No. 25-

IN THE

Supreme Court of the United States

NATHAN AND KELLIE REYELTS,

Petitioners,

v.

KEITH ELLISON, ATTORNEY GENERAL OF MINNESOTA; FARIBAULT-MARTIN COUNTY HUMAN SERVICES; RED LAKE NATION; L.K., MOTHER; AND MCKENZIE BORTH, GUARDIAN AD LITEM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Child Welfare Act ("ICWA") and the Minnesota Indian Family Preservation Act ("MIFPA") impose race-based rules that *require* protecting "Indian children" *less* than non-"Indian" children. When this Court declined to address the equal-protection challenge to ICWA in *Haaland v. Brackeen*, 599 U.S. 255, 294 n.10 (2023), it observed that non-"Indians" seeking to be an "Indian child's" forever family would "[o]f course" have standing to bring that challenge in state court. Petitioners are those people. For more than a year, they provided foster care to two "Indian children" born with severe disabilities. ICWA/MIFPA derailed their permanency plans when the county moved the children to an Indian cousin, citing "ICWA/MIFPA" and Red Lake's preference. Pet.App.314a. The Minnesota Court of Appeals majority recognized Petitioners' standing, although it rejected their challenge. Pet.App.110a-127a. But then the District Court denied them intervention into the children's case—in express part *because* they "motioned th[at] Court to find ICWA and MIFPA unconstitutional." Pet.App.76a. The Minnesota Supreme Court affirmed and, citing that exclusion, refused to consider the constitutional challenge. Pet.App.20a, 31a-36a.

Absent reversal, ICWA/MIFPA's denial of equal protection will continue, and other states could follow Minnesota's roadmap to try to evade this Court's review.

The questions presented are:

1. Whether ICWA and MIFPA unconstitutionally deny equal protection to "Indian" children and to non-"Indian" people who seek custody of them.

2. Whether denying Petitioners intervention because of their good-faith argument that ICWA and MIFPA are unconstitutional violates the First Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. Petitioners, Nathan and Kellie Reyelts, seeking a declaratory judgment that ICWA and MIFPA are unconstitutional, petitioned to intervene in a child-protection proceeding regarding twin toddlers whom they sought to adopt or be permanent custodians of, and petitioned for custody of the twins. Pet.App.311a-312a, 271a-309a. They participated in state trial court, at the Minnesota Court of Appeals, and at the Minnesota Supreme Court.

Respondents are: Keith Ellison, Attorney General of Minnesota; Faribault-Martin County Human Services; Red Lake Nation; L.K., Mother; and McKenzie Borth, Guardian ad Litem.

2. Petitioners are all individuals. Respondents are individuals or tribal and state government agencies.

RELATED PROCEEDINGS

Matter of Welfare of Child. of L.K., No. A23-1762, A24-1296 32 N.W.3d 163 (Minn. 2026). Judgment entered April 9, 2026.

Matter of Welfare of Child. of L.K., A23-1762, 9 N.W.3d 174 (Minn. App. 2024). Judgment entered April 9, 2026.

Matter of Welfare of Child. of L.K., Nos. 46-JV-22-32 (CHIPS File), 42-JV-23-128 (Minn. Dist. Ct.). Final appealable reconsideration order entered July 24, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nathan and Kellie Reyelts respectfully petition for a writ of certiorari to review the opinions of the Minnesota Court of Appeals and of the Minnesota Supreme Court.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 32 N.W.3d 163, (Minn. 2026), and is reprinted in the Appendix at 1a-53a. That opinion came after opinions by the Minnesota Court of Appeals, reported at 9 N.W.3d 174 (Minn. App. 2024), and reprinted at Pet. App.80a-127a (majority) and 128a-153a (dissent). The relevant decision of the Juvenile Court, which came after remand from the Court of Appeals, is unreported and is reprinted at Pet.App.54a-79a.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on April 9, 2026. App. 187a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution are reproduced at Pet.App.189a.

Relevant portions of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.), are reproduced at Pet.App.190a-208a.

Relevant portions of the Minnesota Indian Family Protection Act (Minn. Stat. § 260.751 et seq.), are reproduced at Pet.App.208a-263a.

Relevant Portions of the Minnesota Juvenile Court Act (Minn. Stat. § 260C.001 et seq.), are reproduced at Pet.App.264a-270a.

Minnesota Rule of Juvenile Protection 34.02 is reproduced at Pet.App.270a.

INTRODUCTION

In *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), this Court was confronted with a challenge to the constitutionality of the Indian Child Welfare Act ("ICWA"), a federal law that separates at-risk children into the race-based categories of "Indian" and non-"Indian" and then imposes different, less-protective rules on the child-welfare cases involving "Indian children." For example, ICWA's race-based "placement preferences" require that "Indian children" be placed in foster homes or adoptive homes with "Indian" adults, rather than equally (or better) qualified families who are of other ethnic or national backgrounds. These and other racially discriminatory provisions of ICWA led this Court to acknowledge that ICWA and its state adjuncts raise serious "equal protection concerns." 570 U.S. at 656.

In *Haaland v. Brackeen*, 599 U.S. 255 (2023), these and other constitutional objections to ICWA were raised again. The plaintiffs there lacked standing to raise the equal-protection claims, however, based on redressability problems. *Id.* at 292-94. Still, this Court added that

"[o]f course" an injured party could "challenge ICWA's constitutionality in state court" in a future case. *Id.* at 294 n.10.

That is what the Petitioners did here—or tried to do, only to run into an unconstitutional roadblock: the Minnesota Supreme Court held that *the very fact that Petitioners challenge ICWA's constitutionality* can be used as proof that they are inappropriate caretakers for the children. It accordingly affirmed barring them from challenging ICWA's constitutionality (and that of its state-law adjunct, MIFPA). It then went out of its way to vacate the state appellate court's constitutional opinion, breaking from its longstanding practice of *not* using such a vacation procedure, *see Just. v. Marvel, LLC,* 979 N.W.2d 894, 903 n.9 (Minn. 2022)—and departing from Minnesota law in many other drastic ways, *see* Below, Section II.C.

That effort to prevent this Court's review of the equal-protection issue was foreshadowed during oral arguments when one justice repeatedly expressed animosity toward Petitioners' constitutional challenge, suggesting it was somehow improper for them to "try to get the issue of constitutionality of the Indian Child Welfare Act before the United States Supreme Court," and that "the big question for me" was whether Petitioners intended to seek this Court's review.[1]

That offends the Constitution three times over.

