No. A23-1762

STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Welfare of the Children of: L. K. and A. S., Parents.

Brief of *Amici Curiae* American Civil Liberties Union And American Civil Liberties Union Of Minnesota

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. The ACLU of Minnesota ("ACLU-MN") is a state-based affiliate of the ACLU. In furtherance of their mission, *amici* have supported federal and Minnesota laws designed to preserve Indian families and respect the cultural heritage and sovereignty of Indian Tribes. *Amici* have also advocated for children's rights and a child's interest in family integrity. The proper resolution of this case is, therefore, a matter of significant importance to the ACLU, ACLU-MN, and their members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout this Nation's history, Congress has regulated Indian affairs as a matter of tribal political sovereignty, not race. The Constitution itself recognizes "Indian tribes" as sovereigns and directs Congress to "regulate Commerce" and "make Treaties" with Indian Tribes. U.S. Const. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2. Just as the Constitution recognizes "Indian" as a political—not racial—category, so have the courts. For decades, the United

1 No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to this brief's preparation and submission.

States Supreme Court has clearly and consistently held that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645 (1977). This Court has similarly found that, Minnesota laws encouraging tribal sovereignty, and implementing or reflecting federal laws regarding Indian Tribes, involve political, not racial, classifications. *See Greene v. Commissioner of Minnesota Dept. of Human Servs.*, 755 N.W.2d 713, 724-729 (Minn. 2008). That principle governs the equal protection claims in this case.

The challenged provisions of the Indian Child Welfare Act ("ICWA") and Minnesota Indian Family Preservation Act ("MIFPA") regulate Indian affairs by reference to a child's connection to a federally recognized Indian Tribe—a political sovereign, not a racial group.

The first challenged ICWA provision defines an "Indian child" as a child who is either "a member of an Indian tribe," or is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). MIFPA defines an "Indian child" as a child who is either "a member of an Indian tribe" or is "eligible for membership in an Indian tribe." Minn. Stat. § 260.755 subd. 8. Nothing in these definitions turns on race. It does not matter what race a child or the child's parent may be. What matters is membership in a federally recognized Indian Tribe, or eligibility for such

membership.

Appellants argue that tribal membership is determined "exclusively by racial factors," arguing that therefore, "neither Minnesota nor the Federal Government may grant benefits or impose burdens based" on tribal membership. Appellants' Br. 13. ("ICWA/MIFPA … rules … are triggered exclusively by [children's] biological ancestry, not by any political, social, cultural, etc., connection with a tribe.") But it is *because* ICWA and MIFPA precisely and narrowly define the laws' application by political membership or eligibility in Indian Tribes, that the definitions are not racial. Thus, ICWA and MIFPA *exclude* members of the hundreds of Indian Tribes the federal government does not recognize because those individuals, regardless of their race, are not part of the relevant *political* entity.

The second challenged provision grants a preference in placing an Indian child in foster care, first to "a member of the child's extended family"—— regardless of whether they are Indian; then to "a foster home licensed, approved, or specified by the Indian child's Tribe"; then to "an Indian foster home licensed … by a non-Indian … authority"; and finally to "an institution approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." 25 U.S.C. § 1915(b).[2]

[2] MIFPA's foster placement preferences are identical, except that they

This, too, turns not on race but on family ties or tribal membership. Congress and the Minnesota Legislature have expressly defined "Indian" to refer to tribal *membership*, not race. 25 U.S.C. § 1903(3); Minn. Stat. § 260.755, subd. 7. Because the challenged provisions are "political rather than racial in nature," they are subject to the rational basis standard of review. *Morton v. Mancari,* 417 U.S. 535, 553 n.24 (1974); *see also Greene*, 755 N.W.2d at 714. These ICWA and MIFPA provisions easily survive such review.

Indeed, even if the challenged provisions were subject to strict scrutiny, they are narrowly tailored to further several compelling government interests, and as such are constitutionally sound. The challenged provisions (1) "protect the best interests of Indian children"; (2) "promote the stability and security of Indian tribes"; (3) "protect the long-term interests, as defined by the Tribes, of Indian children, their families as defined by law and custom, and the child's Tribe"; and (4) "preserve the Indian family and Tribal identity…" 25 U.S.C. § 1902; Minn. Stat. § 260.753 ("Indian children are damaged if family and child Tribal identity and contact are denied. Indian children are the future of the Tribes and are vital to their very existence."). Each of these interests is compelling.

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include an additional initial preference to a noncustodial parent—whether or not they are Indian—or to an Indian custodian as defined by the Act. Minn. Stat. § 260.773, subd. 3.

