STATE OF MINNESOTA

IN SUPREME COURT

In the Matter of the Welfare of the Children of :

L.K., Parent.

A23-1762

APPELLANTS' 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

Attorneys for Appellants

AMANDA L HEINRICHS-MILBURN
Attorney Reg. No. 0400393
1400 5th Street Towers
100 South Fifth Street
Minneapolis, MN 55402
(612) 672-3600
Attorney for Martin County

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

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

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

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

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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STATEMENT OF THE ISSUES

I. *Whether ICWA and MIFPA – which classify based on tribal affiliation – comport with the equal protection clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution under Morton v. Mancari, 417 U.S. 535, 553 n.24, 555 (1974), which holds that such "political" classifications "will not be disturbed" if the "special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians."*

The Minnesota Court of Appeals held that MIFPA comports with the Fourteenth Amendment's equal protection clause under rational-basis review, and declined to review Appellants' constitutional challenge to ICWA.

STATEMENT OF THE CASE

This is an appeal from a Child in Need of Protection and Services case (CHIPS) filed in Martin County Minnesota by Faribault and Martin County Health and Human Services (FMCHHS) on April 12, 2022. The children who were subject of this petition, K.K. and K.K., were placed in the foster home of Appellants N.R and K.R. on April 20, 2022, and May 16, 2022, in that order.

On September 23, 2023, the Red Lake Nation tribal counsel informed FMCHHS that the children were to be removed from the home of Appellants to be placed in the home of a cousin of the mother on September 13, 2023. Appellants filed a motion to intervene, to join their third party custody petition (filed on October 4, 2023), and for a stay; arguing that the Minnesota Indian Family

Preservation (MIFPA) and the Indian Child Welfare Act (ICWA) should not be applied because they are unconstitutional under the Equal Protection guarantees of the United States Constitution. The District Court denied the stay on the record at a hearing on September 13, 2023, and a subsequent written order on September 15, 2024. Appellants' motion for intervention was denied by order dated October 31, 2023, which also dismissed their custody petition.

The District Court failed to rule on the merits of the constitutional issues, and no parties chose to brief them, save Appellants. Appellants filed a timely appeal, and on June 3, 2024, the Court of Appeals issued a precedential decision holding that the District Court erred in denying Appellants' motion to intervene, and in dismissing their third-party custody petition. It remanded the issues of intervention and reinstatement of the custody petition to the District Court. The Court of Appeal also held that that MIFPA did not violate Equal Protection, but it declined to rule on the constitutionality of ICWA itself.

STATEMENT OF THE FACTS

This case concerns two-year-old fraternal twins born in Martin County to a mother (L.K.), who tested positive for amphetamines, methamphetamines, and opiates, at the time of birth. L.K. had also received no prenatal care during pregnancy. Both children suffered severe physical disabilities due to prenatal drug use, and required extensive hospital stays. The boy experienced severe drug

withdrawal symptoms, and the girl was born not breathing; after being revived, she was placed on a ventilator in the Natal Intensive Care Unit (NICU) at the Mayo Clinic in Rochester. She experienced seizures and other severe maladies.

Three days after birth, Human Services of Faribault & Martin Counties ("HSFMC") filed a child-in-need-of-protection-or-services ("CHIPS") proceeding, and the court determined that out-of-home placement was necessary to prevent imminent physical harm to the children. The boy was discharged from the hospital at the age of 11 days and placed with K.R. and N.R., non-Indian licensed foster parents. The girl remained in the NICU until she was 37 days old, then discharged into their foster care.

The District Court found that the children are either enrolled or are eligible for enrollment in the Red Lake Nation, and that ICWA and MIFPA apply. A few weeks after the children's birth, Red Lake Nation submitted an affidavit in support of out-of-home placement. K.R. and N.R. also submitted an affidavit, which noted that the county and the guardians ad litem represented to them that they were the preferred long-term placement for the children.

K.R. and N.R. cared for the children for more than a year, taking them to their many necessary appointments for medical care at the Mayo Clinic and facilitating in-home medical visits. This care included monthly physical therapy, quarterly occupational therapy, and quarterly early-childhood-specialist services.

