congress's authority to pass legislation like ICWA, or prohibiting Congress from relying on the word "Indian" to signify membership in a federally recognized tribe, would effectively preclude Congress from exercising its plenary authority in Indian affairs, and render Congress unable to fulfill its historic duties as trustee to the Indian tribes. The facts of this case present poignant and wrenching circumstances, but that should not result in an erosion of Congress's power to enact legislation designed to promote tribal self-government and preserve the continued existence of tribes as sovereign, political communities.

ARGUMENT

I. CONGRESS ENACTED ICWA IN ORDER TO PRESERVE THE CONTINUED SOVEREIGN, POLITICAL EXISTENCE OF INDIAN TRIBES

In the mid-1970s, Congress became aware of a crisis involving the separation of Indian children from their families and tribes that, because of its magnitude, threatened the very existence of Indian tribes as self-governing, political communities. Congressional inquiry over several years demonstrated the severity of the problem: a large percentage of Indian children—one-quarter to one-third—were being adopted or placed in foster care families outside of the Indian tribes; state adoption policies provided little to no protection for maintaining the tribal affiliations of these adopted Indian children; and the loss of millions of acres of tribal lands at the turn of the twentieth century rendered the continued existence

of an Indian tribe's sovereign identity dependent on the tribe's ability to maintain its future generations of citizens—citizens who would learn the tribe's language, practice its traditions, and participate in its tribal government, regardless of whether they lived on or off a reservation.

After "over 4 years of congressional hearings, oversight, and investigation" conducted during three sessions of Congress, Congress concluded that "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people [have been] placed in jeopardy." 124 Cong. Rec. 38101-02 (1978) (remarks of Rep. Morris Udall, principal sponsor of ICWA); *see also* H.R. Rep. No. 95-1386, at 27 (1978). Congress accordingly enacted ICWA, Pub. L. 95-608, 25 U.S.C §§ 1901-1963, as a remedy to these problems, finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," 25 U.S.C. § 1901(3), and that Indian tribes would likely cease to exist as sovereign, political entities absent congressional intervention. Rep. Robert J. Lagomarsino explained: "This bill is directed at conditions which . . . threaten . . . the future of American Indian tribes. . . ." 124 Cong. Rec. 38102 (1978). Congress's enactment of ICWA responded directly to such harms as identified in the legislative record.

A. ICWA Arose From Congress's Awareness That High Adoption Rates For Indian Children Threatened Tribal Sovereignty

As this Court previously has noted, ICWA resulted from "rising concern in the mid-1970's over the consequences to Indian children, Indian families, and

Indian tribes of abusive child welfare practices." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1988). As early as 1973, the Senate subcommittee on Indian affairs "began to receive reports that an alarmingly high percentage of Indian children were being separated from their natural parents through the actions of nontribal government agencies." S. Rep. No. 95-597, at 11 (1977). Over three congressional sessions, both the Senate and the House held hearings on this crisis with testimony "from the administration, Indian people, State representatives, tribal leaders, medical and psychiatric professionals and child welfare groups." *Id.* at 12; H.R. Rep. No. 95-1386, at 27-28. Congress also established the American Indian Policy Review Commission, which in turn established a task force (Task Force IV), that addressed, *inter alia*, issues of Indian child welfare, resulting in a published report in 1976. Task Force Four: Federal, State, and Tribal Jurisdiction, *Report on Federal, State, and Tribal Jurisdiction, Final Report to the American Indian Policy Review Commission*, 2 (Comm. Print 1976) [hereinafter "Task Force Report"].[2] Based upon the findings and recommendations of this and other task forces, the American Indian Policy Review Commission submitted a report to Congress in 1977. American Indian Policy Review Commission, *Final Report* (Comm. Print 1977) [hereinafter "Commission Report"].

Congress's examination of the crisis confirmed that Indian children were far more likely to be removed from their families (and, as a result, their tribes)

[2] The task force considered a large quantity of evidence over 28 days of hearings that included 250 witnesses and 3,000 pages of exhibits and submissions. Task Force Report at 2.

than other children. During the Senate hearings in 1974, one witness described "[t]he wholesale removal of Indian children from their homes" as "the most tragic aspect of Indian life today." *Indian Child Welfare Program Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 3 (1974) [hereinafter "1974 Hearings"]. The evidence presented to Congress during the 1974 hearings revealed that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Holyfield*, 490 U.S. at 32. Furthermore, "[t]he adoption rate of Indian children was eight times that of non-Indian children" and "[a]pproximately 90% of the Indian placements were in non-Indian homes." *Id.* at 33.

