A23-1762

STATE OF MINNESOTA

IN COURT OF APPEALS

In the Matter of the Welfare of the Children of :

L.K., Parent.

APPELLANTS' REPLY BRIEF

MARK D. FIDDLER (#197853)
RACHEL OSBAND (#0386945)
DELMAR FLYNN (#0394885)
Attorneys at Law
12800 Whitewater Drive
Suite 100
Minnetonka, MN 55343
(612) 822-4095

TIMOTHY SANDEFUR (AZ #033670
Attorney at Law,*Pro hac vice
Scharf-Norton Center
For Constitutional Litigation
At the Goldwater Institute
500 E. Coronado Rd.
Phoenix, AZ 85004
tsandefur@goldwaterinstitute.org
(602) 462-5000

Attorneys for Appellants

RYAN A. GUSTAFSON
Attorney at Law
Attorney Reg. No. 021222
117 West 5th Street
P.O. Box 95
Blue Earth, MN 56013
(507) 526-2177

Attorney for L.K., Mother

JODY M. ALHOLINNA
Attorney at Law
Attorney Reg. No. 284221
Minnesota Judicial Center
Suite G-27
25 Rev. Dr. Martin Luther King Jr.
Boulevard
St. Paul, MN 55155
(612) 408-3359

Attorney for Guardian ad Litem

ANNA VEIT-CARTER
Attorney at Law
Attorney Reg. No. 0392518
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 757-1243

Assistant Attorney General
State of Minnesota

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

Attorney for Martin County

JOSEPH PLUMER (#164859)
RILEY PLUMER (#0399379)
Attorneys at Law
9352 N Grace Lake Rd SE
Bemidji, MN 56601
(218) 556-3824

TAMMY J. SWANSON
Attorney at Law
Attorney Reg. No. 0231939
3120 Woodbury Drive #200
Woodbury, MN 55125
(651) 739-9615

Attorneys for Red Lake Nation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Opinions

Federal Circuit Court Opinions

United States Code

State Cases

State Statutes

Rules

REPLY ARGUMENT

Appellants K.R and N.R. hereby submit this Reply to the responsive briefs filed by Guardian ad Litem, Red Lake Nation, and the Minnesota Attorney General.

1. ***The GAL's assertion that denial of permissive intervention in a civil proceeding is generally not appealable is simply wrong.***

The GAL's assertion that denial of permissive intervention in a civil proceeding is generally not appealable and this issue is not properly before this Court is simply wrong—as is the argument that *M.L.S.* represents an exception to this "rule" due to "relative" status of the appellant. These arguments directly contradict the clear and straightforward holding in *MLS. In re Welfare of the Children of M.L.S.*, 964 N.W.2d 441, 451 (Minn. Ct. App. 2021). The Court of Appeals chose to publish its opinion in *M.L.S.*, which is an infrequent occurrence in the area of juvenile protection procedure and adoption appeals, thereby emphasizing the import of this decision *and* making *M.L.S.* precedential case law.

The GAL conflates the issues of the "rule out" order in *M.L.S.* with the appellant aunt's subsequent permissive intervention. The Court noted in *M.L.S.* that any relative who has "informed the court of their whereabouts and willingness to adopt is a party unless they are ruled out" pursuant to Minn. R. Juv. Prot. P. 32.02(e). *M.L.S.* at 450. Any such relative need not file for permissive intervention because they are already a party under Rule 32.02(e). *Id*. However, in

that case, appellant aunt was required to bring a motion for permissive intervention to regain her party status because she had been ruled out by the district court as a placement option. *Id*. In addressing this situation, the Court clarified the right to move for permissive intervention regardless of relative status:

> The right to move for permissive intervention, however, is broad: "*Any person* may be permitted to intervene as a party if the court finds that such intervention is in the best interests of the child." Minn. R. Juv. Prot. P. 34.02 (emphasis added). When the juvenile-protection rules are read together, they suggest that, after a relative has been ruled out, they may regain party status if the district court grants the ruled-out relative permission to intervene. *See generally In re Children of L.L.P.*, 836 N.W.2d 563, 572 n.3 (Minn. App. 2013) (noting section 260C.607 "does not address whether a relative or foster parent must intervene to become a party in order to move to be considered an adoptive placement").

