Case No. A23-1762

STATE OF MINNESOTA
IN SUPREME COURT

In Re the Matter of the Children of:
L.K., Parent.

BRIEF OF *AMICI CURIAE* CALIFORNIA TRIBAL FAMILIES COALITION, UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND, ASSOCIATION OF AMERICAN INDIAN AFFAIRS, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, AND NAVAJO NATION IN SUPPORT OF DISMISSAL

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Amicus California Tribal Families Coalition is an Indian organization with members including nearly 50 federally recognized sovereign Tribal Nations and three statewide tribal leader associations from across California that works to promote and protect the health, safety, and welfare of tribal children and families, actions which are inherent tribal governmental functions and are at the core of tribal sovereignty. *Amicus* United South and Eastern Tribes Sovereignty Protection Fund is a nonprofit inter-Tribal organization advocating on behalf of 33 federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. *Amicus* Association on American Indian Affairs ("AAIA"), formed in 1922, serves Native Country by protecting sovereignty, preserving culture, educating youth, and building capacity; AAIA was integral to the Indian Child Welfare Act's ("ICWA") development and continues to fight for ICWA today. *Amicus* National Congress of American Indians is a nonprofit American Indian and Alaska Native organization serving as a unified voice for the broad interests of tribal governments and communities. *Amicus* National Indian Child Welfare

[1] *Amici* certify that none of the Parties' counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief, and no person—other than *Amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief. Minn. R. Civ. App. P. 129.

Association is a nonprofit organization that works to support the safety, health, and spiritual strength of American Indian and Alaska Native children along the broad continuum of their lives. *Amicus* Navajo Nation is a sovereign federally recognized Tribal Nation with two ratified treaties with the United States. As a sovereign government, the Navajo Nation has an interest in supporting its children and families, and thus was an intervenor defendant in *Haaland v. Brackeen*, 599 U.S. 255 (2023), in which the United States Supreme Court upheld ICWA's constitutionality.

Amici share an interest in protecting the best interests of Native children and promoting the stability and security of Native families and Tribal Nations. *Cf.* 25 U.S.C. § 1902. *Amici* value ICWA as creating minimum federal standards designed to halt the "wholesale removal" of Native children from their homes and communities. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). As such, *Amici* have a vital interest in defending ICWA against misguided attacks like this one, which fundamentally misconstrues equal protection and federal Indian law, and attempts to invalidate ICWA entirely by taking aim at a portion of the law that did not affect Appellants. *Amici* also have a vital interest in defending the constitutionality of the United States' delivery on its long-standing trust and treaty obligations to Tribal Nations and Native people, which would be imperiled should Appellants' arguments find purchase.

Amici urge this Court to dismiss this appeal on the grounds that ICWA's constitutionality is not properly before this Court and Appellants lack standing to challenge a law that did not injure them. In the alternative, *Amici* urge this Court to reject Appellants' foundation-shaking constitutional arguments and hold that ICWA is grounded in the political relationships between Tribal Nations—as sovereign governments—and their people, and between the United States and Tribal Nations, and thus ICWA is directed at Native people because of their political status. This Court should further hold that ICWA is rationally related to fulfilling the United States' unique and solemn obligations to Native people and Tribal Nations.

STATEMENT OF FACTS

Ki.K. and Kh.K. are twins, born in April 2022, who are eligible for citizenship in the Red Lake Nation ("Nation"), a federally recognized Tribal Nation. *See* Respondent L.K.'s Addendum ("Resp. L.K. ADD.") 003, 004; Resp. L.K. ADD.041 (Reyes, J., concurring). Ki.K. and Kh.K.'s mother, L.K., is a citizen of the Nation. Appellants' Addendum at ADD.002.