The legislative record reflected "considerable emphasis on the impact on the tribes themselves of the massive removal of their children." *Id.* at 34; *see also id.* at 49. Congress heard from several tribal leaders "that [thei]r children are [thei]r greatest resource, and without them [tribes] have no future." *Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 78 (1978) [hereinafter "1978 Hearings"] (testimony of Puyallup Tribe official). As the congressionally established task force recognized, "[c]hild rearing and the maintenance of tribal identity are essential tribal relations." Task Force Report at 86 (citation and quotation omitted). The large number of Indian children placed with families outside their tribes "paralyz[ed] the ability of the tribe to perpetuate itself." *Id.; see also id.* at 78-79 ("One of the most pervasive components of the various

assimilation or termination phases of American policy has been the notion that the way to destroy Indian tribal integrity and culture, usually justified as 'civilizing Indians,' is to remove Indian children from their homes and tribal settings.").

The congressional record also reflected concern over state adoption policies and practices that made little or no attempt to preserve a child's membership in a tribe. Testimony from numerous tribal leaders highlighted the ways in which individual States had denied tribes' sovereign interest in preserving their future generations.[3] As one Chief noted, many of the state authorities deciding the placement of adopted Indian children had "no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing." 1978 Hearings at 191-92. Such officials lacked an understanding that "[a]n Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 316 (1977) [hereinafter "1977 Hearings"].[4]

Despite this strong Indian tradition, however, non-tribal authorities often refused even to consider placement within the Indian child's tribe. 1977 Hearings at 175 (testimony on behalf of Mississippi band of Choctaw Indians that "Mississippi, through

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[3] *See, e.g.*, 1978 Hearings at 207 (testimony on behalf of the Navajo Nation that "our history is filled with overzealous acts by states and other non-tribal agencies who unjustly take many Navajo children away from their homes").

[4] *See also* 1978 Hearings at 110 ("[T]here are no words in the . . . Indian language, . . . for an illegitimate child [and] . . . no word or definition for an orphan [] because of the extended family. . . .").

its adoption policy, will not allow Choctaw families to adopt Choctaw children").[5] In the view of members of Congress, the refusal of many States to place Indian children in the homes of their extended Indian families threatened the Indian tribes' continued existence as self-governing communities. *See, e.g.*, H.R. Rep. No. 95-1386, at 19 ("Contributing to this problem has been the failure of State officials, agencies, and procedures to take into account the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future."). As the Task Force found, "the intrusion of a State in family relationships within the [Indian] Nation and the interference with a child's ethnic identity with the tribe of his birth are ultimately the most severe methods of undermining retained tribal sovereignty and autonomy." Task Force Report at 86 (citation and quotation omitted).

Furthermore, the legislative record confirms that Congress was aware that a tribe's loss of its future citizens was a problem existing "both among reservation Indians and off the reservation in urban communities." 1978 Hearings at 191. Historic policies had extinguished Indian tribes' former land-based ways of life and economic self-sustenance. Consequently, many tribal citizens had to "move back and forth from a reservation dwelling to border communities or even to distant communities [to search for] employment and educational opportunities." Commission Report at 86; *see also* 1978 Hearings at 113 (stating that more "than 60 percent of all North American Indians live off-reservation"). These findings led the

[5] *See also* 1974 Hearings at 135 (testimony that the North Dakota Attorney General refused to place Indian children in foster homes on reservations in North Dakota).

congressional commission to include in its report a recommendation that legislation contain provisions to ensure that, "[w]here an Indian child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child shall be given reasonable notice before any action affecting his/her custody is taken." Commission Report at 35, 423.

At the same time, Congress recognized that, as a result of the Dawes Act, Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, the federal government had removed millions of acres of land from tribal governments and ceded them to States and settlers. *See* S. Rep. No. 95-597, at 16 (acknowledging that "Federal allotment . . . at the turn of the century" greatly reduced Indian lands).[6] Thus, in considering the enactment of ICWA, Congress was faced with the fact that Indian land holdings had been reduced by nearly 90 million acres between 1887 and 1934. Commission Report at 67, 318. Congress therefore acknowledged that any legislation limiting an Indian tribe's sovereign interest in its future citizens to those still living on tribal lands would effectively preclude a tribe from ensuring its continued existence as a distinct, political community.[7] Instead, the congressional com-

[6] *See* Task Force Report at 112 ("In response to extreme pressure from whites for access to Indian lands and mineral riches, Congress passed the General Allotment Act of 1887.").

[7] In response to the realization that Federal allotment threatened the continued existence of tribes, "the policy of allotting Indian lands was repealed with the passage of the Indian Reorganization Act." Task Force Report at 112, n.11. In this regard, "[t]he Indian Reorganization Act of 1934 marked a shift away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture," including

mission concluded that a tribe's sovereign interest in a future citizen must be "based on the tribal status of the individual rather than the mere geography of the child." Task Force Report at 86. Accordingly, ICWA effectuates the congressional understanding that "the tribal relationship is one of *parens patriae* to all its minor tribal members"—regardless of where they live. *Id.*

B. ICWA Reflects Congress's Considered Remedy For The Threat Facing Indian Tribes

Congress's primary goal in enacting ICWA was to preserve "the continued existence and integrity of Indian tribes." 25 U.S.C. § 1901(3); *see also* 124 Cong. Rec. 38103 (1978) (statement of Rep. Robert J. Lagomarsino reading letter of Rep. Morris Udall: "I firmly believe that the future and integrity of Indian tribes and Indian families are in danger because of this crisis."). Accordingly, Congress sought in ICWA "to establish minimum federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe." H.R. Rep. No. 95-1386, at 19.

