

IN THE
Supreme Court of the United States

N.R., ET AL.

Petitioners,

v.

KEITH M. ELLISON, ATTORNEY GENERAL OF MINNESOTA, ET
AL.

Respondents.

**On Petition for a Writ of Certiorari
to the Supreme Court of Minnesota**

BRIEF IN OPPOSITION FOR RESPONDENTS

JOSEPH PLUMER
RILEY PLUMER
PLUMER LAW OFFICE
9352 NORTH GRACE LAKE
ROAD
BEMIDJI, MN 56601
*Counsel for Respondent
Red Lake Nation*

M BOULETTE
Counsel of Record
BOULETTE, PLLC
60 SOUTH 6TH STREET,
SUITE 2800
MINNEAPOLIS, MN 55402
612-852-6899
mboulette@boulettelaw.com

PETER JOSEPH FARRELL
OFFICE OF THE
MINNESOTA ATTORNEY
GENERAL
445 MINNESOTA STREET,
SUITE 600
ST. PAUL, MN 55101
*Counsel for Respondent
Keith Ellison, Attorney
General of Minnesota*

JODY MARIE ALHOLINNA
MINNESOTA JUDICIAL
CENTER, Suite G-27
25 REV. DR. MARTIN
LUTHER KING JR. BLVD.
ST. PAUL, MN 55155
*Counsel for Respondent
McKenzie Borth,
Guardian ad Litem*

*Additional Counsel on
Inside Cover*

RYAN A. GUSTAFSON
17 WEST 5TH STREET
BLUE EARTH, MN 56013
Counsel for Respondent K. L. R.

AMANDA L. HEINRICHS-MILBURN
123 DOWNTOWN PLAZA
FAIRMONT, MN 56031
*Counsel for Respondent Human Services of Faribault &
Martin Counties*

QUESTIONS PRESENTED

This case arises out of Minnesota child-protection proceedings for twin children who are enrolled members of the Red Lake Nation. Petitioners, non-relative former foster parents who had custody of the twins as infants, sought permissive intervention and asked the Minnesota Juvenile Court to declare the Indian Child Welfare Act (“ICWA”) and the Minnesota Indian Family Preservation Act (“MIFPA”) unconstitutional in violation of equal protection. Applying the best-interests standard that governs intervention in every Minnesota child-protection case, the Juvenile Court denied intervention. It determined that granting Petitioners party status would encumber the proceedings intended to establish temporary placement for the twins. The Minnesota Supreme Court affirmed. The questions presented are:

1. Whether this Court lacks jurisdiction because the decision below rests on adequate and independent state law grounds.
2. Whether Petitioners lack standing to challenge ICWA and MIFPA’s placement preferences for extended family members because otherwise applicable Minnesota law also grants the twins’ extended family members placement preference over Petitioners.
3. Whether the Juvenile Court’s consideration of Petitioners’ challenge to ICWA and MIFPA as part of the permissive-intervention analysis

comported with the First Amendment and due process, when Petitioners had no legally protected stake in the juvenile proceedings, when Petitioners' challenge was considered only as evidence of Petitioners' attitude toward the children's tribal identity, and when the Juvenile Court had multiple independent grounds for denying permissive intervention.

4. Whether ICWA and MIFPA's preferences for placement of tribal member children with their extended family members rather than non-relative foster parents—regardless of the race of any potential placement—comports with equal protection.

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INTRODUCTION

The petition here asks the Court to review a fact-bound decision by a state court that applied state law. This Court lacks jurisdiction to hear such a case, and even if there were jurisdiction, the petition does not warrant review. It should be denied.

Petitioners say this Court should grant review “to address the constitutionality of ICWA and MIFPA.” Pet. 18. This case presents no such question. It is a dispute about two children—twins who were eligible for membership and are now enrolled in the Red Lake Nation, and whose mother is a Red Lake member—and about whether two non-relative former foster parents could inject themselves as parties into a time-sensitive child protection proceeding whose purpose was to place the twins in temporary care. The Minnesota courts denied the Petitioners’ request for permissive intervention in that context. They did so by applying the same discretionary best-interests standard that governs permissive intervention in every child welfare case in the state, and after weighing four case-specific disadvantages unique to Petitioners and the twins. That fact-bound application of settled state procedure neither presents nor turns on the equal protection question Petitioners attempt to press, and it does not warrant this Court’s review.

Petitioners’ effort to convert that straightforward and routine application of Minnesota court rules into a far-reaching constitutional dispute fails at the threshold—and fails in ways that deprive this Court of jurisdiction. The decision below rests on adequate and independent state-law grounds: Petitioners were

denied intervention under generally applicable Minnesota law, which permits only parties to raise constitutional challenges. This Court thus lacks jurisdiction to entertain any such challenge here. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). And even if Petitioners could clear that jurisdictional bar, the most they would win is a remand to reconsider the intervention under the best-interests analysis—after which the equal protection question would remain to be litigated another day. When that future day came, moreover, Petitioners’ challenge would fail again for lack of standing to raise the equal protection issue: as non-relatives, they would rank below an appropriate relative placement whether or not ICWA and MIFPA applied, because Minnesota prefers relative placements for every child in its care, Indian and non-Indian alike. The question about ICWA and MIFPA’s constitutionality that Petitioners have built their petition around is therefore far from decision. Even if this Court granted review, any one of these threshold obstacles would end the matter long before ICWA and MIFPA’s constitutionality came into view.

Even putting the vehicle problems aside, neither question presented warrants review. Petitioners’ First Amendment and due process theory—that the Minnesota courts “penalized” them for mounting a constitutional challenge—presents no split of authority. No decision of any court holds that denying permissive intervention to a non-party with no protected interest—an inherently discretionary act of case management—transgresses the First Amendment or the Fourteenth Amendment’s Due Process Clause. And on the merits, Petitioners’ argument rests on a

mischaracterization of a decision that denied discretionary intervention on four independent grounds, only one of which touched on Petitioners' views, and that one was expressly deemed "not the decisive factor." Pet. App. 35a.

The constitutional challenge to ICWA and MIFPA fares no better. It too implicates no conflict at all. For forty-five years, every state appellate court to consider the question, together with the en banc Fifth Circuit, has rejected equal protection challenges to ICWA like Petitioners'. That line of authority reflects a settled framework. Under *Morton v. Mancari*, 417 U.S. 535 (1974), classifications tied to tribal affiliation are political rather than racial, and this Court has never once struck down a statute that classifies on that basis. ICWA and MIFPA governed here not because the twins are "racially" Indian, but because their mother chose to become and remain a member of the Red Lake Nation, and because the Nation extended membership to the twins themselves. That is political affiliation with a sovereign—not race. A decades-long, unbroken consensus does not merit review, and disturbing that consensus would require a far better vehicle than this thoroughly encumbered case.

