

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GWLADYS K. NARE and MANFRED L.S. NARE,
Individually; GWLADYS K. NARE and MANFRED
L.S. NARE, as PARENTS, NATURAL GUARDIANS
and NEXT FRIENDS OF M.N., a minor child,

Appellants,

v.

OMAHA DISCOVERY TRUST d/b/a KIEWIT
LUMINARIUM, a Nebraska corporation,

Appellee.

REPLY BRIEF OF APPELLANTS

On appeal from the United States District Court for the District of Nebraska

Case No. 8:25-cv-00048

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ARGUMENT

I. The Overwhelming Factor is Determining Membership in a Federally Recognized Tribe is Race or Descent

Omaha Discovery Trust (“ODT”) misunderstands what this case is about and what is going on. The Appellants didn’t allege that their constitutional Due Process or Equal Protection rights were violated. This case is about garden-variety racial discrimination with the primary statute at issue being 42 U.S.C. §2000a.

What has happened in this case is that one class of people, Native Americans, get free admission to a place of amusement based upon their race and not their political classification. The constitutions of most Native American tribes require members to have a blood quantum of Indian blood or descent from a tribe member. There’s a significant racial component to tribe membership that’s not otherwise seen in voluntary associations like political organizations. If federally recognized Indian tribes were really political organizations as ODT claims they are, what political organization (other than the KKK) has a racial component to membership?

Here’s the syllogism:

1. Not all Native Americans are members of a federally recognized tribe.
2. But to be eligible to join a Native American tribe, the overwhelming factor in determining membership is that a person must have a certain percentage of Native American blood or ancestry.

3. In the United States, we don't allow discrimination based upon race.
4. Ergo, ODT's free admission policy is unlawful.

Restated, all Indians are not tribe members. But to be a tribe member, one must have some Indian blood or be descended from a tribe member. In logic, this is called the classic O-proposition. William Shakespeare expressed this logic with, "All that glitters is not gold."¹

ODT betrays its intent to discriminate on the basis of race with its justification for its Admission Policy, "We honor and welcome Indigenous families, recognizing our location on land traditionally occupied and cared for by Native peoples." Appellee's brief at 2. This is known as a land acknowledgement and is popular with some universities.²

The policy welcomes "Indigenous families" and not members of federally recognized Indian tribes. ODT just as easily could have honored and welcomed members of federally recognized Indian tribes if its Admission Policy was really about a political classification. But it's not. Appellants can't repeat this enough: membership in a federally recognized tribe is a proxy for race. Membership in an

¹ William Shakespeare, *Merchant of Venice*, Act 2, Scene 7.

² "We in the Office of Admissions acknowledge that the University of Minnesota Twin Cities is built within the traditional homelands of the Dakota people." University of Minnesota, Available at: <https://admissions.tc.umn.edu/land-acknowledgement> (Accessed: March 9, 2026).

Indian tribe is tied to race. And using ancestry as a proxy for racial discrimination is unlawful. See, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 220-21 (2023).

At a bare minimum, Appellants should be able to explore via discovery if ODT intended to grant free admission based upon political classification or race.

ODT's land acknowledgment is not just virtue signaling, it is the beginning of something much worse. The intent is to chip away at the legitimacy of the United States as a sovereign nation. It also is the start of questioning the validity of land titles. As crazy as that notion is, the Supreme Court of British Columbia has already done that.

Cowichan Tribes v. Canada, 2025 BCSC 1490 (2025) is a 3,720-page decision that held that fee simple title was invalid and defective and land was ordered to be returned to the Cowichan Tribes. The basis of the holding was not a treaty but something in Canadian law called "Aboriginal title" that lies beyond the land title system. Apparently it is based upon occupation of land and began as a creation of Canadian common law. *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. That's the slipperiest of slopes, but that's the logical conclusion if the

United States continues down the path that Native Americans are entitled to special benefits and rights due to their race and prior occupation of real estate.³

ODT also finds legal significance in the fact that its Admission Policy “includes household members of tribal members, which has no connection to race.” Appellee’s brief at 4. That policy is pure lagniappe designed to avoid family conflict at the admission counter. It’s legally meaningless.