To advance the best and long-term interests of Indian children and their families, Congress passed ICWA to respond to "shocking" disparities "in placement rates for Indians and non-Indians," which have resulted in grievous harm to the safety and well-being of many Indian children removed from their communities. H.R. Rep. No. 95-1386, at 9 (1978). Congress found that those disparities reflected the disturbing history of removing Indian children from their homes and tribal settings to "civilize them" in furtherance of assimilation or termination phases of American policy. S. Rep. No. 95-597, at 39 (1977).

Appellants do not address the data supporting the enactment of ICWA and MIFPA, implying that it is stale and that this Court should therefore override the judgment of Congress and the Minnesota Legislature. That position ignores core separation-of-powers principles, which require courts to accord respect to the legislature, particularly where it has not provided for a statutory expiration date. Regardless, the work is far from done. Indian children today are still removed from their homes and communities far more frequently than non-Indian children, and that is precisely the harm ICWA and MIFPA sought to address. *See infra* § II.B.

As for "the stability and security of Indian tribes," the "long-term interests of the child's tribe," and preserving the "Indian family and Tribal identity", ICWA and MIFPA directly serve these compelling governmental

interests. Congress bears an affirmative duty to advance these interests pursuant to the "trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). To live up to its end of the deal, Congress must act to keep tribes intact—and there can be no question that ICWA and MIFPA do so.

The challenged ICWA and MIFPA provisions are carefully tailored to achieve these vital objectives. Their application is tied to a child's connection to a federally recognized tribe, regardless of race. The placement preferences prioritize keeping Indian children connected to their families, Tribes, and cultures, but allow courts to deviate from the placement preferences for "good cause." Through these provisions, ICWA recognizes the common-sense principle that an Indian household is best equipped to pass on Indian traditions and ensure the ongoing viability of Indian Tribes, which advance the government's recognition of tribal sovereignty.

ICWA and MIFPA seek to remedy what Congress recognized as a pervasive "Indian child welfare crisis," and they do so with precision. As such, although the challenged provisions should be reviewed under rational basis, they survive any level of scrutiny the Court may impose.

ARGUMENT

I. ICWA AND MIFPA CLASSIFICATIONS ARE POLITICAL, NOT RACIAL, AND THUS SUBJECT TO RATIONAL BASIS REVIEW

A. Legislation Governing Indian Tribes Is Rooted in Political Sovereignty, Not Race

For nearly two centuries, the Supreme Court has held that "Indian Tribes [are] 'distinct political communities,'" whose authority is "'not only acknowledged, but guarant[e]ed by the United States.'" *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020) (quoting *Worcester v. Georgia*, 31 U.S. 515, 557 (1832)). Indian tribes hold a "unique legal status" under federal law and a "special relationship" with the federal government, *Mancari*, 417 U.S. at 551-52, in recognition of "the necessity of giving uniform protection" to Indian tribes, *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959).

The "unique legal status" of Indian Tribes is grounded "explicitly" in the Constitution, which grants Congress "plenary power" to "deal with the special problems of Indians." *Mancari*, 417 U.S. at 551–52. That authority includes, among other things, the Article I power "[t]o regulate Commerce . . . with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, and the Article II power "to make Treaties," with Indian Tribes, *id.* art. II, § 2, cl. 2. The Supreme Court recently confirmed that ICWA is well within Congress's Article I power. *Haaland v. Brackeen*, 599 U.S. 255, 272-80 (2023). This power relates to Indian tribes as political entities, akin to the constitutional powers to regulate commerce

between and among States and to make treaties with other sovereign nations.

Ancestry is a "common feature" of citizenship laws that the federal government has long accepted and enforced. *See Brackeen v. Haaland*, 994 F.3d 249, 338 n.51 (5th Cir. 2021) (Dennis, J.), *aff'd in part*, *rev'd in part, vacated in part*; *Haaland,* 599 U.S. at 296. U.S. citizenship itself extends to children born abroad who have at least one parent who is a U.S. citizen. *See* 8 U.S.C. §§ 1401(c)-(d), (g); 8 C.F.R. § 322.2. Many other countries, including Ireland, Greece, Armenia, Israel, Italy, and Poland, determine "citizenship based on descent." *Brackeen*, 994 F.3d at 338 n.51.

The same principle applies to Indian Tribes, which enjoy exclusive authority to establish their own membership criteria. *See 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.").

The Supreme Court has never deviated from *Mancari*'s core holding that laws regarding Indians draw political, not racial lines. *See, e.g.*, *Antelope*, 430 U.S. at 645; *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976). Lower courts have consistently applied this holding and rejected challenges like those advanced here. *See Brackeen*, 994 F.3d at 445 n.1 (Costa, J.) (collecting cases). Minnesota courts have found that "preferences for American Indians are not racial but political when the preferences apply to members of federally

recognized tribes." *Krueth v. Independent School Dist. No. 38, Red Lake, Minn.*, 496 N.W.2d 829, 836 (Minn. Ct. App. 1993), *rev. denied* (Minn. Apr. 20, 1993) (citing *Mancari*, 417 U.S. at 553 n.24). *Mancari* was correct when decided, and has proven durable.

