A23-1762

STATE OF MINNESOTA

IN SUPREME COURT

In the Matter of the Welfare of the Children of :

L.K., Parent.

APPELLANTS' REPLY BRIEF

MARK D. FIDDLER (#197843)
RACHEL L. OSBAND (#0386945)
12800 Whitewater Drive, Suite 100
Minnetonka, Minnesota 55343
(612) 822-4095

TIMOTHY SANDEFUR *pro hac vice*
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000

JEFFREY M. MARKOWITZ (#391959)
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402-3214
(612) 339-3500

Attorneys for Appellants

RYAN A. GUSTAFSON(#021222)
17 West 5th Street
P.O. Box 95
Blue Earth, MN 56013
(507) 526-2177

Attorney for L.K., Mother

TAMMY J. SWANSON (#0231939)
3120 Woodbury Drive #200
Woodbury, MN 55125
(651) 739-9615

JOSEPH PLUMER (#164859)
RILEY PLUMER (#0399379)
9352 N. Grace Lake Rd SE
Bemidji, MN 566001
(218) 556-3824, (218) 368-2773

Attorneys for Red Lake Nation

AMANDA L HEINRICHS-MILBURN
(#0400393)
1400 5th Street Towers
100 South Fifth Street
Minneapolis, MN 55402
(612) 672-3600

Attorney for Martin County

LIZ KRAMER (#197842)
Solicitor General
ANNA VEIT-CARTER (#0392518)
KAITRIN C. VOHS (#0397725)
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 757-1243

Assistant Attorney General
State of Minnesota

TERESA NELSON #0269736)
CATHERINE AHLIN-
HALVERSON (#350473)
DAN SHULMAN (#0100651)
P.O. Box 14720
Minneapolis, MN 55414
(651) 645-4097

Attorneys for American Civil
Union of Minnesota

CRYSTAL PARDUE *pro hac vice*
125 Broad Street, 17th Floor
New York, NY 10004
(206) 584-4039

Attorney for American Civil
Liberties Union Foundation

JODY M. ALHOLINNA (#284221)
Minnesota Judicial Center, Suite G-27
25 Rev. Dr. Martin Luther King Jr.
Boulevard
St. Paul, MN 55155
(612) 408-3359

M BOULETTE (#0390962)
SEUNGWON R. CHUNG (#0398315)
ABBY N. SUNBERG (#0402839)
80 South Eighth Street, Suite 2200
Minneapolis, MN 55402
(612) 977-8603

Attorneys for Guardian ad Litem

MALLORY K. STOLL (#0393357)
NATALIE NETZEL (#0397316)
875 Summit Ave. Room 254
St. Paul, Minnesota 55105
(651) 290-8653

Attorneys for Institute to Transform
Child Protection

BROOKE BESKAU WARG (#0400817)
525 Portland Avenue S., Suite 1000
Minneapolis, Minnesota 55415
(612) 348-3791

Attorney for Hennepin County Adult
Representation Services

SARAH STAHELIN (#0316118)
190 Sailstar Drive NW
Cass Lake, MN 56633
(218) 335-3514

Attorney for Leech Lake Band of Ojibwe

JOSEPH F. HALLORAN (#244132)
CHRISTOPHER SMITH (#0504495)
180 East Fifth Street, Suite 940
St. Paul, MN 55101
(651) 644-4710

Attorneys for California Tribal Families Coalition

ROBERT C. ROBY (#0225721)
237 SW 2nd Ave, Suite 222
Cambridge, MN 55008
(763) 689-5069

KRYSTAL SWENDSBOE *pro hac vice*
ISAAC J. WYANT *pro hac vice*
2050 M Street NW
Washington, D.C. 20036
(202) 719-7000

Attorneys for Christian Alliance for Indian Child Welfare

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SUMMARY OF ARGUMENT

Respondents' contentions that Appellants lack standing are wrong. Appellants have standing because ICWA/MIFPA erect a barrier against their custody petition that others don't face—and which is predicated on their race and that of the twins. That's sufficient for federal standing purposes, *Haaland v. Brackeen*, 599 U.S. 255, 292 (2023), and for the "simpler" standing requirements of Minnesota law. *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy*, 301 Minn. 28, 32 (1974). Since that injury *has* occurred, *is* occurring, and will *continue* to occur absent this Court's intervention, this case is not moot—and even if it were, it easily fits within applicable exceptions to mootness. Appellants also have standing to assert the twins' injuries.

As to the merits, ICWA/MIFPA discriminate based on race or national origin because they are triggered exclusively by the blood in the twins' veins—nothing more. *Morton v. Mancari*, 417 U.S. 535 (1974), expressly declined to apply rational basis review to laws that apply to "Indians not as a discrete racial group," *id.* at 554, so it cannot justify ICWA/MIFPA. Nor can ICWA/MIFPA satisfy strict scrutiny because they aren't narrowly tailored.

ARGUMENT

I. Respondents' procedural arguments are unpersuasive.

Appellants have standing. Standing is a broader concept in state than in federal courts, *Growe v. Simon*, 2 N.W.3d 490, 499 n.6 (Minn. 2024), and under Minnesota's "much simpler 'injury-in-fact' concept of standing," *Snyder's Drug Stores*, 301 Minn. at 32, a party can sue if she has "sufficient stake in a justiciable controversy." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996).

Here, Appellants easily satisfy the *federal* test for standing, let alone the simpler *state* test, and they *do* have sufficient stake in this matter to seek relief. Nor is the case moot, because they are currently being injured by the unconstitutional laws. But even if the case were moot, the questions involved are important enough that this Court should resolve them anyway.

A. Appellants have suffered and are suffering injury-in-fact.

ICWA/MIFPA impose a special set of rules governing cases that involve children who are biologically eligible for tribal membership—rules different from those that apply to cases involving other children. Those rules, among other things, injure Appellants because their custody petition is treated differently on the grounds that they aren't "Indian," and the twins are. The U.S. Supreme Court held in *Brackeen*, 599 U.S. at 292, that this unequal treatment is injury-in-fact under the federal standing test.

That Court has often said that "[t]he 'injury in fact' in an equal protection case" is "the inability to compete on an equal footing," "not the ultimate inability to obtain the benefit." *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993); *accord, Trinity Lutheran Church v. Comer*, 582 U.S. 449, 463 (2017); *Quinn v. Millsap*, 491 U.S. 95, 103, n.8 (1989); *Turner v. Fouche*, 396 U.S. 346, 362 (1970). In *Brackeen,* it said that ICWA "injures [would-be adoptive parents] by placing them on '[un]equal footing' with Indian parents who seek to adopt or foster an Indian child," and that this "racial discrimination … counts as an Article III injury." 599 U.S. at 292.

True, the Court went on to say it could provide no *remedy* because they sued the wrong people. *Id.* at 292–93. But remedy is a different question from injury-in-fact—and this Court "[o]f course" *can* provide a remedy here, *see id.* at 294 n.10.

Red Lake argues that Appellants haven't suffered injury-in-fact because they have no vested right in "being able to permanently care for [the] children" or "maintaining a permanent relationship" with them. RL Br. at 25. But that's irrelevant because the injury-in-fact lies *not* in their being ultimately denied custody, but in the unequal treatment of Appellants in Minnesota courts, as compared to how they would be treated if this case involved non-"Indian" children. As *Brackeen* and other cases make clear, their injury is that the legal process to which they're subjected differs from that which applies to others—solely on the basis of the race/national origin of themselves and the twins. That

alone satisfies the stringent federal injury-in-fact requirement, *Brackeen*, 599 U.S. at 292, as well as Minnesota's "simpler 'injury-in-fact'" test. *Snyder's Drug Stores,* 301 Minn. at 32. Appellants "need not allege that [they] would have obtained [custody] but for the barrier in order to establish standing." *Jacksonville*, 508 U.S. at 666.