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1. https://mncourts.gov/supremecourt/oralargumentwebcasts/2024/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 34:35-35:00 (9/30/2024); https://mncourts.gov/supremecourt/oralargumentwebcasts/2025/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 31:10-31:33 (4/1/2025).

First, ICWA/MIFPA are unconstitutional. The "equal protection concerns" they raise, *Adoptive Couple*, 570 U.S. at 656, are matters of pressing urgency. Every day, at-risk "Indian children" are deprived of equal protection by laws that many so desperately need. As a result, "Indian children" are—because of federal and state law—being physically and psychologically abused, with the states' knowledge, and in some cases even murdered by adults known to the state to be abusive. And each day, children like those involved in this case are denied the possibility of safe, loving homes, solely because of the color of their skin. Petitioners have the standing to raise these constitutional challenges that was missing in *Brackeen*.

Second, affirming the exclusion of Petitioners *because* they seek to challenge those laws in court, on the theory that for them to object to ICWA/MIFPA is proof of their unfitness, violates the First and Fourteenth Amendment rights to petition for redress and to due process of law.

Third, that exclusion was part of an effort to avoid this Court's review of ICWA/MIFPA's constitutionality. This Court doesn't allow its review to be evaded by state-court maneuvering, and should not allow it here. In cases like *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958), this Court has made clear that state courts cannot use "[n]ovelty in procedural requirements … to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." Yet that's what the Minnesota courts have attempted here. Petitioners challenged the constitutionality of laws that inflict grave harms on children and adults. Expressly relying on that challenge, state courts denied them

intervention. That drastically departs from Minnesota procedures, and reflects an effort to thwart review under the veneer of state-law grounds.

This case cries out for certiorari.

STATEMENT OF THE CASE

Petitioners are foster parents who cared for a pair of "Indian children" in need of serious ongoing medical care at the Mayo Clinic, due to prenatal drug exposure. Petitioners moved to intervene in the "CHIPS" proceeding[2] governing the children's care. In that proceeding, they intended to raise constitutional objections to the application of ICWA and its Minnesota state version, MIFPA.

Under Minnesota law, such intervention motions are governed by the "best interests of the child" standard, Minn. R. Juv. Pro. P. 34.02, which focuses on whether the participation of the intervenor would best serve the individual needs of the child(ren). But here, the state trial court denied Petitioners intervention *because they contend* that ICWA/MIFPA are unconstitutional.

That is a violation of Petitioners' First Amendment rights to freedom of speech, petition, and access courts—*and* violates the due-process clause of the Fourteenth Amendment—which together forbid courts from penalizing a party on account of that party's good-faith, non-frivolous legal arguments.

2. CHIPS stands for "Child in Need of Protection or Services," and refers to the Minnesota state-law proceedings governing the twins.

Petitioners sought relief in the Minnesota Supreme Court. But that court—a year and a half after oral arguments—affirmed the denial of intervention and concluded that Petitioners therefore lacked standing to bring their equal-protection challenges. Consequently, the court chose not to address the severe violations of equal protection that ICWA/MIFPA impose upon innocent, at-risk Native American children and the adults who want to help them.

Unfortunately, this isn't the first time a state court has tried to employ such a technique. *See* below, Section II.B. Nor will it be the last if this Court denies review. The decision below creates a roadmap for blocking review of ICWA by casting anyone who challenges ICWA as unfit to participate in a child-welfare case.

This Court should grant certiorari. First, it should address the constitutionality of ICWA/MIFPA, which deprive both Petitioners and the "Indian children" of their rights to equal protection and due process. Second, it should address the constitutionality of Minnesota's refusal to permit Petitioners' intervention and hold that excluding people from court because of their good-faith constitutional challenge is unconstitutional.

The twins are born in severe medical distress and are placed with Petitioners

This case concerns fraternal twins born in Martin County, Minnesota, to a mother (L.K.) who tested positive for amphetamines, methamphetamines, and opiates at the time of birth. Pet.App.56a, ¶3. Both children suffered severe physical disabilities due to prenatal drug use,

and required extensive hospital stays. *Id.*, ¶4. The boy experienced withdrawal symptoms, and the girl was born not breathing; after being revived, she was placed on a ventilator at the Mayo Clinic in Rochester. *Id.* She experienced seizures and other severe maladies. *Id.*

Three days after birth, Human Services of Faribault & Martin Counties ("HSFMC") commenced a CHIPS proceeding, and the court determined that out-of-home placement was necessary to prevent imminent physical harm to the children. Pet.App.83a, 170a. The boy was discharged from the hospital at 11-days old and placed with Nate and Kellie Reyelts (Petitioners), who are non-"Indian" licensed foster parents. Pet.App.56a, ¶ 5, 83a. The girl remained in intensive care until she was 37-days old, and then discharged into their foster care. *Id.*

The state trial court (District Court) found that the twins are either enrolled or eligible for enrollment in the Red Lake Nation, and that ICWA/MIFPA apply. Pet.App.174a. A few weeks after their birth, Red Lake submitted an affidavit in support of placing them in out-of-home foster care. Pet.App.83a

The Reyeltses also submitted a 20-page affidavit, which noted that the county and the guardians ad litem represented that they were "the identified permanency placement for the twins with the plan being adoption." 9.12.2023 Pet. Aff., ¶5. A county-attorney email included with the affidavit confirmed this. Pet.App.314a.

The Reyeltses cared for the children for more than a year, taking them to many necessary medical appointments at the Mayo Clinic and facilitating in-home medical visits.

Pet.App.83a-84a. This care included monthly physical therapy, quarterly occupational therapy, and quarterly early-childhood-specialist services. *Id.*

On August 1, 2023, when the children were one year and four months old, Red Lake announced that it wanted the twins sent to live with a cousin of mother L.K.(9.12.2023 Pet. Aff., ¶5), who is known as R.F. Pet. App.57a, ¶10, 84a, 314a. On September 9, 2023, the county informed the Reyeltses that the children would be placed with R.F. on September 13." 9.12.2023 Pet. Aff., ¶2. There was no transition plan. *Id.*, ¶¶2, 34-41; Pet.App.84a. On September 12, therefore, the Reyeltses 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/MIFPA not to change the placement, and a declaration that ICWA/MIFPA are unconstitutional. Pet.App.310a-312a.