B. The Challenged Provisions Involve Political, Not Racial, Classifications

Mancari and its progeny squarely govern Appellants' equal protection challenges to ICWA and MIFPA, which draw political, not racial, classifications. They are accordingly subject to rational basis review.

"Indian Child." ICWA and MIFPA define "Indian child" by a child's membership in an Indian Tribe or membership eligibility. Minn. Stat. § 260.755 subd. 8; 25 U.S.C. § 1903(4). These definitions turn on the child's connection to a federally recognized "Indian tribe"—a distinct political community—not the child's race. Contrary to Appellants' arguments, they are not predicated on descent alone because they *exclude* (1) many children who are descendants of members of Tribes but are neither members of, nor eligible for membership in, a federally recognized Tribe; and (2) children who are considered "Indian" but are members of non-federally- recognized Tribes. *See id.* §§ 1903(3), (4); Minn. Stat. 260.755 § subd. 12. Indian children "[a]re not subjected to [ICWA] because they are of the Indian race but because" they or their parents "are enrolled [tribal] members," *Antelope*, 430 U.S. at 646, or

are eligible for membership.

"The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is *solely* within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law." 25 C.F.R. § 23.108(b) (emphasis added); *see also* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153 (Feb. 25, 2015) ("[o]nly the Indian tribe(s) . . . may make the determination whether the child" is an "Indian child").

Placement Preferences. The term "Indian," used throughout ICWA and MIFPA placement preferences, is defined in terms of *Tribal membership*—not race. *See* 25 U.S.C. § 1903(3) and Minn. Stat. § 260.755, subd. 7 (citing 43 U.S.C. § 1606) ("'Indian' means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43."). Moreover, the placement preferences prioritize members of a child's "extended family." Thus, any family member, including a non-Indian family member, sits at the front of the line regardless of race or Tribal membership. 25 U.S.C. § 1915(a)(1); Minn. Stat. § 260.773, subd. 3; Minn. Stat. § 260.775.[3] Then, preference applies to all members of federally

[3] MIFPA also priorities non-custodial parents—regardless of tribal membership. *Id.*

recognized Tribes, including those of other races, such as the Cherokee Freedmen.[4] 25 U.S.C. §§ 1915(a)(2), (3); Minn. Stat. § 260.773, subd. 3. Indians who are not members of a federally recognized Indian Tribe receive no placement preference as would-be guardians or adoptive parents—unless they are members of the child's extended family, in which case the basis for placement is familial, not racial. Accordingly, ICWA's placement preferences rest on consideration of a child's "extended family" and links to federally recognized Tribes—not race.

C. Appellants' Attempts to Limit *Mancari* Lack Merit

Recognizing that their equal protection claims fail under *Mancari* and its progeny, Appellants seek to engraft various "limitations" on the reasoning in those cases. None is defensible.

Contrary to Appellants' contentions, *Mancari* is not limited to classifications strictly promoting "Indian self-government." Appellants' Br. 18. While *Mancari* and *Fisher* involved preferences "directly promoting Indian interests in self-government," the Supreme Court has made clear

[4] *See generally Cherokee Nation v. Nash*, 267 F. Supp. 3d 86 (D.D.C. 2017) (explaining that Cherokee Freedmen descended from African slaves and holding the Freedmen have a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees), *enforced sub nom. In re Effect of Cherokee Nation v. Nash*, No. SC-17-07, 2017 WL 10057514 (Cherokee Nation Sup. Ct. Sept. 1, 2017), *judgment entered*, 2021 WL 2011566 (Cherokee Nation Sup. Ct. Feb. 22, 2021).

that those features are not necessary for *Mancari*'s application. Rather, "the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications." *Antelope*, 430 U.S. at 646. Plaintiffs mischaracterize *Antelope*, in which even regulations unrelated to "tribal self-regulation"—such as matters of criminal jurisdiction—were recognized as "rooted in the unique status of Indians as 'a separate people' with their own political institutions." Appellants' Br. 18.

Nor is *Mancari* limited to legislation applicable to "a constituency of tribal Indians living on or near reservations." *Id*. *Mancari* itself upheld a hiring preference within the BIA that was not geographically bound to Indian lands. 417 U.S. 535. The Supreme Court has long held that "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (citation omitted).