The petition should be denied.

STATEMENT OF THE CASE

Ki.K. and Kh.K. are twins who were born in southern Minnesota with significant medical needs. Pet. App. 1a. At the time of their birth, they were eligible for membership in the Miskwaagamiwi-zaag'igan ("Red Lake Nation" or "the Tribe"), a federally recognized Indian Tribe. Pet. App. 4a n.2. Their mother

L.K. was a Red Lake member, and the twins themselves subsequently became enrolled Red Lake members. *See* Pet. App. 4a & n.2; Red Lake Nation’s Notice of Motion and Motion for Transfer of Jurisdiction at 2, *In re Welfare of the Child. of L.K.*, Nos. 46-JV-22-32 & 46-JV-23-128 (Minn. Dist. Ct. 5th Dist. July 1, 2024) (noting the twins’ tribal membership); Findings of Fact, Conclusions of Law, and Order Finalizing Transfer of Permanent Legal Custody, *In re Welfare of the Child. of L.K.*, Nos. 58-JV-19-109 & 58-JV-21-45 at 4, ¶ 20 (Minn. Dist. Ct. 10th Dist. Aug. 10, 2022) (noting L.K.’s tribal membership). The twins are thus “Indian children” for purposes of ICWA and MIFPA.

Following a report that L.K. tested positive for amphetamines, methamphetamines, and opiates, Human Services of Faribault and Martin Counties (“the County”) filed a Child in Need of Protection or Services (“CHIPS”) petition in Juvenile Court in Martin County (“Juvenile Court”). Pet. App. 56a, 170a. An emergency protective care hearing was held in the Juvenile Court, and temporary care and custody of the twins was transferred to the County. Pet. App. 179a. Following hospital care, the twins were discharged to nonrelative foster care with Petitioners. Pet. App. 5a. Petitioners were selected due to the twins’ medical needs at the time. Ct. Rpt., *In re Welfare of Children of L.K.*, No. 46-JV-22-32 (Minn. Dist. Ct. 5th Dist. Aug. 22, 2022).

When the twins were four months old, their court-appointed Guardian ad Litem reported to the Juvenile Court that their health had stabilized and that family members should be identified for relative placement.

Guardian ad Litem Juvenile Ct. Rpt.—ICWA Pre-Permanency, *In re Welfare of the Children of L.K.*, No. 46-JV-22-32 (Minn. Dist. Ct. 5th Dist. August 23, 2022). The Guardian ad Litem also recommended visits between the twins and an older sibling, who was in the custodial care of the twins’ extended relative R.J.F. *Id.* Petitioners arranged no sibling visits. Pet. App. 159a.

In keeping with the Guardian ad Litem’s recommendation, the parties moved forward with a plan to place the twins with R.J.F. Pet. App. 164a. The day before the transition, however, Petitioners filed an emergency motion seeking to intervene, arguing that there was good cause to depart from ICWA and MIFPA’s foster care placement preference for extended family, and seeking third-party custody of the twins. Pet. App. 156a. Petitioners further sought a declaratory judgment that ICWA and MIFPA are unconstitutional. *Id.*

The Juvenile Court held an emergency hearing on the issue of change in placement. Pet. App. 163a-164a. It deferred other issues, including intervention. *See id.* The County, the Guardian ad Litem, and the Tribe opposed Petitioners’ motion, explaining that the twins’ medical needs were substantially improved and the twins deserved the opportunity to be raised with their sibling, in the care of a relative, with other family nearby. At the conclusion of the hearing, the Juvenile Court ordered the children placed with R.J.F. Pet. App. 168a.

In subsequent proceedings, the Juvenile Court turned to Petitioners’ request to intervene. All parties agreed that the Juvenile Court should reserve

Petitioners’ constitutional challenge until the Court decided intervention. Pet. App. 60a. Counsel for Petitioners expressly acknowledged that party status was a prerequisite to addressing their equal protection challenge. *See, e.g.*, Tr. of Proceedings, *In re Welfare of the Child. of L.K.*, No. 46-JV-22-32, at 16 (Minn. Dist. Ct. 5th Dist. Oct. 5, 2023) (conceding that if “our case was dismissed, Your Honor, then we’re done . . . and, you know, the constitutional issues don’t get addressed”).

The Juvenile Court denied Petitioners’ motion to intervene. Pet. App. 160a. It found Petitioners’ ongoing involvement not to be in the twins’ best interests, given their placement with a relative that met all their needs. The court concluded that Petitioners’ intervention would “only create an unnecessary delay for the finalization of the children’s case.” *Id.*

Petitioners appealed. The Minnesota Court of Appeals remanded to the Juvenile Court for it to make additional findings regarding Petitioners’ intervention request. Pet. App. 126a-127a. As for Petitioners’ equal protection challenge, it was not properly before the intermediate appellate court because the Petitioners’ party status was unresolved. But the Minnesota Court of Appeals addressed the equal protection challenge anyway. It held that MIFPA’s placement preferences do not violate the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 115a-126a.

Petitioners sought Minnesota Supreme Court review of their equal protection challenge. At the same time, the Juvenile Court revisited Petitioners’ intervention request. The record on remand reflected the

twins were doing very well. Their health had improved, their verbal and language skills had grown tremendously, and they had a close relationship with their family. Pet. App. 61a, 68a-69a. During this period, the County facilitated a change in placement to the children's maternal grandmother M.L. ("Grandmother"). Pet. App. 60a. Grandmother already had custody of another one of the twins' siblings (their half-brother). *Id.* Grandmother also lives nearer to L.K., which allowed the twins to re-engage in parent/child visits. *Id.* Placement with Grandmother is supported by all parties—L.K., the Tribe, the County, and the Guardian ad Litem. Pet. App. 60a-61a.¹

Based on this record, the Juvenile Court again denied Petitioners' motion to intervene, finding that Petitioners' intervention was not in the twins' best interests. The Juvenile Court determined that the disadvantages of granting Petitioners party status "far outweigh[ed] the potential advantages." Pet. App. 76a-77a. The Juvenile Court found Grandmother to be meeting all of the twins' needs, including medical and cultural ones. By contrast, Petitioners no longer maintained a connection to the twins, with whom they had had no contact for nearly a year. Pet. App. 71a-72a. The Juvenile Court also expressed concern about Petitioners' exploitation of Mother's vulnerability, their attempt to interfere in reuniting the twins with relatives, and their dismissive approach to the twins'

¹ L.K. formally withdrew her previous support for placement of her children with Petitioners, with whom the twins have not lived since they were infants. Pet. App. 61a.

