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STATE OF MINNESOTA

IN COURT OF APPEALS

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

INTERVENOR OFFICE OF THE MINNESOTA ATTORNEY GENERAL'S BRIEF

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LEGAL ISSUE

Whether the Minnesota Indian Family Preservation Act, Minn. Stat. §§ 260.751, *et seq.*, which applies a political classification based on Tribal affiliation to the definition of "Indian child," comports with the Fourteenth Amendment of the United States Constitution.

Decision: The district court did not reach this issue.

Most Apposite Authority:
Morton v. Mancari, 417 U.S. 535 (1974)
United States v. Antelope, 430 U.S. 641 (1977)
Greene v. Comm'r of Minn. Dep't of Hum. Servs., 755 N.W.2d 713 (Minn. 2008)

STATEMENT OF THE CASE

In 1978, Congress determined that "an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901(4). As a result, Congress passed the Indian Child Welfare Act ("ICWA") to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. The Minnesota Family Preservation Act, Minn. Stat. §§ 260.751, *et seq.* ("MIFPA"), Minnesota's state counterpart to ICWA, was also enacted for the purpose of addressing historic wrongs to American Indian tribes and families. ICWA and MIFPA establish minimum standards for the removal of Indian children from their families and for the placement of Indian children in foster or adoptive homes. Those standards require that when placing a child in a preadoptive placement, "preference" be given "in the absence of good cause to the contrary," to certain placements that prioritize Indian children's connections with their families and communities. *See* 25 U.S.C. 1915(b); Minn. Stat. § 260.773.

This case concerns two children who were placed into foster care shortly after birth. Because the children's mother is a member of the Red Lake Nation and the children are eligible for membership in the Red Lake Nation, ICWA and MIFPA apply and Faribault and Martin County Human Services ("FMCHS") is required to place the children according to the placement options and preferences in Minnesota Statutes section 260.773. Although the children were initially placed in a non-Indian foster care placement with Appellants,

FMCHS, and the Red Lake Nation eventually identified a foster or permanency home with the children's aunt, who is a member of the Red Lake Nation.

Appellants subsequently filed a motion to intervene in the child protection matter and a petition to establish third party custody. The district court dismissed the third-party custody petition and denied the motion for intervention. Appellants now argue that the district court abused its discretion and that ICWA and MIFPA violate the Fifth and Fourteenth Amendments of the United States Constitution. The Minnesota Attorney General intervened for the limited purpose of defending the constitutionality of MIFPA and requests that this Court hold that MIFPA comports with the Fourteenth Amendment's Equal Protection Clause.[1]

STATEMENT OF FACTS

A. Congress passed ICWA to address the breakup of Indian families.

In the 1970s, there was a rising national concern about abusive state child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). This often resulted in the placement of Indian children in non-Indian homes, a practice that, in large part, removed access of

[1] On January 4, 2024, the Red Lake Nation filed a motion to limit the scope of this appeal, arguing that the constitutional issues were not fully argued by the parties or ruled upon by the district court. The Court deferred the motion to the panel that will consider the merits of the appeal. The Attorney General has no objection to the Court declining to address the constitutional issues and takes no position on any of the other legal issues identified by Appellants.

Indian children to their Tribal cultural heritage. *Id.* at 50, n.24.[2] Studies from the Association on American Indian Affairs in 1969 and 1974 showed that 25-30% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. *Id.* at 33.

This "wholesale removal of Indian children from their homes" prompted Congress to pass ICWA in 1978. *Id.* at 32. ICWA establishes procedural standards for child custody proceedings in state court, including a "preferences" provision that, in the absence of good cause to the contrary, mandates preadoptive placement of an Indian child with a member of the child's extended family, a foster home approved by the Indian child's tribe, an Indian foster home licensed by a non-Indian licensing authority, or an institution for children approved by the Indian tribe which has a program suitable to meet the child's needs. 25 U.S.C. § 1915(b). Thus, ICWA protects the rights of Indian children and tribes by "making sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'" *Holyfield*, 490 U.S. at 37 (citing H.R.Rep. No. 95–1386, p. 24 (1978)).