The District Court held a hearing the next day (September 13) but confined its attention to the placement change, deferring other issues for later. Pet.App.163a-164a, ¶3. The Reyeltses 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 the Reyeltses. Pet.App.277a-282a. But on September 13, the District Court denied the motion, concluding that the change in placement should occur immediately, and that the children should be placed on the Red Lake Reservation, approximately 350 miles away from the Mayo Clinic and the Reyeltses' home. Pet.App.162a-168a.

The Petitioners file a petition for custody

On October 4, the Reyeltses filed a petition for third-party custody (Pet.App.9a), 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 that petition, and on October 31, the District Court denied the Reyeltses' motion and dismissed their petition. It did not rule on the constitutionality of ICWA/MIFPA. Pet.App.154a-161a.

The Court of Appeals reversed. Pet.App.80a-127a. Although it rejected their constitutional challenges to ICWA/MIFPA on the merits (Pet.App.115a-126a), it held that the Reyeltses were not disqualified from seeking intervention by virtue of being former foster parents of the twins (Pet.App.96a-100a). It remanded to District Court to address the Reyeltses' petition for intervention under Minnesota Rule of Juvenile Protection 34.02. Pet. App.91a-93a, 126a-127a.

Next, the Reyeltses petitioned the Minnesota Supreme Court for review, which was granted. That court also partially stayed the Court of Appeals' remand order, thereby barring the District Court from transferring the case to tribal court. Pet.App.18a. But the District Court continued proceedings regarding the Reyeltses' intervention motion.[3]

3. Meanwhile, MSFMC removed the twins from R.F.'s care "on emergent basis" and placed them with their maternal grandmother. Pet.Add.60a, ¶21.

On remand, the District Court denied the Reyeltses' intervention motion and petition. Pet.App.54a-79a. It held that the petition was not in the twins' best interests because the tribe opposed the Reyeltses having custody, because the twins had not been in their custody for 11 months, but had been in the custody of their maternal grandmother for 1.5 months, and because the Reyeltses had "motioned this Court to find ICWA and MIFPA unconstitutional," which, the court said, revealed a dismissive "attitude toward the importance of the children's tribal identity" and thus rendered their participation in the case "a disadvantage" to the twins. Pet.App.73a-77a.

The Reyeltses petitioned for accelerated review in the Minnesota Supreme Court, which was granted. Pet.App.14a-15a. There they pressed their arguments regarding ICWA/MIFPA's unconstitutionality and their exclusion violating the First Amendment. Pet.App.31a, 45a.

The arguments against ICWA/MIFPA's constitutionality that the Reyeltses seek to make

This Court has addressed ICWA on only three occasions: *Mississippi Choctaw v. Holyfield,* 490 U.S. 30 (1989), *Adoptive Couple*, *supra,* and *Brackeen, supra*. In the latter two cases, several justices expressed concerns about its racially discriminatory provisions—and for good reason.

ICWA imposes rules on child-welfare matters if the child is an "Indian child"—rules that differ from those governing child-welfare matters involving non-"Indian" children. Specifically, these rules are *less protective*

of the child. For example, the race-based placement preferences drastically limit the adoption and foster-care options for in-need "Indian" children, and often result in children being placed in homes that are less suited to their protection and care. Also, its "active efforts" provision bars state-child-welfare services from rescuing abused children from abusive families unless state officials first take extraordinary steps to reunite those families—steps that aren't required if the children are non-"Indian." The consequence is that states must return abused "Indian children" to families that have abused them, when they would not do so for non-"Indian" children. Also, in cases involving non-"Indian" children, the rights of an abusive parent may be terminated based on clear-and-convincing evidence of the need for such action—the standard this Court established in *Santosky v. Kramer*, 455 U.S. 745, 768-69 (1982)—whereas, for "Indian children," the standard is actually higher than the beyond-a-reasonable-doubt standard.[4] 25 U.S.C. § 1912(f). *Santosky* observed that "a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption." *Id.* at 769. But that's exactly the rule ICWA imposes on "Indian children."

These and other provisions thoroughly justify this Court's concern in *Adoptive Couple, supra*, that ICWA "put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." 570 U.S. at 655.

4. ICWA requires both evidence beyond a reasonable doubt and testimony from expert witnesses to establish grounds for the termination of the rights of an abusive parent. This is a standard higher than that required for death-penalty convictions.

At issue here are ICWA/MIFPA's placement preferences and requirements for permanent custody of "Indian children." 25 U.S.C. §§ 1912(e), (f); 1915(a)(b); Minn. Stat. §§ 260.763, 260.771, 260.773. Under these rules, state courts must typically transfer cases seeking custody of "Indian children" to tribal courts, where the Bill of Rights does not apply, *see United States v. Bryant*, 579 U.S. 140, 149 (2016), or, if transfer does not occur, state courts must follow race-based placement preferences whereby the children must be placed with "Indian" adults rather than adults of other races, ethnicities, or national origins.[5] Because the Reyeltses are not "Indian" under ICWA/MIFPA, those statutes place them on an unequal footing with respect to "Indian" adults when it comes to fostering or adopting "Indian" children in need. *See Brackeen*, 599 U.S. at 292.

ICWA/MIFPA are race-based because their applicability is triggered by the fact that the child is an "Indian child,"[6] which is defined as a child who is eligible

5. Throughout this case, and again here, Petitioners contend that ICWA/MIFPA are not only race-based, but also national-origin based. The Court has rarely discussed the distinction, *see, e.g., Oyama v. California*, 332 U.S. 633 (1948), but because national-origin discrimination is subject to the same strict scrutiny as race-based discrimination, it's unnecessary at this point to resolve that. All references to race-based discrimination in this Petition should be understood to include national origin-based discrimination, too.

6. Critically, "Indian child" status is *not* a function of tribal law, but of state and federal law. *See In re Abbigail A.*, 375 P.3d 879, 885 (Cal. 2016) (recognizing this distinction). While tribes may determine citizenship as they please, the state and federal statutes that alone create "Indian child" status must comply with the equal

for tribal membership (even if she is not, in fact, a member) and who has a biological parent who is a tribal member. 25 U.S.C. § 1903(4). While different tribes have different eligibility rules, all are triggered by biological ancestry alone. None requires consideration of any cultural, social, political, or linguistic connections to a tribe.

