

Membership in a federally recognized tribe is not a voluntary association like a political party, alumni club, business tips group or service group. The key ingredient and necessary precondition to being a member in a federally recognized Indian tribe is DNA and blood. The blood aspect will be discussed in more detail below.

Here's an example and it is meant to be provocative to highlight and emphasize the importance of this concept. Suppose a baseball team offered free admission to members of the Knights of the Ku Klux Klan ("KKK"). The actual offer of free admission doesn't mention race. That is, the advertising doesn't say, "Whites-get-in-free day." But membership in the KKK is only open to people of the Caucasian race. Ergo, the free admission offer is based on race.

Plaintiffs submit that the Defendant's limiting free admission policy to tribal members is actually and fundamentally premised on race although the Defendant tries to disguise it. As the British would say, the Defendant is being too clever by half by using the federally recognized Indian tribe membership ruse. Some cynics might say the Defendant's use of the term "federally recognized tribal membership" is a workaround or dodge developed by a lawyer in an attempt to avoid lawsuits.

To further reinforce the racial requirement of membership in the KKK consider the case of former Colorado Springs police officer Ron Stallworth. The comic movie *BlackKkkKlansman* (2018) is based upon true events but parts of the movie are fictionalized to make it funny. But from an NPR news account, we learn that officer Stallworth was able to use his telephone skills and help from a white co-worker to obtain a membership card in the KKK in his name. If the real officer

Stallworth would have appeared at a Klan meeting and asked to join, the color of his skin would have resulted in rejection.¹

Two cases out of Hawaii support the proposition that membership in a tribe is, in fact, based upon race. *Rice v. Cayetano*, 528 U.S. 495, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (1999) held that the State of Hawaii could not restrict citizens from voting in a statewide election based on race or ancestry.

Hawaii has a state agency known as the Office of Hawaiian Affairs (“OHA”). The Hawaii Constitution only allowed “Hawaiians” to vote for nine trustees for the OHA. The term “Hawaiians” was defined as the descendants of “people inhabiting the Hawaiian Islands prior to 1778.” 528 U.S. 499. Harold F. Rice wasn’t a “Hawaiian” or “Native Hawaiian” as defined by state law.

The State of Hawaii argued that its voting scheme, “is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race.” *Id.* at 514.

The Supreme Court responded, “Ancestry can be a proxy for race. It is that proxy here.” *Id.* The same can be said for tribal membership. Membership in a federally recognized Indian tribe is *a proxy for race*.

As will be discussed below, one need not have 100% Indian blood to qualify for tribal membership.

¹ [In 'Black Klansman,' An African-American Detective Infiltrates The KKK : NPR](#)

“Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral. Here, the State’s argument is undermined by its express racial purpose and by its actual effects.” *Rice*, 528 U.S. at 516-17. That’s exactly what the Defendant’s admission policy does. ***It is not race neutral and its purpose is racist.*** The actual effect is that Native Americans get into Kiewit Luminarium for free while all other races pay full price.

At its core, discrimination based on race is unlawful (and bad) because, “it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.” *Id.* at 517.

To further emphasize the point, the Supreme Court in *Rice* cited and quoted *Hirabayashi v. United States*, 320 U.S. 81, 100, 87 L. Ed. 1774, 63 S. Ct. 1375 (1943), “Distinctions between citizens solely based because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” 528 U.S. at 517. A racial preference for admission to a public accommodation is also, by its nature, odious to a free people. In that regard it is worth observing that both Creighton University and the University of Nebraska-Lincoln field athletic teams with players of several races. To think that these two universities might give free admission to fans based upon race is, frankly, bizarre in 2025. It is also unlawful. 42 U.S.C. §2000a. Race neutrality is what federal law requires as the Supreme Court has noted in cases for admission to colleges and in voting in elections. Add public accommodations to that list.

Finally, *Rice* distinguished *Mancari*. The *Mancari* precedent is restricted to the hiring practices of the Bureau of Indian Affairs which is a *sui generis* federal agency. And this is because *the federal government* has “unique obligation towards the Indians.” 528 U.S. at 520.

The other federal case out of Hawaii is *Doe v. Kamehameha Schools/Bishop Estate*, 416 F. 3d 1025, *vac’d and rev’d en banc*, 470 F.3d 827 (9th Cir. 2006), *cert. denied*, 550 U.S. 931, 127 S. Ct. 2160, 167 L. Ed 2d 887 (2007). Plaintiffs will focus on the panel decision as it is more persuasive than the en banc decision. And, of course, this Court is not bound by any Ninth Circuit decision; en banc or panel.