Id. at 450-51.

The Court of Appeals reiterated this position on permissive intervention, and confirmed that it is an appealable determination, in the opening paragraph of its analysis of whether the district court abused its discretion by denying aunt's motion for permissive intervention:

> "***Any person*** may be permitted to intervene as a party if the [district] court finds that such intervention is in the best interests of the child." Minn. R. Juv. Prot. P. 34.02. We review permissive-intervention rulings for abuse of discretion. *Norman v. Refsland*, 383 N.W.2d 673, 676 (Minn. 1986). A district court abuses its discretion by "making findings unsupported by the evidence or by improperly applying the law." *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). ***An appellate court will reverse the denial of a request to permissively intervene only when a clear abuse of***

> ***discretion is shown***. *State v. Deal*, 740 N.W.2d 755, 760 (Minn. 2007).

MLS, 964 N.W.2d at 451 (emphasis added).

The plain language of this paragraph slams the door on the argument that permissive intervention is not appealable and that there is some new "relative exception" to such a rule. There is no question under the precedential case law that Appellants have the right to bring a motion for permissive intervention and appeal its denial by the district court.

2. ***Red Lake's argument that "has a child placed" is written in the present perfect tense is perfectly bad grammar—and bad law.***

Red Lake's argument that "has a child placed" is written in the present perfect tense is gross over-lawyering. Support for this is ironically found in Red Lake's own cited authority. *See* Respondent Red Lake's Br. at 12. All of the cases cited in their Footnote 3 explain and use the phrase "has been" (not "has") as the sample present-perfect tense. (*See Dobrova v. Holder*, 607 F.3d 297, 301–02 (2d Cir. 2010); *In re A.H.B., M.L.B., J.J.B.*, 791 N.W.2d 687, 689–90 (Iowa 2010); *Padilla-Romero v. Holder*, 611 F.3d 1011, 1013 (9th Cir. 2010); State v. Overweg, 922 N.W.2d 179, 184 (Minn. 2019)). These show the present tense of "has" and the past participle of "to be" with the *third* word in the past tense. The true version of present perfect here would be "has *had* placed" and this is not how Section 257C.01, subd. 3(b) reads.

The actual phrase is ""Interested third party" does not include **an individual who has a child** placed in the individual's care." Minn. Stat. §257C.01, subd. 3(b) (emphasis added). The subject noun is "individual" and the subject verb is "has" not "has placed". Red Lake is confusing this Court by putting two verbs together that do not create their own phrase as written by the legislature. If the Court were to buy into Red Lake's argument, then it would use the logic that the individual is the one doing the placing. It is truly what the *individual* has, *not* that the individual has placed.

Further, "placed" is defined as a transitive verb[1], which is "an action verb that requires one or more objects". [1] *State v. Thonesavanh*, 904 N.W.2d 432, 434 n.1 (Minn. 2017) (citing *The Chicago Manual of Style* ¶ 5.96 (16th ed. 2010). Here "child" is the object to "placed", or more specifically, the direct object, which "receive[s] the action of the verb". *United States v. Hernandez-Barajas*, 71 F.4th 1104, 1106 (8th Cir. 2023); (citing Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* 166 (3d ed. 2009) and *United States v.*

[1] Meaning "to put in or as if in a particular place or position : SET… to present for consideration… to put in a particular state… to direct to a desired spot.. to cause (the voice) to produce free and well resonated singing or speaking tones… to assign to a position in a series or category : RANK… ESTIMATE… to identify by connecting with an associated context… to distribute in an orderly manner : ARRANGE… to appoint to a position… to find a place (such as a home or employment) for… to give (an order) to a supplier… to give an order for… to try to establish a connection for…" Merriam-Webster.com Dictionary, *Place* <https://www.merriam-webster.com/dictionary/place#dictionary-entry-2 (accessed February 16, 2024).

