IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GWLADYS K. NARE, MANFRED L.S. NARE, and M.N. (a minor child) Plaintiffs, v. OMAHA DISCOVERY TRUST d/b/a KIEWIT LUMINARIUM, a Nebraska Corporation, Defendant.	)	Civil Action No. 8:25-cv-00048-JFB-RCC

DEFENDANT OMAHA DISCOVERY TRUST'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. SUMMARY

Plaintiffs' opposition to Defendant's motion to dismiss is predicated on a fundamentally flawed argument that is irreconcilable with well-established holdings from the United States Supreme Court and the 8th Circuit Court of Appeals. Plaintiffs argue that membership in a federally recognized Indian tribe is limited to those who are descendants of American Indians and therefore, according to Plaintiffs, providing free admission to members of federally recognized Indian tribes is discriminatory. Plaintiffs' arguments disregard holdings from the U.S. Supreme Court establishing that membership in a federally recognized Indian tribe is a political, rather than racial classification. *See Morton v. Mancari*, 417 U.S. 535, 120 S. Ct. (1974). As such, a program or policy that provides a benefit to members of federally recognized Indian tribes does not constitute racial discrimination. Moreover, in service of their flawed argument, Plaintiffs rely on *Rice v. Cayetano*, 528 U.S. 495 (1999). As discussed below, *Rice* has little application to the present case.

In sum, Plaintiffs' opposition is bereft of support for its erroneous argument that a policy

that provides a benefit to members of federally recognized Indian tribes is racially discriminatory. Accordingly, Plaintiffs' Complaint must be dismissed with prejudice.

II. FEDERALLY RECOGNIZED INDIAN TRIBES ARE SOVEREIGN POLITICAL ENTITIES, NOT RACIAL GROUPS.

Federal law expressly acknowledges recognized Indian tribes as distinct political entities that are semiautonomous from the authority of federal and state governments. *See generally*, 25 U.S.C. § 5123. "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) (internal citation omitted). Federally recognized tribes have the power to make their own substantive law in internal matters, and this includes the power of each recognized Tribe to establish its criteria for membership. *See, Id.* Thus, the defining characteristic of a federally recognized Indian tribe is not racial homogeneity, as Plaintiffs suggest in their opposition. Rather, federally recognized Indian tribes are defined by their unique political autonomy; a feature shared by few other entities in the United States, if any.

Plaintiffs' opposition ignores the federal designation of recognized tribes as autonomous political entities and, instead, conceives of these tribes solely in terms of race. In essence, Plaintiffs argue that if a federally recognized Indian tribe requires any degree of tribal lineage as part of its criteria for membership, then any program or policy that provides a benefit to members of that tribe is inherently discriminatory. Indeed, in their opposition, Plaintiffs equate Defendant's policy of providing free admission to members of federally recognized tribes to a baseball team providing free admission to members of the Ku Klux Klan. Fully addressing all the problems with Plaintiffs' unfortunate analogy requires far more words than what Local Rule 7.1(c) allows. But perhaps the most obvious problem with Plaintiffs' analogy is that, unlike the Ku Klux Klan, the recognition of certain Indian tribes, as well as the autonomy and power granted to those tribes, is an express

creation of federal law. Whereas the Ku Klux Klan – a subversive and violent organization expressly dedicated to the cause of white supremacy – has no recognition under federal law, designated tribes are expressly recognized as unique self-governing institutions. Federal law, therefore, recognizes designated Indian tribes not as racial groups, but as distinct, semi-independent political entities. Thus, for purposes of Title II of the Civil Rights Act and its state counterpart, federally recognized Tribes must be understood as they are elsewhere in federal law – as distinct, quasi-independent, political entities.

III. PLAINTIFFS' ARGUMENT IS CONTRARY TO HOLDINGS OF THE UNITED STATES SUPREME COURT.

The United States Supreme Court has expressly acknowledged that federally recognized tribes as political entities, rather than racial groups. In *Morton v. Mancari*, the United States Supreme Court considered whether a Bureau of Indian Affair's ("BIA") policy which provided preferential employment treatment to members of certain Indian tribes was in conflict with the Equal Employment Opportunities Act of 1972. 417 U.S. 535. The Court upheld the BIA policy, and, in a footnote, the Court explained:

> The preference is not directed towards a 'racial group' consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature.

Id. n. 24.

Here, as in *Morton*, Defendant's policy applies to members of federally recognized tribes, as opposed to a broader group of individuals of Native American ancestry. The Supreme Court has acknowledged that such policies are "political, rather than racial in nature" and, as consequence do not constitute racial discrimination.

IV. RICE V. CAYETANO PROVIDES NO SUPPORT FOR PLAINTIFFS' ARGUMENT.

In their opposition, Plaintiffs rely on the United States Supreme Court's ruling in *Rice v. Cayetano*, 528 U.S. 495 (2000). *Rice* has little, if any, application to the present case. At issue in *Rice* was provision of the Hawaiian Constitution that limited the right to vote for trustees of a state agency – known as the Office of Hawaiian Affairs – to "Hawaiians," which a state statute defined as "those persons who are descendants of people inhabiting the Hawaiian Islands in 1778." *Rice v. Cayetano*, 528 U.S. 495, 498 (2000). The issue before the Court was whether the provision in Hawaii's constitution and the related statute violated the Fifteenth Amendment to the United States Constitution. *Id.* The Court ultimately determined that Hawaii's voting restrictions were unconstitutional.

Plaintiff, however, ignores a fundamental distinction between *Rice* and the present case that render it of little value in deciding the case at bar. Specifically, the Hawaii statute in question was explicitly based in terms of race. As the Court noted, "Hawaiians" – as the statute then defined term – do not share the same political status as federally recognized Tribes. *Id.* at 518 ("If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises. Among other postulates, it would be necessary to conclude that Congress…has determined that native Hawaiians have a status like that of Indians in organized tribes…). Notably, in a concurring opinion, Justice Stephen Breyer noted, "As importantly, the statute defines the electorate in a way that is not analogous to membership in an Indian tribe." *Id.* (Breyer, S., concurring). Thus, *Rice* did not involve a policy directed at members of federally recognized Indian tribes, but rather a voting restriction based in terms of race.

Moreover, the central issue in *Rice* was whether the state of Hawaii could prohibit non-Hawaiian residents of the state – as defined by state law – from voting for a public agency. The

Court held, "To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole cases of its citizens from decision-making in critical state affairs. The Fifteenth Amendment forbids this result." *Id.* at 522. However, it does not follow from that holding that a policy that provides free admission to members of federally recognized Indian tribes constitutes race discrimination in violation of Title II of the Civil Rights Act. As discussed above and in Defendant's motion to dismiss, the policy Plaintiffs challenge in their complaint provides free admission to members of distinct political entities – federally recognized Indian tribes. That policy has no Fifteenth Amendment implications, nor does it constitute race discrimination for the purpose of Title II of the Civil Rights Act or its state counterpart. Consequently, Plaintiffs' Complaint must be dismissed.

V. CONCLUSION

As set forth in Defendant's motion to dismiss, Plaintiffs' Complaint fails to state a claim upon which relief can be granted and, pursuant to Rule 12(b)(6), must be dismissed.

Dated this 18th day of April, 2025.

Respectfully submitted,

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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 1,328 words. No generative artificial intelligence program was used in drafting this document.

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which sent notification of such filing to all counsel of record.

/s/ Catherine A. Cano
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