The provisions of ICWA reflect Congress's careful and balanced approach to setting those standards. *First*, out of recognition that a tribe's ability to maintain its sovereign existence depends on its future citizens, Congress created a definition of "Indian child" that makes ICWA's application contingent

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promoting tribal self-government. *Id.* (citation and quotation omitted); *see also United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2327 n.8 (2011). ICWA constitutes one result of this shift away from assimilation and toward tribal self-government.

upon tribal citizenship. *See* 25 U.S.C. § 1903(4). *Second*, because Congress found that a tribe's sovereignty depends upon the preservation of extended Indian family relationships within the tribe, Congress crafted provisions designed to ensure that a court's first attempt to place an adopted Indian child is with a member of her extended family. *See* 25 U.S.C. § 1915(a). *Third*, understanding the complex history surrounding Indian lands, Congress created provisions that not only recognize a tribe's inherent jurisdiction concerning the placement of an Indian child domiciled on a reservation, but also afford tribes jurisdictional and procedural rights in proceedings involving children not domiciled on a reservation where the parents' rights have been voluntarily relinquished or terminated by a State. *See, e.g.*, 25 U.S.C. § 1911.[8]

1. Congress Defined "Indian Child" In Light Of The Link Between Tribal Citizenship And Sovereignty

Understanding that the preservation of tribal self-government derives from the preservation of a tribe's future citizens, Congress made ICWA's definition of "Indian child" contingent upon tribal citizenship. *See* 25 U.S.C. § 1903(4).[9] Thus, for ICWA to apply, either the child must already be an enrolled citizen at the time of the state proceedings, or the child's parent

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[8] Furthermore, Congress broadly defined "reservation" to include all trust and restricted land, making ICWA applicable to all Indian children on tribal lands, regardless of reservation boundaries. *See* 25 U.S.C. § 1903(10).

[9] 25 U.S.C. § 1903(4) 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."

must be an enrolled citizen *and* the child herself must be eligible for citizenship under her tribe's unique citizenship requirements. *See id*. This limited definition confirms the congressional purpose behind ICWA: in instances where a child is already a citizen, or is eligible for citizenship and her parent has elected to maintain his citizenship, then the child's tribe has a sovereign, political interest in where that child is placed.

This definition of "Indian child" stems from Congress's consideration of testimony from tribal leaders who confirmed that, without a future generation of citizens, tribal governments would have no means by which to transfer their culture, heritage, language, or civic duties such as voting and participation in self-governance. Indeed, without citizens, tribes have no future leaders; without future leaders, tribes have no self-government. *See* 1978 Hearings at 193 (testimony that adoption practices that place tribes' future citizens outside of tribal communities "seriously undercut the tribes' ability to continue as self-governing communities"). For this reason, application of ICWA is contingent upon membership.

In constructing ICWA, Congress remained cognizant that, "for an adult Indian, there is an absolute right of expatriation from one's tribe." H.R. Rep. No. 95-1386, at 20 (citing *U.S. ex. rel. Standing Bear v. Crook*, 25 Fed. Cas. No. 14891 (1879)). Thus, in ICWA, Congress recognized that a child's parent could terminate voluntary tribal membership at any time. For this reason, Congress intentionally refrained from extending ICWA's application to children who are eligible for citizenship in a tribe, but whose parents have elected to terminate their citizenship with the tribe or simply never enrolled. *See*

25 U.S.C. § 1903(4)(b). For non-enrolled children, ICWA extends only to those whose parent has maintained citizenship in the tribe, thereby manifesting a voluntary intention to contribute to the preservation of the tribe's sovereign identity. *Id.*

ICWA's definition also excludes children who themselves are not eligible for citizenship, despite the fact that one or both of their parents may be. *See* 25 U.S.C. § 1903(4). In excluding such children, Congress refrained from imposing its own definition for membership in a federally recognized tribe, demonstrating respect for this Court's decision that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Consequently, Congress's definition of "Indian child" in ICWA recognized that Congress's authority over Indian affairs extends only to individuals who meet the individual tribes' unique, political qualifications for membership.

2. Congress Deemed Preserving Family Relationships Essential To The Tribes' Continued Existence

ICWA also evinces Congress's determination, stemming from evidence in the legislative record, that the preservation of family relationships based on tribal identity is essential to maintaining the tribes' continued sovereign existence. Congress sought to preserve family relationships as a means of preserving tribal sovereignty.