"[A] plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others." *Barr v. Am. Ass'n of Pol. Consultants*, 591 U.S. 610, 634 (2020). ICWA/MIFPA's placement preferences cause Appellants to be significantly less likely to have the twins placed in their permanent custody, because these statutes require that "preference" be given in child placement matters to tribal members or institutions "approved by an Indian tribe" (indeed, any tribe will do). *See* 25 U.S.C.A. § 1915(b); Minn. Stat. § 260.773, subd. 3. These rules would not apply but for the race/national origin of the children and Appellants. Consequently, Appellants have suffered and are suffering injury-in-fact—and have standing.

The Guardian ad Litem (GAL) misreads Minnesota law when arguing that "the placement hierarchy Appellants complain of exists whether or not ICWA and MIFPA apply." GAL Br. at 25-26. The GAL cites a statute that requires child-placing agencies to "consider[]" placement with relatives in a stated order (with (1) a relative or (2) "an important friend" of the parent, etc.), Minn. Stat. § 260C.212, subd. 2(a), but that order of preferences differs from ICWA/MIFPA's, and that statute is *not* a preference statute. In *In re S.G.*, 828 N.W.2d 118 (Minn. 2013), this

Court said that Section 260C.212 "requires that the district court *consider* the adoption petition of a relative … *but does not require* that the court prefer a relative over a nonrelative when determining the best interests of the child." *Id.* at 119 (emphasis added). ICWA/MIFPA, by contrast, *mandate* placement in accordance with their statutory preferences. *See* Minn. Stat. § 260.771, subd. 7(a) (district court "must follow the order of placement preferences"); *see also* Minn. Stat. § 260C.212, subd. 2(a) (agency must follow preferences). So the GAL's reliance on Section 260C.212 does nothing to show that Appellants aren't injured by ICWA/MIFPA's *mandatory* placement preferences.

What's more, ICWA/MIFPA dilute the best-interests-of-the-child analysis that would apply, but for the twins' race. For white or black children, for instance, the best-interests analysis is "an individualized determination," Minn. Stat. § 260C.212 subd. 2(a), whereas ICWA/MIFPA override that individualized determination and dictate that "'best interests of an Indian child' means compliance with [ICWA] and [MIFPA]." Minn. Stat. § 260.755, subd. 2a; *accord*, 25 U.S.C.A. § 1902. That means the process inherently "favors others" through "discriminatory treatment," which entitles Appellants to sue. *Barr*, 591 U.S. at 634.

Appellants don't dispute that they have no right to adopt or gain custody (no one has such a right)—but they *do* have the right to pursue their custody

petition free of discriminatory burdens.[1] The fact that ICWA/MIFPA impose such burdens easily satisfies the injury-in-fact requirement.

B. Appellants will continue to suffer injury-in-fact.

There's another, related way in which Appellants face unequal treatment. As their custody petition proceeds, ICWA/MIFPA impose different evidentiary and procedural requirements on them, due solely to the parties' race/national origin.[2] Already, for example, in seeking to stay the change of placement ordered by the District Court last September, they were forced to argue that "good cause" exists to deviate from ICWA/MIFPA—a requirement that only applies in ICWA/MIFPA cases (*see* Minn. Stat. Ann. § 260.773 subd. 4; 25 U.S.C. § 1915 (b))—which means, only because of the parties' race. Appellants were also required to argue that "good cause" existed to deviate from the statutory mandate to transfer the case to tribal court—a procedural step that also only exists in ICWA/MIFPA cases. *See* Minn. Stat. § 260.763; 25 U.S.C. § 1911. And if their petition proceeds to a hearing regarding whether to terminate parental rights as a step toward

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[1] This means the GAL's lengthy standing argument (GAL Br. at 22-28), is irrelevant; Appellants' injury is not to their "hopes of obtaining permanent placement," *id.* at 25; rather, their injury lies in the fact that they're placed on an unequal footing with respect to their custody petition filed in this case.

[2] Red Lake says "[s]everal other steps must also occur before a court may enter an adoption order." RL Br. at 31-32. True—and at every step, Appellants will be barred from competing on an equal footing, due to the separate set of rules that ICWA/MIFPA impose on their custody petition. That *proves* Appellants' injury-in-fact.

adoption, different rules will again apply: Appellants will be required to provide evidence "beyond a reasonable doubt," based on "expert witness testimony"—an extremely high burden of proof (higher than applies in criminal law, where expert testimony isn't required)—and one that does not apply in cases involving non-"Indian" children.[3]

In these and other ways, Appellants are subjected to legal burdens and requirements here that would not be applied if they or the children were of a different race. And, again, that means they're suffering and, absent this Court's action, *will* suffer injury-in-fact.

A party seeking prospective relief need only allege an unconstitutional interference with some concrete plan to act in the future. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992). If, as in *Lujan*, the "desire to use or observe an animal species, even for purely esthetic purposes, [was] undeniably a cognizable interest for purpose of standing," *id.*, then the desire for the return of children to Appellants' care—for whom Appellants cared since birth, for more than a year, and for whom they have demonstrated a commitment—certainly satisfies that requirement.

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[3] ICWA/MIFPA require "beyond a reasonable doubt" and expert testimony, *see* Minn. Stat § 260.771 subd. 6; 25 U.S.C. § 1912(f), whereas "clear and convincing evidence" applies to cases involving non-"Indian" children. *See In re Welfare of Child. of K.S.F.*, 823 N.W.2d 656, 663 (Minn. Ct. App. 2012); *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

Appellants have filed a custody petition; they have a concrete, particularized, actual, imminent plan to seek permanent placement. *See* (9.12.2023 Affidavit, ¶ 5; Ind. # 101) (testifying that they are "100% committed to [the twins] and to being their forever home."); *id.*, ¶ 5. (they consistently told all social workers: "we want to be the permanency option for the twins, whether it be adoption or permanent legal custody."). There's nothing speculative or abstract about this: they gave loving, attentive care to the twins as foster parents for more than a year. (*Id.*, ¶¶ 5-26). According to assistant Martin County attorney, before the July 31, 2023, removal of the twins from their care, "the tribe and the GAL had indicated to FMCHS that they supported [appellants] as the permanency option." (*Id*. ¶ 36; Ind. #101). And after being notified of the tribe's plan to transfer the children from their custody on four days' notice, Appellants quickly filed an emergency motion for permissive intervention, a stay of the change of placement, a finding that good cause existed not to change the placement, and a declaration that ICWA/MIFPA are unconstitutional. After the District Court denied these requests, they filed a motion for permissive intervention and third-party custody. This all shows that Appellants are suffering an "immediate" injury, "not a 'possible, remote consequence, or mere possibility.'" *In re Custody of D.T.R.*, 796 N.W.2d 509, 513 (Minn. 2011) (citation omitted)).