ODT complains that Appellants “distastefully compar[ed] tribal membership to the Knights of the Ku Klux Klan.” Appellee’s brief at 10. Well, that was the whole point of the KKK analogy. In 2026, it is distasteful, reprehensible and unlawful for a place of amusement to grant free admission to one race over another. But that’s exactly what ODT has done with its Admission Policy and that’s why it has to be stopped. Only white people can join the political organization called the KKK and – in the overwhelming majority of cases – only people with some Native American blood or descended from an Indian tribe member can join a federally recognized Indian tribe. A person’s race or blood or lineage is essential to becoming a member of the KKK or a federally recognized Indian tribe.

³ At an official event, an employee of the Lincoln Public Schools said LPS should give back to Native Americans the real estate LPS owns in fee simple absolute “or they should be fairly compensated for their loss of language, culture, religion, and autonomy.” The Plains Sentinel, Feb. 18, 2026, Available at: <https://plains-sentinel.com/p/built-on-genocide-lps-holds-land> (Accessed: March 9, 2026).

Appellants cited Snowden, *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 Neb. L. Rev. 171 (2001) because, frankly, the law review article authors examined a great number of constitutions of Native American tribes and wrote, “Consequently, citizenship or membership provisions in Native nation constitutions **regularly** require a blood-quantum or descent.” *Id.* at 221. (emphasis added)

More importantly, three Nebraska-based tribes (Omaha, Santee Sioux and Winnebago) constitutionally require a blood-quantum or descent to become tribal members. 80 Neb. L. Rev. 37-40. So, arguable these three tribes are from the groups of Indigenous people who occupied and cared for the land in today’s downtown Omaha.

The so-called bible of Indian law is Felix Cohen, *Handbook of Federal Indian Law* (1982). Cohen wrote, “Definitions vary among tribes, but **most** require blood quantum or descent from a tribal member.” Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. L. Reform 275, 308 (2000) citing *Handbook of Federal Indian Law* at 22-23. (emphasis added) The degree of blood quantum varies by tribe “from one-half degree of tribal blood to no blood requirement at all.” *Id.* The blood quantum requirement is all over the map; from one-half to 1/64th. *Id.*

And then there's the descent issue. Descent can be from a member of the Dawes Commission Rolls or listed on a tribe's membership rolls as of a date certain. *Id.* If a person qualifies for tribal membership based upon descent, then the amount of blood quantum is irrelevant. The purpose of the Dawes Severalty Act of 1887 was to bar "whites adopted by tribes from gaining an interest in tribal property distribution." *Id.* at 279.

ODT cited the unpublished *Allen v. Cherokee Nation Tribal Council*, 2006 Cherokee JAT LEXIS 7* (2006). The issue was the constitutionality of a Cherokee statute and that court construed it against the provisions of its 1975 Constitution. Members of the Delaware and Shawnee tribes had been adopted into the Cherokee tribe and were citizens. It appears from *Allen* that after the Civil War these two tribes were small in number and that the federal government forced the Cherokees to adopt them and move them west. As noted in the dissent, the Cherokees had backed the losing side in the Civil War. *Id.* at *36. But the Delawares and Shawnee were Indians by blood. The 1975 Cherokee Constitution included as citizens those listed on the Dawes Commission Rolls. *Allen* was apparently about "a small minority of these citizens [who] possess no Cherokee blood at all." *Id.* at *9.

The majority opinion in *Allen* engages in the discredited "one drop" school of racial politics, "A full blood Delaware Indian has the same legal citizenship rights as a person who is 1/1024th Cherokee by blood **or less.**" *Id.* at *9. (emphasis added)

The one drop rule or hypodescent brought us the separate but equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896) where a person with one-eighth African blood was found to be colored under Louisiana law for the purpose of segregating train cars.⁴

Allen also informs us that the constitutions of the Choctaw, Chickasaw and Muscogee (Creek) Nations make clear that blood determines tribal citizenship. *Id.* at *14.

The Chief Justice of the Cherokee Judicial Appeals Tribunal dissented in *Allen* because he was of the opinion that the majority had “chosen to ignore the simple reading of the whole 1975 Constitution of the Cherokee Nation....” *Id.* at *40.

In reviewing a motion to dismiss, a court is not about to examine the constitutions of 574 federally recognized Indian tribes. Appellee’s brief at 10. But the vast majority of tribes do have a blood requirement. 80 Neb. L. Rev. at 172 and 221. And, more importantly, and as is discussed in the next section, the political status of a Native American tribe is premised upon Indians being wards to the “Great White Father” because they were thought to be racially inferior. The pupilage theory is unlawful because it is racial discrimination.