During its inquiry into the crisis, Congress discovered that the "family relationships" that serve as the foundation for citizenship and tribal sovereignty

in tribal communities extend beyond the parent-child relationship and include the dozens of relatives "counted as close, responsible members of the family." 1974 Hearings at 18. However, as the House Report concluded, the "dynamics of Indian extended families are largely misunderstood" by States and nontribal authorities that insist on placing Indian children in non-Indian homes outside of their tribe. H.R. Rep. No. 95-1386 at 10.

With this understanding, Congress designed ICWA to protect the parent-child relationship as an aspect of the child's relationship with the tribe. For instance, Section 1912(f) sets a higher standard for the termination of parental rights, and Section 1913(a) requires that any voluntary consent to termination of parental rights be executed in writing and recorded before a judge of a "court of competent jurisdiction," who must certify that the terms and consequences of the consent were fully explained and understood. The parental termination provisions found in these sections serve ICWA's broader purpose that, "where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37. Maintaining these family-based relationships provides a means through which to foster a child's relationship with her tribe. *In re A.J.S.*, 204 P.3d 543, 547-49 (Kan. 2009) (explaining that *Holyfield* "underscored the central importance of the relationship between an Indian child and his or her tribe, independent of any parental relationship").

Congress further determined that, in situations where the biological parents' rights to the child have been terminated—whether the termination was voluntary or involuntary—the Indian child's extended family should be the *first* place that the state looks in

searching for a placement that is in the best interest of the child. *See* 25 U.S.C. § 1915(a) ("[P]reference shall be given . . . to a placement with (1) a member of the child's extended family. . . ."). If good cause exists to prevent this placement, then state courts must look to place the child with "other members of the Indian child's tribe," and, if a suitable home within the tribe is not available, then preference is given to placement in "other Indian families." *Id.* Section 1915 ties directly to the evidence before Congress indicating that tribal citizenship is best preserved within the context of an extended Indian family.

Sections 1912 and 1915 show that Congress designed ICWA to apply beyond the limited circumstances in which an Indian child was removed from the home of an Indian parent or family. Rather, the procedural mechanisms of ICWA apply anytime an Indian child is put up for adoption, regardless of the child's individual circumstances.[10] In this regard, Sections 1912 and 1915 "recognize[] that the Federal trust responsibility and the role of Indian tribes as *parens patriae* extend to all Indian children involved in all child custody proceedings." S. Rep. No. 104-335, at 14 (1996).[11] Together, these provisions ensure that

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[10] *See* S. Rep. No. 104-335, at 14 (1996) ("When the ICWA was enacted, . . . Congress intended . . . to provide for tribal involvement with, and Federal protections for, all children defined by their tribes as members or eligible for membership who are involved in any child custody proceeding, regardless of their individual circumstances.").

[11] Congress designed ICWA so that its application would hinge solely on membership in a federally recognized tribe as defined by "tribal laws and constitutions" because "[s]tate courts are poorly equipped to make fundamental determinations of

"the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society," H.R. Rep. 95-1386 at 23, are protected in all adoption proceedings concerning the placement of Indian children.

3. Congress Enacted Procedural Mechanisms To Protect The Tribes' Sovereign Interest In Their Minors' Membership

ICWA also addressed the jurisdictional concerns embedded in the crisis before Congress. Based on a 1976 decision of this Court, Congress recognized that "[t]he exclusive jurisdiction of the tribe [over the adoption placements of its children] is well founded in the law." S. Rep. No. 95-597, at 17 (citing *Fisher v. District Court*, 424 U.S. 382 (1976)). ICWA thus contains not only "procedural and substantive standards for those child custody proceedings that do take place in state court," *Holyfield*, 490 U.S. at 36, but also procedural rights meant to protect the Indian tribe's inherent sovereign jurisdiction over the placement and legal status of its own members, both on and off the reservation, *see id.* at 49.[12]

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tribal membership and tribal affiliations." S. Rep. No. 104-288, at 4 (1996).

[12] ICWA affords Indian tribes certain rights that are purely procedural and jurisdictional in nature. *See Holyfield*, 490 U.S. at 49 (citing §§ 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over non-domiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with states)). In this regard, ICWA mandates a process, not a result.

First, "[i]n enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States." *Holyfield*, 490 U.S. at 42. This provision acknowledges the status of tribal governments as sovereign entities.

Second, relying upon the Task Force's conclusion that the "concept of [tribal] court jurisdiction is based on the tribal status of the individual rather than the mere geography of the child," Task Force Report at 86, Congress concluded that ICWA must afford tribes certain procedural rights for Indian children domiciled *off* reservation. In instances where the child is not domiciled on the tribe's reservation, Section 1911(b) creates the presumption that any proceeding concerning foster care or the termination of parental rights for an Indian child will be transferred to tribal court, "*absent objection* by either parent . . . or the Indian custodian or the Indian child's tribe." 25 U.S.C. § 1911(b) (emphasis added); *see also* H.R. Rep. No. 95-1386, at 21 ("Either parent is given the right to veto such transfer.").