Appellants attempt to justify their cramped view of *Mancari* by misreading *Rice v. Cayetano*, 528 U.S. 495 (2000) and *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). *Rice* was neither an Indian law nor an equal protection case. It involved a challenge under the Fifteenth Amendment to a Hawai'i election law that singled out individuals for voting eligibility "solely because of their ancestry or ethnic characteristics." 528 U.S. at 515 (citation

omitted). The classification found to be racial in *Rice* was based *purely* on ancestry: the state statute explicitly defined "Hawaiian" only through descent, with no tie to political tribal membership. *Id.* Here, by contrast, the classification of "Indian child" turns on the child's or parent's membership, or a child's eligibility for membership, in a federally recognized Tribe. In addition, since *Rice* involved a state election, it had no opportunity to consider the federal government's authority over Indian affairs, or its trust responsibilities with respect to Indian Tribes.

Appellants' reliance on *Adoptive Couple* is equally unavailing. In *dicta,* the Supreme Court suggested certain interpretations of ICWA could "raise equal protection concerns." 570 U.S. at 656. But the Court's reasoning limited *Adoptive Couple* to its unique circumstances of "abandonment"—without suggesting that ICWA's classifications are facially suspect—and this case does not present any of the questions noted in *Adoptive Couple*'s *dicta.*

Ultimately, if Appellants' reading were accepted, it could have sweeping consequences for other Indian-related laws. By way of example, the Major Crimes Act and General Crimes Act allow federal prosecution for crimes by or against "Indians"—which, in Appellants' view, makes the statutes so constitutionally suspect that they trigger strict scrutiny.[5]

[5] Beyond the criminal context, numerous other laws regulate Indian affairs

* * *

For the foregoing reasons, the challenged provisions need only satisfy rational basis review. Regardless, they also satisfy strict scrutiny for the reasons explained in the next section. Because they survive strict scrutiny, and are rationally related to fulfilling Congress's trust responsibility, they also easily satisfy rational basis review. *See generally Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 541 (3d Cir. 2011) ("[i]f the [challenged governmental action] survived strict scrutiny, it would necessarily survive intermediate scrutiny or rational basis review.").

II. EVEN UNDER STRICT SCRUTINY, ICWA AND MIFPA PROVISIONS ARE CONSTITUTIONALLY SOUND

Even if the Court were to apply strict scrutiny, ICWA and MIFPA would survive. Strict scrutiny is satisfied where the government has a "strong basis in evidence" for its compelling interests, and if the legislative action "substantially addresses" that interest. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.) (citations omitted).

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by reference to an individual's Indian status or identity. *See, e.g.*, 25 U.S.C. §§ 1603(13)(A), 1612, 1613 (Indian Health Care Improvement Act (IHCIA), identifying anyone "who is a descendant, in the first or second degree" of a Tribal member as a means of supporting Indians entering the healthcare profession); *id.* § 1801(7)(B) (providing educational support to the "biological child of a member of an Indian tribe"); *see also* 20 U.S.C. § 7491(3)(B) (defining "Indian" to include "a descendant, in the first or second degree" of a Tribal member for purposes of providing education grants to Indian communities).

"Context matters" when applying strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). Appellants simply assume that the modern doctrine of strict scrutiny—developed in the context of racial discrimination unrelated to Indian affairs— applies to ICWA and MIFPA. But strict scrutiny in that sense, which is applied where classifications are especially suspect, makes little sense where the government has a specific, constitutionally-based obligation to Indian tribal members. The very existence of that obligation means that laws treating Indian tribal members differently are not inherently suspect, but rather grounded in the Constitution itself. Strict scrutiny has never before been applied to the government's regulation of Indian affairs, and it is far from clear that its modern form would apply in this context. But even assuming it were to so apply, ICWA and MIFPA are narrowly tailored to further compelling government interests.

A. ICWA And MIFPA Further Compelling Government Interests

By its terms, ICWA furthers at least two compelling government interests: (1) "protect[ing] the best interests of Indian children"; and (2) "promot[ing] the stability and security of Indian tribes." 25 U.S.C. § 1902. MIFPA similarly "protects the long-term interests, as defined by the Tribes, of Indian children, their families as defined by law or custom, and the child's Tribe"; and "preserves the Indian family and Tribal identity." Minn. Stat. §

260.753.

These interests are rooted in the "special relationship between the United States and the Indian tribes and their members," 25 U.S.C. § 1901, as well as "the fulfillment of Congress' unique obligation" to address "special problems" affecting Indian Tribes. *Mancari*, 417 U.S. at 551-52, 555. Congress and the Minnesota Legislature recognized that the removal of Indian children had historically been a tool to both harm Indian children and to eradicate Indian Tribes altogether and passed ICWA in response. These interests are unquestionably compelling.