On August 1, 2023, when the children were one year and four months old, Red Lake Nation announced that it wanted the twins sent to live with a cousin of L.K., known here as R.F. On September 9, 2023, the county informed K.R. and N.R. that the children would be placed with R.F. on September 13, 2023. There was no transition plan. On September 12, 2023, therefore, K.R. and N.R. filed an emergency motion for permissive intervention in the District Court, seeking a stay of the change of placement, a finding that "good cause" exists under ICWA and MIFPA not to change the placement, and a declaration that ICWA and MIFPA are unconstitutional.

The District Court held a hearing the next day (September 13) but confined its attention to the placement change, deferring other issues for later decision. K.R. and N.R. argued that the placement should be stayed because there was no transition plan; because R.F.—who had never met the children—was unfamiliar with their medical needs; because such placement was distant from L.K.; and because L.K. favored placement with K.R. and N.R. and not with R.F. The District Court, however, concluded that the change in placement should occur immediately, and that the children should be placed on the Red Lake Reservation. On September 15, it issued an order denying K.R. and N.R.'s motion.

On October 4, K.R. and N.R. filed a petition for third-party custody, and the District Court held a hearing on that petition the next day (although it gave the other parties the opportunity to file written submissions afterward). The guardian

ad litem (GAL) and Red Lake moved to dismiss the petition, and on October 31, the District Court denied the motion and dismissed the petition. It did not rule on the constitutionality of ICWA or MIFPA.

The Court of Appeals reversed in part. It held that the District Court erred in denying the motion for permissive intervention and K.R. and N.R.'s third party custody petition. However, it held that MIFPA is constitutional—although it declined to address whether ICWA is unconstitutional, finding both that MIFPA is "more specific" than ICWA (although it did not explain what this meant) and that a state court lacks authority to declare a federal statute unconstitutional.

ARGUMENT

I. ICWA and MIFPA violate the constitutional guarantee of equal protection of the laws because they treat the children differently based exclusively on their biological ancestry.

ICWA and MIFPA treat "Indian children" differently from non-"Indian children"—subjecting them to rules that are less protective of their individual rights than the laws that apply to other children—and does so based on their racial ancestry and/or national origin. That is unconstitutional, and the Court of Appeals committed reversible error by holding otherwise.

A. A ICWA and MIFPA impose different, and less protective, rules due solely to the blood in these children's veins.

The Fifth Amendment's due process clause and the Fourteenth Amendment's equal protection clause prohibit the government from treating people differently based on "immutable characteristic[s] determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), unless the government shows that such differential treatment meets the "daunting" burden of strict scrutiny—i.e., the distinction is narrowly tailored to advance a compelling government interest. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206–07 (2023).

ICWA and MIFPA impose rules on child custody proceedings involving "Indian children" that differ from those that apply to non-"Indian children." These include evidentiary requirements that make it harder to prove abuse or neglect[1]; rules mandating the transfer of cases to tribal court[2] where the Bill of Rights does not apply, *see, e.g., United States v. Bryant*, 579 U.S. 140, 149 (2016); and the "placement preferences" at issue here, which require that an "Indian child" be

[1] *Compare* Minn. Stat. § 260C.317 (requiring clear and convincing evidence in termination-of-parental-rights cases) *with* 25 U.S.C. § 1912(e), (f) *and* Minn. Stat. § 260.771 subd. 6. (requiring beyond-a-reasonable-doubt, instead).
[2] *See* 25 U.S.C. § 1911(b); Minn. Stat. § 260.763.

placed according to a schedule of preferences based on their racial or national origin.[3]

Indeed, as the proceedings below demonstrate, a petitioner seeking an order deviating from these placement preferences must meet the strict "clear and convincing" evidence standard to show good cause to deviate. 25 C.F.R. § 23.132. And under MIFPA, anyone seeking to show "good cause" to deviate from the preferences—here, by showing that the children have special needs—must proffer the testimony of a "qualified expert witness." But to be "qualified" means to be approved by the child's tribe. By contrast, if a tribe proffers an expert witness, that witness's qualifications are unassailable. Minn. Stat. Ann. § 260.771 (b) ("The qualifications of a qualified expert witness designated by the Indian child's Tribe are not subject to a challenge."). This means witnesses offered by one side must first be vetted by the other side—whereas the reverse is not true.