ICWA thus reflects Congress's determination that the tribe has a sovereign interest in its citizens no matter where they reside. As one state court reviewing and applying these provisions has concluded, this Court's decision in "*Mississippi Choctaw* indicates that the jurisdictional provisions of ICWA apply to child custody proceedings involving Indian children regardless of where the children are born or where they are proposed for adoption." *In re Baby Boy Doe*, 849 P.2d 925, 931 (Idaho 1993). By ensuring that the tribe's sovereign jurisdiction over its own citizens is preserved and recognized by the individual States within the federal system, Congress

intended ICWA to serve "the interest the tribe has in its children." *Id.*

II. CONGRESS HAS THE EXCLUSIVE POWER TO LEGISLATE WITH RESPECT TO INDIAN TRIBES

In enacting ICWA, Congress concluded that a federal legislative response to the crisis before it was necessary for two reasons. *First*, Congress recognized that, as the legislative arm of the federal government, it alone held the requisite authority under the Constitution, as well as the historical responsibility, to correct the problem. *See* 25 U.S.C. § 1901(1)-(2). *Second*, although States' adoption policies and practices contributed significantly to the creation of the crisis, States do not have the inherent power to legislate with respect to Indian affairs, which is the responsibility of the federal government as trustee of the Indian tribes. *See* 25 U.S.C. § 1901(3), (5).

A. The Constitution Grants Congress Broad Power Over Indian Affairs

The Constitution affords Congress exclusive authority to regulate concerning Indian affairs and tribal government. *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975). This Court has described Congress's authority in this realm as "plenary," "broad," and "exclusive." *See id.*; *United States v. Lara*, 541 U.S. 193, 200 (2004). This power is not limited to reservations or Indian lands. Rather, "Congress possesses the broad power of legislating for the protection of the Indians *wherever* they may be within the territory of the United States." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (emphasis added); *see also Morton v. Ruiz*, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Govern-

ment to deal fairly with Indians wherever located has been recognized by this Court on many occasions."); *Perrin v. United States*, 232 U.S. 478, 482 (1914) (explaining that congressional power extends "whether upon or off a reservation and whether within or without the limits of a state").

"The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). It derives from the Indian Commerce Clause (Art. I, § 8, cl. 3), *e.g.*, *Dick v. United States*, 208 U.S. 340, 356-57 (1908) ("Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes, a power as broad and as free from restrictions as that to regulate commerce with foreign nations."); the Treaty Clause (Art. II, § 2, cl. 2), *e.g.*, *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); the Property Clause (Art. IV, § 3, cl. 2), *e.g.*, *United States v. Kagama*, 118 U.S. 375, 379-380 (1886); and the Debt Clause (Art. I, § 8, cl. 1), *e.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 397 (1980).

In describing Congress's constitutional authority over Indian affairs, this Court has held that "[t]he central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs." *Lara*, 541 U.S. at 200. And although "[t]he treaty power does not literally authorize Congress to act legislatively, . . . treaties made pursuant to that power can authorize Congress to deal with matters with which otherwise Congress could not deal." *Id.* at 201. Congress's authority to legislate over Indian affairs arises not only from the text of the Constitution itself, but also from this Court's recognition that, throughout "much of the

Nation's history, [it was the hundreds of] treaties, and [congressional] legislation made pursuant to those treaties, [that] governed relations between the Federal Government and the Indian tribes." *Id.* Congress's constitutionally derived authority to legislate with respect to Indian tribes is well-established.

B. The Federal Government's Authority Does Not Inhere In The States

1. The Constitution Excluded States From Wielding Power With Regard To Indian Tribes

Since the inception of the United States, interactions between the United States and Indian nations have been vested exclusively in the federal government. *Worcester v. Georgia.*, 31 U.S. 515, 557, 561 (1832) ("The treaties and laws of the United States [have always] contemplate[d] . . . that all intercourse with [Indian tribes] shall be carried on exclusively by the government of the union."). This Court has deemed the supremacy of congressional regulation necessary to protect Indian nations from States, whose actions have historically threatened tribal self-governance and continued existence. *See Kagama*, 118 U.S. at 383-84 (concluding that this exclusively federal authority "is within the competency of congress" in part because Indian tribes "owe no allegiance to the states, and receive from them no protection").