B. ICWA Furthers the Government's Compelling Interest in Protecting the Best Interests of Indian Children

When it enacted ICWA, Congress recognized our nation's grim history of mistreating Indian children and sought to address "shocking" disparities "in placement rates for Indians and non-Indians." H.R. Rep. No. 95-1386, at 9. At the time, "an estimated 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive homes, foster care, or institutions." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38839 (June 14, 2016) (codified at 25 C.F.R. § 23). Around 90 percent of those children were being raised by non-Indians"— "[m]any would never see their biological families again." Christie Renick, *The Nation's First Family Separation Policy*, Imprint (Oct. 9, 2018). "In 16 states surveyed in 1969,

approximately 85 percent of all Indian children [] were living in non-Indian homes." H.R. Rep. No. 95-1386, at 9 (1978). By contrast, "[i]n 1980, the incidence rate of children [nationwide] in foster care was 4.4 [per 1,000 children]"—or 0.44 percent. Karl Ensign, U.S. Dep't of Health & Hum. Servs., *Foster Care Summary: 1991* (Dec. 31, 1990). Thus, Indian children were approximately *fifty to eighty times* more likely to be removed from their families (and Tribes) than other children.

Congress found that "the separation of large numbers of Indian children from their families and tribes" resulted from a long discriminatory history of "abusive child welfare practices," *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989), which disregarded "essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," 25 U.S.C. § 1901(5). Indeed, Congress considered that "[one] of the most pervasive components of the various assimilation or termination phases of American policy has been the notion that the way to destroy tribal integrity and culture, usually justified as 'civilizing Indians,' is to remove Indian children from their homes and tribal settings."[6]

Congress determined that depriving an Indian child of tribal relations

[3] S. Rep. No. 95-597 at 43-44 (Excerpt of Task Force Four: Federal, State, and Tribal Jurisdiction, Final Report to the American Indian Policy Review Comm'n (1976)).

inflicts unique harm on the child—including the loss of his or her personal tribal identity, relationships, cultural heritage, and language, and enacted ICWA to mitigate these harms. *See* 25 U.S.C. § 1902 (policy statement). Indeed, research addressed below has demonstrated that children removed from their tribal community exhibit elevated levels of substance abuse, mental health struggles, self-injury, and even suicide.

While ICWA has proven effective, the statute's work is far from finished, and Congress retains a compelling interest in keeping Indian families together for the best interest of the children. Contemporary studies consistently find that "[N]ative American children [] are still disproportionately more likely to be removed from their homes and communities than other children," and are still "unnecessarily removed from their families and placed in non-Indian settings; where the rights of Indian children, their parents, or their Tribes were not protected." Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38779. In 2020, American Indian children in Minnesota were 18 times more likely to be placed in foster care than white children. *See* Minn. Dep't of Educ., *Foster Care* (July 28, 2021);[7] *see also Disproportionate Representation of Native Americans in Foster Care Across United States*, Citizen Potawatomi Nation Blog (Apr. 6, 2021), https://tinyurl.com/2s9eb27m (Indian families "are

[7] https://education.mn.gov/MDE/dse/ESEA/foster/PROD046026

up to four times more likely to have their children taken and placed into foster care than their non-Native counterparts"); Annie E. Casey Foundation, *Child Welfare and Foster Care Statistics* (May 16, 2022) (Indian children were still "overrepresented among those entering foster care" at nearly double the nationwide rate), https://tinyurl.com/2td3ytbw.

In 2019, Indian children in Minnesota represented more than 25% of children in foster care, yet were only 1.7% of the population. *Disproportionality in Child Welfare Fact Sheet*, National Indian Child Welfare Association (Oct. 2021).[8] In Oklahoma, Indian children "represented more than 35 percent of those in foster care, yet Native Americans ma[d]e up only around 9 percent of Oklahoma's population" as of 2017. *Disproportionate Representation of Native Americans*, *supra*. In Nebraska, the percentage of children in foster care who are Native American is four times greater than their percentage of the State population.[9] And in South Dakota, "52 percent of the children in the state's foster care system are American Indians," and "[a]n Indian child is 11 times more likely to be placed in foster care than a

[8] https://www.nicwa.org/wp-content/uploads/2021/12/NICWA_11_2021-Disproportionality-Fact-Sheet.pdf

[9] Bayley Bischof, SPECIAL REPORT: A look at Nebraska's foster care system and how teens need more help, KOLN-TV (May 12, 2022), https://tinyurl.com/muxhzrb3.

white child" as of 2017.[10]

As one example, a case filed by the ACLU in South Dakota on behalf of the Oglala Sioux Tribe, the Rosebud Sioux Tribe, and a class of Indian families, illustrated how local officials ignored ICWA in Indian child custody cases. In that case, children were removed from their homes following State-court hearings in which parents were not given a copy of the petition accusing them of wrongdoing, were not assigned counsel, and were not permitted to testify, call witnesses, or cross-examine any state employee. The hearings typically lasted fewer than five minutes—some wrapped up in sixty seconds—and the State won 100 percent of the time. *See Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 757 (S.D. 2015) (noting that 823 Indian children were removed from their homes between 2010 and 2013 in violation of ICWA), *vacated on other grounds*, *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018). In the absence of ICWA's protections, the experience of plaintiff Madonna Pappan, a member of the Oglala Sioux Tribe, was typical. After a hearing that lasted less than sixty seconds, the court stripped the Pappans of custody over their children for at least sixty days. The forced removal caused the children to suffer long-lasting emotional and psychological harm,