These (and other) differences in treatment are detrimental to children's welfare. They:

- deter otherwise fit and willing adults from offering safe, loving, permanent homes to children in need. *See, e.g., In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (1996) ("As a result of this disparate treatment, the number and variety of adoptive homes that are potentially available to an Indian child are more limited than those available to non-Indian children, and an Indian child who has been placed in an adoptive or potential adoptive home has a greater risk than do non-Indian children of being taken from that home and placed with strangers.").

[3] 25 U.S.C. § 1915; Minn. Stat. § 260.773.

- require state child welfare agencies to return "Indian children" to homes known to be abusive. *See, e.g.*, Mark Flatten, *Death on a Reservation* (Goldwater Inst. 2015)[4] (detailing cases such as *In re Int. of Shayla H.*, 855 N.W.2d 774 (Neb. 2014), in which court forced state to return children to sexually abusive household because state did not satisfy ICWA's "active efforts" requirement—whereupon they were molested again).

- permit tribal governments to remove children from families they've come to love, and send them to live with strangers, instead, depriving them of the stability they need. *See, e.g., In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (2016) (taking six-year-old from family she'd lived with for four years, to live in another state with a *non*-Native in another state).

- enable abusive, *non-"Indian"* ex-spouses to block "Indian" parents from protecting their own children's best interests. *See, e.g., Matter of Adoption of T.A.W.*, 383 P.3d 492 (Wash. 2016) (non-Native father successfully invoking ICWA to block tribal member mother from terminating his rights).

- override the "best interest of the child" rule: whereas for non-"Indian" children, the child's best interests are the "paramount" consideration, *Matter of Welfare of D.L.*, 486 N.W.2d 375, 379 (Minn. 1992) (citation omitted), an "Indian child's" best interests are only considered one among a "constellation of factors" for courts to consider. *Alexandria P.*, 204 Cal. Rptr. 3d at 634. And whereas for non-"Indian" children, a best-interests determination is "an *individualized* determination," Minn. Stat. § 260C.212 subd.2(a)—meaning it focuses on the *specific* needs and circumstances *particular* child and his or own *individual* welfare—those individual needs are compromised for "Indian children"; MIFPA says their "best interests … are interwoven with the best interests of the Indian child's Tribe." Minn. Stat. § 260.755 subd. 2a. Even the court below acknowledged that MIFPA "is designed to serve the interests of Indian tribes," Slip Op. at 37—whereas child welfare law with respect to *other* children is designed to serve the best interests of *the child*.

In these and other ways, ICWA and MIFPA impose burdens on "Indian" children, not benefits. *See generally* Dwyer, *The Real Wrongs of ICWA*, 69 Vill. L. Rev.

[4] https://www.goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/8/14/Final%20Epic%20pamplet.pdf

1, 42–52 (2024); Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1, 35–59 (2017).

Of course, the question before this Court is not whether ICWA/MIFPA are good policy, but whether the separate and less-equal rules they impose are an unconstitutional form of race- or national-origin-based discrimination. The answer is yes.

Before proceeding, one important preliminary note: It's imperative to keep in mind the difference between tribal citizenship[5] on one hand, and "Indian child" status on the other. *See In re Abbigail A.*, 1 Cal. 5th 83, 95 (2016) (noting this distinction); *Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011) (noting distinction between "defin[ing] membership only for *tribal* purposes," and "defin[ing] membership for the purposes of a federal statute."). Tribal membership is exclusively a function of tribal law. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("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."). But "Indian child" status is a categorization created by *state and federal* law, and must therefore comply with constitutional equal protection requirements. This case does not dispute or threaten a tribe's right to

[5] The terms "tribal membership" and "tribal citizenship" are used interchangeably herein.

determine its own citizenship. Rather, it concerns the constitutionality of the statutory category of "Indian child."