Doe was a §1981 action brought against the private and non-sectarian Kamehameha Schools when a qualified student was denied admission because he did not have the requisite pure or part aboriginal blood.² Section 1981 “forbids racial discrimination in the making and enforcement of contracts.” 416 F. 3d at 1027. In the instant case, one of the Plaintiffs’ causes of action alleges violation of 42 U.S.C. §1981. When the Plaintiffs appeared at the admission counter of the Defendant’s place of business, a contract was formed; money in exchange for admission to the museum. But because the Plaintiffs weren’t the “right” race they had to pay the full admission price.

² The trial court entered summary judgment in favor of the schools concluding that the admissions policy was a valid race-conscious remedial affirmative action program. 295 F. Supp. 2d 1141, 1172 (D. Haw. 2003) Note well that the case was not dismissed pursuant to 12(b)(6) and the trial court had evidence before it.

The schools in *Doe* admitted that their admission policy was based on race. The issue, as stated by the panel, was “whether a private school, receiving no federal funds, may legitimately restrict admission to those of the native Hawaiian race.” *Id.* at 1030. The Plaintiffs haven’t alleged any receipt of federal funds by the Defendant so the same issue is presented. The panel held that the “Hawaiians first” admission policy constituted unlawful invidious race discrimination in violation of Section 1981. 416 F. 3d at 1027.

The *Doe* panel traced the history of Sections 1981 and 1982, the Thirteenth Amendment, Fourteenth Amendment and prior Supreme Court cases. *Id.* at 1029 – 1039. *Jones*³ held that that 42 U.S.C. §1982 encompassed and prohibited racial discrimination in purely private transactions.⁴ *Runyon*⁵ held that “an individual’s §1981 right ‘to make and enforce contracts’ is violated if a private offeror refuses to extend him ‘the same opportunity to enter into contracts’ that he extends to white offerees, solely on the basis of race.” 416 F.3d at 1032,1033.

A rhetorical and interpretative note is necessary here. Both §1981 and §1982 refer to the rights of white citizens. Plaintiffs submit that since Native American citizens get in free at the Kiewit Luminarium, they are privileged and placed above all other races; reverse discrimination as it were. And if 42 U.S.C. §2000a is read *in pari materia* with §1981 and §1982, it is obvious that Congress

³ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 20 L. Ed. 2d 1189, 88 S. Ct. 2186 (1968).

⁴ Defendant wrongly claims in footnote 1 that admission to its place of business is not personal property. A ticket is piece of property and a revocable license to enter a place of amusement. In Nebraska, Cornhusker football tickets are routinely divided in divorces. *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017).

⁵ *Runyon v. McCary*, 427 U.S. 160, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976)

intended that all racial discrimination is barred; direct and reverse. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 49 L. ed. 2d 493, 96 S. Ct. 2574 (1976) is in agreement with the Plaintiffs as it held that §1981 encompassed discrimination against white persons. 427 U.S. at 295-96.

The *Doe* panel then concluded, “This means once the §1981 plaintiff establishes a prima facie case of intentional race discrimination, the defendant must come forward with a legitimate nondiscriminatory reason justifying the challenged practice; if such a reason is offered the plaintiff may still attempt to show that the reason is a pretext for unlawful race discrimination.” 416 F.3d at 1039.

The instant case has not even moved into the discovery phase. The Plaintiffs’ Complaint alleges that the Defendant’s free admission policy “was intentionally established by the Defendant as malicious, oppressive or in reckless disregard to Plaintiffs’ federal civil rights.” Complaint, ¶ 19 (filing #1). At a minimum, this case should proceed to see if the Defendant can allege and prove a non-pretextual and legitimate non-discriminatory reason as to why it is discriminating on the basis of race.

The *Doe* panel discussed *Mancari* in the context of the Hawaiian people and Native Americans. It stated that *Mancari* is a narrow ruling about the hiring practices of the BIA with the tribes as political entities. It concluded,

Nonetheless, it does not follow from *Mancari*, or from any other authority of which we are aware, that Congress may authorize a private school to exclusively restrict admission on the basis of an express *racial* classification. Rather, the Court’s decisions in this

arena have emphasized the nonracial classifications held to withstand scrutiny under modern civil rights law. 416 F. 3d at 1048 (emphasis in original)

The full Ninth Circuit reversed the Doe panel but seven judges dissented and four opinions were written. As Judge Kozinski wrote, “Given the scores of pages we have written on both sides of this issue, it should be clear that the question is a close one and ours might not be the last word.” 470 F.3d at 889.