Tribe and culture. Pet. App. 75a-76a.

Petitioners appealed this order and requested accelerated review of this second appeal. Pet. App. 3a. The Minnesota Supreme Court granted Petitioners' request and heard both of Petitioners' appeals. *Id.*

Applying state law, the Minnesota Supreme Court affirmed the Juvenile Court's denial of Petitioners' motion for permissive intervention. The Minnesota Supreme Court determined that the twins were Indian children for purposes of ICWA and MIFPA. Pet. App. 4a n.2.² But it concluded that ICWA and MIFPA's provisions were ultimately irrelevant to the appeal. *See* Pet. App. 47a-51a. It held that the Juvenile Court did not abuse its discretion when it determined, under state rules applicable to all children in CHIPS proceedings, that Petitioners' intervention was not in the twins' best interests. Pet. App. 24a-31a. And it further concluded—as Petitioners had conceded below—that because Petitioners were not parties, their equal protection arguments were not properly raised. *See* Pet. App. 45a-51a. The Minnesota Supreme Court, exercising its supervisory authority, accordingly vacated the portion of the Court of Appeals' opinion that had addressed those arguments. *Id.*

² The Minnesota Supreme Court noted that the children's eligibility for membership was sufficient to render them "Indian children" for purposes of these proceedings. *See* Pet. App. 4a n.2 As discussed above, the twins are also "Indian children" because the twins' mother is a tribal member and because the twins themselves are now enrolled. *Supra* 3-4.

The Minnesota Supreme Court also considered Petitioners' argument that the Juvenile Court violated the First Amendment because it considered their constitutional challenge to ICWA and MIFPA as among the reasons to deny intervention. Pet. App. 32a. The Minnesota Supreme Court found no clear evidence in the record of retaliatory animus. Pet. App. 32a-35a. It also concluded that, even if the Juvenile Court's finding regarding Petitioners' attitude toward the twins' heritage was inappropriately affected by Petitioners' challenge to ICWA and MIFPA, that was not the decisive factor in the Juvenile Court's decision. *Id.*

Proceedings in the Juvenile Court have continued while Petitioners have pursued their appeals. The twins are nearly four and a half years old and thriving in Grandmother's care. *See* Pet. App. 8a-9a.

REASONS FOR DENYING THE PETITION

I. This Case Is A Poor Vehicle.

The principal reason Petitioners say the Court should take this case is "to address the constitutionality of ICWA and MIFPA." Pet. 18. That question does not merit review. *Infra* 28-34. But even if it did, this case is not the case to consider it. Serious vehicle issues preclude the Court from reaching that question here.

A. The Decision Below Rests On Adequate And Independent State Law Grounds.

At the outset, this Court lacks jurisdiction to review Petitioners' challenge to ICWA and MIFPA. This Court cannot review the decision of a state high court

that rests on “adequate and independent state grounds.” *Long*, 463 U.S. at 1042. That is precisely the basis for the decision here. The Minnesota courts denied Petitioners’ motion for permissive intervention based on a standard application of procedural rules applicable in all child welfare cases in Minnesota. That fact-bound application of Minnesota law is both unworthy of and beyond this Court’s review.

1. Although child-protection proceedings can touch lives far beyond children and their parents, Minnesota’s Rules of Juvenile Protection Procedure limit who may become a party to these proceedings. Minn. R. Juv. Prot. P. 32.01. A child’s guardian ad litem, their custodian, and the petitioner (often the Department of Human Services) are automatically parties as of right. *Id.* Others, including the child and parents if not already parties, grandparents, and the social service agency, can become parties as a matter of right if they make an affirmative request. Minn. R. Juv. Prot. P. 34.01.

But for anyone else—including foster parents—party status depends on showing that their intervention serves “the best interests of the child.” Minn. R. Juv. Prot. P. 34.02. There is no presumption in favor of intervention, and the Juvenile Court’s decision is reviewed on appeal only for an abuse of discretion. *Valentine v. Lutz*, 512 N.W.2d 868, 871 (Minn. 1994); Minn. R. Juv. Prot. P. 34.02. In this way, Minnesota’s rules for intervening in a child welfare case differ dramatically from the rules applicable in other Minnesota civil cases, which “encourage” interventions with the goal of “rul[ing] in one lawsuit” for all potential

parties and on all potential grounds. Minn. R. Civ. P. 24.02; *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 166 (Minn. 1974); *Norman v. Refsland*, 383 N.W.2d 673, 678 (Minn. 1986).

The Juvenile Court here applied Minnesota's well-established child welfare intervention standard and denied intervention for reasons that were amply supported by the record. The Juvenile Court weighed, for instance, the alleged benefits of Petitioners' history of caring for the twins against the fact that Petitioners' knowledge had now gone "stale" compared to that of other caregivers. *See Valentine*, 512 N.W.2d at 871; Pet. App. 73a-77a. The Juvenile Court also expressed concern that Petitioners were determined to disrupt the twins' placement with relatives and had manipulated the twins' mother when she was in the throes of addiction. *Id.* The Juvenile Court's assessment of these considerations is a question of state law and is therefore beyond this Court's review. *See* Pet. App. 20a (noting that "the [Juvenile Court's] decision on intervention was not predicated on [Petitioners'] tribal eligibility status").

2. This intervention determination—which presented a "threshold question," Pet. App. 19a—also places Petitioners' constitutional challenges to ICWA and MIFPA outside of this Court's jurisdiction. Pet. App. 19a. As a matter of state law, ICWA and MIFPA's constitutionality "can be raised" in a CHIPS proceeding "only by a proper party to the CHIPS proceedings." *Id.* And as a matter of state law, Petitioners were not proper parties. *Supra* 10-11. Every aspect of

the decision below, therefore, rested solely on state law grounds.

3. Petitioners attempt to show otherwise, primarily by arguing that the Minnesota Supreme Court's decision "deviated from usual Minnesota law and practice in dramatic ways." Pet. 28. But in doing so, they take notable pains to insist they are not trying to "bog this Court down with Minnesota procedure." Pet. 31. That itself is the tell. The reason Petitioners' arguments are, by Petitioners' own admission, deep in the weeds of Minnesota law is that quarreling with the routine application of settled state procedure is all they have. Petitioners cannot make the drastic showing that would overcome the adequate-and-independent-state-grounds hurdle.