The definition of a race-based statute[6] is 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) (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)). ICWA and MIFPA certainly do that. They apply to cases involving "Indian children," a term of art statutorily defined solely by biological ancestry.

ICWA defines "Indian child" as a minor who either is a tribal member or who (a) is eligible for membership and (b) has a biological parent who is a tribal member. 25 U.S.C. § 1903(4). MIFPA's definition is similar, but broader; it defines an "Indian child" as a child who is either a member *or* who is eligible for membership—and it omits ICWA's requirement that the child have a biological parent who is a member.

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[6] If ICWA/MIFPA are not race-based, they are based on national origin. A national-origin classification is based on "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). Thus in *Oyama v. California*, 332 U.S. 633, 645 (1948), the Court found a law unconstitutionally 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. Because national-origin and racial categorization are subject to the same strict scrutiny, *Frontiero*, 411 U.S. at 682, all references herein to racial categorization should be construed as applying equally to ICWA/MIFPA insofar as they treat children differently based on the national origin of their ancestors.

Tribal membership, in turn, is a function of tribal law. Under Red Lake Nation law, the *sole* relevant factor is biological ancestry. The Nation's law requires a minimum of 25 percent Indian blood.[7] But it requires no social, political, religious, linguistic, or cultural affiliation. Indeed, no American tribe requires any cultural, political, social, etc., connection as a condition for citizenship; all are based exclusively on biological factors.[8]

Consequently, children are deemed—and the bi-racial children in this case *were* deemed—"Indian children" based exclusively on their biological ancestry, *not* any political, cultural, social, etc., connection to a tribe. A child can be an "Indian child" even if she is not, *and never becomes* a tribal member. Also, a child who is fully acculturated to the Tribe, speaks a Native language, practices a traditional religion, has thoroughgoing social and political connections to the Tribe, will *not* qualify as an "Indian child" under ICWA/MIFPA if she lacks the requisite blood quantum. A child who *does* have the requisite blood quantum, by

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[7] An authoritative copy of the tribal enrollment ordinance could not be located online. However, Red Lake Nation reports the requirement to be one quarter. *See* https://www.redlakenationnews.com/story/2022/11/18/news/red-lake-nation-expects-rapid-decline-in-tribal-membership-over-next-100-years-under-current-enrollment-criteria/110228.html

[8] In most states, in fact, courts are *prohibited* from considering the existence *vel non* of a child's political, cultural, religious, etc., connection to a tribe, when deciding whether ICWA applies, thanks to the repudiation of the "Existing Indian Family" doctrine. *See, e.g., In re A.J.S.*, 204 P.3d 543, 549–51 (Kan. 2009); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 963–65 (Ariz. Ct. App. 2000). In these states, courts are *only* allowed to consider biological ancestry in deciding whether ICWA applies.

contrast, will *not* be disqualified by any *lack* of political, social, cultural, etc., connection to the tribe. Also, a child who is *adopted* by a tribal member and raised with tribal cultural and social identity, will not qualify because she lacks a "biological parent" who is a tribal member. *See In re Francisco D.*, 178 Cal. Rptr. 3d. 388, 396 (Ct. App. 2014) (ICWA does not apply to a child adopted by a tribal member). Biological ancestry is therefore the sole factor in defining "Indian child."

It's often said that ICWA is not race-based because not every person of Native American ancestry will qualify. Judge Dennis, for example, said in *Brackeen v. Haaland*, 994 F.3d 249, 339 n.50 (5th Cir. 2021) (en banc), that ICWA's definition of "Indian child" is not a racial classification because it "does not capture" many people of Native ancestry. But that argument is untenable, because as *Rice* observed, "[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." 528 U.S. at 516-17. If a statute created a classification of, say, "all black people with driver licenses," that would be a racial classification, even though it excludes black people without driver licenses. Where race is the "but-for cause" of a statutory difference in treatment, the statute creates a racial classification. *Cf. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 327 (2020).