In drafting the Constitution, the Framers determined that "[t]he only efficient way of dealing with the Indian tribes was to place them under the protection of the general government." *Dick*, 208 U.S. at 356. They considered, but rejected, inclusion of a provision in the Articles of Confederation that

subjected the power of the federal government over Indian affairs to the qualification "that the legislative right of any state within its own limits be not infringed or violated." *See* Articles of Confederation of 1781, art. IX, para. 4; *see also* Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 26 (2002) ("This ambiguous proviso preserving some state authority over tribes became a source of controversy in the pre-constitutional era. The Constitution eliminated the qualification. . . .") (internal footnote omitted). The framers of the Constitution thus purposefully removed any former assignment of power over Indian tribes to the states, and instead reserved that power exclusively and unambiguously to the federal government. *See Worcester*, 31 U.S. at 559 ("The shackles imposed on this power, in the confederation, [have now been] discarded."). Consequently, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

2. Only Congress May Manage The Trust Relationship Between The Federal Government And The Tribes

In addition to deriving from the text of the Constitution, Congress's authority to regulate Indian affairs to the exclusion of the States arises from the historic trust relationship between the federal government and Indian tribes. As a result of the treaties signed with Indian tribes to acquire the majority of the lands constituting the United States today, the federal government "charged itself with moral obliga-

tions of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (citing 1856 treaty between United States and Seminole Nation). Since this Court's decision in *Seminole Nation*, these "moral obligations" grounded in treaties have evolved into "a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). This Court has reaffirmed that management of this trust relationship is assigned to Congress. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011) ("Throughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.").

As *Jicarilla Apache Nation* recognized, this trust relationship vests Congress with the constitutional authority to legislate over Indian affairs. *See id.* at 2323-24 (noting that Congress has the authority to "define[] . . . the trust relationship between the United States and the Indian tribes"); *see also Blackfeather v. United States*, 190 U.S. 368, 373 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize."). Indeed, the United States's trust relationship with Indian nations has no counterpart in any relationship between Indian nations and individual States. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979) ("States do not enjoy this same unique relationship with Indians . . . ."). The trust relationship between Indian tribes and the United States is "an instrument of federal policy[,]" and Congress therefore has the authority to "invoke[]

its trust relationship to prevent state interference with its policy toward the Indian tribes." *Jicarilla Apache Nation*, 131 S. Ct. at 2327 & n.8. When it comes to regulation of Indian affairs related to tribal government and sovereignty, only Congress has the necessary constitutional authority to complete the task.

III. ICWA FALLS WITHIN CONGRESS'S CONSTITUTIONAL POWER AND DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES

Because Congress enacted ICWA pursuant to its plenary powers derived from the Indian Commerce Clause, its duties as trustee of the Indian people, and its exclusive role in maintaining the integrity of the United States's relationship with Indian tribes within a federal system, *see* 25 U.S.C. § 1901(1), the enactment of ICWA should be understood as based on a political classification necessary to Congress's exercise of its plenary authority and duties as trustee of the Indian people. Any conclusion to the contrary would run afoul of this Court's previous holdings permitting legislation targeted specifically at American Indians based on their membership in distinct political communities.

A. ICWA Is A Constitutional Exercise Of Congress's Exclusive Authority Over Relations With Indian Tribes

Congress's exclusive power over tribal relations is at its height when Congress acts to protect the continued existence and integrity of Indian tribes as distinct political communities. ICWA fits within this broad congressional power because it regulates and protects tribal affairs designed to promote tribal self-

government through the preservation of the citizenship of its members. *See* 25 U.S.C. § 1901(1). Furthermore, in enacting ICWA, Congress explicitly relied upon both its authority pursuant to the Treaty Clause, 25 U.S.C. § 1901(2), and its plenary trust authority and concomitant obligations to Indian tribes as their "trustee," 25 U.S.C. § 1901(3). ICWA thus is a constitutional exercise of Congress's unique, federal power over Indian affairs, and does not infringe upon any States' rights reserved in the Tenth Amendment or structural principles of federalism.

As Representative Udall noted at the time of ICWA's passage, "state courts and agencies and their procedures share a large part of the responsibility" for the crisis threatening "the future and integrity of Indian tribes and Indian families." 124 Cong. Rec. 38103; *see also Holyfield*, 490 U.S. at 44 (noting that the text and legislative history of ICWA demonstrate that "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities"). Because state adoption policies and practices contributed significantly to the problem, and because only Congress has the requisite plenary authority to address the problem, ICWA was necessarily a federal solution.

ICWA does not infringe upon the States' regulation of domestic family relations because, as this Court has concluded, tribes retain *their* inherent sovereign authority over such proceedings.[13] *See Fisher*, 424

[13] *See, e.g.*, *In re Lelah-puc-ka-chee*, 98 F. 429 (N.D. Iowa 1899) (state court lacked jurisdiction to appoint guardian for Indian child living on reservation); *In re Adoption of Buehl*, 555 P.2d 1334 (Wash. 1976) (state court lacked jurisdiction over custody of Indian children placed in off-reservation foster care by tribal court order).

U.S. at 387-88 (concluding that "powers of self-government conferred upon [Indian tribes] and exercised through the[ir] Tribal Court[s]" include tribal jurisdiction over Indian child adoption proceedings); *see also Wakefield v. Little Light*, 347 A.2d 228, 234 (Md. 1975) ("[C]hild-rearing is an 'essential tribal relation' within the doctrine espoused by the Supreme Court in *Williams v. Lee*, [358 U.S. 217 (1959)].").