[10] Stephen Pevar, In South Dakota, Officials Defied a Federal Judge and Took Indian Kids Away from Their Parents in Rigged Proceedings, ACLU Blog (Feb. 22, 2017), https://tinyurl.com/mtavckbb.

including (to varying degrees) separation anxiety, bed-wetting, emotional swings, and suicidal tendencies.[11]

According to one 2017 study, Indian children placed for foster care or adoption—many outside their families and tribal communities—reported higher rates than non-Indian adoptees "on all mental health problems measures (*e.g.*, substance abuse, mental health, self-injury, and suicide)." Ashley Landers, et al., *American Indian and White Adoptees: Are There Mental Health Differences?*, 24 Am. Indian & Alaska Native Mental Hlth. Res. 54, 54 (2017). This study recognized that Indian children "have a number of unique experiences . . . that may distinctly affect their mental health." *Id.* at 56; *see also, e.g.*, Janie M. Braden & K.T. (Hut) Field, *Cultural Issues in the Adoption of Indian Children: Post-Legal*, 5 The Roundtable: J. Natl. Res. Ctr. for Special Needs Adoption 4, 4 (1991) ("An environmental factor contributing to higher suicide rates among Indian youth is adoption *in which Native American youth are placed in non-Indian families*."). Although ICWA has improved placement rates for Indian children,[12] the interests that prompted Congress to pass ICWA remain compelling today.

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[11] *See* ACLU, *Shadow Report to the 7th–9th Periodic Reports of the United States*, at 56–62, 85th Session of the Committee on the Elimination of Racial Discrimination (July 9, 2014), https://tinyurl.com/mtavckbb.

[12] *See* Capacity Building Center for Courts, *ICWA Baseline Measures Project Findings Report* 17, 19 (2020), https://tinyurl.com/spa68nm.

C. ICWA and MIFPA Further the Government's Compelling Interest in Protecting the Stability and Security of Indian Tribes

ICWA also fulfills Congress's "broad and enduring trust obligations to the Indian tribes." *Brackeen*, 994 F.3d at 341. In adopting ICWA, Congress expressly acknowledged that the United States "through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources." 25 U.S.C. § 1901(2). Pursuant to the "trust relationship between the United States and the Indian people," *Mitchell*, 463 U.S. at 225, the government "has charged itself with moral obligations of the highest responsibility and trust toward Indian tribes." *Haaland*, 599 U.S. at 275, (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011)). Accordingly, Congress possesses a distinct and compelling interest in discharging its own trust obligations to preserve the stability and integrity of Indian Tribes through their members and prospective members. *See* 25 U.S.C. § 1902 (declaring that "it is the policy of this Nation" to "promote the stability and security of Indian tribes").

Federal courts have long recognized this interest as compelling. In *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011), for example, the Tenth

Circuit considered a Religious Freedom and Restoration Act challenge[13] to the Eagle Act, which generally prohibits possessing eagle feathers, but allows for certain exceptions, including one for Tribes. The Tenth Circuit held that the federal government had a compelling interest in the "protection of the culture of federally-recognized Indian tribes," explaining that this compelling interest "arises from the federal government's obligations, springing from history and from the text of the Constitution, to federally-recognized Indian tribes" and "Congress' 'obligation of trust to protect the rights and interests of federally-recognized tribes and to promote their self-determination.'" *Id.* at 1285-86 (quoting *United States v. Hardman*, 297 F.3d 1116, 1128-29 (10th Cir. 2002)). The Tenth Circuit explained that this compelling interest allows the federal government to take actions that might otherwise be impermissible—in *Wilgus*, by impinging on the religious practices of a non-Tribal member and by granting rights to Tribal members that non-Tribal members do not enjoy.

"The protection of this tribal interest is at the core of the ICWA." *Holyfield*, 490 U.S. at 52. Congress expressly recognized that nothing "is more vital to the continued existence and integrity of Indian tribes than their children," and that Tribes are best positioned to preserve Indian culture,

[13] RFRA employs the same strict scrutiny analysis as equal protection jurisprudence. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006).

traditions, and communities. 25 U.S.C. § 1901(3). "[T]here can be no greater threat to essential tribal relations, and no greater infringement on the right of the . . . [t]ribe to govern themselves than to interfere with tribal control over the custody of their children." *In re Adoption of Buehl*, 555 P.2d 1334, 1342 (Wash. 1976) (internal quotation marks omitted).