Nor is it any defense to say ICWA/MIFPA don't create racial categories because they are "based on membership in an Indian tribe," as the court below held, Slip Op. at 38, given that tribal membership itself turns exclusively on

biological ancestry. If the government imposes burdens or benefits based on a person's membership in an organization, and that organization is itself discriminatory, then the government's benefits and burdens become discriminatory as well, and must satisfy the applicable scrutiny. *See, e.g., Terry v. Adams*, 345 U.S. 461, 469 (1953) (private organization was free to discriminate, but when state relied on that organization to determine public policy, the policy was discriminatory); *Sokolow v. County of San Mateo*, 261 Cal. Rptr. 520, 527 (Ct. App. 1989) (where sheriff's department effectively required membership in organization, and that organization was discriminatory, the department was engaged in discrimination). To repeat: tribes are free to set the conditions of citizenship as they wish, but neither Minnesota nor the Federal Government may grant benefits or impose burdens based on a person's membership in an organization that determines membership exclusively by racial factors.

To sum up: ICWA/MIFPA impose a different, and less-protective set of rules on children, which are triggered exclusively by their biological ancestry, not by any political, social, cultural, etc., connection with a tribe.

In addition to "singl[ing] out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics,'" ICWA/MIFPA also do so "for a racial purpose." *Rice,* 528 U.S. at 515. The U.S. Supreme Court has acknowledged that ICWA's goal is to implement "'a Federal policy that, where possible, an Indian child should remain in the Indian community.'" *Mississippi Band of Choctaw Indians*

*v. Holyfiel*d, 490 U.S. 30, 37 (1989) (quoting Congress). Indeed, ICWA/MIFPA impose a legal presumption that "Indian children" should be raised by "Indian" adults—even of different tribes![9]—rather than with a fit Asian, Hispanic, Black, White, etc., family. *In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) ("ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences"). This despite the fact that presumptions are singularly inappropriate in child welfare matters. *See Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972) ("when, as here, the [presumption] forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.").

Even the court below said that ICWA/MIFPA are premised on the idea that "Indians [are] 'a separate people'"—and presumably should be kept that way. Slip Op. at 35 (quoting *United States v. Antelope,* 430 U.S. 641, 646 (1977)). In short, ICWA/MIFPA treat children differently based on their ancestry *for the purpose* of keeping "Indian children" separated from adults of other biological ancestry.

[9] In *Brackeen*, 994 F.3d at 268, *aff'd in part*, 599 U.S. 255 (2023), the en banc Fifth Circuit affirmed by an equally divided court the District Court's finding that ICWA's placement preferences lack a rational basis insofar as they require the placement of a child from one tribe with adults of a different tribe. The Supreme Court did not disturb that holding.

B. How these less-protective rules treated these children differently from others.

The twins in this case were born severely drug-exposed, with life-threatening maladies that may hinder their development throughout their lives. Fortunately, they were placed with K.R. and N.R., who live close enough to the Mayo Clinic to get them the care they need. Had these children been white, the government's "foremost consideration," *Thornton v. Bosquez*, 933 N.W.2d 781, 792 (Minn. 2019), would have been their best interests. Moreover, under Minn. Stat. §260C.212 subd. 2(a), "[t]he policy of the state of Minnesota" would have been "to ensure that the child[ren]'s best interests are met by requiring an *individualized determination* of the needs of the child[ren] … and of how the selected placement will serve the current and future needs *of the child being placed*." (emphasis added). That individualized determination would have been made by consulting the list of ten statutory factors[10] in Minn. Stat. § 260C.212 subd. 2(b), and they would have been placed in accordance with the relative "consideration" in subdivision 2(a). As the Court has said, "[t]he language of the statute…requires the district court to "'*consider* placement, consistent with the child's best interests and in the following

[10] Notably, the ten-factor best-interests determination in Section 260C.212 subd.2(b) *already* includes consideration of the child's religious and cultural needs and connections with community. This shows that even without MIFPA, an Indian child's connections with a tribe *would already be* considered as part of the best-interests evaluation.

order, with (1) a relative or relatives of the child or (2) an important friend with whom the child has resided or had significant contact.' Notably…[the] word 'preference' does not appear in the current version." *In re S.G.*, 828 N.W.2d 118, 124 (Minn. 2013) (emphasis added).[11]

What's more, the government would have been legally forbidden from delaying or denying their placement based on their race or national origin ,or that of K.R. and N.R. Minn. Stat. § 260C.212 subd. 2(c).