L.K. used harmful substances while she was pregnant with Ki.K. and Kh.K., and the twins were born with significant medical issues. Resp. L.K. ADD.003–004. Almost immediately after the twins' birth, County Human Services filed Child in Need of Protection and Services ("CHIPS") petitions for Ki.K. and Kh.K. and removed them from L.K.'s custody. *Id.* The ultimate goal of

a CHIPS proceeding is to safely reunite children with their family of origin. *See* Minn. Stat. § 260C.001, subdiv. 2(b). The Nation has been involved in the CHIPS proceeding from the beginning to advocate for Ki.K. and Kh.K.'s best interests. *See* Resp. L.K. ADD.004.

The Nation identified a relative, R.F., as a preferred placement for the children. R.F. also had the meaningful benefits of being a licensed foster parent who resides on the Nation's reservation and is the legal custodian of Ki.K. and Kh.K.'s sibling. Resp. L.K. ADD.005; Resp. L.K. ADD.041 (Reyes, J., concurring). The children were initially placed with Appellants—non-relative, non-Indian licensed foster parents who lived closer to the Mayo Clinic—due to the children's immediate medical needs. Resp. L.K. ADD.004.

By August 2022, the children's health had improved, and the guardian *ad litem* believed there was no longer a need to keep them near the medical facility and thus out of an ICWA-preferred placement. Br. of Resp't Guardian *Ad Litem* McKenzie Borth at 5. Under ICWA, 25 U.S.C. § 1915(b)(i), and the Minnesota Indian Family Preservation Act ("MIFPA"), Minn. Stat. § 260.773, subdiv. 3, there is a legal preference for placing children in foster care with relatives, rather than in non-relative foster homes, absent "good cause" to do otherwise, 25 U.S.C. § 1915(b); Minn. Stat. § 260.773, subdiv. 10(2). Minnesota Statutes section 260C.212 subdivision 2(a)—which applies to all children, regardless of

Native[2] status—also prioritizes consideration of relative placements before all others.

By fall 2023, a plan to reunite Ki.K. and Kh.K. with relatives through placement in R.F.'s home was moving forward. Resp. L.K. ADD.005. L.K.'s parental rights remained intact, the placement was for foster care—not adoption—and the goal of the proceedings continued to be reunification with the children's mother, *see* Minn. Stat. § 260C.001, subdiv. 2(b)(7).

On September 12, 2023, Appellants filed an emergency motion requesting permissive intervention in the CHIPS case, a stay in the change of placement, and—among other things—declaratory judgments that both ICWA and MIFPA, broadly, violate the U.S. Constitution's guarantee of equal protection. Resp. L.K. ADD.005. Appellants filed their brief containing constitutional arguments less than a day before the District Court held an emergency hearing, leaving the other parties no time to respond. Resp. L.K. ADD.056 (Reyes, J., concurring). The District Court held a hearing the next day, at which it denied Appellants' motion for a stay in the change of placement. Resp. L.K. ADD.006. The constitutional arguments were not argued before the Court. Resp. L.K. ADD.056 (Reyes, J., concurring).

[2] Both ICWA and MIFPA use the term "Indian." Because that term is considered by some to be outdated, this brief uses the term "Native," except where directly quoting a court or statutory provision.

Ki.K. and Kh.K. were moved to R.F.'s home shortly thereafter. Through subsequent legal proceedings, the District Court denied Appellants' remaining requests, but did not explicitly rule on the constitutionality of ICWA or MIFPA. Resp. L.K. ADD.006.

Appellants appealed to the Court of Appeals, which affirmed the denial of the stay in change of placement and held that MIFPA is constitutional, while remanding other issues to the District Court. *See* Resp. L.K. ADD.040. The Court declined to rule on the constitutionality of ICWA because it determined that the District Court had relied on MIFPA, not ICWA, in placing the children with R.F. Resp. L.K. ADD.022–023, 031.

This appeal followed, in which Appellants again challenge the constitutionality of MIFPA and ICWA broadly on equal protection grounds.

ARGUMENT

I. This Court Should Reject Appellants' Constitutional Challenge to ICWA Because it Was Not Addressed by the Courts Below and Because Appellants Lack Standing.