In short, ICWA and MIFPA further the government's compelling interests in protecting the best interests of Indian children and promoting Indian Tribes.

D. ICWA and MIFPA Are Narrowly Tailored to Achieve the Compelling Interests They Further

Congress articulated in ICWA a carefully circumscribed definition of "Indian child" and adopted a "minimum" prophylactic measure regulating the "removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. The Minnesota Legislature followed suit. Minn. Stat. § 260.755. Both are narrowly tailored to achieve the compelling interests outlined above.

First, ICWA and MIFPA narrowly define "Indian child" to capture a child's connection to a federally recognized Tribe—not, as Appellants claim, "based on their racial or national origin." Appellants' Br. 7. To the contrary, this definition *excludes* those people who are descendants of Tribe members, *id.*, but who are not members or eligible for membership in a federally

recognized Tribe. *Supra* § I.B; *see, e.g.*, *In re T.I.S.*, 586 N.E.2d 690, 692-93 (Ill. Ct. App. 1991) (Canadian Indians not covered by ICWA). The definition also excludes those Indians who are members of Tribes *not* recognized by the federal government, as those Tribes lack the government-to-government relationship at the core of Indians' political status. *See, e.g.*, *In re A.L.*, 862 S.E.2d 163, 168 (N.C. 2021) (child eligible only for membership in state-recognized Tribe is not an "Indian child" for purposes of ICWA).[14] There are approximately 400 Tribes in the United States, including many State-recognized Tribes, that lack federal recognition,[15] and their children are not protected by ICWA and MIFPA. Similarly, "Indian child" excludes individuals who have been disenrolled from their Tribes.[16] If the classification were based on race, there would be no such rulings governing any individuals

[14]"[A] formal government-to-government relationship between the United States and a tribe" is established by "federal recognition of an Indian tribe." U.S. Gov't Accountability Off., GAO-02-936T, Indian Issues: Basis for BIA's Tribal Recognition Decisions Is Not Always Clear 1 (2002).

[15] U.S. Gov't Accountability Off., GAO-12-348, Fed. Funding for Non-Federally Recognized Tribes 1 (2012).

[16] *See, e.g.*, *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) (concluding a person from a terminated Tribe is not an "Indian" under federal law); *Allen v. United States*, 871 F. Supp. 2d 982, 985 (N.D. Cal. 2012) (disenrolled individuals from the Pinoleville Pomo Nation did not constitute a "Tribe" under the Indian Reorganization Act); *In re K.P.*, 195 Cal. Rptr. 3d 551, 554 (Cal. Ct. App. 2015) (affirming ruling of juvenile court that disenrolled children "are not Indian children within the meaning of ICWA" despite their mother being an enrolled member of the Pala Band Tribe).

"terminated" or "disenrolled" from the category. ICWA and MIFPA definitions of "Indian" and "Indian child" turn on status relative to a federally recognized Tribe, and are thus narrowly tailored to the government's compelling interest in fulfilling its trust obligations towards federally recognized Tribes, regardless of race.

Second, ICWA placement preferences are specifically tailored to address Congress's finding that vague and discriminatory standards had resulted in the failure of "administrative and judicial bodies" to "recognize . . . the cultural and social standards prevailing in Indian communities and families," 25 U.S.C. § 1901(5). MIFPA placement preferences similarly acknowledge and are narrowly tailored to address "that the historical deprivation of rights of Indian people and Indian Tribes has led to disparate out-of-home placement of Indian children." Minn. Stat. § 260.754(f). ICWA and MIFPA placement preferences respond to this problem head on—prioritizing placement with an Indian child's family or Tribe. *See* 25 U.S.C. § 1915(b); Minn. Stat. § 260.773 subd. 3. These preferences aim to keep Indian children connected to their families, Tribes, and culture, consistent with child welfare practices recognized today as the best practices for all children—focusing on strengthening families instead of removing children from families considered unfit.

ICWA and MIFPA also were narrowly tailored to ensure that every case

involves an individualized consideration of the child's needs, and courts can deviate from placement preferences whenever "good cause" exists to do so. 25 U.S.C. §§ 1915(a), (b); Minn. Stat. § 260.773, subd. 3. ICWA and MIFPA also provide for emergency removal or emergency placement of a child "in order to prevent imminent physical damage or harm." 25 U.S.C. § 1922; Minn. Stat. § 260.758. The "good cause" exception ensures that the statute's placement preferences do not control in circumstances in which the child's best interests require a different approach. *See, e.g.*, *In re Interest of Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983) (explaining that ICWA's placement preference and "good cause" exception reinforce "the cardinal rule that the best interests of the child are paramount").