But because these children are legally deemed "Indian," the rules are different. Instead of the "individualized" best-interest analysis based on ten statutory factors, to which a white child is entitled, these children were subjected to an eleventh factor, *see* Minn. Stat. § 260C.212 subd. 2(b)(11)—one that dilutes (or more precisely overrides) that individualized determination, and instead legally presumes that their best interests mandate placement with tribal members, Minn. Stat. 260.755 subd. 2a, and that also regards "the future welfare and continued existence of the child's Tribe" as a priority equal to or greater than their own individual welfare. Minn. Stat. § 260.754(e); 260.753.

The consequence of this difference in treatment is that the children were taken from a safe, loving home where they'd lived for over a year, with convenient

[11] The statute at issue in *S.G.* was an adoption statute, but it's identical to the placement statute in all juvenile protection matters: Minn. Stat. § 260C.212, subd. 2.

access to the medical treatment they desperately need, and placed in a home on the reservation, far from medical care, with the mother's aunt, whom the children had never even met, and who had no familiarity with their medical needs.

C. Mancari does not absolve ICWA/MIFPA of their constitutional infirmities.

The Court of Appeals held (Slip Op. at 34-38) that this differential treatment was nevertheless constitutional under *Morton v. Mancari*, 417 U.S. 535, 554 (1974), a case which upheld a Bureau of Indian Affairs (BIA) rule that gave hiring preferences to tribal members. The Court said that distinction was not racial, but political in nature, because it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities," and because these entities are "governed by the BIA in a unique fashion," the preference was analogous to a rule requiring "that a member of a city council reside within the city governed by the council." 417 U.S. at 554. Under those circumstances, the Court said, the proper standard of review was rational-basis, not strict scrutiny. *Id.* at 555.

Mancari never said that *all* laws that treat Native Americans differently from other groups are subject to rational basis review. *See also 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.").

In fact, *Mancari* expressly declined to hold that: "The preference is not directed towards a 'racial' group consisting of 'Indians,'" it said. 417 U.S. at 553 n.24.[12] Similarly, *Antelope* withheld judgment regarding whether rational-basis was the proper standard of review for laws that, for example, "subject[] [Indians] to differing penalties and burdens of proof from those applicable to non-Indians charged with the same offense." 430 U.S. at 649 n.11. (Notably, both ICWA and MIFPA *do* impose different burdens of proof on child welfare cases involving "Indian children.")

Most importantly, *Mancari*'s rational basis rule was expressly limited to *political relationships*—that is, it drew the line between racial (strict scrutiny) and political (rational basis) on the theory that tribes as political entities—are analogous to a "city" governed by a city council, which a person can choose to join and/or remain a member of. Hence the Court's statement that the hiring preference was granted to "members" of tribes, 417 U.S. at 553 n.24, and its references to "a constituency of tribal Indians living on or near reservations," and "the cause of Indian self-government." *Id.* at 552, 554. ICWA/MIFPA, by contrast,

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[12] Notably, *Mancari* did *not* hold that "Indian" is not *also* a racial group, but only that differential treatment of that group's members *in that instance* was based on their separate political status as tribal members. *See Mancari*, 417 U.S. at 553 n.24 ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are *racially to be classified as 'Indians*.'").

do *not* turn on political relationships of any sort; they do not even require that a child to be an actual tribal member. Instead, they turn on a child's biological eligibility for a (future) political relationship. That's not within the category of "political" relations contemplated by *Mancari*.

Also, *Rice* expressly limited *Mancari*, holding that "the case was confined to the authority of the BIA, an agency described as 'sui generis.'"[13] 528 U.S. at 520 (quoting *Mancari*, 417 U.S. at 554). Of course, ICWA/MIFPA are not limited to the workings of the BIA.