Because Appellants' equal protection challenge to ICWA was not fully considered by the District Court or the Court of Appeals, this Court should likewise decline to entertain it. If this Court does address Appellants' constitutional challenge to ICWA, it should be to reject it for lack of jurisdiction: Appellants lack standing to challenge ICWA's constitutionality.

A. This Court Should Not Address ICWA's Constitutionality when Neither of the Courts Below Ruled on the Issue.

As an initial matter, there is no lower court ruling on the constitutionality of ICWA for this Court to review: the District Court did not explicitly address Appellants' constitutional arguments; the Court of Appeals ruled on—and rejected—Appellants' argument that MIFPA is unconstitutional but declined to rule on the constitutionality of ICWA.[3]

Minnesota appellate courts generally do not consider issues that were not thoroughly developed in or addressed by the court(s) below, *see Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), and are particularly reluctant to stretch to reach constitutional issues, *see In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998); s*ee also Lott v. Davidson*, 109 N.W.2d 336, 345 (Minn. 1961) ("The power of the court to declare a law unconstitutional is to be exercised only when absolutely necessary in a particular case.").

The constitutionality of ICWA—and delivery on the United States' trust and treaty obligations—is too important an issue to take up without thorough briefing and consideration at all levels, *see infra* at II(B). Because neither of the

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[3] The Court of Appeals held that because 25 U.S.C. § 1921 requires courts to apply state law where state law provides a higher standard of protection to a child or the child's parents, and the good cause exceptions to MIFPA's placement preferences are narrower than the good cause exceptions to ICWA's placement preferences, MIPFA applies in this case. Resp. L.K. ADD.022–023. This analysis supplies another reason this Court should not reach the merits of Appellants' constitutional challenge to ICWA.

lower courts ruled on ICWA's constitutionality, this Court should not now entertain Appellants' constitutional challenge.

B. Appellants Lack Standing to Challenge ICWA's Constitutionality.

Standing is a jurisdictional issue; "[t]he lack of standing bars consideration of a claim by a court." *Garica-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 663 (Minn. 2014). To have standing, a party must have suffered some injury-in-fact, which is "a concrete and particularized invasion of a legally protected interest." *Id.* (internal quotation omitted). The injury must be "fairly traceable to the challenged action . . . and likely to be redressed by a favorable judicial decision." *Id.* Appellants lack standing to challenge ICWA's constitutionality because they have no legal authority to assert any injuries allegedly suffered by Ki.K. and Kh.K., and they have not themselves been injured by ICWA's preference for Native foster homes.

i. Appellants Have No Legally Protected Interest in the Constitutional Rights of Others.

Appellants' opening brief is exclusively dedicated to the contention that ICWA, broadly, is an affront to equal protection because children covered by ICWA are treated differently and worse on account of their race. Setting aside that ICWA was not applied in this case, *see* Resp. L.K. ADD.022–023,[4] that

[4] As noted above, the Court of Appeals held that MIFPA's placement preferences, not ICWA's, govern in this case. This subsection and the next explain why

ICWA's application does not depend on race-based classifications, *see infra at* II, as well as the fact that ICWA is widely recognized to be the "gold standard" for child welfare practice, *see Brief of Casey Family Programs, et al.,* as *Amici Curiae*, *Haaland v. Brackeen*, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3648364, Appellants lack standing to make this argument.

"[O]ne who invokes the power of the court to declare a statute unconstitutional must be able to show not only that the statute is invalid but that the person has sustained or is in immediate danger of sustaining some direct injury resulting from its enforcement…." *Paulson v. Lapa, Inc.*, 450 N.W.2d 374, 380 (Minn. Ct. App. 1990) (citing *Lott*, 109 N.W.2d at 345.) A litigant cannot create a justiciable controversy by raising an alleged equal protection injury to *others*; the litigant "lacks standing to raise th[e] issue on behalf of [others]." *Paulson*, 450 N.W.2d at 380. That the statute "affects the rights of others is no concern of his. He may champion hi[s] own, but not the rights of others." *Lott*, 109 N.W.2d at 345 (internal quotation omitted). Appellants lack standing to challenge ICWA's constitutionality on behalf of Ki.K. and Kh.K.[5]

Appellants would lack standing to challenge ICWA's placement preferences even if the courts below had applied ICWA.