That means a child is deemed "Indian"—and that she and the adults involved in her care are subject to ICWA/MIFPA's unequal burdens—based on biology alone—"an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)—regardless of whether she ever actually joins a tribe.

MIFPA is even more constitutionally offensive. It imposes the same disadvantages on "Indian children," but its definition of that term is even more obviously race-based. A child is an "Indian child" under MIFPA if she is either a tribal member or eligible for membership, *regardless of the parent's membership status*. Minn. Stat. § 260.755, subd. 8. Thus, even more clearly than under ICWA, a child is classified as "Indian" under MIFPA *solely* due to the blood in her veins.

How ICWA and MIFPA were applied in this case

From nearly the day the twins were born and for 16 months afterwards, the Reyeltses showered the twins with love and care, shepherded them from medically

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protection guarantees of the Fifth and Fourteenth Amendments. Thus ICWA/MIFPA (or their invalidity) have no effect on any tribe's capacity to determine its own citizenship.

dire starting points in life, and grew "100% committed" to being their forever family. 9.12.2023 Pet. Aff., ¶¶1-5. County officials chose the Reyeltses to be *the* permanency plan for them. *Id.*, ¶5; Pet.App.314a. But then everything went wrong, because of "ICWA/MIFPA." Pet.App.314a (county-attorney email).

County officials took the twins from the Reyeltses' custody and sent them to live with a cousin of the children's biological mother who they had never met (a placement which fell through), and when the Reyeltses tried to intervene in the child-custody proceeding to challenge ICWA/MIFPA's constitutionality, the courts said no, *because* they challenge ICWA/MIFPA's constitutionality. When the Minnesota Supreme Court affirmed that, it did so because the Reyeltses have a legal disagreement with the Tribe and believe that placing the twins with them is in the twins' best interests. Pet.App.31a-35a.

Had the children been any other race, the Reyeltses' petitions would have been decided pursuant to race-neutral state law that concerns itself solely with the children's best interests as individuals. *See* Minn. Stat. § 260C.212, subd. 2 ("The policy of the state of Minnesota is to ensure that the child's best interests are met by requiring an individualized determination of the needs of the child….").

But because the children are biologically eligible for tribal membership, ICWA/MIFPA would require either that the case be transferred to tribal court or that the children be placed with other tribal members, or with members of any tribe, or with individuals chosen by the tribe, instead of the Reyeltses. 25 U.S.C. § 1915(a), (b); Minn. Stat. § 260.773, subds. 2, 3.

What's more, if permanent custody required termination of parental rights, the Reyeltses would be forced to prove beyond a reasonable doubt, with the testimony of expert witnesses,[7] that such termination was necessary to prevent imminent harm to the children. 25 U.S.C. § 1912(f); Minn. Stat. § 260.771, subd. 6. By contrast, if the children were members of any other race, the state court could terminate parental rights based on a clear-and-convincing-evidence standard, without need of expert witness testimony. Minn. Stat. § 260C.317, subd. 1.

In these and other ways, the application of ICWA/MIFPA to this case transformed it, procedurally and substantively, all to the detriment of the twins and the Reyeltses.

The Minnesota courts bar the Reyeltses' intervention for unconstitutional reasons

The Reyeltses sought to raise these constitutional objections in every forum available. But the trial court concluded that *this very fact* rendered their participation in the case undesirable. In simple terms, it said that because the Reyeltses think ICWA/MIFPA unconstitutional, their participation in the case is contrary to the children's best interests.

It made that determination while the equal-protection challenge was pending before the Minnesota Supreme Court. The Reyeltses therefore argued before *that* court that the District Court's determination violated their First

7. Under the Bureau of Indian Affairs' ICWA regulations, such experts must be acceptable to tribal officials, and must be experts in tribal culture. 23 C.F.R. § 23.122.

Amendment rights to speech and petition, because they were being penalized for presenting a good-faith legal argument to a court. Yet the state Supreme Court joined in this determination to penalize the Reyeltses for having the temerity to raise the argument. One justice even expressed animosity toward the Reyeltses' constitutional challenge, suggesting it was improper for them to "try to get the issue of constitutionality of the Indian Child Welfare Act before the United States Supreme Court."[8]

On March 11, 2026, that court affirmed denial of the intervention motion, and said the District Court had not acted improperly in predicating its denial of their participation on the fact that they contend ICWA/MIFPA are unconstitutional. *See* Pet.App.75a, ¶50.ii.C. It began by expressing doubt that "that a court violates the First Amendment when it considers a prospective intervenor's presentation of a good-faith legal argument in the lawsuit as a basis for denying intervention." Pet.App.34a. It then concluded that the real reason for denial of intervention was the Reyeltses' supposed "'lack of understanding about the importance of [the twins' indigenous] heritage." Pet.App.34a. This alleged lack of understanding was supposedly proven by the Reyeltses' contention that ICWA/MIFPA are unconstitutional: "[their] challenge to ICWA and MIFPA," it said, is "indicative of appellants' [negative] 'attitude toward the importance of the children's tribal identity,'"—which was sufficient to justify the District Court's conclusion that the Reyeltses'

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8. https://mncourts.gov/supremecourt/oralargumentwebcasts/2024/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 34:35-35:00 (9/30/2024); https://mncourts.gov/supremecourt/oralargumentwebcasts/2025/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 31:10-31:33 (4/1/2025).

participation in the case would be contrary to the twins' best interests. Pet.App.29a-31a. That finding was despite the Reyeltses' detailed Native American Culture Plan for raising the twins with strong indigenous identities. Pet. App.316a-323a.

The court then buttressed this conclusion with the odd assertion that the Reyeltses' "'strong attachment to the children has created a bias that would only hinder and harm the progression of the children's protection proceeding,' because 'they could not see the value in any other placement for the children.'" Pet.App.30a-31a. In other words, the very fact that the Reyeltses think placement with them is in the children's best interests renders them unfit.

"Kafkaesque" is not an unfair way to describe such proceedings.

The Reyeltses petition this Court

The Reyeltses now come before this Court with two constitutional injuries: the fact that ICWA/MIFPA discriminate against them and the children based on race—and the fact that Minnesota courts have barred them from even raising that legal argument, on the grounds that doing so renders them unfit to take custody of children.