A close examination of Petitioners' arguments proves the point. Petitioners first maintain that it was irregular for the Minnesota Supreme Court to vacate the intermediate appellate court's equal protection analysis. Pet. 28-29. In fact, that was standard practice, because the Court of Appeals' constitutional decision was premature and unnecessary. Pet. App. 49a-51a. But more fundamentally, the vacatur is irrelevant at this stage. What prevents Petitioners from raising their equal protection challenge is their lack of party status, not the vacatur of the intermediate appellate order.

Petitioners fare no better when it comes to their request for declaratory relief. Pet. 29-30. They characterize the Minnesota Supreme Court as having shut the door on their constitutional challenges. *See id.* at 29. Not so. The Minnesota Supreme Court only held

that Petitioners could not seek such declaratory relief *in the CHIPS case*, Pet. App. 19a-20a—an inherently temporary proceeding, meant only to identify an interim placement for a child, and designed to last only until long-term permanency proceedings can begin. *See* Pet. 31 (admitting that “[a] permanency proceeding is separate from a juvenile-protection proceeding”). The decision Petitioners now cite to assert that ruling was error—*McCaughtry v. City of Red Wing*, 808 N.W.2d 331 (Minn. 2011)—is inapposite. *See* Pet. 29. In *McCaughtry*, plaintiffs initiated a *standalone* declaratory judgment action. *See* 808 N.W.2d at 337.

Petitioners next contend that the Minnesota Supreme Court deviated from Minnesota’s liberal policy in favor of intervention. Pet. 29-30. As already explained, however, that policy does not apply in child welfare proceedings. *Supra* 10-11. Nor was the basis for denial at all unusual here. Minnesota courts have previously denied party status based on a foster parent’s attempt to prevent a child’s placement with relatives. *E.g.*, *Valentine*, 512 N.W.2d at 871. And Minnesota’s appellate courts have affirmed a permissive intervention denial even when foster parents provided “excellent care” to a special-needs child for over five years. *Id.* at 869, 871. Petitioners quibble over small factual differences between this case and past ones, but such fine parsing of state precedent is again the province of the state courts. *See Fid. Union Co. v. Field*, 311 U.S. 169, 177 (1940) (recognizing that the “highest state court is the final authority on state law”).

Finally, Petitioners assert that the decision below does not rely on adequate, independent state law grounds because they challenge the denial of their intervention on federal constitutional grounds. Pet. 28. While it is true that Petitioners' First Amendment and due process arguments raise federal questions, those arguments are meritless. *Infra* 23-28. Only if those arguments *succeeded* and *resulted in Petitioners being granted party status* would the state law obstacle to Petitioners' equal protection challenge be overcome.³

B. Even If Petitioners Prevailed On This Case's Threshold Questions, The Remedy Would Be, At Most, A Remand To Reconsider Intervention.

The petition runs into a second vehicle problem, irrespective of whether the decision below rested on adequate and independent state law grounds. Again, Petitioners cannot challenge ICWA and MIFPA's constitutionality in this CHIPS proceeding unless and until they obtain party status. *Supra* 11; Pet. App. 19a-20a. This Court would thus have to address Petitioners'

³ Petitioners also fault the Minnesota Supreme Court for concluding that they had forfeited a technical argument—about Minnesota Statutes section 260C.515, subdivision 4(d), and section 260C.007, subdivision 27 (2024)—by failing to raise it until their reply brief. Pet. 31 & n.21; *see* Pet. App. 41a-42a n.21. They say appellants in Minnesota courts are given broad leeway to respond to arguments in their replies. *See* Pet. 31 n.21. But this argument was in fact not preserved: the argument asserted a *new* ground for relief rather than responding to any arguments Respondents made.

second question—about whether the intervention denial violated the First Amendment and due process—before resolving their first. And even if Petitioners could establish as a threshold matter that the Minnesota courts unconstitutionally “penalized” them for challenging ICWA and MIFPA (it did not, *infra* 23-25), this Court would not then turn to the merits of the equal protection challenge. Instead, it would remand for the Juvenile Court to perform the intervention analysis again under state law.

The reason for that is simple. Permissive intervention is just that: permissive. Whether to grant it rests in a trial court’s “sound discretion.” Pet. App. 26a; *Valentine*, 512 N.W.2d at 871. And while denying intervention on an unconstitutional ground is, to be sure, an abuse of that discretion, the remedy for an abuse of discretion is usually not an automatic grant of intervention. It is a remand to let the trial court reassess the record based on proper factors. *See Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011); *EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1048-49 (D.C. Cir. 1998). Or it is an affirmance, so long as it is plain that valid grounds independently support the denial. *See Kane County v. United States*, 597 F.3d 1129, 1136 (10th Cir. 2010). That is the practice in the circuit courts. *See, e.g., id.* (assuming district court relied on erroneous rationale but affirming denial of permissive intervention because valid rationales remained); *Freedom from Religion Found.*, 644 F.3d at 844 (determining district court abused discretion but remanding to let district court reassess permissive intervention); *Nat’l Children’s Ctr. Inc.*, 146 F.3d at 1048-49 (same). And that

approach is consistent with this Court’s First Amendment jurisprudence, which holds that a decisionmaker who penalizes protected conduct must be given a chance to show “it would have reached the same decision ... even in the absence of [that] conduct.” *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (remanding to allow such showing).

Of course, this general practice does not apply where the *only* permissible exercise of discretion is to grant intervention. *See, e.g., Buck v. Gordon*, 959 F.3d 219, 226 (6th Cir. 2020) (reversing district court and directing grant of intervention but recognizing that the district court retained “broad discretion in setting the precise scope of intervention going forward” (citation modified)). This, however, is no such case. Even if (counterfactually) Petitioners were penalized for their litigation position, the record contains many permissible reasons to deny their intervention request. *Supra* 11. The course forward, therefore, would be either to affirm, because it is plain the Minnesota courts would have denied intervention on those additional grounds, *infra* 25-26, or at most to remand, for an intervention re-do.

The constitutionality of ICWA and MIFPA is therefore not one step from decision but several. Even if Petitioners cleared every intervening hurdle, the constitutional question would still need to be litigated in the Minnesota courts before it might return here. That Petitioners have nonetheless built their petition around a question that is not before the Court only confirms that this case does not merit review.