B. Minnesota passed MIFPA to strengthen the requirements in ICWA.

Indian children in Minnesota were particularly impacted by the child welfare practices in the 1970s. In Minnesota, one in eight Indian children was in an adoptive home and in 1971-1972 one in every four Indian infants was placed for adoption. *Id.* at 33. After Congress passed ICWA, the Minnesota Legislature sought to strengthen and expand the

[2] Approximately 90% of Indian children placements were in non-Indian homes. *Holyfield*, 490 U.S. at 33.

requirements in ICWA by passing MIFPA in 1985. *Doe v. Piper*, 165 F. Supp. 3d 789, 794 (D. Minn. 2016). MIFPA aims to protect the interests of Indian children, their families, and the child's Tribe, and to preserve the Indian family and Tribal identity. Minn. Stat. § 260.753. This includes an understanding that Indian children are damaged if contact with their Tribe is denied. *Id.*

ICWA applies in any child placement proceeding involving an Indian child where custody is granted to someone other than a parent or an Indian custodian. Minn. Stat. § 260.752. MIFPA further requires that, in the absence of good cause to the contrary, preference shall be given to an Indian child placement with:

> (1) a noncustodial parent or Indian custodian;
>
> (2) a member of the child's extended family;
>
> (3) a foster home licensed, approved, or specified by the Indian child's Tribe;
>
> (4) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (5) an institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Minn. Stat. § 260.773, subd. 3. ICWA requires that the standards applied in meeting the preference requirements be the "prevailing social and cultural standards of the Indian community in which . . . the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915(d). MIFPA requires the same and further states that the

county shall defer to the Indian child's Tribe as to the suitability of a particular placement. Minn. Stat. § 260.773, subds. 5 & 7.

C. MIFPA's application to the child protection proceeding.

On April [redacted] 2022, L.K. gave birth to twins, K.K. and K.K. App. Add. at 1. An emergency hold was placed on the twins shortly after their birth because L.K. tested positive for and admitted to using illicit substances throughout her pregnancy. *Id.* at 5. The district court determined that ICWA applies because the twins are eligible for membership with the Red Lake Nation. *Id.*

The children were subsequently placed in the foster care home of Appellants. *Id.* at 6. In September 2023, FMCHS and the Red Lake Nation identified a relative pre-adoptive placement for the twins. *Id.* at 2. On September 12, Appellants filed an emergency motion to intervene and stay the children's expected change of placement to the relative placement. *Id.* at 6. Following a hearing on September 13, the district court denied Appellants' motion and approved FMCHS's placement of the children with their relative. *Id.*

Appellants also served the Attorney General's Office with a notice of constitutional challenge to MIFPA as unconstitutional under the Fourteenth Amendment's Equal Protection Clause and to ICWA as unconstitutional under the Fifth Amendment's incorporation of Equal Protection guarantees. On October 4, 2023, Appellants filed an amended motion for intervention and a petition to establish third party custody and the district court heard argument on the motion and petition on October 5. *Id.* at 1, 6. The district court did not hear argument or request briefing on the constitutional issues. On October 31, 2023, the district court issued an order dismissing the third-party custody

petition and denying the motion for permissive intervention. *Id.* at 7. The district court did not reach the constitutional issues.

Appellants filed a notice of appeal, including their Equal Protection challenges to MIFPA and ICWA in the statement of issues. On December 13, 2023, the Court of Appeals granted the Attorney General's Office's motion to intervene for the limited purpose of addressing the constitutionality of MIFPA.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law subject to de novo review. *Star Tribune Co. v. Univ. of Minn. Bd. of Regents,* 683 N.W.2d 274, 283 (Minn. 2004). Statutes are presumed to be constitutional and courts "exercise the power to declare a statute unconstitutional with extreme caution and only when absolutely necessary." *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 421 (Minn. 2005) (quoting *In re Haggerty*, 448 N.W.2d 363, 364 (Minn.1989)). The party challenging a statute's constitutionality bears the burden of establishing that the statute is unconstitutional beyond a reasonable doubt. *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 819 (Minn. 1998).