In *Brackeen*, this Court acknowledged the serious concerns ICWA raises, and said that that non-"Indians" could "[o]f course" raise these arguments through the normal appellate chain from state court. 599 U.S. at 294 n.10. The Reyeltses tried to do that—and were excluded by the Minnesota courts as a result.

"Novelty in procedural requirements" cannot be used "to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Patterson*, 357 U.S. at 457-58. The state courts' maneuvering should not be allowed to foil this Court's review.

ARGUMENT

I. The Court should take this case to address the constitutionality of ICWA and MIFPA

A. A brief overview of ICWA/MIFPA's constitutional offenses

How Minnesota law protects an abused or neglected child depends on that child's race. For *non*-"Indian" children, "[t]he paramount consideration" is the child's "health, safety, and best interests." Minn. Stat. § 260C.001, subd. 2(a). But "[i]n proceedings involvement an American Indian child"—a category defined exclusively by biological factors—"the best interests of the child must be determined consistent with [MIFPA] and [ICWA]." *Id.* A side-by-side comparison of shows that these statutes do not equally protect "Indian children."

1. For *non*-"Indian" children, the state's policy when deciding on placement focuses on "an *individualized* determination of the needs of the child," which weighs many factors. Minn. Stat. § 260C.212, subd. 2(a)-(b) (emphasis added). When it comes to the placement of children in need of shelter, Minnesota law gives no preference to adults who have a blood relationship with the child. It only

requires that relatives be given first "consider[ation]," *id.*, subd. 2(a)(1)—and *consideration*, Minnesota courts have held—is different from a *preference*, because requiring *consideration* doesn't mandate placement. *See In re S.G.*, 828 N.W.2d 118, 124 (Minn. 2013) ("the language directing the order of consideration does not require that the district court prefer a relative over a nonrelative … nor does it establish a preference for relatives.").[9]

Such *consideration* is statutorily specified to include not just blood relatives but also "individual[s] who [are] … important friend[s] of the child or of the child's parent or custodian," or "who [have] a significant relationship to the child or the child's parent or custodian." Minn. Stat. § 260C.212, subd. 2(a)(2).

2. For an "Indian child," the rules are different. MIFPA *conclusively presumes* that the "'[b]est interests of an Indian child' means compliance with [ICWA] and [MIFPA]." The best interests of "Indian children" are *per se* declared to be "interwoven" with "the best interests of the Indian child's Tribe." *Id.* § 260.755, subd. 2a. Minnesota law says "the best interests of an Indian child" are defined by MIFPA, and that the placement agency "*shall* follow the order of placement preferences in [ICWA]." Minn. Stat. § 260C.212, subd. 2(a), (b)(11) (emphasis added).

3. ICWA likewise treats "the best interests of Indian children" differently than the best interests of

9. A prior version of the CHIPS statute did give a *preference* to blood relatives, but that was replaced with a statute that requires only "that the court should consider" relative placement. *In re Welfare of A.M.C.*, No. A16-0282, 2016 WL 4421517, at *5 (Minn. Ct. App. Aug. 22, 2016).

non-"Indian" children. As *Holyfield* observed, ICWA gives the tribe "an interest in the child which is distinct from but on a parity with the interest of the parents." 490 U.S. at 52.[10] Consequently, "the phrase 'best interests of Indian children' in the context of the ICWA is different than the general Anglo–American 'best interest of the child' standard." *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 (Tex. App. 1995). Specifically, it is *not* an *individualized* assessment. For "Indian children," the child's *specific* needs are only "one of the constellation of factors" a court must consider. *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 634 (Cal. App. 2016).

Accordingly, ICWA imposes placement preferences—i.e., mandates—that "Indian children" be placed with blood relatives, tribal members, or tribe-approved entities in accordance with ICWA's statutory preference tiers. These govern adoption, 25 U.S.C. § 1915(a), and foster care or preadoptive placements. *Id.* § 1915(b). MIFPA does the same. Minn. Stat. §§ 260.773, subd. 4; 260.773, subd. 3.

4. As noted earlier, whether a child is entitled to the *individualized* best-interests test, or the less-protective "Indian" best interests test, turns on whether ICWA or MIFPA classify her as "Indian," which turns *exclusively* on blood ancestry, *not* political, cultural, or social affiliation. *See* 25 U.S.C. § 1903(4). MIFPA defines "Indian child" similarly, except without the "biological child" piece: MIFPA says any unmarried person under 18 who is "eligible for membership" in a tribe is an "Indian child."

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10. In *Troxel v. Granville,* 530 U.S. 57 (2000), this Court held that it is unconstitutional for the government to give anyone an interest in a child "on a parity with" the interests of parents.

Minn. Stat. § 260.755, subd. 8(2). This means that while parents can prevent application of ICWA by renouncing their tribal membership,[11] there is nothing they can do to prevent MIFPA's application to their children.

Tribal membership virtually always turns exclusively on a child's biological ancestry. It does so here, as the Red Lake Nation conceded below.[12]

B. It is critical to address ICWA/MIFPA's constitutionality to protect at-risk "Indian children" who are being harmed every day.

Thanks to ICWA, vulnerable children of Native American descent across America are being subjected to worse conditions, for longer, than their peers of other races. Because ICWA (and MIFPA) makes it vastly more difficult for children who are biologically eligible for tribal membership to be rescued from abusive homes or placed in permanent adoptive homes, these children suffer more abuse and neglect than they would if they were, say, black, Jewish, white, or Asian. Indeed, the application of these laws has repeatedly resulted in the preventable murder of "Indian children," when state officials have been compelled to return them to households known to be abusive.

A few brief examples:

11. *See* Indian Child Welfare Act Proceedings, 81 Fed.Reg. 38778, 38783 (June 14, 2016); *In re D.M.*, 320 Cal. Rptr. 3d 757, 776 (Cal. App. 2024).

12. https://mncourts.gov/supremecourt/oralargumentwebcasts/2024/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 37:00-37:25 (9/30/2024).