In his dissent below, Judge Reyes contended that Appellants lack standing, but his analysis "conflat[ed] the threshold standing inquiry with the subsequent

merits inquiry," which is improper. *Stone v. Invitation Homes, Inc.*, 986 N.W.2d 237, 251 n.12 (Minn. Ct. App. 2023), *aff'd* 4 N.W.3d 489 (Minn. 2024) (citation omitted). He wrote that "'Indian' is not a racial classification," and therefore that Appellants lack standing to argue that ICWA/MIFPA are unconstitutionally race-based. Int. Add. at 59-60. But "'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal.'" *Forslund v. State*, 924 N.W.2d 25, 33 (Minn. App. 2019) (citation omitted). Otherwise, "every losing claim would be dismissed for want of standing." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006). All that's necessary for standing is that Appellants suffer injury-in-fact which a court could remedy. In fact, "[f]or purposes of standing, [courts] *must assume the Plaintiffs' claim has legal validity*." *Id.* at 1093 (emphasis added). Thus the dissent's standing analysis was backwards. "A determination of standing properly focuses on the party seeking to have a court decide the merits of a dispute, 'and not on the issues [the party] wishes to have adjudicated.'" *Schiff v. Griffin*, 639 N.W.2d 56, 59 (Minn. Ct. App. 2002) (citations omitted).

C. Appellants' injuries are redressable.

Although *Brackeen* held that ICWA imposed an injury-in-fact on would-be adoptive parents, it said the Court couldn't remedy that injury. 599 U.S. at 293-94.

That was because the plaintiffs had sued the wrong defendants: the Court couldn't issue a judgment binding those who responsible for their injury.

Here, by contrast, this Court *can* provide a remedy. A ruling declaring ICWA/MIFPA invalid *would* remove the race-based unequal footing on which these laws place Appellants in seeking permanent placement.

Red Lake says "there is no outcome of [this] case that could result in [Appellants] actually … obtaining their desired result," RL Br. at 31, but that errs for two reasons. **First**, the "desired result" is to have Appellants' custody petition adjudicated through a non-discriminatory process. An order from this Court declaring ICWA/MIFPA unconstitutional would have that consequence.

Second, redressability doesn't require Appellants to show that the Court's action would *certainly* cure their injury, only that such action will "significant[ly] increase … the likelihood" of their injuries being remedied. *Utah v. Evans*, 536 U.S. 452, 464 (2002). In other words, Appellants "need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision," *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir. 1998), which is what Red Lake is demanding. Instead, Appellants "must show only that a favorable decision is likely to redress [their] injury, not that a favorable decision *will inevitably* redress [that] injury." *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994); *accord, D.T.R.*, 796 N.W.2d at 512. Appellants have satisfied that requirement.

The dissent below said that since "no good-cause exception exists to ICWA and MIFPA's placement preferences," a remand of the CHIPS proceeding would not result in adoption, Int. Add. at 60, a position the GAL endorses. GAL Br. at 26. But, again, an order from this Court declaring the discriminatory laws unconstitutional would enable Appellants to have their petition adjudicated "on an equal footing," and that's all that's required to satisfy the redressability requirement. *Jacksonville*, 508 U.S. at 666.

D. The case is not moot or forfeited.

The GAL argues that Appellants forfeited their constitutional challenge in District Court because that court did not reach the issue. GAL Br. at 28. But the Court of Appeals rightly rejected this argument because Appellants "*did* present their constitutional argument to the district court." Int. Add. at 27. They filed a properly-briefed motion seeking a declaration of unconstitutionality. Even if the District Court did not address that argument, that doesn't constitute forfeiture; forfeiture isn't something a court can do to a party by not addressing that party's argument. *See generally Ries v. State*, 920 N.W.2d 620, 639-40 (Minn. 2018) (Hudson, J., concurring in part, dissenting in part) (discussing the different ways in which a party can forfeit an issue). Rather, "forfeiture refers to the failure to timely assert a right," *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 631 n.3 (Minn. 2017), and Appellants *did* timely assert their rights (and those of the children).

True, *Thiele v. Stich* says a reviewing court "must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it," 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted), but the "considered by the trial court" prong is not a forfeiture rule. And even if it were, the Court of Appeals rightly concluded that Appellants' arguments "should be reviewed under the well-established exception that applies if an argument could be decisive of the controversy on the merits, if the facts are undisputed, and if 'there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question.'" Int. Add. at 28 (cleaned up).

The GAL also argues that the case is "moot" because the twins' biological mother rescinded her support for Appellants. GAL Br. at 30 n.16. But that doesn't moot this case. A case is only moot if the circumstances have changed to such an extent that the Court can provide no remedy. *Matter of Inspection of Minnesota Auto Specialties, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984). That's not true here, because Appellants can still pursue their custody petition regardless of the biological mother's position. Their petition that *has been filed, is now pending*,[4] and will be adjudicated under ICWA/MIFPA's discriminatory rules, absent this Court's

[4] The district court dismissed Appellants' custody petition on remand (again relying on ICWA), and that dismissal has been appealed and is pending. *See In the Matter of the Welfare of the Children of: L. K. and A. S., Parents*, A24-1296.

intervention. That means a ruling in their favor would ensure that their petition would be decided on *non*-discriminatory grounds, including an unbiased assessment of the twins' best interests, pursuant to Minn. Stat. § 260C.212 subd. 2. Such assessment would include *consideration* of the birth mother's desires, but that wouldn't be a determinative factor. In any event, this Court *can* remedy Appellants' injuries, which means the case is not moot. *Hous. & Redevelopment Auth. ex rel. City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885, 888 (Minn. 2002) ("An issue is not moot if a party could be afforded effectual relief.").

Nor is this case moot due to the children's placement with their grandmother. On August 2, the twins' grandmother informed Appellants that she needed a break from caring for the twins, and asked Appellants to care for them until August 5. They happily did so, as the County approved this respite care. This is another indication that the care and custody of the children is still a live matter that affects Appellants' rights—and that a favorable ruling from this Court would help resolve.

Even if this case were moot, the Court should still address it for two reasons.

First, "the issue[s] [are] capable of repetition yet evade[] review." *Matter of Welfare of Child of K. O.*, 4 N.W.3d 359, 366 (Minn. Ct. App. 2024). The "capable of repetition" doctrine applies where there's a reasonable expectation that the party would suffer the same wrong again, and that the duration of the challenged action is too short to be adjudicated before it expires. *Id.* at 365. Here, that's certainly the

case. Appellants are foster parents who have taken care of at-risk "Indian" children on many occasions—not just the twins. Such children are liable to be placed with them on quite short notice; this has often happened, including with these twins just weeks ago. And once an "Indian" child is placed with them, they're subject to the discriminatory burdens of ICWA/MIFPA with regard to having these children removed and placed elsewhere, and with respect to any petition for custody—including the one that's pending. That means the same injury is likely to recur. And because the children can be removed and placed in accordance with a tribe's preferences on short notice—four days, in this case[5]—and a case can be transferred on short notice to tribal court, beyond the jurisdiction of state courts, as nearly happened in this case—such injuries evade review.