[5] Ki.K. and Kh.K. do not lack for champions to assert their rights: L.K.'s parental rights remain intact, the county has taken custody of the children, a guardian *ad litem* has been appointed, and the Nation may arguably raise its children's

ii. Appellants Have Not Been Injured by ICWA's Preference for Native Foster Homes.

Appellants did not argue in their opening brief that their own constitutional rights have been violated, or that they have been directly injured by ICWA's placement preferences. But because the Court of Appeals' holding on standing turned on an alleged injury to Appellants, *see* Resp. L.K. ADD.029–030, it bears noting: Appellants were not injured by ICWA's preference for "an Indian foster home," because that was not the preference applied in this case.

ICWA creates a hierarchy of preferred foster care placements. 25 U.S.C. § 1915(b). The first tier of preferred placements—the tier that would have applied when Ki.K. and Kh.K. were moved to R.F.'s home, had ICWA been the law in operation—is for "a member of the Indian child's extended family." 25 U.S.C. § 1915(b)(i). To the extent Appellants could have been harmed by ICWA, it would have been by application of this first placement preference: Appellants are not a preferred placement for Ki.K. and Kh.K. because they are not members of Ki.K. and Kh.K.'s extended family. But there is no credible argument to be made that application of this placement preference involves racial discrimination, as it applies to all extended family members, whether Native or not. A similar placement preference exists in MIFPA, Minn. Stat. § 260.773 subdiv. 3, and

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constitutional rights as *parens patriae*, *see State, Dep't Health & Soc. Servs. v. Native Village of Curyung*, 151 P.3d 388, 399–402 (Alaska 2006). Appellants need not and may not do so.

generally applicable Minnesota child welfare law also prioritizes placement with relatives for all children, *see* Minn. Stat. § 260C.212, subdiv. 2(a). Appellants have no argument that application of this first placement preference has injured their constitutional rights.

Notably, even if R.F. had not been a relative of Ki.K. and Kh.K., ICWA's second tier foster care placement preference—the preference for "a foster home licensed, approved, or specified by the Indian child's Tribe," 25 U.S.C. § 1915(b)(ii)—would have applied because R.F. is a licensed foster parent who was specified by the Nation. But again, even if Appellants had been "injured" by this second placement preference, there would be no credible argument that the preference was a racial classification, as it applies to any foster home licensed, approved, or specified by the child's Tribal Nation, whether Native or not.

It is the next placement preference—the preference for "an Indian foster home licensed or approved by an authorized non-Indian licensing authority"—that requires that Native foster homes be considered over non-Native foster homes. 25 U.S.C. § 1915(b)(iii). It is to this preference that the U.S. Supreme Court referred in *Brackeen*, when it noted that alleging a racial discrimination injury from the operation of a placement preference could be sufficient to

establish injury for standing purposes. *See* 599 U.S. at 292.[6] And it is upon this portion of *Brackeen* that the Court of Appeals mistakenly relied in determining that Appellants had standing for their constitutional challenge. *See* Resp. L.K. ADD.030. But Appellants cannot allege that they were injured by a preference for "an Indian foster home" because that preference was not applied in this case. Put another way, even if this Court held the preference for "an Indian foster home" to be unconstitutional, that holding would not redress any injury suffered by Appellants; R.F.'s home would remain a preferred placement for Ki.K. and Kh.K. because R.F. is a member of the children's extended family.[7]

Appellants cannot allege that ICWA's preference for "an Indian foster home" applied here. Appellants cannot and do not allege a racial discrimination injury from ICWA's relative placement preference (the preference that would have applied, had the courts below applied ICWA). Appellants lack standing to

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[6] Notably, while the *Brackeen* Court referenced both foster and adoptive homes, the underlying cases at issue in *Brackeen* were adoption cases. *See* 599 U.S. at 268–70. CHIPS proceedings are fundamentally different from adoption proceedings: in an adoption case, the prospective adoptive family seeks to permanently add a child to their family, *see*, *e.g.*, Minn. Stat. § 259.23, subdiv. 2(h), but in a CHIPS proceeding, the ultimate goal is to return the child to her family of origin, *see* Minn. Stat. § 260C.001, subdiv. 2(b)(7)(i). A foster home plays an important, but ultimately temporary, custodial role. *See, e.g.*, *Matter of Welfare of E.G.*, 268 N.W.2d 420, 422 (Minn. 1978).