- In 2013, two Spirit Lake Sioux children were taken—pursuant to ICWA—from the safe, loving foster home in which they had lived for more than two of their three years of life, and sent to live on the reservation with their grandfather and his wife, who had until then shown no interest in caring for them. The grandfather's wife had a record of child abuse, which—had the children been of any other ethnicity—would have prevented their placement in that household. Slightly over a month later, the grandfather's wife murdered one of them. *See* Flatten, *Death on a Reservation* (Goldwater Institute, 2015).[13]

- In 2014, Nebraska's Supreme Court held that state officials violated ICWA when removing three girls from the custody of their sexually abusive father. *In re. Shayla H.*, 855 N.W.2d 774 (Neb. 2014). It said officials had provided the "reasonable" efforts state law requires for children of other races, but not the "active" efforts ICWA requires for "Indian children." That difference is critical because "reasonable efforts" contains an exception for cases of "aggravated circumstances" such as sexual molestation, Neb. Rev. Stat. § 43-283.01 (4)(a), but ICWA's "active efforts" requirement does not. *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 618–19 (S.D. 2005). Consequently, the children were returned to the household, where they were again molested, and had to be removed again. The trial court later said they had "experienced lifetimes of trauma," which would not have happened had they

13. https://www.goldwaterinstitute.org/death-on-a-reservation/.

been of another race. *In re Interest of Shayla H., et al.*, Doc. JV13 (Juvenile Court of Lancaster County, May 1, 2015) at 3.

- In 2019, a 5-year-old Crow boy, Tony Renova, was murdered by his parents in Columbus, Ohio. He had been removed from their care when one-month old, and placed with a loving foster family, where he lived safely for five years. Had he been of any other ethnicity, his foster parents could have become his forever home. Instead, ICWA applied, and state officials were required to return him to his parents, who had violent criminal histories, and who starved, tortured, and beat him to death. *See* Pronovost, *Losing Tony,* Stillwater County News, Dec. 5, 2019[14]; Rosenbaum, *Judge Gives Maximum Sentences to All 3 Involved in 5-year-old's Beating Death*, Great Falls Tribune, July 6, 2022.[15]

There are far too many similar cases to list here.[16]

There's no question that, as Justice Gorsuch emphasized in *Brackeen,* ICWA was adopted out of a desire to remedy past injustices and prevent their recurrence. 599 U.S. at 297. But noble as this motive was, ICWA's race-based restrictions and rules limiting the

14. https://perma.cc/2FP2-PDX9.

15. https://www.greatfallstribune.com/story/news/crime/2022/07/26/3-sentenced-in-5-year-old-antonio-renovas-murder-in-great-falls-montana-emilio-emmanuel-renova/65383015007/.

16. *See further* Flatten, *supra*; Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. 55, 95-98 (2021).

ability to rescue "Indian children" from harm or to find them safe, loving, permanent homes, is now inflicting new injustices on these children.

II. The Reyeltses have the standing that was missing in *Brackeen*

A. ICWA/MIFPA imposes on Petitioners a barrier that makes it more difficult for them to seek custody than adults of other races—which is a constitutional injury

In *Brackeen*, this Court found that the individual plaintiffs lacked standing to raise equal-protection challenges to ICWA due to a redressability problem: they only sought relief against federal defendants, and that would not have redressed their injuries. 599 U.S. at 292. The Court acknowledged that the plaintiffs in that case *had* suffered injury—"[t]he racial discrimination they allege counts as an Article III injury," *id.*—but there was no redressability because all they could hope for was an "opinion," rather than a judgment. *Id.* at 294. Instead, the proper way to raise the equal-protection argument would be for parties to object in state court, and then seek review here. *Id.* at 294 n.10.

That is what the Reyeltses are doing—and they *do* have standing. They are suffering the same injury as the *Brackeen* plaintiffs, perhaps worse. They aren't just placed "last in line for potential placements," and not only does ICWA/MIFPA "'erect[] a barrier that makes it more difficult for [them] to obtain a benefit than it is for members of another [racial] group,'" *id.* (citation omitted), but they have actually had children taken from them, and have lost their opportunity to have their permanent-custody

petition reviewed in a race-neutral manner, due to the operation of these statutes.

And whereas the *Brackeen* plaintiffs had a redressability problem because they sought relief against the wrong defendants, no such concern exists here.

B. The court below unconstitutionally barred Petitioners' challenges to ICWA's constitutionality by deeming that challenge proof of unfitness and thereby excluding them from the case—something that should not be allowed to happen

The court below said the Reyeltses' intervention would not be in the twins' best interests because the Reyeltses contend that ICWA/MIFPA are unconstitutional. But it violates the First Amendment to penalize a litigant in that way from presenting a good-faith, non-frivolous legal argument. *Herring v. New York*, 422 U.S. 853, 860 (1975). And it violates procedural due process to bar a person from court, not because her legal argument is wrong, but because she dares to make it. Due process requires, at a minimum, that the Reyeltses be given a meaningful opportunity for their non-frivolous arguments to be heard on the merits—not to have the fact that they are making those arguments used as a justification for an adverse ruling. That is why it is an abuse of discretion to penalize a party for "press[ing] a legitimate argument [or] protest[ing] an erroneous ruling." *Andrews v. Superior Court*, 98 Cal. Rptr. 2d 426, 429 (Cal. App. 2000); *cf. Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 120–21 (D.D.C. 2025) (government may not "penalize[] a particular law firm … due to the Firm's representation … of clients pursuing claims and taking positions.").

Although the Minnesota court claimed that the Reyeltses' contention that ICWA/MIFPA are unconstitutional "had no bearing" on their intervention motion being denied, that is contradicted both by the record and by the Minnesota Supreme Court's ruling itself, which agreed with the lower courts that the Reyeltses' "challenge to ICWA and MIFPA" was evidence that they have a "[negative] attitude toward the twins' indigenous heritage." Pet.App.35a, 75a, ¶50.ii.C.

And the proceedings below were rife with evidence of prejudice against the Reyeltses based not on the *merits* of their equal-protection arguments, but on the fact that they dared to raise such arguments at all. For example, during the oral argument before the Minnesota Supreme Court, one justice asserted that it was "gamesmanship" for the Reyeltses to even petition that court for review because they were just "using this Court as an avenue to try to get the issue of constitutionality of the Indian Child Welfare Act before the United States Supreme Court"—a question the justice said was "probably going to be controversial."[17] The same justice demanded of the Reyeltses' counsel, "[i]t seems as if this case is being used as an avenue for your, I don't even know if it's your clients, but to try to find ICWA and MIFPA unconstitutional, rather than the real concern about these kids."[18]

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17. https://mncourts.gov/supremecourt/oralargumentwebcasts/2024/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 34:35-35:00 (9/30/2024).