C. Petitioners Also Lack Standing To Challenge ICWA And MIFPA.

Yet a third problem would prevent this Court from deciding ICWA and MIFPA’s constitutionality if it granted review: Petitioners lack standing to mount that challenge.

Article III standing requires Petitioners to show that they have suffered an injury in fact that is “fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *California v. Texas*, 593 U.S. 659, 668-69 (2021). The injury must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation modified). Here, Petitioners assert broad, policy-based claims about the harms that they believe ICWA and MIFPA impose on Indian children. *See* Pet. 2, 4, 6, 10-12, 15, 21-23, 32-33. But the only way ICWA and MIFPA impacted *them*, specifically, was by preferring the twins’ extended family for placement over them. Pet. 24-25. And that application of ICWA and MIFPA fails to give Petitioners standing to mount an equal protection challenge.

First, that application of ICWA and MIFPA does not give rise to an equal protection injury for purposes of standing, for ICWA and MIFPA did not diminish Petitioners’ placement priority. As non-relatives, Petitioners would receive lower consideration than an appropriate relative placement regardless of the application of ICWA or MIFPA. That is because Minnesota law requires courts to consider relative placements over non-relative placements for both Indian

and non-Indian children. *Compare, e.g.*, Minn. Stat. § 260.773, subd. 3 (establishing a placement preference for a child’s extended family under MIFPA), *with* Minn. Stat. § 260C.212, subd. 2(a) (requiring that relatives be considered first for out-of-home placements in non-MIFPA cases).

Petitioners contend, citing *In re S.G.*, 828 N.W.2d 118, 124 (Minn. 2013), that the placement consideration prescribed by ICWA and MIFPA is in fact different from the state law default. Pet. 19. *In re S.G.*, however, acknowledged that if both relative and non-relative petitioners were equally qualified to adopt, the relatives would benefit from first consideration and could proceed with the adoption. 828 N.W.2d at 125. That circumstance was not present in *S.G.*, where the court noted “real concerns” about the grandparents’ ability to identify the children’s special needs. *Id.* at 124. In contrast, here the Juvenile Court determined the relative placement was “nearly ideal,” noting that the twins’ sibling lives in the home, the Tribe supports the relative placement, and nobody—including Petitioners themselves—raised concerns regarding the relative placement. Pet. App. 74a. Hence, whether the court applied § 260C.212’s non-MIFPA placement preferences or ICWA and MIFPA’s placement preferences, Petitioners necessarily would have received lower-priority consideration than an appropriate relative placement. Petitioners thus cannot demonstrate that ICWA and MIFPA caused them to be treated differently because of race.

For similar reasons, Petitioners cannot show redressability. Even if this Court were to reach the

equal protection issue, Minnesota law still requires the responsible social services agency to first consider placing a child with a relative “without delay” when the child must live in foster care. Minn. Stat. § 260C.221, subd. 4. The social services agency identified an ideal relative placement for the twins and there is no reason to consider a non-relative placement alternative. Put another way, even if this Court found any aspect of ICWA or MIFPA to be unconstitutional, that holding would not redress any alleged injury suffered by Petitioners; the twins’ Grandmother would remain the preferred placement for the twins because she is a member of their extended family, regardless of their status as Indian children. Petitioners cannot identify any direct and concrete redressable injury that they suffered because of the placement preferences in ICWA or MIFPA, as opposed to their abiding status as non-relatives. Because Petitioners have failed to articulate an actual, concrete, and redressable injury caused by ICWA or MIFPA, this Court should deny the petition.

**D. These Problems Are Independent,
Multiple, And Cumulative.**

Each of the foregoing defects independently warrants denial of the petition. Their significance is even greater in combination. This is not a case with a single vehicle wrinkle the Court might work through in service of an important question. It is a case in which every path to that question is separately obstructed. Petitioners must run this entire table—including prevailing on the merits of their First Amendment and due process arguments. And a misstep at any point

would end the matter before this Court could even begin to consider ICWA and MIFPA’s constitutionality.

Further, the problems with this case are not the ordinary uncertainties that attend any grant. They are multiple and independent—two of them jurisdictional—and together they render the odds that this case would ever yield a decision on ICWA and MIFPA’s constitutionality remote in the extreme. Nor are any of these obstacles inherent in the question of ICWA and MIFPA’s constitutionality. Each is a product of this case and its specific facts. Opportunities to challenge ICWA are not scarce. *Infra* 28. There is no reason for the Court to take up the question of ICWA’s constitutionality on a record this encumbered.

II. The Denial Of Petitioners’ Motion For Permissive Intervention Does Not Merit Review.

Even putting the vehicle problems aside, the questions presented do not merit review. Petitioners’ arguments implicate no split and are not otherwise important. And they are wrong on the merits.

A. The Intervention Question Implicates No Split.

Below, Petitioners failed to identify “any decision directly supporting the principle that a court violates the First Amendment when it considers a prospective intervenor’s presentation of a good-faith legal argument in the lawsuit as a basis for denying intervention.” Pet. App. 34a. Their petition likewise lacks any authority to support their First Amendment and due

process arguments. The rights to petition, to free speech, and to due process of law have always been subject to procedural rules like the rules on permissive intervention applied below.

Petitioners nonetheless attempt to create a split. Their lead cases are not even remotely on point. Petitioners begin with a decision about a *criminal defendant's* right to *closing argument*. Pet. 25 (citing *Herring v. New York*, 422 U.S. 853 (1975)). It bears no factual resemblance to this case and was decided under the Sixth Amendment. *Herring*, 422 U.S. at 856-57. Petitioners' other primary cite is about the power of California trial courts to impose monetary sanctions on attorneys. Pet. 25 (citing *Andrews v. Superior Court*, 98 Cal. Rptr. 2d 426 (Cal. Ct. App. 2000)). It addressed no constitutional question. Instead, it was purely about a California state rule of civil procedure. *Andrews*, 98 Cal. Rptr. 2d at 427-29.

Only three of the cases Petitioners cite even address the First Amendment or due process. But those decisions are buried rather than displayed, *see* Pet. 25, 34—and for good reason. *Perkins Coie LLP v. U.S. Dep't of Justice*, 783 F. Supp. 3d 105 (D.D.C. 2025), is about an executive order directed at a law firm. *See* Pet. 25. *Truax v. Corrigan*, 257 U.S. 312 (1921), and *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011), meanwhile, are cited for no more than the propositions that due process bars arbitrary action and the First Amendment helps protect other fundamental rights. Pet. 34.