Sanders, 966 F.3d 397, 406 (5th Cir. 2020) (explaining the "grammatical[] significan[ce]" of "direct object[s]," which "receiv[e] the action of a transitive verb" (citation omitted)).

In short, "has" and "placed" in Section 257C.01, subd. 3(b) are not a package deal and do not qualify as present perfect tense. And saying it is does not make it so. "[H]as" *is* in the present tense so that the statute did not exclude Appellants as interested third parties because they did not presently have the children placed with them at the present time they filed their third party custody action. Law requires that the rules of grammar be followed, so grammar is not just about etiquette, it is the law. The district court erred as a matter of law in dismissing Appellants' custody petition.

3. ***Red Lake's argument that a "presumption of unfitness" undermines Mother's preference rights under ICWA is incorrect.***

Red Lake argues Mother's placement preference under ICWA does not constitute "good cause" to deviate because Mother is presumably unfit. They argue:

> *It is presumed that a parent is palpably unfit* to be a party to the parent and child relationship upon a showing that the parent's custodial rights to another child have been involuntarily transferred to a relative under Minn. Stat. § 260C.515, subd. 4, or a similar law of another jurisdiction. Minn. Stat. § 260C.301, subd. (b)(4)[sic].

(RL Br. at 17). Leaving aside the remarkable notion *from the Tribe* that ICWA somehow permits presumptions of unfitness, Red Lake's argument simply takes

the presumption under Minn. Stat. § 260C.301, subd. 1 (b)(4), subd. 4 too far. The section cited by Red Lake states:

> (4) that a parent is palpably unfit *to be a party to the parent and child relationship* because of a consistent pattern of specific conduct before the child or of specific conditions directly relating to the parent and child relationship either of which are determined by the court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the child. It is presumed that a parent is palpably *unfit to be a party to the parent and child relationship* upon a showing that the parent's parental rights to one or more other children were involuntarily terminated or that the parent's custodial rights to another child have been involuntarily transferred to a relative under Minnesota Statutes 2010, section 260C.201, subdivision 11, paragraph (e), clause (1), section 260C.515, subdivision 4, or a similar law of another jurisdiction….

Minn. Stat. 260C.301, subd. 1 (b)(4). This presumption simply relieves the petitioner in permanency cases of the duty of proving unfitness in cases where parents have involuntarily lost custody in prior cases. In other words, they need not establish "anew" that the parent is "palpably unfit to be a party *to the parent and child relationship.*" It does not presumptively terminate or rebut *all other* rights of the parent, including the due process right to be heard regarding the care, custody, and control of her child—in cases where she cannot be party to the parent-child relationship. That is as far as the statute goes. And even *if* Mother K.L. was not entitled to a presumption of fitness regarding her day-to-day parenting capacity, that does not mean she forfeits other statutory rights, such as her statutory right to have her placement preferences enforced:

> If the child's birth parent explicitly requests that a specific relative not be considered for placement of the child, the *court shall honor that request* if it is consistent with the best interests of the child and consistent with the requirements of section 260C.221.

Minn. Stat. § 260C.193, subd. 3 (e)(emphasis added). The presumption of unfitness under Minn. Stat. § 260C.301, subd. 1 (b)(4), does not make any reference to this parental preference statute. Accordingly, it does not apply.