18. https://mncourts.gov/supremecourt/oralargumentwebcasts/2025/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s., 31:10-31:33 (4/1/2025).

This isn't the first time a state court has used this tactic. In 2018, a juvenile court in Ohio likewise removed a GAL from a case on the grounds that he had argued to the court that ICWA is unconstitutional. That case, called *Matter of C.J. Jr.,* involved an Ohio-born 5-year-old whose father was a member of an Arizona-based tribe, and who had been placed immediately after birth with a foster family. Although the child had never even visited Arizona, and had lived with his Ohio foster parents all his life, the tribal court issued an *ex parte* order pursuant to ICWA demanding that he be sent to live on the reservation near Phoenix with race-matched strangers he had never met. The Ohio Court of Appeals reversed that order, 108 N.E.3d 677 (Ohio Ct. App. 2018), but once remanded, the juvenile court ordered the GAL removed from all future proceedings because he "questions the Constitutionality of ICWA, which includes arguing that ICWA is racially-based." Decision and Judgment Entry, *In re C.J. Jr.,* No. 15JU-232 (Ohio Ct. Com. Pl. Nov. 13, 2018) at 36, 39.[19]

The decision below also resembles the Florida Supreme Court's decision in *Palmore v. Sidoti*, 466 U.S. 429 (1984), which denied custody of a child based on race, but asserted that this was not racial discrimination, because the court's true concern was with the child's best interests—and those interests would be harmed by being placed with a mixed-race couple. This Court did not accept that excuse, *see id.* at 433, and should not accept similar excuses now.

19. The GAL appealed, but the case was settled prior to a decision.

C. The decision below does not rest on adequate, independent state-law grounds

A state-court ruling is not supported by an adequate, independent state law ground precluding this Court's review if that ruling is "merely a device to prevent a review of the other [federal] ground of the judgment." *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (citation omitted); *see also Ford v. Georgia*, 498 U.S. 411, 424 (1991) (where state procedural rule was "unannounced at the time of petitioner's trial" it was "inadequate to serve as an independent state ground."). "A state ground of decision is independent only when it does not depend on a federal holding…"*Crawford v. Mississippi*, 146 S.Ct. 33 (Mem) (2025).

The Minnesota courts denied the Reyeltses' intervention motion because they would argue that ICWA/MIFPA are unconstitutional. The District Court candidly said that it was denying the Reyelts's motion in part because they "motion[ed] for this Court to find ICWA and MIFPA unconstitutional." Pet.App.34a-35a, 75a-76a, ¶50.ii.C. Not only did the decision depend upon a federal holding, the affirmance of that decision deviated from usual Minnesota law and practice in dramatic ways.

First, the court vacated the equal-protection opinion without determining that the Court of Appeals lacked jurisdiction or authority to render that decision—contrary to Minnesota practice. *See, e.g., Marvel,* 979 N.W.2d at 903 n.9 (declining to vacate: "When we have vacated court of appeals decisions without deciding the merits of the underlying issues, it has typically been because the court of appeals did not have authority or jurisdiction.

[Appellant] does not point us to any case where we vacated a court of appeals decision on the merits as to issues that we did not address.").[20]

Second, the court never explained how the Reyeltses not being parties to the juvenile-protection proceeding could affect their standing to pursue their declaratory judgment challenge to ICWA/MIFPA. Such standing is separately provided by Minnesota's declaratory judgment statute, which doesn't require that they be parties to any such proceeding. *See* Minn. Stat. § 555.01. Constitutional challenges are proper under that statute. *See, e.g., McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337–38 (Minn. 2011). Minnesota courts have never before said that standing to bring Section 555.01 challenges depends on party status in child-welfare cases.

Third, in denying intervention, the court deviated from its practice of "follow[ing] the policy of encouraging all legitimate interventions." *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 28 (Minn. 1981), under which, permissive-

20. The lone precedent the Minnesota Supreme Court cited to justify this anomalous move was one in which "it was 'immediately apparent ... that the appellate court's opinion far exceeded the bounds of appropriate appellate review.'" *Id.* (quoting *Pike v. Gunyou*, 491 N.W.2d 288, 289-90 (Minn. 1992)). That certainly does not characterize this case; all the Court of Appeals did was address MIFPA's constitutionality, because that was critical to the outcome, Pet.App.110a-113a, and because it mattered to Petitioners' intervention and custody motions. The Minnesota Supreme Court's invocation of *Pike* was therefore a transparent effort to rationalize a "clear[] break from the past," *Cruz,* 598 U.S. at 27, that was "clearly at variance" with state law. *Bouie v. City of Columbia*, 378 U.S. 347, 356 (1964).

intervention denials are "subject to reversal in appropriate cases," *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 166 (Minn. 1974). Although the court cited *Valentine v. Lutz*, 512 N.W.2d 868 (Minn. 1994), as "guid[ing] our decision" to affirm the intervention denial, Pet.App.26a-28a, *Valentine* was entirely different; it affirmed denial of intervention to foster parents into a child-protection proceeding where the child had been thriving in a relative's home for more than a year. *Id.* at 869, 871. Here, the opposite is true. After the twins were torn from the Reyeltses' home, they were moved to a placement that fell through only nine months later—and then to a grandmother on an emergency basis, (in the middle of the night). Pet.App.60a, ¶21. They had only been with the grandmother for six weeks when the Reyeltses' petition was denied. *Compare* date of transfer, *id.*, with date of decision, *id.* at 79a. Nor is there any indication that the *Valentine* court blocked the intervention because of a constitutional challenge. Minnesota has never before said that individuals seeking intervention and custody in a CHIPS case may be denied intervention *because they believe the law governing the case is unconstitutional and detrimental to the children's welfare.*

Fourth, the court implicitly decided that the Reyeltses could not seek declaratory relief because of its decision to affirm the denial of their intervention motion—the theory being that only parties to such CHIPS proceedings can file motions in such proceedings. Pet.App.43a-44a, n.25. No party asked the court to review that issue. Its choice to do so was contrary to its "presumption that 'we do not address issues that were not raised in a petition for review.'" *Great Nw. Ins. Co. v. Campbell*, 24 N.W.3d 256, 261 n.3 (Minn. 2025) (citation omitted).