That just leaves *Palmore v. Sidoti*, 466 U.S. 429 (1984) and *Matter of C.J. Jr.*, 108 N.E.3d 677 (Ohio

Ct. App. 2018). *See* Pet. 27. *Palmore* was an equal protection case, not a First Amendment or due process one, and it concerned a mother’s custody rights, not permissive intervention by former foster parents. 466 U.S. at 432-34. As for *Matter of C.J. Jr.*, 108 N.E.3d 677 (Ohio Ct. App. 2018), it *undermines* Petitioners’ claim of a conflict. It shows that to the extent Petitioners have found a case at all like this one, that decision aligns with the Minnesota Supreme Court’s here. *See* Pet. 27. Petitioners have not identified any legal dispute that requires clarification from this Court.

B. The Intervention Question Is Not Important.

Petitioners likewise fail to show why, absent a split, this question warrants review. It does not.

Start with the obvious: the ruling below is deeply fact-bound. The Minnesota courts denied intervention only after weighing four case-specific “disadvantages” tied to these petitioners and these children. Pet. App. 34a-35a. Case-specific, record-driven balancing of that sort is not a question of national importance.

The permissive intervention posture makes the stakes lower still. Permissive intervention is a discretionary dispensation. No one is entitled to it, and its denial takes from the applicant nothing to which they had any right.

In short, Petitioners challenge a discretionary, fact-specific ruling that binds no one and resolves nothing beyond their own case. Such a decision does not warrant this Court’s review.

C. The Denial Of Petitioners' Intervention Was Constitutional.

Petitioners are also wrong on the intervention merits. Neither the First Amendment nor the Fourteenth Amendment's Due Process Clause prohibits a court from denying permissive intervention when non-parties seek to inject new arguments into ongoing proceedings.

1. Start with the First Amendment. The First Amendment protects the right to express one's views and the "right of access to courts for redress of wrongs." *Guarnieri*, 564 U.S. at 387 (quoting *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)). But the First Amendment does not grant "a right to intervene" in someone else's case. *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985). As foster parents, Petitioners had no protected liberty interest in the state proceedings under review. *See, e.g., Rodriguez v. McLoughlin*, 214 F.3d 328, 337 (2d Cir. 2000); *Kyees v. Cnty. Dep't of Pub. Welfare of Tippecanoe Cnty.*, 600 F.2d 693, 694 (7th Cir. 1979) (per curiam). The Juvenile Court, in turn, had no First Amendment obligation to allow them entry into these proceedings to challenge ICWA and MIFPA.

2. To get around this, Petitioners characterize the denial of intervention as "penalizing" them for challenging ICWA and MIFPA's constitutionality—an apparent invocation of the First Amendment's

prohibition on retaliation against protected conduct. Pet. 5.⁴ But again, the Minnesota courts did not take action designed to punish or silence Petitioners. They did not, for example, bar Petitioners from challenging ICWA and MIFPA’s constitutionality in the twins’ *permanency* proceeding or other actions (Petitioners never even moved for intervention in the twins’ permanency file). *Supra* 12-13. Rather, the Minnesota courts held that Petitioners, as non-parties with no legally protected interest at stake, could not inject that challenge into the twins’ *temporary* placement proceeding. *See id.*

It was thus no unconstitutional “penalty” to deny permissive intervention to the non-party Petitioners on the ground that they would “unnecessarily encumber the CHIPS proceedings.” Pet. App. 29a (citation modified). It was a sound act of case management. *Cf.* Fed. R. Civ. P. 24(b)(3) (requiring federal courts to consider “undu[e] delay or prejudice ... [to] the original parties’ rights” when deciding permissive intervention). Indeed, other courts have denied intervention in similar circumstances. *See, e.g., Victim Rts. L. Ctr. v. Rosenfelt*, 988 F.3d 556, 560-64 (1st Cir. 2021)

⁴ The Minnesota Supreme Court understood Petitioners to be asserting a “retaliation” argument, Pet. App. 33a-35a, and retaliation cases are the only First Amendment precedent that Petitioners cite. *See* Pet. 25, 34 (citing *Guarnieri*, 564 U.S. at 397; *Perkins Coie LLP*, 783 F. Supp. 3d at 120-21). But Petitioners strangely avoid styling their argument that way. That is likely because case law has recognized that retaliation may be asserted as a *claim*, in a *separate proceeding*. To Respondents’ knowledge, no court has held that the retaliation doctrine can be deployed in this procedural posture.

(denying permissive intervention to non-party who wished to present constitutional defenses not raised by the defendant).

Nor was it an unconstitutional penalty to deem Petitioners' constitutional challenge "indicative of [their] attitude toward the importance of the children's tribal identity," and thus contrary to the children's best interests. Pet. App. 34a (citation modified). Such *evidentiary* use of a potential custodian's views does not violate the First Amendment. Family courts consider parental and custodian "attitude[s] and inclinations" on subjects like medical care, education, religious upbringing, and race all the time, to assess how such views will "impact the child." *Woodall v. Woodall*, 471 S.E.2d 154, 157 (S.C. 1996); *see, e.g., Tipton v. Aaron*, 185 S.W.3d 142, 150 (Ark. Ct. App. 2004) (denying custody to parent whose "child-rearing philosophy" did not "promote[] racial tolerance"); *Boarman v. Boarman*, 459 S.E.2d 395, 399 (W. Va. 1995) (rejecting claim that First Amendment prohibited consideration of parent's "racial, ethnic, and gender slurs"). At most, that is what the Juvenile Court did here. And it poses no First Amendment problem.

3. Petitioners' retaliation argument also fails for the independent reason that the Juvenile Court "would have reached the same decision" even if Petitioners had raised no constitutional challenge. *Mt. Healthy*, 429 U.S. at 287 (explaining that government action infected by retaliation must still be upheld when also justified on other grounds). The Minnesota Supreme Court expressly concluded as much. It determined the Juvenile Court denied intervention based

on “four possible disadvantages,” including the “concern that appellants’ ‘strong attachment to the children has created a bias that would only hinder and harm the progression of the children’s protection proceeding,’ because ‘they could not see the value in any other placement for the children.’” Pet. App. 34a-35a (quoting Juvenile Court). Of those four disadvantages, only one was Petitioners’ approach to the twins’ heritage, evidence of which included but was never limited to Petitioners’ litigation position. Pet. App. 35a. And even then, Petitioners’ negative attitude towards the twins’ culture and background “was not the decisive factor in the [Juvenile Court’s] analysis.” *Id.* Petitioners thus cannot make the showing “required for relief in any claim of retaliation for protected speech.” Pet. App. 35a.