4. ***Respondent Red Lake's argument that Appellants have not suffered injury in fact is confused on the law of standing.***

Red Lake argues that Appellants do not have standing to argue any equal protection claims because they have not suffered any "injury in fact." This argument could not be more insensitive to Appellants' loss. Appellants were advised by county and GAL shortly after the twins' births that they were their preferred permanency option[2]. They relied on these statements to devote themselves selflessly for nearly one and one half years to meeting the twins' profound medical needs. They fell in love with them and that love was reciprocated. An attachment formed that psychologists now recognize as being essential for long term psychological health. As this Court has noted, "there is a broad consensus that the central importance of the primary [attachment] relationship has been convincingly demonstrated." *Goldman v. Greenwood,* 725 N.W.2d 747, 754 n.5 (Minn. Ct. App. 2007). "[I]nterruption of the parent-child

[2] The GAL denies there is any support "in the record" for this assertion, notwithstanding it is stated in Appellants' affidavit (br. at 2).

relationship may be seriously detrimental to the child's psychological development." *Goldman v. Greenwood*, 725 N.W.2d at 754 n.5. The United States Supreme Court has characterized foster parents' bonds in this way:

> No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals.

Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844, 97 S. Ct. 2094, 2109-10 (1977). While Appellants do not argue that attachment alone creates standing, they do submit the attachment relationship, coupled with their *right* to be "considered" by the county and court as permanent placement options as the children's "important friends",[3] establishes their standing to intervene and *be heard* on equal footing with the Indian relative.

It is well established that plaintiffs have Article III standing where (1) they "have suffered an injury in fact," (2) that injury is "fairly trace[able] to the challenged action of the defendant," and (3) it is "likely" that "the injury will be

[3] Minn. Stat. § 260C.212, subd. 2 (2) requires the agency to consider placement of the children "with an individual who is an important friend of the child or of the child's parent or custodian, including an individual with whom the child has resided or had significant contact or who has a significant relationship to the child or the child's parent or custodian."

redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Appellants are subject to ICWA and MIFPA's discriminatory preference scheme because of their race and the race of their prospective foster children. "The 'injury in fact' in an equal protection case" is "the denial of equal treatment resulting from the imposition of [a] barrier, not the ultimate inability to obtain [a] benefit." *Ne. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). "Discriminatory treatment at the hands of the government" is "recognizable for standing irrespective of whether the plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment under law or regulation." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012). *See also Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) ("the gravamen of an equal protection claim is differential governmental treatment").

Were there any doubts as to Appellants' standing the United States Supreme Court erased them in *Haaland v. Brackeen,* which Red Lake neglects to mention:

> The individual petitioners argue that ICWA injures them by placing them on "[un]equal footing" with Indian parents who seek to adopt or foster an Indian child. *Northeastern Fla. Chapter*, *Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993). Under ICWA's hierarchy of preferences, non-Indian parents are generally last in line for potential placements. According to petitioners, this "erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Ibid.*; see also *Turner* v. *Fouche*, 396 U. S. 346, 362, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970) (the Equal Protection Clause secures the right of individuals "to be considered" for government positions and benefits "without the burden of

invidiously discriminatory disqualifications"). *The racial discrimination they allege counts as an Article III injury.*

Haaland v. Brackeen, 599 U.S. 255, 143 S. Ct. 1609, 1638 (2023)(emphasis added). While individual petitioners were found to have lacked standing in that case on *other grounds* (namely redressability), the court made it emphatically clear that as for the injury-in-fact claims, petitioning potential adoptive parents had shown an injury in fact.

5. ***ICWA and MIFPA create racial, not political, classifications***

A. ICWA and MIFPA separate people based on race or national origin

Red Lake (RL) and the Minnesota Attorney General (AG) recite the standard argument for the constitutionality of ICWA and MIFPA, but they never actually answer the arguments Appellants put forth in their Brief. For example, RL and AG assert that *Morton v. Mancari*, 417 U.S. 535 (1974), declared laws that distinguish between Indians and non-Indians are "political rather than racial," AG Br. at 8, RL Br. at 24, but they ignore the fact—pointed out in App. Br. at 46—that *Morton* was limited. It involved adults who chose to become or remain tribal members—not children who were merely born into a racial category. In fact, *Mancari* took pains to emphasize that it was *not* giving carte blanche to laws "directed towards a 'racial' group consisting of 'Indians.'" 417 U.S. at 553 n.24. ICWA and MIFPA, by contrast, are directed towards a racial group consisting of Indians, and therefore fall outside the *Mancari* rule.