In *Children of K.O.*, the court found that the "capable of repetition" rule applied to a minor's challenge to a statute whereby he could be temporarily held in juvenile detention. By the time the court ruled, the minor had been released, but the court said the case was not moot because there was a reasonable expectation that he might be detained again, given that he had been detained twice in the past. *Id.* at 366. Also, the detentions were brief enough that it was likely a future detention would terminate before the court could adjudicate the matter. *Id.* By the

[5] On September 9, 2023, the county informed Appellants that, pursuant to ICWA/MIFPA, it would remove the twins from their care and place them with the birth mother's cousin—despite the mother's objection—on September 13. Two days later, the District Court authorized the custody transfer.

same reasoning, this case qualifies for the "capable of repetition" exception because these twins (and other "Indian children") are likely to be placed in their care, again subjecting them to ICWA/MIFPA's discriminatory standards. And given the rapidity with which "Indian children" can be removed from foster care under ICWA/MIFPA, and their cases transferred to tribal court, the constitutionality of ICWA/MIFPA is likely to evade this Court's review.

In *Brackeen*, the Fifth Circuit held that the "capable of repetition" exception to mootness applied in a situation where the plaintiffs—would-be adoptive parents—were successful in adopting before they could fully adjudicate their challenge to ICWA's placement preferences. *Brackeen v. Bernhardt*, 937 F.3d 406, 423 (5th Cir. 2019).[6] The plaintiffs had "demonstrated a reasonable expectation" that they would seek to adopt the child's sister, and that they would be "subject to [ICWA's] regulatory burdens" if and when that happened. *Id.* Likewise here, Appellants have a pending custody petition, and even if the District Court rejected their argument against placement with the grandmother, there's every reasonable expectation that as they proceed with that petition (or with a petition for custody of another "Indian child" who might be placed with them), they will again be subject to ICWA/MIFPA. So, again, the "capable of repetition" exception applies.

[6] This was affirmed by an equally divided court on en banc appeal; only Judge Duncan and his colleagues addressed the "capable of repetition" issue, finding that it applied. *See* 994 F.3d 249, 370 n. 14 (5th Cir. 2021) (per Duncan, J.).

Second, even if it did not, this Court should still exercise its discretion to decide this case, because it's "functionally justiciable and present[s] important questions of statewide significance." *In re Guardianship of Tschumy*, 853 N.W.2d 728, 736 (Minn. 2014). A case is functionally justiciable if it is sufficiently sharpened: i.e., both sides are effectively presented and briefed so it's susceptible of judicial resolution. *Snell v. Walz*, 985 N.W.2d 277, 284 (Minn. 2023). And the pressing statewide importance element is satisfied if the "failure to decide [the issues presented] now could have a continuing adverse impact in other [cases]." *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984).

This case easily satisfies both requirements. It's functionally justiciable because there are no factual disputes and the issues are fully briefed by multiple parties and amici. And the case is of unusual statewide importance because ICWA/MIFPA continue to be applied regularly to child custody proceedings throughout Minnesota, to the detriment of "Indian children" and the adults who would otherwise care for them.[7]

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[7] For example, Minnesota suffers from an extraordinary shortage of Native American foster homes. *See* Christine Renick, *In Minnesota, Recruitment of Native American Foster Homes Stymied by "Lifetime Prohibitions,"* The Imprint, Jan. 16, 2018, https://imprintnews.org/analysis/minnesotas-tribal-foster-home-shortage/29434. Because ICWA/MIFPA effectively require that "Indian" children be placed in "Indian" foster homes, these laws, combined with this shortage, deprive children of care they would receive under a race-neutral regime. What's more, ICWA and laws like it deprive them "of equal opportunities to be adopted that are available to non-Indian children and expose[] them … to having an existing non-Indian family torn apart through an

E. <u>Of course</u> this Court can declare a federal statute unconstitutional.

Red Lake seeks to buttress the Court of Appeals' strange[8] claim that Minnesota courts lack power to declare ICWA unconstitutional. Red.Br.22; Int. Add. at 31 n.4. There's no basis for such doubt. *Every* court, from the humblest trial court to the most august appellate court, has the authority *and the obligation* to declare a federal statute unconstitutional if, in fact, it is. *State v. Great N. Ry. Co.*, 111 N.W. 289, 294 (Minn. 1907) ("when [a statute] conflicts with the Constitution, courts have no alternative except to declare it invalid, for the obligation of courts to support the Constitution is unceasing and imperative.").

This obligation arises from the nature of the judicial power.[9] The Constitution is the supreme law of the land, and laws made "in pursuance thereof" are also the supreme law of the land. U.S. Const. art. VI § 2. That means any statute *not* "in pursuance [of]" the Constitution—i.e., conflicting with it—is *not* the law of

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after the fact assertion of tribal and Indian-parent rights." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 529 (Ct. App. 1996). This ongoing harm, happening now to countless Minnesota children who fall within the "Indian" category, is of pressing statewide importance.

[8] Equally strange is Red Lake's argument that Appellants gave insufficient notice to the United States and Minnesota Attorneys General of their constitutional challenges. RL Br. at 21. As the Court of Appeals observed, they "gave proper notice." Int. Add. at 27. Moreover, the Minnesota Attorney General has briefed these issues every step of the way on appeal. The United States had opportunity to file an amicus brief by August 8, 2024 Order of this Court, but declined.

[9] "It is emphatically the province and duty of *the judicial department* to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The judicial department includes all levels of the courts.

the land, but is instead "void." *The Federalist* No. 78 at 524 (J. Cooke, ed., 1961) (Alexander Hamilton). And if it's void, it's not a "law" that can be enforced by courts. Since state courts are bound by oath "to support this Constitution," U.S. Const. art. VI § 3, it follows that they, no less than federal courts, have the power and duty to declare federal statutes unconstitutional if and when they actually are. *See Great N. Ry. Co.*, 111 N.W. at 294; *State v. Chicago, M. & St. P. Ry. Co.*, 68 Minn. 381, 385 (1897) ("the courts have a right, and it is their duty, to declare the law unconstitutional" if it is so); *Maddux v. Blagojevich*, 911 N.E.2d 979, 991 (Ill. 2009) ("If a statute is unconstitutional, courts are obligated to declare it invalid. This duty cannot be evaded or neglected, no matter how desirable or beneficial the legislation may appear to be." (citation omitted)).

The contention that state courts lack the power of judicial review "to declare a federal statute invalid" is, frankly, absurd. RL Br. at 22. If that were true, the entire process of judicial review would be confined to the federal courts system. But state courts have often found federal statutes unconstitutional, and their power to do so has never been doubted.[10] *See, e.g.*, *Texas Dep't of Pub. Safety v. Torres*, 583 S.W.3d 221, 225–30 (Tex. App. 2018), *rev'd on other grounds*, 597 U.S. 580 (2022); *Guillen v. Pierce Cnty.*, 31 P.3d 628 (Wash. 2001), *rev'd on other grounds*, 537

[10] The federal certiorari-review statute itself contemplates state supreme courts exercising that power; it allows the U.S. Supreme Court to review decisions in which state courts rule on "the validity of a … statute of the United States." 28 U.S.C. § 1257(a).

U.S. 129 (2003); *People ex rel. First Nat. Bank v. Russel*, 119 N.E. 617, 617 (Ill. 1918); *State v. Sawyer*, 94 A. 886, 888-89 (Me. 1915); *In re. Booth*, 3 Wis. 1 (1854). *See also Blue Earth Cnty. Welfare Dep't v. Cabellero*, 225 N.W.2d 373, 375 (Minn. 1974) (reviewing constitutionality of federal act).

In fact, the *Brackeen* Court *invited* state courts to address ICWA's constitutionality: "the individual petitioners," it said, "can challenge ICWA's constitutionality in state court." 599 U.S. at 294 n.10. That's what's happening here.