Fifth, the court's assertion that the Reyeltses forfeited arguing that they should be allowed to move for custody as relatives is untenable. Pet.App.41a-42a, n.21 The court said the district court "did not consider" a motion to that effect, *id.*, but as the Reyeltses stated in their intervention motion, they sought party status "so they may file an alternative transfer of legal custody permanency petition." Pet.App.272a, ¶3. 311a, ¶2. The only people who can file such petitions are "part[ies] to the permanency proceeding." Minn. Stat. § 260C.515, subd. 4(d). A permanency proceeding is separate from a juvenile-protection proceeding—and the permanency proceeding had not yet begun. *See id.* § 260C.503, subd. 1(a).[21]

The point is not to bog this Court down with Minnesota procedure, but to show that the decision below deviated from standard state practice in many unusual ways, all combining to establish the kind of "[n]ovelty in procedural requirements" that this Court does not allow lower courts to employ "to thwart review in this Court"—especially in cases involving challenges to racially discriminatory laws. *Patterson*, 357 U.S. at 457-58.

Several justices of this Court have recently expressed frustration at lower courts for exploiting jurisdictional doctrines "as a way of avoiding some particularly

21. The court also faulted the Reyeltses for only raising certain arguments in a reply, Pet.App.41a-42a, n.21, but Minnesota law requires that replies be "'liberally construed to allow the appellant to respond to the arguments advanced by the respondent, even if they are not technically 'new matter,'" *Goeman v. Allstate Ins. Co.*, 725 N.W.2d 375, 378 (Minn. App. 2006) (citations omitted)—yet another rule the court below ignored.

contentious constitutional questions." *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist., Wisconsin*, 145 S. Ct. 14, 14-15 (2024) (Alito and Thomas, JJ., respecting denial of cert.); *Lee v. Poudre Sch. Dist. R-1*, 146 S.Ct. 26, 26 (2025) (Alito, Thomas, and Gorsuch, JJ., respecting denial of cert.). That's what happened here.

The Minnesota Supreme Court's rejection of the Reyeltses' constitutional arguments, on the grounds that they were not parties to the case for state-law reasons, does not constitute an adequate, independent state law ground. To the contrary, it reflects an effort to employ novel procedural requirements to bar review in this Court of the crucial constitutional issues at stake.

III. Lower courts need guidance respecting ICWA/MIPFA's constitutionality

ICWA/MIFPA's race-based burdens are so pervasive that they affect an indefinitely large number of legal issues in cases involving children, leaving state courts in grave doubt and resulting in many conflicts on many different issues.

Consider the "existing Indian family doctrine" (EIFD), which says ICWA cannot be constitutionally applied to a child whose sole connection to a tribe is biological, as opposed to political or cultural. Originally a saving construction to prevent ICWA from operating as a race-based burden, that doctrine has now been rejected by most courts, *see, e.g., In re. A.J.S.*, 204 P.3d 543, 549 (Kan. 2009), meaning that in those states, courts *may not* inquire whether an alleged "Indian child" has any political, social, cultural, or linguistic connection to a tribe. Only race matters there.

Yet this Court appeared to endorse the EIFD in *Adoptive Couple*, when it held that the child's biological connection to the tribe is *not* sufficient to qualify as an "Indian family" under ICWA. *See* 570 U.S. at 651-52.

Even more confusingly, California courts disagree over the EIFD. One of that state's appellate districts has endorsed it, *see In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-22 (Cal. App. 1996); *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 723–24 (Cal. App. 2001), another has rejected it, *In re Alicia S.*, 76 Cal. Rptr. 2d 121 (Cal. App. 1998), and still another has, bizarrely, done both. *Compare Crystal R. v. Superior Ct.*, 69 Cal. Rptr. 2d 414, 427 (Cal. App. 1997) (endorsing doctrine), *with In re Vincent M.*, 59 Cal. Rptr. 3d 321, 334-37 (Cal. App. 2007) (finding it "unconvincing" but refusing to overrule *Crystal R.* or abolish the rule). Yet for well over twenty years, the California Supreme Court has declined to address this acknowledged split.

Adding to the confusion, the Bureau of Indian Affairs promulgated rules that purport to overrule these state court decisions applying federal constitutional guarantees. *See* 25 C.F.R. § 23.103 ("In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.").

This Court has already said courts cannot base adoption and custody decisions on race. *Palmore*, 466 U.S. at 434. Indeed, federal law makes it illegal to deny or delay an adoption based on race. 42 U.S.C. § 1996b(1). That law, however, includes on exception: it is lawful—indeed,

mandatory—to discriminate against adults and children based on race in cases involving "Indian children." *See id.* § 1996b(3).

IV. Excluding people from court because they dare to make a good-faith constitutional challenge is so egregiously unconstitutional as to by itself warrant summary reversal

Due process requires that a court "hear[] before it condemns … [and] proceed[] not arbitrarily or capriciously, but upon inquiry." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). The First Amendment right of petition is "in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 397 (2011).

Yet the District Court excluded Petitioners from the proceeding expressly because they "motioned [the court] to find ICWA/MIFPA unconstitutional." Pet.App.75a, ¶50. ii.C. The state Supreme Court affirmed, holding that any violation was harmless, for reasons that do not pass the smell test. Pet.App.34a-35a. First, it said the challenge, in combination with Petitioners' legal dispute with the Tribe, showed they were dismissive of the twins' indigenous culture. *Id.* Petitioners had a detailed culture plan for raising the twins with strong indigenous identities, and were learning Ojibwe, practicing smudging, and engaging in other Native cultural practices. Pet.App.316a-323a. Second, it said Petitioners have "strong attachment" to the twins and believe that placing the twins in their custody is in the twins' best interests—which the court said is "bias." Pet.App.30a-31a.

To bar someone from court for making a good-faith argument against the constitutionality of the law governing her case is an act of unusually grievous arbitrariness. If left unaddressed, the decision below risks short-circuiting this Court's ability to review ICWA's constitutionality and providing state courts a roadmap for doing likewise. To prevent that, the Court should do one of two things:

1. It should grant review in full and address the First Amendment issue, alongside the equal-protection challenge.

2. Alternatively, if it denies review of the equal-protection challenge, it should grant review of the First Amendment issue, vacate that portion of the lower court's opinion, and remand for adjudication of the equal-protection challenge.

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

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