[7] Arguably, even if this Court declared all of ICWA's foster care placement preferences unconstitutional, R.F.'s home would remain a favored placement for Ki.K. and Kh.K. because of Minnesota's preferences for relative placements and for placing siblings together. *See* Brief of Respondent Red Lake Nation ("Nation Br.") at 8–11.

challenge ICWA's constitutionality and this Court should dismiss their challenge for lack of jurisdiction.

II. ICWA Complies with the Constitution's Equal Protection Requirements.

Even if Appellants' equal protection arguments were properly before this Court, their assertion that ICWA is unconstitutional is baseless. ICWA's classifications are political, not racial, and therefore subject to rational basis review—which they satisfy.[8]

A. Equal Protection Analysis Involves Two Distinct Steps.

The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the government from denying to any person equal protection under the law. *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 216–18 (1995). To determine whether a government action treating two groups of similarly situated people differently is a denial of equal protection, courts apply a two-step review process, where step one requires determining whether the government action creates a constitutionally suspect classification, such as one based on race, and step two requires applying the appropriate level of scrutiny for the type of

[8] Appellants propose, in a footnote, an alternative theory: that ICWA discriminates unconstitutionally on the basis of national origin. To the extent this under-developed theory requires a response, the response is the same as that articulated below: ICWA's classifications are grounded in the special political relationships between Tribal Nations and their people and between the United States and Tribal Nations, and as such are unique, non-suspect political classifications subject only to rational basis review.

classification. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312–14 (1976). If the government action creates a constitutionally suspect classification, the court applies strict scrutiny, which requires the government to have a "compelling governmental interest[]" and have "narrowly tailored" its measures to achieve that interest, *Adarand*, 515 U.S. at 227. If the government action does not create a suspect classification, the court applies the rational basis test, which asks only whether the government action is rationally related to a legitimate governmental interest. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

B. Two Political Relationships Serve as the Basis for Tribal Nations and Native People's Unique Political Status under U.S. Law.

The United States frequently legislates and otherwise acts with respect to Tribal Nations and Native people, and those classifications are regularly upheld as non-suspect political classifications entitled to rational basis review, rather than suspect racial classifications subject to strict scrutiny. *See Morton v. Mancari*, 417 U.S. 535, 551–55 (1974); *see also* Nation Br. at 34–36. The unique and long-standing legal status of Tribal Nations and Native people—upon which the United States may properly act in alignment with equal protection requirements—is grounded in two political relationships: the relationship between the United States and Tribal Nations, and the relationship between Tribal Nations and their own people.

i. The Unique Political Relationship Between the United States and Tribal Nations is Predicated on Tribal Nations' Inherent Sovereignty, Long-Standing, and Enshrined in the Constitution.

Tribal Nations are and always have been sovereign political entities: this status is inherent, predates the arrival of colonizing forces, and does not depend on the existence of—or recognition from—the United States. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (describing Tribal Nations as "separate sovereigns pre-existing the Constitution") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)); *see also Brackeen*, 599 U.S. at 308 (Gorsuch, J., concurring) (explaining that before colonization, Tribal Nations "existed as 'self-governing sovereign political communities'" and that "such entities do not 'cease to be sovereign and independent' even when subject to military conquest—at least not 'so long as self government and sovereign and independent authority are left in the[ir] administration'") (quoting *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978), and *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)); *United States v. Lara*, 541 U.S. 193, 210 (2004) (Stevens, J., concurring) ("The inherent sovereignty of the Indian tribes has a historical basis that merits special mention. They governed territory on this continent long before Columbus arrived."). Tribal Nations' inherent sovereignty is supported by international law principles. *Brackeen*, 599 U.S. at 308 (Gorsuch, J., concurring) (referring to "long-held tenet of international law"); Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection From Our Protectors: The Nature,*

Issues, and Future of the Federal Trust Responsibility to Indians, 6 Mich. J. Env't & Admin. L. 397, 412 (2017) ("[T]he relationship of Indian tribes with the United States is founded on 'the settled doctrine of the law of nations[.]'").