II. ICWA/MIFPA classify based on race and national origin.

A. The classification is based solely on biological and national ancestry.

The Supreme Court has defined a race-based law as one that "singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics.'" *Rice v. Cayetano*, 528 U.S. 495, 515 (2000) (citation omitted). It has defined a national origin-based law as one that classifies people based on "the country where [they] [were] born, or … from which [their] ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973); *see also Oyama v. California*, 332 U.S. 633, 645 (1948).

ICWA/MIFPA do both. They single out identifiable persons solely because of their ancestry or ethnic characteristics, because they classify children as "Indian" based solely on their eligibility for tribal membership, which is

determined exclusively by biological ancestry. A child who satisfies Red Lake's blood quantum requirement is eligible for membership and is therefore classified under ICWA/MIFPA as an "Indian child," regardless of whether that child has any political, social, cultural, linguistic, religious, traditional, geographical, or even sentimental connection to the tribe. And a child who lacks the requisite blood quantum would *not* be an "Indian child" regardless of how closely connected in political, social, etc., terms.[11] No amount of "political" affiliation will make a child an "Indian child" under ICWA/MIFPA if she lacks the required biological pedigree—and no *absence* of "political" affiliation will *dis*qualify a child who *has* the right blood in her veins.[12]

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[11] Thus a child adopted by a trial member and raised within the tribal community is still not an "Indian child" under ICWA. *In re Francisco D.*, 178 Cal. Rptr. 3d. 388, 396 (Ct. App. 2014). The fictional character Linda Wishkob in Louise Erdrich's novel *The Round House* (2012), for example—a white baby adopted and raised by a tribal family and who considers herself a tribal member—would *not* be an "Indian child," whereas a newborn such as "Veronica" in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), whose sole connection to a tribe was the fact that a "remote" ancestor "was an Indian," *did* fall within the classification. *Id.* at 655.

[12] The Attorney General claims that "MIFPA would … not apply to a child who is Native American but does not have the necessary ties to an Indian Tribe." AG Br. at 15. Yes, but the "necessary ties" are *blood quantum*, and only blood quantum. So the AG is simply reiterating the fact that MIFPA classifies based solely on biological ancestry—i.e., racial and national origin. As for the historical practices of other tribes extending membership to outsiders, *see id.*, that's simply not at issue here, because as the AG admits, the twins fit within the category "because the Red Lake Nation determined they were eligible," *id.* at 16—and it did so based exclusively on blood quantum.

What's more, ICWA/MIFPA were written for the express purpose of keeping "Indian" children separate from non-"Indians." *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (ICWA represents "a Federal policy that, where possible, an Indian child should remain in the Indian community.").[13]

Therefore ICWA/MIFPA "single[] out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics,'" and do so "for a racial purpose." *Rice*, 528 U.S. at 515. That means they create a racial classification, and

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[13] For this reason, it is misleading to refer to ICWA/MIFPA as imposing "preferences" or creating a "presumption." *Matter of Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994). The more accurate word would be "prejudice." A *presumption* is a logical default which, for some neutral reason, is deemed a norm from which deviations must be justified. Such a default is not *a priori*, but reflects a rational calculation based on experience. A *prejudice*, by contrast, is a kind of stereotyping; it reflects the assumption that anyone with some logically unrelated feature—such as skin color or biological ancestry—*must necessarily* have certain psychological or social traits. That was what happened in the Japanese internment cases such as *Korematsu v. United States,* 323 U.S. 214 (1944). MIFPA makes that assumption: it says "[t]he best interests of an Indian child support the Indian child's sense of belonging to … [the] Tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's Tribe." Minn. Stat. § 260.755 subd. 2a. Such a blanket, across-the-board statement about what's *inherently* in the best interest of *all children who fit a biological profile* is a prejudice, not a presumption. Indeed, by using ancestry as a proxy for political affiliation, ICWA/MIFPA do exactly what *Korematsu* did. In any event, the Court said in *Stanley v. Illinois*, 405 U.S. 645 (1972), that presumptions regarding best interests are inappropriate in child welfare cases because "disdain[ing] present realities in deference to past formalities … needlessly risks running roughshod over the important interests of both parent and child." *Id*. at 656–57. And ICWA/MIFPA's assumption that all children of a particular race must necessarily have specific psychological or social needs is exactly the prejudice that *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984), found unconstitutional.

must satisfy strict scrutiny. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206–07 (2023). The Attorney General says ICWA/MIFPA don't create a racial classification because their definition of "Indian child" "excludes many individuals who are racially Native American but not members of an Indian tribe." AG Br. at 14. But "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Rice*, 528 U.S. at 516-17. *See* Appellants' Opening Brief at 12.

ICWA/MIFPA also create a national-origin-based classification because they classify based on "the country from which [the twins'] ancestors came." *Espinoza*, 414 U.S. at 88. They do so by treating children differently based on their eligibility for tribal membership, which, again, is determined exclusively by the immutable characteristic of their ancestry. In *Oyama,* 332 U.S. at 645, the statute discriminated based on national origin because, "as between the [American] citizen children of a Chinese or English father and the [American] citizen children of a Japanese father, there [was] discrimination" in how the law operated. The same is true of ICWA/MIFPA: they treat American-citizen children differently based on whether their parents are sufficiently "Indian." National-origin classifications are also subject to strict scrutiny. *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

B. Mancari does not justify ICWA/MIFPA.

Respondents argue that even though ICWA/MIFPA are triggered by biological ancestry alone—not by any political, social, cultural, etc., affiliation with a tribe—they're nevertheless "political" classifications subject to rational basis review under *Mancari, supra. See, e.g.,* RL Br. at 41-42. But that argument commits several fallacies.

First, *Mancari* upheld a hiring preference at the Bureau of Indian Affairs (BIA) on the theory that it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." 417 U.S. at 554. The Court was not asked to decide, and did not decide, that all laws that treat Indians differently from non-Indians are subject to rational basis review. *See Jackson ex rel. Sorenson v. Options Residential,* 896 N.W.2d 549, 553 (Minn. Ct. App. 2017) (precedent is only valid regarding "issues actually presented and resolved."). And, in fact, the Supreme Court repudiated such a reading of *Mancari* in *Rice,* 528 U.S. at 520, when it emphasized that the *Mancari* precedent "was confined to the authority of the BIA, an agency described as 'sui generis.'"

Mancari concerned adults who chose to become or remain tribal members—not children who are deemed "Indian" as a function of federal or a state law based on their biological eligibility for future membership—and it focused "only [on] employment in the Indian service … not … any other Government agency or

activity." 417 U.S. at 554. Neither it, nor any of the other cases Respondents cite, authorize, or even refer to, a statute that classifies children based entirely on biological ancestry.

The difference between *Mancari*-style political distinctions and race-based distinctions is a matter of common-sense: membership in a political community is ultimately a matter of choice—*Mancari* used the analogy of a city governed by a city council, *id*. at 554—whereas a racial distinction is one based on an "immutable characteristic[s] determined solely by the accident of birth." *Frontiero*, 411 U.S. at 686. ICWA/MIFPA obviously are the latter, not the former: the twins are "Indian children" solely because of their DNA. And that sort of classification triggers strict scrutiny.