ARGUMENT

The Equal Protection Clause of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Equal Protection Clause generally requires that persons similarly situated be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Appellants argue that MIFPA and ICWA discriminate against children and foster parents in the child welfare system on the basis of race. Because the classification of an "Indian child"

contained in Minnesota Statutes section 260.755, subdivision 8, is a classification based upon political, not racial, status, and because MIFPA is rationally related to the State's legitimate interest in promoting the stability and security of Indian families, MIFPA does not violate the Fourteenth Amendment's equal protection guarantee. *See City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985).

I. RATIONAL BASIS IS THE APPROPRIATE STANDARD OF REVIEW FOR THE CLASSIFICATION ESTABLISHED IN MIFPA'S DEFINITION OF "INDIAN CHILD."

MIFPA creates rebuttable placement preferences for an "Indian child" that are different than those for a non-Indian child. *Cf.* Minn. Stat. § 260.773 *with* Minn. Stat. § 260C.212. Heightened scrutiny is nonetheless not warranted because the classification established in MIFPA's definition of "Indian child" draws distinctions based upon political status and not race.

A. Rational Basis Should Be Applied to Statutory Classifications Designed to Fulfill the Government's Trust Responsibility to Indians.

The United States Supreme Court has made clear that the Court employs a rational basis test when statutory classifications distinguishing between Indians and non-Indians are "political rather than racial." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). In *Mancari*, the Supreme Court applied rational basis review and rejected an equal protection challenge to a statutory hiring preference within the Bureau of Indian Affairs. *Id.* at 555. The Court noted that it had previously upheld legislation that singled out Indians for particular treatment on numerous occasions. *Id.* (citing *Board of County Comm'rs v. Seber,* 318 U.S. 705 (1943) (federally granted tax immunity)*; McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973) (same)*; Simmons v. Eagle Seelatsee,* 384 U.S. 209 (1966),

aff'g 244 F.Supp. 808 (E.D. Wash. 1965) (statutory definition of tribal membership, with resulting interest in trust estate)*; Williams v. Lee,* 358 U.S. 217 (1959) (tribal courts and their jurisdiction over reservation affairs).[3]

The Court held that whether the hiring preference comported with equal protection guarantees "turn[ed] on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Mancari*, 417 U.S. at 551. The Court explained that statutory preferences relating to Indians are political when the preferences apply to members of federally recognized Indian tribes. *Id.* at 553 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather as member of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."); *see also United States v. Antelope*, 430 U.S. 641, 645 (1977) ("[C]lassifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.").

While *Mancari* concerned a challenge to federal law and relied on Congress's unique obligation to federally-recognized Indian tribes under the trust doctrine, Minnesota courts have recognized that "state action for the benefit of Indians can also fall under the

[3] Although Appellant cites to Justice Kavanaugh's concurrence in *Haaland v. Brackeen* as evidence of the Supreme Court's equal protection concerns surrounding ICWA, the majority of the Court did not join Justice Kavanaugh's concurrence. App. Br. at 38-39 (citing *Haaland v. Brackeen*, 599 U.S. 255, 333 (2023) (Kavanaugh, J., concurring)). *Mancari* and the above cases upholding statutes providing special treatment for Indians remain as binding precedent.

trust doctrine and therefore be protected from challenge under the equal protection clause or civil rights statutes." *Greene v. Comm'r of Human Servs.*, 733 N.W.2d 490, 497 (Minn. Ct. App. 2008), *aff'd*, 755 N.W.2d 713 (Minn. 2008); *State by Malcolm v. Sw. Sch. of Dance, LLC*, A20-1612, 2021 WL 2794654, at *4 (Minn. Ct. App. July 6, 2021). Courts have therefore applied rational basis review to state laws that promote Tribal self-governance, benefit Tribal members, or implement or reflect federal laws. *Greene*, 755 N.W.2d at 727; *see also Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463 (1979); *St. Paul Intertribal Housing Bd. v. Reynolds*, 564 F. Supp. 1408, 1412-13 (1983); *Krueth v. Indep. Sch. Dist. No. 38*, 496 N.W.2d 829, 837 (Minn. Ct. App. 1993), *rev. denied* (Minn. April 20, 1993).