It is sometimes said that ICWA/MIFPA nevertheless turn on political factors because they use biological factors as "a proxy for connection[] to a political entity." Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 Stan. L. Rev. 491, 538 (2017). In his *Brackeen* opinion, for example, Judge Dennis said that the fact that a person "may be eligible for citizenship based on their ancestry does not … alter the fact that citizenship and eligibility therefor ... are political matters." 994 F.3d at 338 n.51. But that's not the question. The question is whether it is constitutional for state and federal

[13] Notably the *Mancari* Court's use of the term "*sui generis,*" 417 U.S. at 554, is often glossed over, as if it justified disparate treatment of all types. Actually, it was a term of limitation. It literally means something that "stands alone"—that is, incomparable. The self-determination employment preferences for Indians working within the BIA on tribal programs was truly "*sui generis*." See Black's Law Dictionary 1602 (4th ed. 1968) ("the *only* one of its own kind.").

governments to treat *American* citizens[14] differently just because they are genetically entitled to some future dual citizenship. The answer is no: they may not restrict the rights of American children of, say, Jewish or Irish ancestry on the grounds that they might someday become dual citizens of Israel or Ireland.[15]

In any event, ICWA/MIFPA are nothing like the law involved in *Mancari*. There, the Court was understandably sensitive to the BIA's goals in ensuring that it be "responsive to the needs of its constituent groups." 417 U.S. at 554. But ICWA/MIFPA are not concerned with that, or with any other political matters, or with Indian self-government generally. These are ordinary child-welfare laws. They don't affect how the BIA governs, or the authority of tribal or state governments. They don't even apply on reservations. *See* 25 C.F.R. § 23.103(b)(1) (ICWA does not apply in tribal court). Instead, they govern how *the state* treats abused or neglected children who reside *off*-reservation, who have *no* political, social, cultural, etc., connection to a tribe; who are often not even tribal members, and may have no idea they have Native ancestry.

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[14] It should never be forgotten that **all American Indians are citizens of the United States, entitled to the same individual rights and constitutional protections as all other citizens.** 8 U.S.C. § 1401b. They are not and cannot be considered analogous to foreign nationals.

[15] Nor is it constitutional to use biological ancestry as a proxy for political affiliation, and on that basis impose burdens. That's precisely what happened in *Korematsu v. United States*, 323 U.S. 214 (1944), and what the Supreme Court repudiated in *Trump v. Hawaii*, 585 U.S. 667, 710 (2018).

As the Ninth Circuit has observed, *Mancari*'s rational basis rule "shield[s] only those statutes that affect uniquely Indian interests." *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997).[16] But the welfare of Minnesota-citizen children needing protection is not a uniquely Indian interest; it's a *state* concern—regardless of their race. *See Price v. Sheppard*, 307 Minn. 250, 259 (1976) (state has a "duty to protect the well-being of its citizens who are incapable of so acting for themselves."). In fact, that's why the Court of Appeals held the Minority Adoption Act unconstitutional in *Matter of Welfare of D.L.*, 479 N.W.2d 408, 413 (Minn. Ct. App. 1991).[17] The court said the Act "establishe[d] a racial classification by requiring, in the adoptive placement of a child of minority racial or ethnic heritage, that the trial court follow certain preferences not required for non-minority children" (which is also true of ICWA/MIFPA). *Id*. But the state's proper concern was with "*all* children," not just children of one or another race—and all children

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[16] The court in *Babbitt* rejected the oft-repeated claim the sky would fall if Indians were deemed members of a racial group. It stated, "Intervenors claim that subjecting laws favoring Indians to strict scrutiny "would effectively gut Title 25 of the U.S. Code." Intervenor-Defendant-Appellee's Br. at 14. Such a dire prediction, however, is unwarranted. We have little doubt that the government has compelling interests when it comes to dealing with Indians. In fact, *Mancari*'s lenient standard may reflect the Court's instinct that most laws favoring Indians serve compelling interests. *See* Cohen, *Handbook of Federal Indian Law* 656 ("The Court's reliance on a political-racial distinction may be no more than an imprecise reference to the special status of Indian tribes under the Constitution and laws."). If so, Title 25 will only be stripped of those laws that are not narrowly tailored. *Williams v. Babbitt*, 115 F.3d 657, 665 n.8 (9th Cir. 1997).