The main dissent did cite the Supreme Court’s view on racial discrimination. “[c]lassifications of [persons] solely on the basis of race ... threaten to stigmatize individuals by reason of their *membership in a racial group* and to incite racial hostility. *Shaw v. Reno*, 509 U.S. 630, 643, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).” *Id.* at 872.

On its face, the Defendant’s free admission policy is explicitly based on membership in a racial group. It really couldn’t be more clear. People who appear at the Defendant’s ticket counter get the in-your-face race message and the sense that the Defendant is hostile to all races except Native Americans.

Finally, a University of Nebraska Law Review article is particularly helpful. The authors are a retired UNL Law professor and two Indian Nation historians. Snowden, *American Indian Sovereignty and Naturalization: It’s a Race Thing*, 80 Neb. L. Rev. 171 (2001).

The authors state their conclusions at two places in the law review article,

[f]ederal Indian law usually requires some quantum of Indian blood or descent before recognition of the person as a citizen or member of the nation for purposes of Indian sovereignty. That is, there is a racial criteria at the center of federal recognition of membership in an Indian nation whenever that membership is raised in the context of which nation’s law shall apply to a controversy. 80 Neb. L. Rev. at 173.

“Consequently, citizenship or membership provisions in Native nation constitutions regularly require a blood-quantum or descent.” *Id.* at 221.

The tribal constitutions of the Omaha, Ponca, Santee Sioux and Winnebago tribes were reprinted in the law review article and three of the four tribes required at least one-fourth degree of aboriginal blood. In other words, membership in an Indian tribe is blood based. *Id.* at 220. Interestingly the Ponca tribe allows people to be voted in as honorary members if they don’t satisfy the blood requirement, but they can’t vote, hold office or “otherwise exercise the rights or receive benefits of the members of the Ponca Tribe of Nebraska.” *Id.* at 223. What that means is a Black person could be voted as an honorary member of the Ponca Tribe, but wouldn’t receive a tribal membership card allowing that person free admission to the Kiewit Luminarium.

In a letter from a BIA official, Professor Snowden was told that on a partial list of the BIA’s 155 tribes, “97 tribes had a one-fourth degree requirement...” *Id.* at footnote 241.

The bottom line here from the academic scholarship and the actual Indian constitutions is that tribal membership requires Indian blood. Race is a proxy for membership in a tribe.

EAGLEBOY IS DISTINGUISHABLE.

United States v. Eagleboy, 200 F.3d 1137 (8th Cir. 1999) is a criminal case in which the plaintiff is the United States of America. The key to understanding *Eagleboy* is that the Eighth Circuit noted that the United States has “special obligations toward Indians” and that “the government [has] trust obligations to Indians.” 200 F.3d at 1138 and 1139.

Omaha Discovery Trust is not the government of the United States and it has no historical, special or trust relationship with Indians. In fact, it is a brand-new enterprise.

The foundational United States Supreme Court case relied upon by the *Eagleboy* court and the Defendant in its brief is *Morton v. Mancari*, 417 U.S. 535, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974). *Mancari* involved the special relationship between the federal government and Native Americans. In *Mancari*, the issue was whether Native Americans could be preferred for employment by the BIA. Again, the centuries-long and special relationship between the tribes and the federal government drove the government's decision to favor Indians for federal employment. It is also worth noting that the Indian tribes and United States waged war against each other, signed treaties and – in some cases – the United States treated the Indian tribes poorly. A remedial policy for employment was certainly in order and the political decision was made to put that policy into a statute.

THE SUPREME COURT HAS REACHED ITS LIMITS FOR TOLERANCE OF RACIAL DISCRIMINATION.

Plaintiffs submit that after decades of litigation the Supreme Court has moved into a new era regarding racial discrimination law. And to not to put too fine a point on it, the Justices are fed up with revisionist and rearguard efforts on the margin to continue race discrimination in our country.

Chief Justice Roberts wrote back in 2007, “That the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 749, 127 S. Ct. 2738, 168 L.Ed.2d 508 (2007).

The message, however, was apparently not understood in some quarters as the Supreme Court had to again pronounce what the Constitution (and American society) requires. It is fair to say that the Supreme Court has reached the limits of its tolerance for racial discrimination schemes with its decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023).

Students for Fair Admissions, Inc. can best be understood in the context of *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) where Justice O'Connor wrote that by 2028, "the use of racial preferences will no longer be necessary...." 539 US. at 343. Universities, however, were recalcitrant and a *Students for Fair Admissions, Inc.* was filed so that *Grutter* might be overruled.