ICWA and MIFPA promote Tribal self-governance and benefit Tribes and Tribal members by safeguarding Indian children from unwarranted removals. MIFPA specifically recognizes that Indian children are important to their Tribes, "not only as members of Tribal families and communities, but also as the Tribe's greatest resource as future members and leaders of the Tribe." Minn. Stat. § 260.754(e). The vitality of Indian children and families is thus "essential to the health and welfare of both the state and the Tribes and is essential to the future welfare and continued existence of the child's Tribe." *Id.*

B. The Classification of "Indian Child" is Political Rather than Racial Because it Hinges on Affiliation with Quasi-Sovereign Entities.

MIFPA's classification of "Indian child" is political because it is tied to membership in a quasi-sovereign entity. MIFPA defines an "Indian child" as an unmarried person who

is under the age of 18 and is either a member of an Indian tribe or eligible for membership in an Indian tribe. Minn. Stat. § 260.755, subd. 8. An "Indian tribe" means an Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary because of their status as Indians. *Id.*, subd. 12. Just as was the case with the political distinctions in *Mancari*, MIFPA's definition of "Indian child" is not racial because it *excludes* many individuals who are racially Indian but not members of an Indian tribe. Minn. Stat. § 260.755, subd. 8. For example, in *United States v. Antelope*, the Supreme Court clarified that *Mancari*'s holding was meant to be applied to the governance of "once-sovereign political communities" and not "as legislation of a 'racial' group consisting of 'Indians'." 430 U.S. 641, 646 (1977). The Court in *Antelope* specified that, based on this distinction, individuals who are racially classified as "Indians" are not subject to the Major Crimes Act in the same way as members of the Coeur d'Alene Tribe. *Id.*, n. 7. ("Moreover, members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act.")

MIFPA's definition may also include members or member-eligible persons who are not racially Indian. Minn. Stat. § 260.755, subd. 8. For example, some tribes have historically extended membership to individuals who are not racially Native American. *See, e.g. United States v. Rogers*, 45 U.S. 567 (1846) (concerning federal criminal

jurisdiction over "a white man who, at mature age, is adopted into an Indian tribe.")[4] Here, the twins meet the definition of "Indian child," not due to their race, but because they are eligible for membership in the Red Lake Nation.

Appellants cite *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) and *Loving v. Virginia*, 388 U.S. 1, 5 n.4 (1967), in support of their argument that membership in an Indian tribe depends on lineal descent and that "[a]ncestry can be a proxy for race." App. Br. 41-45. But neither case addresses the unique status of Tribal members. Further, the statute at issue in *Loving* punished interracial marriage and used blood quantum *only* to define a "white person". *Loving*, 388 U.S. at 5. Unlike *Loving*, the classifications in *Mancari* and MIFPA are not based solely on blood quantum. Rather, they uphold the government's unique trust duties by using classifications based on Tribal affiliation. *Cf. Mancari*, 417 at 553, n. 24 (BIA preference required an individual be one-fourth or more degree Indian blood *and* a member of a federally-recognized tribe) (emphasis added); Minn. Stat. § 260.755, subds. 8, 12 (definition of Indian child limited to individuals who are members or eligible for membership in an "Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary because of their status as Indians…") *with Loving*, 388 at 5, n. 4 (concerning a statute that prohibited interracial marriage and used blood-quantum *only* to define "white person").

[4] In *Rogers*, the Supreme Court established a test for determining Indian status. 45 U.S. at 572-73. This test is not relevant for MIFPA, which defines "Indian child" based on a child's affiliation with a tribe and does not require any amount of "Indian blood."