Again, in *United States v. Antelope*, 430 U.S. 641 (1977), on which RL relies, the Court "intimate[d] no views" about the constitutionality of laws that treat people differently based on biological ancestry alone, noting that "we are not concerned with instances in which Indians … are subjected to differing … burdens of proof from those applicable to non-Indians." *Id.* at 649 n.11. ICWA/MIFPA impose different burdens of proof on cases involving children who fall within a biologically defined category. That is, they are precisely the type of statutes the Court expressly declined to address in *Mancari* and *Antelope*.

What is a racial classification? *Rice v. Cayetano*, 528 U.S. 495 (000), defined that term as a law that "singles out 'identifiable classes of persons ... solely because of their ancestry or ethnic characteristics.'" *Id.* at 515 (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)). ICWA and MIFPA certainly do that.

First, they are triggered not by a child's political, social, religious, linguistic, or cultural relationship to a tribe, but solely by a child's biological connection to a tribe. It applies even to children who are not and may never become tribal members, because it applies based on a child's *eligibility* for membership—and eligibility depends exclusively on biological ancestry. RL claims (RL Br. at 31) that ICWA/MIFPA require a "tight, present-day political affiliation," but that is simply not true. **No amount of political affiliation with a tribe will qualify a child as "Indian" under ICWA or MIFPA if she lacks the biological prerequisites. And**

no *lack* of political affiliation will *dis*qualify a child who fits the biological profile.

Second, ICWA—but not MIFPA—requires that a child have a "biological" parent who is a tribal member in order to qualify; a child who is *adopted* by a tribal member does not qualify, regardless of how much "political" affiliation to a tribe that child may have. *See, e.g., In re Francisco D.*, 178 Cal. Rptr. 3d. 388, 396 (Ct. App. 2014). And under MIFPA, even this factor does not count. The *only* thing that counts in determining whether ICWA applies is a child's biological ancestry.

Third, the very concept of "Indian" is a racial, not a political category.[4] If tribes are political entities, then a political category would consist of, say, Choctaw, Cherokee, Navajo, etc.—but ICWA and MIFPA do not use these terms; they use the term "Indian" generically. And that concept of generic "Indianness" is manifested throughout the statutes. ICWA requires, as RL observes (at 33) that "Indian children" be placed with "Indian families," *even if they are of different tribes*—rather than with adults of other ancestry. 25 U.S.C. § 1915(a)(3).

Rice also said a race-based statute is one that "use[s] ancestry as a racial definition and for a racial purpose." 528 U.S. at 515. ICWA and MIFPA certainly do that; the Supreme Court itself said so in *Mississippi Band of Choctaw Indians v.*

[4] The concept of the generic "Indian" has been accurately described as "an arbitrary collectivization" imposed by Europeans in disregard of the cultural differences between aboriginal inhabitants of America. Robert Utley, *The Indian Frontier, 1846-1890* at 4-6 (2003).

Holyfield, 490 U.S. 30, 37 (1989), when it said ICWA "establish[es] 'a Federal policy that, where possible, an Indian child should remain in the Indian community.'" (citation omitted).

RL claims (RL Br. at 27) that ICWA/MIFPA "classif[y] based on tribal affiliation," but that is not true. They classify based on a child being biologically eligible for affiliation—that is, based on being a *potential* member—where that potential membership is determined solely by biological factors: ancestry alone in MIFPA's case, and ancestry plus the status of the *biological* parent in ICWA's case.