Second, Red Lake says "tribal membership is about much more than descent of blood." RL Br. at 41. Maybe so, but **this case doesn't concern tribal membership**. It concerns "Indian child" status under ICWA/MIFPA, which is a different thing. *In re Abbigail A.*, 1 Cal. 5th 83, 95 (2016) (drawing this distinction). Tribal citizenship is a function of tribal law, not at issue here. But "Indian child" status is a classification established by *federal* and *state* law. *Id.* Therefore, it must comply with constitutional prohibitions on race or national origin-based classifications. Because "Indian child" status depends solely on "immutable characteristic[s] determined solely by the accident of birth," *Frontiero*, 411 U.S. at

686, that classification is a suspect classification, which is why strict scrutiny, not rational basis, applies.[14]

Third, Red Lake contends that "Indian child" status is a political classification because it applies "only when tribes have made political choices to make children membership-eligible." Red Br. at 42. But that's a shell-game argument. As Appellants observed in their Opening Brief (at 13), the state or federal government cannot escape strict scrutiny and lay claim to rational-basis by the simple expedient of making a "political choice" to employ someone else's racial classification. That was what the "white primary" cases, such as *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944), and *Terry v. Adams*, 345 U.S. 461, 469 (1953), said. There, the Court held that a political party is a private organization—and may therefore discriminate based on race if it chooses—but that the state cannot grant benefits or burdens based on membership in that organization, because doing so would constitute discrimination by the state. Likewise, *Sokolow v. County of San Mateo*, 261 Cal. Rptr. 520, 527 (Ct. App. 1989), said that the government cannot predicate government benefits on membership in an organization that uses

[14] Further evidence of MIFPA's "Indian" classification being racial is this: imagine a tribe that determined that all children in Minnesota were eligible for membership. Under MIFPA, that determination would be "conclusive" that all children in Minnesota are Indian. Minn. Stat. § 260.755, subd. 8. That possibility seems absurd precisely because this is no political classification. It's a racial and national-origin classification that incorporates by implication the tribal law that makes ancestry determinative.

a discriminatory membership criterion, because that would constitute discrimination. So, too, tribes are free to base citizenship eligibility on ancestry or blood quantum—Appellants don't contend otherwise—but for the state and federal governments to impose benefits and burdens by reference to such membership is a form of discrimination by the government, and therefore subject to strict scrutiny.

Palmore made clear that the government cannot make the "political" choice to employ the racially discriminatory choices of others. That was an adoption case which unanimously held that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 466 U.S. at 433. When the law *does* give effect to such biases—as ICWA/MIFPA do—that cannot be excused as a merely "political" choice subject to rational basis. Rather, that's the incorporation of a racial classification into the law, which triggers strict scrutiny.

Red Lake cites *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019), for the proposition that the government can grant benefits or impose burdens based on ancestry without crossing the line into a racial classification. RL Br. at 42. But recall what the *Davis* court went on to say: "'[a]ncestry *can* be a proxy for race'" if the government uses it to "make ethnic distinctions." 932 F.3d at 838 (cleaned up). *Davis* held that the use of ancestry in that case *was,* in fact, for that purpose: the law at issue created a classification that "tie[d] voter eligibility to descent from an ethnic group," and "referenced blood quantum to determine descent" in order to

treat "the indigenous people of Guam" differently from people of other ethnicities. *Id.* at 838-39 (cleaned up). Thus the statute used "seemingly neutral criteria," that were "so closely associated with" a racial classification that it constituted racial discrimination. *Id*. at 837 (citation omitted). The same is true of ICWA/MIFPA. They establish a racial classification by classifying children based on their *biological* eligibility for tribal membership—which depends solely on ancestry, not on political, social, cultural, etc., connection to a tribe—and do so for the purpose of separating "Indian children" from non-"Indians." *Holyfield*, 490 U.S. at 37.

C. Congress cannot ignore the demands of Equal Protection even under its Indian powers.

Red Lake argues that Congress can treat "membership-eligible individuals" differently from others under its power to legislate for "Tribes" and "Indians." RL Br. at 43. But this ignores the hornbook rule that whatever Congress's enumerated powers might be, they're limited by the Bill of Rights and subsequent Amendments. *Reid*, 354 U.S. at 5-6. Even if Red Lake were correct that Congress's power to make treaties with tribes lets it treat "membership-eligible individuals" differently from other American citizens, the Equal Protection Clause and other federal limits on Congress's power still restrict *how* it can do so—as *Brackeen* acknowledged. 599 U.S. at 276 ("Congress's Indian affairs power is not absolute." (cleaned up)).

It bears repeating that **all "Indian children" are citizens of the United States and the state where they reside, and cannot be regarded as analogous to foreign nationals. 8 U.S.C. § 1401b.** That means Minnesota owes these children the "paramount" duty to serve their best interests "without regard to race or ethnic heritage." *Matter of Welfare of D.L.*, 486 N.W.2d 375, 379 (Minn. 1992). The U.S. Supreme Court has said that this citizenship matters: "Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected ... from unwarranted intrusions on their personal liberty.'" *Duro v. Reina*, 495 U.S. 676, 692 (1990). They're also embraced within the constitutional promise against race-based and national origin-based discrimination. *See Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

Thus whatever power Congress may have to treat "membership-eligible individuals" differently, it may *not* do so by drawing lines based on race or national origin without satisfying the strict-scrutiny standard. Red Lake may be right that Congress can treat children "with close tribal affiliations" differently, RL Br. at 43—but biology is not a "close tribal affiliation." It's a racial classification. That's why *Baby Girl* said that ancestry alone was insufficient to trigger application of ICWA—there must also be an actual "relationship"—and that were it otherwise,

ICWA would raise "equal protection concerns." 570 U.S. at 651-52, 656; *accord, In re Bridget R.*, 49 Cal. Rptr. 2d at 522.

Contrary to Red Lake's implication, *Mancari* does not give the federal (or state) governments "blank checks" to legislate with regard to Indians. *Brackeen,* 599 U.S. at 276. Thus *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), found that *Mancari* did not allow Congress to give Alaska natives preference in the purchase of livestock, because that was "a naked preference for Indians unrelated to unique Indian concerns." *Id*. at 664. *Mancari*'s rational basis test, it said, applies to "[l]egislation that relates to Indian land, tribal status, self-government or culture," not to a "race-based" restriction that "deprives the disfavored racial group of all opportunity to participate, thus placing a tremendous burden on innocent third parties." *Id*. at 664, 665–66.

Of course, the welfare of Minnesota children, not domiciled on reservation, born with severe disabilities, and in need of protection and loving care, is not a "unique[ly] Indian concern[]," *Babbitt,* 115 F.3d at 664—it's a concern shared by all Minnesotans. *Price v. Sheppard*, 307 Minn. 250, 259 (1976).[15] The preferences in ICWA/MIFPA, which deprive a disfavored racial group of their right to

[15] Red Lake contends that ICWA/MIFPA "protect[] the next generation of tribal members," RL Br. at 36, but not only are ICWA/MIFPA actually detrimental to "Indian children," as detailed in Appellants' Opening Brief, but the children involved are also the next generation of *Minnesotans*, and the state cannot wash its hands of its legal obligation towards them by treating them as if they were foreign nationals.

participate on an equal footing in a legal proceeding for custody indeed "place[s] a tremendous burden on innocent third parties," *Babbitt*, 115 F.3d at 666—namely, the twins, who are deprived of the legal protections other children enjoy. *See* Appellants' Opening Brief at 7-9 (listing ways ICWA/MIFPA are detrimental to "Indian" children).