As this Court noted in *Holyfield*, "[t]ribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA." *Holyfield*, 490 U.S. at 42. A tribe's sovereign authority over its internal domestic relations existed well before 1978. *See Kagama*, 118 U.S. at 381-82 (recognizing that tribes maintain the inherent sovereign "power of regulating their internal and social relations"). Congress, through ICWA, merely sought to protect the authority tribes already held.

Likewise, ICWA's provisions concerning tribal court jurisdiction over children not domiciled on a reservation align with this Court's holding that Congress's power over Indian affairs does not stop at a reservation's borders. *Perrin*, 232 U.S. at 482. Thus, in instances where the child does not live on a tribe's reservation, ICWA creates the presumption that any proceeding concerning foster care or the termination of parental rights for an Indian child will be transferred to tribal court, unless either parent (Indian or non-Indian) objects. 25 U.S.C. § 1911(b). This carefully considered provision of ICWA protects the tribe's sovereign interest in the placement of its future citizens while simultaneously preserving the right of any parent to have such proceeding heard in state court.

Furthermore, the procedural standards that state courts must follow when adjudicating the placement of an Indian child fall within the scope of Congress's constitutional authority to legislate over Indian affairs "although within the limits of a State." *United States v. Holliday*, 70 U.S. 407, 418 (1865). This Court has long recognized that Congress's "right to exercise it[s authority] in reference to any Indian tribe" is not limited to "the limits of a State[,]" but instead extends "to any Indian tribe, or any person who is a member of such tribe." *Id.* In this regard, ICWA constitutes a constitutional exercise of Congress's power pursuant to the Indian Commerce Clause.

ICWA also constitutes a constitutional exercise of Congress's authority under the Treaty Clause. ICWA specifically cites this power, 25 U.S.C. § 1901(2), and the invocation of authority under the Treaty Clause accords with this Court's approved use of such authority. *E.g., Rice v. Cayetano*, 528 U.S. 495, 519 (2000); *see also Kagama*, 118 U.S. at 384 (Congress derives its power to regulate Indian affairs from the "course of dealing of the federal government with [Indian nations], and the treaties in which [the federal government] promised . . . the duty of protection").

Congress's enactment of ICWA likewise falls within its historical duties as trustee. *Jicarilla Apache Nation*, 131 S. Ct. at 2327 & n.8. ICWA specifically invoked Congress's "authority as trustee." 25 U.S.C. § 1901(3). Indeed, ICWA's legislative record reflects Congress's "considered judgment" that "[t]he U.S. Government, pursuant to its trust responsibility to Indian tribes, has failed to protect the most valuable resource of any tribe—its children." Task Force

Report at 87.[14] Ultimately, Congress determined that the tribes' continued existence as self-governing communities depends upon their children as citizens and future governmental leaders, and thus ICWA reflects Congress's "considered judgment" to "design[] the trust relationship to serve the interests of the United States as well as to benefit the Indian tribes." *Jicarilla Apache Nation*, 131 S. Ct. at 2327 & n.8.

B. ICWA's Classification Of "Indian Child" Is A Political Classification

ICWA 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). This definition constitutes a political classification because it singles out Indians based solely on membership in a sovereign Indian tribe. The narrow definition relates only to the unique tribal requirements for membership, not race, and thus guarantees ICWA's application to only those Indian children with the potential to carry on the traditions, culture, and self-government of the tribes. As a result, this classification does not violate the equal protection principles embodied in the Fifth Amendment's Due Process Clause.[15]

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[14] As Representative Udall explained: "[B]ecause of the trust responsibility owed to the Indian tribes by the United States to protect their resources and future, we have an obligation to act to remedy this serious problem. What resource is more critical to an Indian tribe than its children?" 124 Cong. Rec. 38102.

[15] Because "the Fourteenth Amendment [] applies only to the states," *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954), any equal protection challenge to ICWA's classification of "Indian

As an initial matter, ICWA's classification based on tribal membership does not equate with race. Indeed, ICWA's definition of "Indian child" leaves out many individuals who are racially "Indian" but not eligible for membership in a federally recognized tribe, and includes individuals who are *not* "Indian" by race or ancestry, but have been granted citizenship in a tribe. *See Mancari*, 417 U.S. at 553 n.24 (recognizing that, where Congress uses "Indian" to signify "members of 'federally recognized' tribes[, t]his operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature."). Like the statute in *United States v. Antelope*, 430 U.S. 641 (1977), ICWA classifies "Indian child[ren]" not "because they are of the Indian race but[, rather,] because they are [voluntarily] enrolled members of" a federally recognized tribe. 430 U.S. at 646. As a result, such legislation "is not based upon impermissible racial classifications" because it is "rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Antelope*, 430 U.S. at 646. [16]

ICWA's classification based on membership is thus political, and not racial, because citizens of Indian nations must decide voluntarily to affiliate them-

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child" arises from the equal protection principles embodied in the Fifth Amendment's Due Process Clause, *see id.*