Appellees suggest that the Hawaii cases have no bearing on this dispute. Appellee’s brief at 11-14. That’s incorrect. The Hawaii cases were not cited for the

⁴ 163 U.S. at 541 citing La. Rev. Stat. §45:528-534 (1890).

proposition of whether the strict scrutiny or the rational basis tests apply. And admission to the Kiewit Luminarium is not like the fundamental right to vote in state elections as was the issue in *Rice v Cayetano*, 528 U.S. 535 (2000). The point of the Hawaii cases is that ancestry can be a proxy for race when race is used to discriminate in a public accommodations case. The Supreme Court concluded that the legislation at issue “used ancestry as a racial definition and for a racial purpose.” 528 U.S. at 515. And, as stated above, descent (or ancestry) is frequently considered in determining whether a person is eligible for tribal membership. And, most importantly, 42 U.S.C. §2000a deals with plain racial discrimination in a place of public accommodation.

For the Court’s information, Appellants discussed in their brief *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). A case has been filed to overrule the Ninth Circuit’s 8-7 decision based upon recent Supreme Court cases. *Students for Fair Admissions, et al. v. Trustees of the Estate of Bernice Pauahi Bishop d/b/a Kamehameha Schools*, 1:2-cv-450 (D. Haw. 2025).

II. The Statutory Definition of an Indian

In federal law, there are thirty-three different definitions of the term “Indian.” 34 U. Mich. L. Reform at 278. Brownell concluded that there are

three categories, “(1) those that use definitions based on blood quantum; (2) those that use definitions based on tribal status; (3) those lacking any definition at all.” *Id.*

25 U.S.C. §5129 states,

The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

Again, the racial component of blood quantum and descent are essential to defining who is an Indian under federal law. Note well the use of the phrase “aboriginal peoples of Alaska” which is along the same lines of Hawaii’s statutory definition of Hawaiians in *Rice*, that is, “the descendants of such blood quantum aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.” *Rice v. Cayetano*, 528 U.S. 495, 516 (2000).

III. *Mancari* is a Narrow Decision

Mancari v. Morton, 417 U.S. 535 (1974) was a constitutional law case interpreting the Indian Commerce Clause, U.S. Const. art. I, §8. *Mancari* stands for the narrow proposition that when the federal government is dealing

with the Indian tribes on a sovereign-to-sovereign matter, a program that benefits a politically defined indigenous group need only meet the rational basis test. 298 U. Mich. L. Reform at 298, footnote 163.

IV. *Eagleboy* Rests on a Faulty Premise and it Should Be Repudiated

In *United States v. Eagleboy*, 200 F. 3d 1137 (8th Cir. 1999) this Court wrote that the federal government has “special obligations toward Indians” and cited *Morton v. Mancari*, 417 U.S. 535, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974) for that proposition. *Id.* at 1138. Three times the *Eagleboy* court wrote about the federal government’s “trust obligations” to the Indians. *Id.* at 1139-40.

But what is that special relationship and trust obligation based on? It is based on the guardian/ward relationship or pupilage concept first announced by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) and then followed in *United States v. Kagma*, 118 U.S. 375 (1886) (“These Indian tribes are the wards of the nation.”) and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The guardian/ward relationship between the sovereigns is grounded in the racist idea that Indians are racially inferior, “savages” and “heathens” who are dependent upon the federal government for their existence. Mary Nagle, *Standing Bear v. Crook: The Case for Equality under Waaxe’s Law*, 45 Creighton L. Rev. 455 (2012). Nagle argues that the plenary power doctrine is based on racist notions and is extraconstitutional. *Id.* at 463-83.

In *Scott v. Sanderford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. Const. amendment XIV, Chief Justice Roger B. Taney wrote the following for the majority,

It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, *to regard them as in a state of pupilage*, and to legislate to a certain extent over them and the territory they occupy. *Id.* at 404. (emphasis added)

Scott discussed the pupilage concept in a case that held that African-Americans were not citizens under the Constitution and that enslaved African-Americans were property for purposes of the Fifth Amendment.