The point is that *Mancari* does not authorize the extremely broad power Respondents claim. *See further Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("We reject the notion that distinctions based on Indian or tribal status can never be racial classifications subject to strict scrutiny."). The one thing the majority and dissenters agreed on in *Brackeen* was that "Congress's authority to legislate with respect to Indians is not unbounded." 599 U.S. at 276. And a law that imposes severe burdens on children based on the fact that their biological ancestry makes them eligible to someday become tribal members is outside those boundaries.

Consider also what Red Lake's argument would mean: if Congress can treat "membership-eligible" children differently from others, based solely on biological ancestry, and if Congress has "plenary" power to legislate with respect to tribes, as *Brackeen* said, 599 U.S. at 272–73, then Congress would have exactly the sort of "absolute" power that *Brackeen* expressly repudiated. Under Red Lake's theory, Congress could forbid "membership-eligible individuals" from marrying people of other races, or having children with them, or from leaving the reservation, or

expressing opinions contrary to the tribe's official political positions.[16] These things are obviously absurd because "power unmoored from the Constitution would lack both justification and limits," *id.* at 273, which means that even when legislating with respect to "membership-eligible individuals," Congress must respect the Bill of Rights and other Amendments, including the restrictions on racial classifications.

That means Red Lake's argument about Congress's power *vis-à-vis* "membership-eligible individuals" is beside the point. The question here is whether ICWA/MIFPA violate the Bill of Rights and therefore exceed Congress's power. Reference to the Treaty and Commerce Clauses is not helpful in answering that question.

What's more, because tribes have the right to set citizenship criteria however they want, a rule whereby Congress could legislate however it wished regarding "membership-eligible individuals" would empower tribes to create federal law through their own internal legislation by altering membership rules. That would violate the non-delegation doctrine because it would enable tribes to determine whom federal and state law would or would not apply to. *See Loving v.*

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[16] In fact, some legal theorists have argued that ICWA applies even before an "Indian child" is *conceived*. *See* Daune Cardenas, *ICWA in a World with Assisted Reproductive Technology*, Ariz. Att'y, Apr. 2019, at 18, 20. ("[P]arents conceiving children via [assisted reproductive technology] who know or have reason to know the resulting child may be an 'Indian child' as defined in ICWA should comply with the federal mandates under ICWA.").

United States, 517 U.S. 748, 759 (1996) ("the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution … cannot be done." (citation omitted)); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested.").[17] If Congress can legislate, free of the constitutional prohibition on race-based classification, with respect to "membership-eligible individuals," then tribes could expand and contract Congress's legislative authority at will, by altering their membership criteria. But that's unconstitutional, as the Court said in *Medellin v. Texas*, 552 U.S. 491 (2008), when it held that Congress cannot create a treaty[18] that would make foreign law "automatically enforceable domestic law" within a state. *Id.* at 510-11. That, the Court said, would be "equivalent [to] writing a blank check" to foreign governments, enabling them to regulate within states, which is impermissible. *Id.* at 515.

It's unnecessary to resolve that question here, however. It's sufficient that Congress's power to legislate with respect to Indians does not entitle it to draw

[17] In *Brackeen*, the Supreme Court found that no party had standing to raise the delegation issue; 599 U.S. at 291–92. No such obstacle exists here.
[18] Note that Congress's foreign treaty-making power is every bit as "plenary" as its Indian treaty power. Yet *Medellin*, like *Reid*, held that it was subject to constitutional limitations, including the Bill of Rights.

race-based or national origin-based classifications without satisfying the strict scrutiny standard, and because the "Indian child" classification in ICWA/MIFPA—and other provisions such as the differential "best interests" test, the evidentiary burdens, and the placement preferences—are based solely on biological ancestry, they are not justifiable under *Mancari*.

III. ICWA/MIFPA fail strict scrutiny.

Amicus ACLU attempts to fashion a brand-new strict scrutiny doctrine, not found in any previous case,[19] by which to justify ICWA/MIFPA. ACLU Br. at 15-31. This novel argument fails, however.

Racially discriminatory statutes virtually never satisfy strict scrutiny because "racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities." *Students for Fair Admissions*, 600 U.S. at 276–77 (Thomas, J., concurring). Narrow tailoring requires that the government prove "that no workable race-neutral alternatives would" would accomplish the compelling interest. *Fisher v. Univ. of Texas*, 570 U.S. 297, 298 (2013). ICWA/MIFPA fail that test.

[19] It admits its new version of strict scrutiny differs from the "modern doctrine" or the "modern form" of strict scrutiny—by which it means the doctrine that actually exists in binding precedent. ACLU Br. at 15. This Court, of course, is not free to adopt ACLU's new version of "strict scrutiny" for purposes of the Fifth and Fourteenth Amendments.

First, ACLU argues that ICWA/MIFPA serve compelling interests in promoting the best interests of "Indian" children. But the best interests of Minnesota children, "Indian" and otherwise, are *already* protected by Minn. Stat. § 260C.212 subd.2(a). That statute sets forth a 10-factor test for determining what's in a child's best interests, a test which includes all the factors to which ACLU refers, such as the child's mental health or risk of substance abuse. ACLU Br. at 18. As the Court of Appeals said in *D.L.*, 479 N.W.2d at 413, the concerns about protecting the best interests of minority children can be addressed by race-neutral means. That alone proves ICWA/MIFPA is not narrowly tailored and fails strict scrutiny.

In the same vein, ACLU mentions abuses such as were involved that *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (S.D. 2015), but there, too, non-ICWA law was found to already provide protections: the court said the wrongful actions there violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 769–72. Obviously, the government has a compelling interest in preserving the fundamental rights of children and families, but these interests are already protected by other laws. And even if they weren't, Congress could address these abuses in race-neutral ways: e.g., by providing a remedy for specific instances of children being discriminated against, as opposed to providing separate rules for all children within a racial category regardless of whether they've actually suffered discrimination.

Similarly, the government clearly has a compelling interest in eliminating "vague and discriminatory standards" in child welfare law, ACLU Br. at 26, but ICWA/MIFPA do not achieve that. These statutes are strikingly vague; ICWA lacks definitions for such crucial statutory terms as "active efforts,"[20] "good cause,"[21] "involuntary proceeding,"[22] "domicile,"[23] or "qualified expert witness."[24] It does not even define "Indian family."[25] MIFPA suffers from the same infirmities. *See, e.g., In re KMN*, 870 N.W.2d 75, 85 (2015). And, again, Congress and the Minnesota legislature can fix vagueness without treating children differently based on race—by mandating more specific standards, or providing remedies for those who have actually been injured, rather than through ICWA/MIFPA's discriminatory rules that apply to all "Indian children," regardless of whether they've suffered injury due to vague state-law standards.[26]

Second, ACLU's arguments that ICWA/MIFPA satisfy the narrow tailoring requirement are unpersuasive. Those laws do not "narrowly define 'Indian child' to capture a child's connection to a federally recognized Tribe." ACLU Br. at 24. Instead, they define "Indian child" based exclusively on *biology*. That means a child

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[20] *In re Welfare of Child. of S.W.*, 727 N.W.2d 144, 150 (Minn. Ct. App. 2007).
[21] *In re Welfare of Child. of R.M.B.*, 735 N.W.2d 348, 351 (Minn. Ct. App. 2007).
[22] *Matter of Adoption of B.B.*, 417 P.3d 1, 31 (Utah 2017).
[23] *Holyfield*, 490 U.S. at 43.
[24] *S.R.K.*, 911 N.W.2d at 828 n.7.
[25] *In re Interest of S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986).
[26] Nobody has alleged, for instance, that these twins have suffered an injury due to any vagueness in non-ICWA/MIFPA Minnesota child welfare law.

who has no familiarity whatever with tribal culture can be deemed "Indian" based on blood quantum—while a child who's deeply familiar with tribal culture, but lacks the requisite blood quantum, would be deemed non-"Indian." This, again, fails to promote the government's interest in tribal preservation, and even contradicts it. As Ojibwe author David Treuer observes, "you cannot measure culture by percentages of blood." *Rez Life* 279 (2012).