[16] Congress knowingly *excluded* individuals who are racially Indian but not enrolled in a tribe, in line with this Court's constitutional teachings in *Mancari* and *Antelope*. *See* 1978 Hearings at 151 (criticism of ICWA's definition of "Indian child" excluding individuals with Native ancestry not enrolled in a federally recognized tribe); *see also* S. Rep. No. 104-288, at 4 (Congress refused to extend ICWA to "persons of Indian descent.").

selves as tribal citizens—tribal citizens can always terminate their citizenship of their own free will. *See Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005) ("[Petitioner] has chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe. His Indian status is therefore political, not merely racial.").[17]

Furthermore, ICWA's definition of "Indian child" refrains from defining any requirements for citizenship in a federally recognized tribe. That is a power of the sovereign Indian nations, not Congress. *See Santa Clara Pueblo*, 436 U.S. at 72 n.32 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."); *see also Rice*, 528 U.S. at 527 ("[A] Native American tribe has broad authority to define its membership."); *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (same).

There is no precedent to support the conclusion that ICWA's definition of "Indian child" invokes a racial classification. In fact, this Court's precedents support the opposite conclusion. *See, e.g., Lara*, 541 U.S. at 209 (rejecting the argument that "Congress's use of the words 'all Indians'" violates equal protection principles); *Fisher*, 424 U.S. at 390-391 (1976) (concluding "Indian" classification relates not to race but "the quasi-sovereign status of the [tribe]"); *Antelope*, 430 U.S. at 646 (similar); *Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S.

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[17] *See also Smith v. Bonifer*, 154 F. 883, 886 (C.C.D. Or. 1907) ("[M]embers of [a] tribe can sever their relations as such . . . .").

at 501 (similar).[18] Time and again this Court has affirmed its prior holdings that legislation targeted at Indians cannot be analyzed within the traditional equal protection framework because such preferences are "not racial at all [when they are] . . . 'reasonably designed to further the cause of Indian self-government.'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 304 n.42 (1978) (quoting *Mancari*, 417 U.S. at 554). ICWA falls precisely within this constitutionally permissible category.

C. Congressional Classifications Of "Indian" Are Necessary To Effectuate Congress's Constitutional Authority Over Indian Affairs

To effectuate Congress's exclusive power over Indian affairs, Congress must retain the ability to pass legislation targeted at Indian tribes and their citizens. Absent this ability, Congress could not carry out its constitutional authority over Indian affairs or its duties as trustee of Indian peoples.

This Court repeatedly has held that "legislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution." *Antelope*, 430 U.S. at 647 n.8. As this Court has recognized, if classifications

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[18] Although the Ninth Circuit struck down a challenged preference in the Reindeer Act, 25 U.S.C. §500n, that Act presented a classification that differed significantly "from a lot of other legislation pertaining to Native Americans," including ICWA. *Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997). The Reindeer Act's classification did not hinge on membership in a federally recognized tribe but, rather, on the term "Native." *See id.* at 663-64. Consequently, *Williams* offers no guidance to this Court's analysis of ICWA, a statute that classifies based on membership in a tribe, not the term "Native."

based on membership in a federally recognized tribe "were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Mancari*, 417 U.S. at 552.

This result was explicitly rejected by Congress at the time the Fourteenth Amendment was passed. S. Rep. No. 41-268, at 1 (1870). The Fourteenth Amendment was to apply to "every human being, no matter what his complexion," Cong. Globe, 37th Cong., 2d Sess. 1640 (1862), *except* for Indian tribes and their members because the tribes were "recognized at the organization of this Government as independent sovereignties," *id.* at 1639. *See also* S. Rep. No. 41-268, at 1 (The Fourteenth Amendment did "not annul the treaties previously made between [Indian nations] and the United States."). This Court previously has concluded that the Fourteenth Amendment never granted Indians any rights or privileges because, at the time of the Amendment's passage, they were citizens of "distinct political communities." *Elk v. Wilkins*, 112 U.S. 94, 99-100 (1884). Indeed, Indians did not become citizens of the United States until 1924. *See* 1924 Indian Citizenship Act, ch.233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)). If congressional classifications of "Indian" are deemed unconstitutional, then the very congressional act that made Indians citizens of the United States would be rendered unconstitutional.

Thus ICWA, no less than other congressional legislation classifying Indians based on their citizenship in a tribe, is a political classification arising from the sovereign-to-sovereign governmental relationship formed between the United States and

Indian nations as a result of the treaties they negotiated and signed. As *Mancari* concluded, such congressional political classifications run concomitant with the United States's treaty duties and obligations to Indian tribes as trustee. *Mancari*, 417 U.S. at 541-42; *see also Rice*, 528 U.S. at 519 ("Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs."). To deem congressional classifications of "Indian" invidious discrimination would render Congress unable to carry out its constitutional authority over Indian affairs.

CONCLUSION

For the foregoing reasons, and for those stated by the Respondents, the decision below should be affirmed.

Respectfully submitted,

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