The bottom line is simple: a race-based law is a law that turns on "immutable characteristics determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), whereas the law at issue in *Mancari* was based on a chosen political affiliation. ICWA/MIFPA fall on the racial side of that line. Alternatively, if they are not based on race, they are based on national origin, which the law regards with the same degree of suspicion—and the same strict scrutiny—as racial categorization. *See, e.g., Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117,1120 (9th Cir. 1998) (finding an Indian/non-Indian distinction to be national origin-based). A national origin-based classification is one based on a person's "ancestry." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). A law triggered by the citizenship of a child's parents is a national origin-based statute. *See Oyama v. California*, 332 U.S. 633, 645 (1948). ICWA/MIFPA obviously qualify.

B. Respondents' arguments to the contrary are fallacious

AG says (AG Br. at 11) that ICWA/MIFPA cannot be race-based because not all Native American children qualify as Indian children under these laws. But this is a fallacious argument that *Rice* explicitly rejected. It said that "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." 528 U.S. at 516-17. For example, if a law only applied to left-handed black people, it would still be a race-based statute even though it excluded right-handed black people. The fact that ICWA/MIFPA apply only to a subset of a racial classification does not mean, as AG claims, that the classification is not racial.

RL says (RL Br. at 30) that "tribal membership is about much more than descent or blood." That's true—but this case is not about tribal membership. Tribal membership is *not* the same thing as Indian child status under ICWA/MIFPA. *See In re Abbigail A.*, 375 P.3d 879, 885-86 (Cal. 2016) (drawing this distinction). Tribal membership is entirely a function of tribal law. But Indian child status is a function of federal and state law, and must therefore comply with the Constitution. While tribes may certainly confine tribal citizenship to those who fit a biological profile, the federal and state governments cannot condition benefits or burdens on membership in such a group. *Cf. Sokolow v. County of San Mateo*, 261 Cal. Rptr. 520, 527 (Ct. App. 1989) (state could not condition benefits on membership in a private organization that excluded women); *Terry v. Adams*, 345 U.S. 461, 469 (1953)

(political party could condition primary voting on race, but state could not elect officials by relying on that decision). RL's conflation of tribal membership with Indian child status is a logical fallacy this Court should avoid.[5]

Indeed, RL's statement (at 32) that "[a] child eligible for membership typically must take affirmative steps to enroll with the tribe," makes this point clear. A child in that situation *is* an "Indian child" under ICWA/MIFPA, but is *not* a tribal citizen. That demonstrates that these two legal concepts are not identical, and, to repeat, this case is not about tribal citizenship, but about Indian child status—which is a function of federal and state law. Because the latter must comply with constitutional limitations, including the application of strict scrutiny to classifications based on race or national origin, ICWA/MIFPA must be subjected to strict scrutiny.

Even if tribal membership were what this case addressed, RL should be estopped from denying that tribal citizenship turns on biological ancestry. The tribe recently changed its own rules regarding the blood-quantum required for membership, by arbitrarily declaring that people born prior to 1958 qualify as "full

[5] RL argues that ICWA/MIFPA are politically based, not race-based, because they "appl[y] only when tribes have made political choices to make children membership-eligible." RL Br. at 30. Cases like *Sokolow* and *Adams* make clear why that argument cannot work. A tribe or any other organization is free to make membership turn on an immutable characteristic such as race or national origin. But under the Equal Protection and Due Process Clauses, the state is not free to rely upon such classification or membership to impose benefits or burdens. Doing so would be to adopt the organization's classification by proxy.

blood."[6] If Indian membership isn't about blood, it would make no sense for the tribe to manipulate the percentages required in this way. In any event, "[c]ulture isn't carried in the blood, and when you measure blood, in a sense you measure racial origins." David Treuer, *The Heartbeat of Wounded Knee: Native America from 1890 to The Present* 382 (2019).