Consider an example borrowed from Treuer: a person (call her B.), who is "as Indian as they come," *id.* at 277—an expert on Native Languages, "granddaughter of the most important Ojibwe ceremonial chief of the twentieth century," *id.* at 280, and who served as tribal educational director—but is excluded from tribal membership by the tribe's blood quantum requirement. *Id*. If she were a minor, she would *not* qualify as an "Indian child"under ICWA/MIFPA despite "spen[ding] the better part of her life living her Indian way and participating in ceremony," and serving as a professional teacher of Native culture. *Id*. (Nor would she qualify as an "Indian" adult under these laws.) Such exclusion is certainly not narrowly tailored to advance the government's interest in preserving tribal culture.

Despite ACLU's argument (at 26) the placement preferences don't even satisfy *rational basis* scrutiny. They require placement with "Indians," regardless of tribe, *see* Minn. Stat. § 260.773 subd. 3; 25 U.S.C. § 1915(a),(b), which, as Judge Duncan and his Fifth Circuit colleagues explained, doesn't "rationally link[]

children with their tribes." *Brackeen v. Haaland*, 994 F.3d 249, 392 (5th Cir. 2021), *vacated* 599 U.S. 255 (2023). ACLU's contention that "[f]amilies of *any* Tribe are thus uniquely positioned to integrate children into Indian cultures," ACLU Br. at 30, is paternalistic racial stereotyping. It ignores the manifold differences between, say, Seminole and Salish, Modoc and Menominee, and assumes that one Indian is the same as any another.

Third, ACLU says the preferences are narrowly tailored because they "aim to keep Indian children connected to their families, Tribes, and culture," *id.* at 26, but this just isn't true. Nothing in ICWA/MIFPA require that the family a child is placed with actually have any cultural affiliation or meaningful relationship with the tribe. As long as a family qualifies as "Indian"—defined solely by their biological ancestry—it qualifies for the preference even if its members don't follow tribal cultural or religious practices, or speak a tribal language. Meanwhile, a non-"Indian" family is denied the preferences even if that non-"Indian" family is *fully* acculturated with a tribe. If B. (the woman referenced by Treuer, *supra*) sought custody of a child, she would not qualify as an "Indian" parent under ICWA/MIFPA—despite the profoundest cultural, linguistic, social, and political relationships with the tribe—solely because she lacks the required blood quantum. Denying preferences to adults who are culturally affiliated with a tribe, while giving them to adults who aren't, does not serve the government's interest in

connecting Native children to their ancestors' culture.[27] So, again ICWA/MIFPA are not narrowly tailored.

Fourth, ACLU also claims that ICWA "is tailored to reflect that … Indian families and Tribes are best positioned to raise their children." ACLU Br. at 28. But that isn't what narrow tailoring means. The claim that "Indian" adults are "best positioned" to raise "their" children is simply a racial prejudice, and prejudices aren't narrow tailoring. As for "the historical deprivation of rights of Indian people and Indian Tribes," *id*. at 26, the answer is simple: "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

Obviously, it's true, and tragic that a disproportionately large number of "Indian" children are in foster care, ACLU Br. at 19, but that's because Native kids face disproportionate risks of abuse, neglect, poverty, and other factors likely to necessitate state intervention. The narrowly tailored solution would be to address the causes of abuse, neglect, and poverty—*not* to restrict children's opportunity to escape and to find safe, loving, permanent homes. Neither the state nor ACLU has

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[27] ACLU says Appellants do not "rebut" the Congressional testimony that led to ICWA's passage. Appellants aren't required to do that, because under strict scrutiny, the burden of proof is on the government, not Appellants./ *Fisher*, 570 U.S. at 310. But if such rebuttal were required, the Court is referred to Randall Kennedy, *Interracial Intimacies* ch. 12 (2003), for a thorough discussion of the flaws in that testimony.

proven that Native children are disproportionately taken into foster care due to the state's racism—and that would be the *minimum* required to justify ICWA/MIFPA's race-based standards. *See Pena*, 515 U.S. at 222.

Finally, ACLU claims that ICWA/MIFPA are narrowly tailored because they include exceptions for when continued custody by the "Indian" parent or custodian "is likely to result in serious emotional or physical damage to the child." ACLU Br. at 29. But compare those exceptions to the statute that applies to non-"Indian" children, and it becomes clear how inadequate this is. Under Section 260C.212, subd. 2(a), placement of a non-"Indian" child must serve "an individualized determination of [her] needs," and under subdivision 3, her placement can be changed if "the agency specifically documents that the current placement is unsuitable or another placement is in the best interests of the child." The burden of proof is preponderance-of-the-evidence. *In re S.G.*, 828 N.W.2d 118, 123 (Minn. 2013). For "Indian children," by contrast, removal can only occur if there is a risk of "serious emotional or physical damage," *and* this must be proven with beyond-a-reasonable-doubt evidence, including expert witness testimony, *S.R.K.*, 911 N.W.2d at 824, 829—an *extremely* high burden to satisfy.

The difference between these two rules means an "Indian" child cannot be rescued from an abusive home unless the mistreatment is *so severe* that it qualifies as "serious injury," and there is *overwhelming* proof based on expert testimony—whereas a child of another race may be rescued from an unsuitable placement

much more easily. In other words, an "Indian" child must suffer *more harm* than a non-"Indian" child before the state can intervene. That certainly does not serve the government's interests either in protecting children *or* in protecting tribes. It is therefore not narrowly tailored.

Racially discriminatory laws virtually never satisfy strict scrutiny "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic." *Pena*, 515 U.S. at 236 (cleaned up). Here, drawing a distinction based on biological ancestry does not serve the government's interests in protecting children or in preserving tribal integrity, which could be equally or better served through race-neutral laws. ACLU's clever new strict scrutiny test cannot cure ICWA/MIFPA's constitutional flaws.

CONCLUSION

ICWA/MIFPA are unconstitutional, and the decision should in that respect be *reversed*, while in other respects, *affirmed*.

Respectfully submitted,

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Fiddler Osband Flynn LLC.

/s/ Mark D. Fiddler

Mark D. Fiddler, (#197853)
Rachel Osband (#0386945)
12800 Whitewater Drive #100
Minneapolis, MN 55343
Tel: (612) 822-4095

Timothy Sandefur (*pro hac vice*)
Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
tsandefur@goldwaterinstitute.org

Jeffrey M. Markowitz (ID #391959)
Arthur, Chapman, Kettering, Smetak & Pikala, P.A.
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402-3214
P: (612) 339-3500
jmmarkowitz@ArthurChapman.com

Attorneys for Appellants

CERTIFICATION OF BRIEF LENGTH

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