[17] This Court affirmed the Court of Appeals without reaching the constitutionality of the Act. 486 N.W.2d 375 (1992).

have the right to be protected "in a racially neutral manner." *Id. See also Palmore v. Sidoti*, 466 U.S. 429 (1984) (basing child placement decisions on race was unconstitutional).

That ICWA's classifications are unconstitutionally race-based is powerfully confirmed by *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013), which recognized that ICWA raises "equal protection concerns." In that case, the Court observed that if a tribal member could "play [the] ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests," then "many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA." *Id.* This, the Court recognized, "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Id.* at 655–56.

It's impossible to imagine a clearer example of "eleventh-hour" application of the ICWA trump card than the case at bar.

ICWA and MIFPA fall outside the narrow circle of cases in which differential treatment of Indians and non-Indians is subject to rational basis scrutiny. They're race-based and unconstitutional.

D. The "plenary" power doctrine is irrelevant.

In *Haaland v. Brackeen*, 599 U.S. 255 (2023), the Supreme Court rejected federalism-based arguments that ICWA unconstitutionally commandeers state

governments. Those arguments are obviously not raised here, and that Court declined to address the equal protection and due process questions that *are* raised here, because it said the plaintiffs lacked standing. *Id.* at 291–96. *See also id.* at 333–34 (Kavanaugh, J., concurring) (expressing wish to address ICWA's equal protection flaws).

The Court did, however, say that ICWA fell within Congress's "plenary" power, *id.* at 276, and that might lead to confusion here. So, to clarify: the Court acknowledged that whatever the word "plenary" may mean, it does *not* mean absolute or unlimited. *See id*. It certainly must be cabined by the Bill of Rights. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) ("The United States is entirely a creature of the Constitution…. It can only act in accordance with all the limitations imposed by the Constitution [including] … the Bill of Rights."); *cf. United States v. Montoya de Hernandez*, 473 U.S. 531, 563 (1985) (Brennan, J., concurring) (plenary power is limited by Bill of Rights); *Bridges v. Wixon*, 326 U.S. 135, 160–62 (1945) (Murphy, J., concurring) (same).

Even when exercising its treaty powers with respect to foreign governments, Congress's must obey the Bill of Rights. In *Reid*, the Court found it unconstitutional for Congress, via a treaty, to force American citizens to undergo trials in tribunals that lacked full Bill-of-Rights protections: "no agreement with a foreign nation can confer power on the Congress … which is free from the restraints of the Constitution," it said, or allow Congress to "strip[] away" the

"shield which the Bill of Rights and other parts of the Constitution provide ... just because [the citizen] happens to be in another land." *Id.* at 5-6, 16.[18]

Talismanic reference to "plenary" power cannot, therefore, resolve or even help resolve the constitutional questions raised here.

CONCLUSION

Former foster parents K.R. and N.R. respectfully request that this Court find that MIFPA and ICWA are unconstitutional under the Equal Protection Clause.

The Fourteenth Amendment's language could not be simpler, or more majestic:

> *No State shall…deny to any person within its jurisdiction the equal protection of the laws.*

Appellants only ask this Court to make that commandment mean what it says. Appellants are "any person"—so are K.K. and K.K. Under any fair reading of the non-ICWA statutory best-interest factors that apply to children of every other race, placement with Appellants is in the children's best interests. To the extent that ICWA/MIFPA command a contrary result, they are unconstitutional.

Separate child welfare laws for children of Indian descent like the twins in this case are, like separate schools, inherently unequal, *Brown v. Board of Education,*

[18] ICWA/MIFPA disregard these limits by, *inter alia*, forcing the parties in a state child welfare proceeding into tribal courts which are not governed by the Bill of Rights.

347 U.S. 483, 495 (1954), and are especially harmful to children. *Cf. id.* at 494. This separateness must end.

The judgment of the Court of Appeals should be *reversed* with respect to the constitutionality of ICWA and MIFPA, and 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
mark@fiddlerosband.com

/s/ *Timothy Sandefur*
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

Attorneys for Appellants

CERTIFICATION OF BRIEF LENGTH

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