Grutter wasn't explicitly overruled by *Students* but the Supreme Court held that university students "must be treated on his or her experiences as an individual – not on the basis of race." 600 U.S. at 231. In the "fed up" category, the Chief Justice wrote, "That is so, *we have repeatedly explained*, because '[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals not as simply components of a racial, religious, sexual or national class.'" 600 U.S. at 223. (emphasis added) Chief Justice Roberts used the word "repeatedly" five times in his majority opinion. Both quotes are strong language in support of the Supreme Court's goal of achieving a color blind society and what the law requires.

Chief Justice Roberts wrote, '[c]ollege admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.' 600 U.S. at 187. The same can be said of admission charges

to the Kiewit Luminarium. The free admission for one racial group advantages one racial group at the expense of all others.

THIS COURT HAS PERSONALLY BEEN AT THE FOREFRONT OF RULING AGAINST DISCRIMINATION AND ALSO ACCURATELY PREDICTED FUTURE SUPREME COURT RESULTS.

Discrimination in state marriage laws on the basis of sex was rejected by the Supreme Court in *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (fundamental right to marry and liberties are protected by federal law). But a full ten years earlier, this Court reached the same result in *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd and rem'd*, 455 F. 3d 859 (8th Cir. 2006).

Citizens for Equal Protection, Inc. was not presented exactly on the same facts and with the same procedural history as *Obergefell*, but this Court was directionally correct with its result. There is language in this Court's decision that mirrors and predicted the result in *Obergefell*. Marriage is a right "accorded full constitutional protection." 368 F. Supp. 2d at 992. "The court finds Section 29 is a denial of access to one of our most fundamental sources of protection, the government." *Id.* at 1003.

This Court decided *Waters v. Ricketts*, 48 F. Supp. 3d 1271 (D. Neb. 2015) on March 2, 2015. Less than four months later, the Supreme Court decided *Obergefell*. Without comparing *Waters* to *Obergefell* on an issue-by-issue or paragraph-by-paragraph basis, this Court was prescient in its analysis of what the Supreme Court ruled in *Obergefell*.

Waters was appealed to the Eighth Circuit and this Court was affirmed. 798 F.3d 682 (8th Cir. 2025). The final ruling in *Waters* was on February 4, 2016 on the issues of jurisdiction and mootness. The Court concluded its opinion with this language, “[A]ll relevant state officials are ordered to treat same-sex couples the same as different-sex couples in the context of processing a marriage license or determining the rights, protections obligations or benefits of marriage.” *Waters v. Ricketts*, 159 F.3d 992, 1001 (D. Neb. 2016).

Plaintiffs submit that similar language could be used in this case, “All owners and operators of museums and places of amusement in Nebraska are ordered to treat all races equally for purposes of calculating the price of admission to their places of business.”

The point of this discussion is not for the Plaintiff’s attorney to be obsequious with the Court, but rather to acknowledge that this Court has correctly analyzed and applied the law – and with foresight – on issues of discrimination. When you are right, you are right.

Non-discrimination at places of amusement has been federal law since 1964. It is a fundamental right that the people of this country are treated equally at the admission window to sporting events, movie theaters and museums. It really is beyond the pale and outside the comprehension of an American in the year 2025 to think that race would have the bearing on a ticket price. But that’s exactly what the Omaha Discovery Trust is doing.

FAIRNESS IS A QUESTION FOR THE FINDER OF FACT.

There are four cases annotated under Neb. Rev. Stat. §59-1601 et seq., the Nebraska Consumer Protection Act. Neb. Rev. Stat. §59-1602 reads, “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful.”

To put the fairness issue in the vernacular, consider a Black person appearing at the counter to purchase an admission ticket at any place of entertainment or amusement in Omaha and is told that he’s not entitled to a discount but people of another race get in free. At a very human level the likely response is, “That’s not fair.”

In *State ex rel. Stenberg v. Consumer’s Choice Foods, Inc.*, 276 Neb. 481, 755 N.W.2d 583 (2008) the trial court found that it was an unfair trade practice to cause consumers to believe that a freezer was free when, in fact, they had to pay nearly \$100 per month for 48 months. 276 Neb. at 485.

CONCLUSION

For the foregoing reasons, the Plaintiffs submit that the Defendant’s 12(b)(6) motion be denied. Race discrimination is at the core of the Defendant’s free admission policy. Federal law does not allow intentional racial discrimination in public accommodations.

DATED this 11th day of April, 2025.

GWLADYS K. NARE, MANFRED L. S.
NARE, Individually and as Parents,
Next Friends and Guardians of M.N., a
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that applying the word-count function using Microsoft Word for Microsoft Office 365, and including all text, including the caption, headings, footnotes, and quotations (but excluding this Certificate of Compliance), the foregoing brief contains 3,818 words.

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which sent notification to all counsel of record.

/s/ David D. Begley _____