BIA regulations provide five bases for establishing "good cause": (1) the attested "request of one or both of the Indian child's parents". . . (2) "[t]he request of the child, if the child is of sufficient age and capacity to understand the decision that is being made"; (3) "[t]he presence of a sibling attachment…"; (4) "[t]he extraordinary physical, mental, or emotional needs of the Indian child . . ."; [and] (5) "[t]he unavailability of a suitable placement after a determination by the court that a diligent search was conducted…" 25 C.F.R. § 23.132(c)(1)-(5); *see also* Minn. Stat. § 260.773 subd. 10 (requiring "testimony of a qualified expert designated by the child's Tribe" to establish good cause under item (4) *supra*, or, if necessary" testimony from an expert qualified

under § 260.773 subd. 6, para. (d)). These factors are not exclusive, as "there may be extraordinary circumstances where there is good cause to deviate from the placement preferences based on some reason outside of the five specifically-listed factors." Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38839. "[T]he final rule says that good cause 'should' be based on one of the five factors, but leaves open the possibility that a court may determine, given the particular facts of an individual case, that there is good cause to deviate from the placement preferences because of some other reason." *Id*. The "good cause" exception thus ensures that the statute is neither over- nor under-inclusive: it provides a calibrated structure for preserving a child's connections to the Indian community, while still permitting departures as the circumstances of a particular case and the best interests of the child may require.[17]

Third, ICWA is tailored to reflect that—contrary to Appellants' assertions—Indian families and Tribes are best positioned to raise their children, both for the best interest of the children and the stability and well-being of the tribe. As the Chief of the Mississippi Band of Choctaw testified in a hearing leading to ICWA's enactment, "the chances of Indian survival are

[17] In this case, the district court considered and rejected Appellants' arguments for good-cause exceptions based on the alleged mother's preference and on alleged medical needs. *See In re Welfare of Children of L.K.*, 9 N.W.3d 174, 188-91 (Minn. 2024).

significantly reduced if our children, the only real means for the transmission of tribal heritage, are raised in non-Indian homes and denied exposure to the ways of their people." *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs*, 95th Cong. 193 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians). Appellants do not meaningfully rebut the testimony Indian leaders provided to Congress, and they provide no basis to ignore the importance of an Indian household as a means of preserving tribal traditions and culture for all involved. *See In re Interest of J.R.H.*, 358 N.W.2d 311, 321 (Iowa 1984) (considering "the rich Indian heritage these children will be deprived of if placed" in a non-Indian foster home and the impact of "cultural adjustments these [Indian] children . . . would have to make").

Fourth, ICWA maintains its narrowly tailored approach because it is not a sweeping mandate across all circumstances but instead provides a specific exception for any and all circumstances in which "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f); Minn. Stat. § 260.771 subd. 6.

Fifth, ICWA appropriately includes Indian families of Tribes other than the child's in its preference scheme. 25 U.S.C. § 1915. "[M]any contemporary

tribes descended from larger historical bands and continue to share close relationships and linguistic, cultural, and religious traditions" today. *Brackeen*, 994 F.3d at 345 (Dennis, J.). One example is the Oceti Sakowin band, which is located in Minnesota, Montana, Nebraska, North Dakota, and South Dakota. *Case Study: Oceti Sakowin*, Smithsonian Nat'l Museum of the American Indian, https://tinyurl.com/mns653a6. Families of any Tribe are thus uniquely positioned to integrate children into Indian cultures and to guide and support a child in connecting to the child's own Tribe as well as tribal resources.

Finally, ICWA and MIFPA are appropriately tailored to address the structure of Indian families, recognizing that an Indian "family" includes "the child's extended family." 25 U.S.C. § 1915(a); Minn. Stat. § 260.773 subd. 3, 4, 11, 14. Many Indian Tribes operate as "extended families" for the Indian child, such that the child may "have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." H.R. Rep. No. 95-1386, at 10. And importantly, this "extended family" often includes non-Indian relatives. As a further illustration, in both the Apache and Navajo languages, the word for "mother" is the same as the word for "aunt," and the word for "father" is the same as the word for "uncle." *See* Renick, *Nation's First Family Separation Policy*, *supra*. The ICWA "good cause" provision similarly prioritizes family unity even when a child's biological parents may not be in a

position to have custody of the child: it facilitates placement at the "request of one or both of the Indian child's parents," based on the "presence of a sibling attachment," and pursuant to the "extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live." 25 C.F.R. § 23.132(c)(1)-(5).

In short, even if strict scrutiny were applicable here, ICWA and MIFPA definitions of Indian child and placement preferences are narrowly tailored to further their compelling interests in protecting Indian children and Indian Tribes. Appellants' equal protection challenges should be rejected.

CONCLUSION

For all the above reasons, the court of appeals' decision rejecting Appellants' equal protection challenge should be affirmed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

Dated: August 28, 2024

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