4. Petitioners’ responses miss the mark. They say that the Minnesota courts admitted they considered Petitioners’ challenge as part of the intervention analysis. Pet. 26. That use, however, was only as “evidence” of what served the twins’ best interests, Pet. 26—which, as explained, is both common and constitutional. *Supra* 25. And equally important, this consideration was, again, only one subfactor supporting one factor out of four that weighed against intervention. *Id.* Petitioners also insist that they presented evidence that they supported the twins’ indigenous heritage, and they say that the state court wrongly deemed their connection to the twins to be a disadvantage. Pet. 34. But the weight and value of that evidence were fact-bound, state-law determinations quintessentially within the state courts’ sole discretion.

Petitioners’ attempt to impugn the Minnesota Supreme Court itself is likewise baseless. They cite two questions by one justice as evidence that “the Minnesota courts denied the [Petitioners’] intervention motion because they would argue ICWA/MIFPA are unconstitutional.” Pet. 28. Together, these questions amount to fifty-eight seconds in more than two hours of oral argument, from a single justice who did not author the court’s unanimous decision. And the questions did not imply nefarious intent. Far from showing animosity to Petitioners’ legal position, these questions addressed the concerns that the twins’ lives might be used as a vehicle for impact litigation, and whether these alternative motives might be eclipsing what is best for these children.⁵ The focus, again, was not on Petitioners, but on the twins, as required by Minnesota law.

5. Petitioners’ due process argument falls equally flat. Due process does not attach unless the claimant has been “deprived of a protected interest.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Again, Petitioners had no protected interest at stake

⁵ *In the Matter of the Welfare of the Children of: L.K. and A.S.* at 34:35-35:00, Minn. Jud. Branch: Minnesota Supreme Court Video Oral Argument (Sep. 30, 2024), <https://mncourts.gov/supremecourt/oralargumentwebcasts/2024/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s.>; *In the Matter of the Welfare of the Children of: L.K. and A.S.* at 31:10-31:33, Minn. Jud. Branch: Minnesota Supreme Court Video Oral Argument (Apr. 1, 2025), <https://mncourts.gov/supremecourt/oralargumentwebcasts/2025/in-the-matter-of-the-welfare-of-the-children-of-l.k.-and-a.s.-welfare-of-the-children-of-l.k.-and-a.s.>, 31:10-31:33 (4/1/2025).

in this case. *Supra* 23. And even assuming some cognizable interest, due process guarantees a meaningful opportunity to be heard—not a right to intervene in another family’s case—and Petitioners were fully heard on their intervention motion, twice. There thus was no due process violation in excluding them from the CHIPS proceeding.

III. Petitioners’ Constitutional Challenge to ICWA And MIFPA Does Not Merit Review.

A. There Is No Conflict.

The question of ICWA and MIFPA’s constitutionality is also unworthy of review. Petitioners contend that “lower courts need guidance respecting ICWA/MIFPA’s constitutionality.” Pet. 32. But they identify no split, and none exists.

For more than four decades, courts have uniformly rejected equal-protection challenges to ICWA and its state-law counterparts. Two years after ICWA’s enactment, the South Dakota Supreme Court turned such a challenge aside, *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278 (S.D. 1980), and every state appellate court to consider the question since has done the same. See *In re J.M.*, 980 N.W.2d 499 (Wis. Ct. App. 2022); *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. Ct. App. 2017); *In re KMO*, 280 P.3d 1203 (Wyo. 2012); *In re Beach*, 246 P.3d 845 (Wash. Ct. App. 2011); *In re A.A.*, 176 P.3d 237 (Kan. Ct. App. 2008); *In re N.B.*, 199 P.3d 16, 22 (Colo. App. 2007); *In re Interest of Phoenix L.*, 708 N.W.2d 786 (Neb. 2006); *Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605 (Cal. Ct. App. 2006); *In re Baby Boy C.*, 27 A.D.3d 34 (N.Y. App. Div. 2005); *In the Matter of Baby Boy L.*, 103 P.3d 1099 (Okla.

2004); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *Matter of Adoption of Riffle*, 922 P.2d 510 (Mont. 1996); *In re Marcus S.*, 638 A.2d 1158 (Me. 1994); *Application of Angus*, 655 P.2d 208 (Or. Ct. App. 1982). An unbroken, forty-five-year line of authority is no conflict.

Nor do the proceedings in *Haaland v. Brackeen* supply a split. Petitioners attack the “Indian child” definition as racial. Pet. 21. But the en banc Fifth Circuit—the only federal court of appeals to reach the question—held that classification to be consistent with equal protection. *Brackeen v. Haaland*, 994 F.3d 249, 267-68 (5th Cir. 2021) (en banc). And it likewise sustained against equal protection attack the ICWA placement preference for extended family members at issue here. *Id.* at 267-69. No court anywhere—and certainly no court of last resort—has ever held ICWA’s or MIFPA’s “Indian child” classification or its “extended family” preference invalid under equal protection.

The purported confusion Petitioners do invoke has no bearing on this case. Petitioners urge the Court to take up the “existing Indian family doctrine,” Pet. 32, but no party raised, and no court passed on, that doctrine below. And they point to Bureau of Indian Affairs regulations interpreting ICWA, Pet. 33, that similarly have no bearing on the decision below. A conflict that does not exist and issues that were never presented below are no basis for certiorari.

**B. The Question Of ICWA And MIFPA's
Constitutionality Is Not Otherwise
Certworthy.**

The absence of a conflict is not the only reason to deny review. Even on its own, the question of ICWA and MIFPA's constitutionality does not demand this Court's attention. The governing framework is settled. For half a century, *Morton v. Mancari* has supplied the rule that classifications tied to tribal affiliation are political rather than racial, and are sustained if rationally related to Congress's obligations to the tribes. 417 U.S. at 553-55 & n.24. This Court has applied that rule repeatedly and has never invalidated a law that classifies based on tribal affiliation. *See, e.g., United States v. Antelope*, 430 U.S. 641 (1977); *Fisher v. Dist Ct. of Sixteenth Dist. of Mont.*, 424 U.S. 382 (1976) (per curiam). And lower courts have repeatedly applied the *Mancari* framework to reject equal protection challenges to ICWA, as demonstrated by the line of cases cited above that speak with one voice.