Arizona v. Navajo Nation, 599 U.S. 555, 573, 143 S. Ct. 1804, 216 L.Ed. 2d 540 (2023) states, “In future cases, we should clarify the exact status of this amorphous and seemingly ungrounded ‘trust relationship.’ As a start, it would be helpful to acknowledge that many of this Court’s statements about the trust relationship were mere dicta.”

Given the language of *Navajo Nation*, *Eagleboy* should not be followed for purposes of this civil case because it is based on the racist pupilage theory.

V. The Adoption Issue

Appellee makes much that some tribes allow people to become tribal members via adoption. From *Allen*, we know that other Native American tribes were adopted by the Cherokee tribes. Assuming *arguendo* that there are some non-racially Native

Americans who have become members of a federally registered tribe via adoption, Appellants submit that this is based upon family cohesion.

The purpose of adoption is that the adopted baby is, for all intent and purposes, considered to be the natural born child of the adoptive parents. Neb. Rev. Stat. §43-110.⁵ While a Black baby adopted by Native American parents can't change races, they are legally considered to be parent and child.

Adoption in the Santee Sioux tribe requires that the adopted have “1/4 or more of Santee Sioux Indian blood...” 80 Neb. L. Rev. at 225. For the Winnebago Tribe of Nebraska, the adoptee must have “one fourth degree Winnebago Indian blood” and there is a vote of the tribe. *Id.* at 227.

United States v. Rogers, 45 U.S. 567 (1843) held that, for purposes of federal criminal law, although a mature white man had been adopted into the tribe of Cherokees he “does not thereby become an Indian....” 45 U.S. at 573.

If membership in a tribe is solely considered to be a political organization, then contrast that with the fact that an adopted child of Democrat parents doesn't necessarily become a Democrat party member when voting age is achieved. An

⁵ “After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred.”

adopted child of two rock-ribbed Republicans doesn't always become a card-carrying Republican. Party identification is a matter of free choice.

VI. The Origins of Tribalism and Its Threat to our Constitutional Republic

The classicist and historian Victor Davis Hanson wrote *The Dying Citizen: How Progressive Elites, Tribalism and Globalization are Destroying the Idea of America*. In it, he traces the origins of tribalism, its precivilizational nature and its threat to America today.

The word “tribe” derives from the Latin *tri-tribus*. *Id.* at 99. “*Tribus* referred to the ancient Roman notion that, in the age before common Roman citizenship, three ethnic groups made up the Roman state.” *Id.* The Latin *natio* reflects the “revolutionary idea that the free citizens of a state did not all have to look the same or be of the same *tribus*. There was no word similar *natio* in any ancient language.” *Id.*

The ancient Greeks invented politics and the rule of law. This development allowed mankind to initiate “the slow and fragile ascent over the normal, natural state of tribalism. Ethnicities surrendered their primary identities and loyalties to a higher notion of transcendent ideas, bonds and traditions.” *Id.* at 102. In a Greek constitutional government, citizens elected their officials “despite accidents of clan or tribal affiliation.” *Id.*

Thucydides contrasted the Greek city-states with tribal people who were forced to be nomadic hunter-gatherers because of pressure from invading tribes. Hence, tribal people “neither built large cities nor attained any form of greatness.” *Id.*

According to Hanson, the Founders were Aristotelians “who sought pragmatic laws and customs to work around innate human nature and to balance a host of competing historical realities.” *Id.* at 118. “The ultimate rationale of America’s unique Constitution led Americans eventually to define themselves by their shared values, not their inconsequential appearances.” *Id.* at 107.

The harm of allowing tribalism to become reestablished is that, “it is almost impossible to thwart this ancient narcotic or to prevent it from destroying centuries-long and much harder work of establishing multiracial nationhood and citizenship.” *Id.* at 108.

Hanson considers the new cultural and racial Marxism as an effort “to return to ancient tribal criteria of oppression.” *Id.* at 117.

ODT’s land acknowledgment nurses ancient wounds along racial lines. Appellee’s brief at 2. Hanson considers that to be “a prescription for societal failure” which will fragment “citizenship linguistically into endless categories sometimes used to justify different treatment under the law.” *Id.* at 132. Or free admission to the Kiewit Luminarium.