The Supreme Court has routinely recognized this difference by applying heightened scrutiny to laws or policies that benefit Native Americans as a minority race, but applying rational basis review to laws or policies that benefit members of a federally-recognized Indian tribe. *Cf. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 600 U.S. 181, 213 (2023) (applying strict scrutiny to race-based admissions program that included "American Indian" as a choice for an applicant to explain "how you identify yourself"); *Grutter v. Bollinger,* 539 U.S. 306, 306 (2003) (applying strict scrutiny to an admissions policy that included Native Americans in the school's commitment to diversity statement); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995) (applying strict scrutiny to a racial classification presuming Native Americans and other minority groups are disadvantaged by a provision of the Small Business Act); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989) (applying strict scrutiny to a city regulation that required companies to subcontract to businesses owned by minorities, including "Indians"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280, 284 n. 13 (1986) (requiring strict scrutiny for a preferential layoff protection that included "American Indians", along with other racial groups, within the definition of "minority") *with Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. at 500 (1979) (applying rational basis to state statute regarding federal jurisdiction within Indian reservations); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (applying rational basis to distribution of congressional funds); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 480 (1976) (applying rational basis to cigarette tax immunity impacting Indian tribe and its members).

Rice is similarly distinguishable. In *Rice*, the Supreme Court considered a Fifteenth Amendment challenge to a state's racial classification targeting certain Native Hawaiians. 528 U.S. at 509. *Rice* reaffirmed *Mancari* and stated Congress may fulfill its trust responsibility by enacting legislation dedicated to the specific benefit and needs of Indian tribes without triggering heightened equal protection review. *Id.* at 519. This was true even though the Court in *Rice* acknowledged the classification in *Mancari* had "a racial component." *Id.* However, the Court refused to extend the holding in *Mancari* to a "new and larger" classification scheme that "fence[] out whole classes of its citizens from decision-making in critical state affairs" based purely on race or ancestry. *Id.* at 520, 522. The classifications in MIFPA—classifications that are based on present-day affiliation with a recognized quasi-sovereign entity—are distinguishable from the racial classifications in *Rice* and more akin with the political classifications in *Mancari*. *See Matter of Welfare of Child of S.B.*, A19-0225, 2019 WL6698079, at *5 (Minn. Ct. App. Dec. 9, 2019) (concluding *Mancari* was not superseded by *Rice*).

Because MIFPA's application is based on political rather than racial classifications, the rational basis test applies. *Mancari*, 417 U.S. at 554.

II. APPLICATION OF THE RATIONAL BASIS TEST SHOWS THAT MIFPA IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

Under the federal rational basis test, a court must determine whether there is a legitimate state interest and whether the challenged classification is rationally related to the legitimate state interest. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). In accordance with this highly deferential standard of review, a law is deemed constitutionally

valid if there is a plausible policy reason for the classification, the legislative facts supporting the classification were rationally considered to be true by the governmental decisionmaker, and the relationship between the classification to its goal is not so attenuated as to be arbitrary or irrational. *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012).

Applying the rational basis test to the placement preferences in MIFPA comports with the equal protection guarantees in the Fourteenth Amendment. The "Indian child" classification is rationally related to a legitimate government purpose. Appellants do not dispute that the State has a legitimate interest in preventing the breakup of Indian families and concedes that proceedings concerning the welfare and placement of vulnerable children are "critical" state affairs. App. Br. at 47. MIFPA explicitly states that its purpose is to protect the long-term interests of Indian children and preserve the Indian family and identity, "including an understanding that Indian children are damaged if family and child Tribal identity and contact are denied." Minn. Stat. § 260.753. MIFPA's placement preferences protect Indian children's connections to their immediate families, extended families, and Tribes. By mandating that local social service agencies prioritize culturally appropriate placements and placements with family, MIFPA directly responds to the "wholesale removal" of Indian children from their homes and the decimation of their Tribal connections. MIFPA is thus a reasonable solution to promote the legitimate State interest in preventing the breakup of Indian families.

CONCLUSION

Based upon the foregoing, the Attorney General respectfully requests this Court hold that MIFPA comports with the Equal Protection requirements in the Fourteenth Amendment of the United States Constitution.

Dated: February 6, 2024

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