RL disputes Appellant's argument that *Mancari*'s rational basis test applies solely where the discrimination imposed by the statute relates to tribal self-government. It claims that "the link to tribal self-government was the reason the classification [in *Mancari*] was rational—not the reason rational-basis review applied," RL Br. at 26—in other words, that *Mancari* imposed rational basis to review to all laws that "treat Indians differently," *id.* at 24, including laws that have nothing to do with tribal self-government. This is false. *Mancari* plainly stated that "[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians *living on or near reservations*…. [T]hese laws [are] … explicitly designed to help only Indians." 427 U.S. at 552 (emphasis added). These "on or near" laws dealt with self government: "Congress was well aware that the proposed preference would result in employment disadvantages within the BIA for non-Indians. Not only was this displacement unavoidable if room were

[6] Malaak Khattab, *Red Lake Tribal Council Passes Resolution To Increase Blood Degree*, Lakeland PBS, Nov. 6, 2019, https://lptv.org/red-lake-tribal-council-passes-resolution-to-increase-blood-degree/.

to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the entire *program for self-government*." *Id*. at 544 (emphasis added). In other words, the self-government limitation was the *sine qua non* for the Court's differentiation of the type of discrimination at issue in *Mancari* and the types of discrimination at issue in race-based laws. Concerns for self-government were thus the basis of the Court's doctrinal distinction—not a defense of its rationality.

If there were any doubt about that, *Rice* laid it to rest. It differentiated *Mancari* from the circumstances at issue there by saying that "this Court…[has] held that various tribes retained some elements of quasi-sovereign authority…. The retained tribal authority *relates to self-governance…. In reliance on that theory* the Court has sustained a federal provision giving employment preferences to persons of tribal ancestry. *Mancari*, 417 U.S., at 553–555." 528 U.S. at 518 (citations omitted; emphasis added).

RL implies (RL Br. at 24) that claims that to find ICWA/MIFPA unconstitutional would require finding "provisions in the U.S. Constitution itself…unconstitutional." This is obviously silly—nothing in the Treaty Clause or other constitutional provisions imposes a race-based or national origin-based classification, or requires the government to treat people differently based solely on their biological ancestry, as ICWA/MIFPA do. However, consider the consequences of RL's theory that Congress enjoys virtual *carte blanche* "to protect

tribes," subject only to rational basis scrutiny—even doing so by controlling the fates of children who, based solely on biological ancestry, might someday join a tribe. RL Br. at 34. Were that the case, Congress could forbid tribal members from marrying non-members, or from using birth control, or from leaving the tribe, or making contracts with people outside reservation boundaries. All these things would plausibly "protect tribes" as political entities. Yet it is plain that Congress has no authority to deprive American citizens[7] of their rights whenever it believes that doing so bears some rational relationship to preserving tribes.

Respectfully submitted,

Dated: February 20, 2024

FIDDLER OSBAND FLYNN LLC

/s/ Mark D. Fiddler

Mark D. Fiddler, #197853
Rachel L. Osband, #0386945
Delmar Flynn, #0394885
12800 Whitewater Drive, Suite 100
Minnetonka, MN 55343
(612) 822-4095
mark@fiddlerosband.com
rachel@fiddlerosband.com
delmar@fiddlerosband.com

[7] All Indian children are citizens of the United States and of the state where they reside. 8 U.S.C § 1401(b). They are not foreigners.

/s/ Timothy Sandefur
Timothy Sandefur (AZ #033670)
**Pro hac vice*
Scharf-Norton Center
For Constitutional Litigation
At the Goldwater Institute
500 E. Coronado Rd.
Phoenix, AZ 85004
tsandefur@goldwaterinstitute.org
(602) 462-5000

CERTIFICATION OF BRIEF LENGTH

The above signed hereby certify that Appellants' Reply Brief conforms to the to the requirements of the applicable rules for a brief, is produced with a proportional font, and the length of this document is 4,776 words. This document was prepared using Microsoft Word for Mac, version 16.80.