Hanson cautions against allowing multiculturalism to seep into the legal system. *Id.* at 130. Marginalized groups will be treated unequally under the law. “Instead of earlier pseudoscientific arguments of racial superiority, the notions of reparatory justice for past collective sins, or tit-for-tat, eye-for-an-eye transgenerational payback serve as justification for the new tribal asymmetry.” *Id.* at 131.

The Kiewit Luminarium is for children. Allowing ODT’s racist Admission Policy to continue will only tell kids that “their ethnic and/or gender identifications define who they are at the expense of their commonality as Americans.” *Id.* at 126.

VII. The District Court Improperly Dismissed Appellants’ Nebraska Consumer Protection Act Claim

If this Court agrees with ODT and that tribal membership is a political classification, then Appellants concede that the District Court is correct. But if this Court agrees with the Appellants that the applicable precedents mean that ODT is discriminating against customers based on race, then the state law claim survives. It survives because the trial court would need to predict if Nebraska law considers racial discrimination to violate an established concept of fairness or was immoral, unethical or oppressive for purposes of Nebraska Consumer Protection Act. *Topp’s Mech., Inc. v. Kinsale Ins. Co.*, 968 F.3d 854, 855 (8th Cir. 2020); *Langner v. Boston Sci. Corp.*, 492 F. Supp. 3d 925, 931 (D. Neb. 2020).

If the district court is uncomfortable about predicting what Nebraska law is given the lack of controlling precedent, Neb. Rev. Stat. §24-119 has a procedure for certifying the question to the Nebraska Supreme Court. *Great Plains Trade Group v. Archer Daniels Midland Co.*, 320 Neb. 882 (2026).

The issue of whether admission to a place of amusement is a private transaction that affects the public interest is a question of fact. The Kiewit Luminarium is a prominent new facility in downtown Omaha that draws a large number of patrons from a wide area. It is not at all similar to the purchase of a used Jeep as was the case in *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). On the concrete injury in fact, the Appellants paid full price for their admission while members of another race receive free admission. The concrete injury in fact was the price of the admission tickets the Appellants paid.

CONCLUSION

In his *Korematsu v. United States* dissent Justice Robert Jackson recognized that once a judicial opinion validated a racially discriminatory action, it has “for all time validated the principle of racial discrimination...” 323 U.S. 214, 246 (1944). Appellants submit that allowing ODT to continue its Admission Policy would be validation of a racially discriminatory action.

Today’s Supreme Court has reached the limits of its tolerance for racial discrimination. “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). This sentence is a classic and iconic statement of the law from the Supreme Court. It’s in the league with Chief Justice Marshall’s statement that the Supreme Court decides, “What the law is.” or Justice Jackson’s language that “The Constitution is not a suicide pact.”

That’s because Chief Justice Roberts expressed an essential American legal truth in a few words. Racial discrimination nearly tore apart our country and – after the Civil War – we solemnly resolved to do better. At its core, this case is about stopping racial discrimination so that we can continue to create a more perfect union.

As with every legal proposition, there are anomalies and exceptions. But the overwhelming number of Indian constitutions require a blood quantum or descent to become a tribe member. Membership in a federally recognized Indian tribe is a proxy for race. ODT’s free admission policy discriminated on the basis of race.

Appellants respectfully request that this Court remand this case to the district court for a trial on the merits.

DATED: March 10, 2026

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NARE, Individually and as Parents,
Next Friends and Guardians of M.N., a
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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 28(a)(10) and Fed. R. App. P. 28.1(e)(2)(B)(i) and 32 (g)(1), the undersigned counsel certifies that this Appellants' Brief complies with the word/line limits set forth in Fed. R. App. P. 28.1(e)(2)(B)(i). The brief contains 4,049 words, exclusive of the cover page, statement with respect to the table of contents, table of authorities, certificates of counsel, signature block, certificate of compliance and certificate of service. This brief complies with the typeface requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style font.

Pursuant to Fed. R. App. P. 28(a)(h), the undersigned further certifies that the brief and appendix have been scanned for viruses and are virus-free.

s/ David D. Begley

CERTIFICATE OF SERVICE

I hereby certify that on a copy of the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit, using the CM/ECF system, on the 10th day of March, 2026, which sent notification to all counsel of record. I further certify that ten paper copies of the foregoing will be sent by US mail, postage prepaid, to the Clerk of the Eighth Circuit once the brief has been found to be in compliance and that one paper copy will be mailed to opposing counsel.

/s/ David D. Begley_____