The specific issue raised by the facts here—whether it is constitutional to prefer placement of Indian children with their family members over non-relative foster parents—is even less worthy of review. As is the case in Minnesota (*supra* 17-18), states very frequently prefer placement with family members for *all* children in their care—regardless of whether ICWA or a state law like MIFPA applies. Indeed, federal law incentivizes states to do so. *See* 42 U.S.C. § 671(a)(19) (requiring states to consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child as eligibility

condition for foster care and adoption assistance funds). This particular provision of ICWA, therefore, rarely changes case outcomes in practice. There is no reason for this Court to take a case about it.

C. ICWA And MIFPA Readily Pass Constitutional Muster.

Finally, Petitioners are wrong on the equal protection merits. ICWA and MIFPA both satisfy the Constitution.

1. When Congress classifies based on affiliation with federally recognized tribes, those classifications are “political rather than racial.” *Mancari*, 417 U.S. at 553 n.24. The Constitution itself—including the Indian Commerce Clause and Article I’s Apportionment Clause—establishes that Congress may treat Indians differently. That is because the Constitution recognizes tribes for what they are: sovereign political entities. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831). From the beginning, Congress has enacted legislation protecting Indians’ lands, regulating their trade, punishing crimes against them, managing their resources, and providing education, housing, and healthcare—all in reliance on the principle that Congress may legislate specifically for Indians. *E.g.*, Act of July 22, 1790, ch. 33, §§1, 4-5; 25 U.S.C. §§391, 1601, 2000, 3102. And this Court, in turn, has held that when Congress classifies based on tribal affiliation, it draws “political” classifications reviewed only for rational basis. *Mancari*, 417 U.S. at 554-55 & n.24.

2. ICWA and MIFPA draw political classifications here. They initially applied to the proceedings below not because the twins are racially Indian, but because

they were eligible for tribal membership in the Red Lake Nation, and because their mother, Respondent L.K., is a Red Lake member. *Supra* 3-4; *see* 25 U.S.C. § 1903(4); Minn. Stat. § 260.755, subd. 8. The statutes continued to apply throughout the course of the twins' placement proceedings because the children themselves became enrolled Red Lake members. *Supra* 4. ICWA and MIFPA's triggers were thus political affiliations with a sovereign tribe—not race.

Petitioners maintain that tribal membership turns on ancestry and is thus a proxy for race. *See* Pet. 21. That submission cannot be squared with *Mancari*, which Petitioners have not asked this Court to overrule. The submission is also wrong as a matter of first principles. Tribal membership is about much more than descent or blood. It is about political choices: here, the federal government's choice to maintain a government-to-government relationship with the Red Lake Nation; the Nation's choice to offer membership to L.K. and the twins; and L.K.'s choice to accept that offer and remain a member. This Court has therefore never been distracted by tribal citizenship practices. Tribes are “separate people[s]” whose “right to define [their] own membership”—like that of foreign governments—is “central to [their] existence as ... independent political communit[ies]” and “unconstrained” by the Fifth and the Fourteenth Amendments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 72 n.32 (1978).

Nor is MIFPA, in particular, infirm for encompassing children who are eligible for membership but lack tribal member parents. Pet. 13, 20-21. For one thing,

that provision of MIFPA is not at issue because the twins are now tribal members, and even before that, their mother was enrolled (which is why not just MIFPA, but ICWA too, applied from day one). *Supra* 3-4. But in all events, this classification is political too: it turns on the government-to-government relationship between the United States and tribes, and tribes' sovereign choices to make children membership-eligible.

Petitioners' arguments about ICWA's and MIFPA's placement preferences also fail to show race discrimination. *See* Pet. 12. Petitioners are not subject to a lower-ranked preference because of their "race[], ethnicit[y], or national origin[]." *Id.* They are subject to a lower-ranked preference because they are not members of the twins' extended family. *See* 25 U.S.C. § 1915(b); Minn. Stat. § 260.773, subd. 3. Indeed, Petitioners would be subject to this lower-ranked preference even if they were racially Indian, and even if the preferred member of the twins' extended family was racially *non*-Indian (a common occurrence). As that scenario illustrates, the preference at issue operates based on family relationships, not race.

3. Under rational basis review, both ICWA and MIFPA easily satisfy scrutiny. Congress enacted ICWA to halt the unwarranted and devastating removal of Indian children from their families and tribes and to carry out the United States's trust obligations—interests this Court has recognized as compelling. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-37 (1989). MIFPA reflects Minnesota's parallel judgment, and it furthers ICWA's purposes by

accepting Congress’s invitation to adopt “a higher standard of protection” in cases involving Indian children. 25 U.S.C. § 1921. Petitioners never attempt to show that the ICWA and MIFPA provisions at issue here fail to rationally advance these objectives. That is for good reason. ICWA has been recognized as the “gold standard ... for all children and families.” Brief of Casey Family Programs et al. as Amici Curiae in Support of Appellants at 3, *Brackeen v. Bernhardt*, No. 18-11479 (5th Cir. Dec. 13, 2019). ICWA and MIFPA thus “rationally ... fulfill[] ... Congress’ unique obligation toward the Indians.” *Mancari*, 417 U.S. at 555.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JOSEPH PLUMER
RILEY PLUMER
PLUMER LAW OFFICE
9352 NORTH GRACE LAKE
ROAD
BEMIDJI, MN 56601
*Counsel for Respondent Red
Lake Nation*

M BOULETTE
Counsel of Record
BOULETTE, PLLC
60 SOUTH 6TH STREET,
SUITE 2800
MINNEAPOLIS, MN 55402
612-852-6899
mboulette@boulettelaw.com

PETER JOSEPH FARRELL
OFFICE OF THE MINNESOTA
ATTORNEY GENERAL
445 MINNESOTA STREET,
SUITE 600

JODY MARIE ALHOLINNA
MINNESOTA JUDICIAL
CENTER, SUITE G-27
25 REV. DR. MARTIN
LUTHER KING JR. BLVD.

ST. PAUL, MN 55101

*Counsel for Respondent Keith
Ellison, Attorney General of
Minnesota*

ST. PAUL, MN 55155

*Counsel for Respondent
McKenzie Borth, Guardian
ad Litem*

RYAN A. GUSTAFSON

17 WEST 5TH STREET

BLUE EARTH, MN 56013

*Counsel for Respondent
K. L. R.*

AMANDA L. HEINRICHS-

MILBURN

123 DOWNTOWN PLAZA

FAIRMONT, MN 56031

*Counsel for Respondent
Human Services of Faribault
& Martin Counties*