From the beginning, the United States and its predecessor colonizing governments demonstrated their recognition of Tribal Nations as sovereign political entities by interacting with them as such. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) ("From the commencement of its existence, the United States has negotiated with the Indians in their tribal condition as nations . . . capable of making treaties. This was only following the practice of Great Britain before the Revolution."); *see also Brackeen*, 599 U.S. at 307–33 (Gorsuch, J., concurring); *Herrera v. Wyoming,* 587 U.S. 329, 345 (2019) ("A treaty is 'essentially a contract between two sovereign nations.'") (quoting *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979)); Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 180 (2008) (noting that from 1763 through the ratification of the Fourteenth Amendment, the historical record "provides remarkably unambiguous support" for the proposition that the United States approached "Indian affairs . . . in the context of tribal political relationships with the federal government.").

Through its war and treaty-making with Tribal Nations—engagement that recognized Tribal Nations' status as sovereigns—the United States

assumed ongoing trust and treaty obligations to Tribal Nations and Native people that are political in nature. *See Seminole Nation v. United States,* 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes the Government is . . . more than a mere contracting party . . . .[I]t has charged itself with moral obligations of the highest responsibility and trust."); *see generally* American Law Institute, RESTATEMENT OF THE LAW OF AMERICAN INDIANS, Ch. 1 § 4 (2021).

The unique political relationship between the United States and Tribal Nations was recognized and preserved in the Constitution, including through the Indian commerce clause, U.S. CONST., art. I, § 8, cl. 3; the treaty clause, U.S. CONST., art. II, § 2, cl. 2; the territory clause, U.S. CONST., art. IV, § 3, cl. 2; and "the Constitution's adoption of preconstitutional powers;" *Lara*, 541 U.S. at 201; *see also McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164, 172 n.7 (1973); *United States v. Holliday*, 70 U.S. 407, 418 (1865); *Brackeen*, 599 U.S. at 307, 310 (Gorsuch, J., concurring) (referring to "Indian-law bargain struck in our Constitution," the terms of which include that "Indian Tribes remain independent sovereigns with the exclusive power to manage their internal matters."). The Constitution also directly refers to Native individuals in the Indian non-taxation portion of the apportionment clause. U.S. CONST., art. I, § 2, cl. 3. These constitutional provisions empower the United States to deliver on

its trust and treaty obligations. *Brackeen*, 599 U.S. at 275; *United States v. Antelope*, 430 U.S. 641, 647 n.8 (1977); *Mancari*, 417 U.S. at 551–52.

The federal government continues to address Tribal Nations as sovereigns. Federal recognition of a Tribal Nation remains a "formal political act" that solidifies the "government-to-government relationship" between a particular Tribal Nation and the United States. H.R. REP. NO. 103–781 (1994); *see also* 25 C.F.R. § 83.2(a) (2015); 140 Cong. Rec. S6145 (May 19, 1994) (Sen. McCain) ("The recognition of an Indian tribe by the Federal Government is just that—the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal Government has established formal relations."). Congress, in celebrating the 200th anniversary of the signing of the Constitution, reaffirmed that the government-to-government relationship between the United States and Tribal Nations is installed therein. H.R. Con. Res. 331, 100th Cong. (1988). And Congress continues to affirm Tribal Nations' inherent sovereignty and governmental authority. *See, e.g.,* Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116–123, 134 Stat. 146 (2020); Indian Civil Rights Act, 25 U.S.C. § 1301(2)("'[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe …; and means the inherent power of Indian tribes, hereby recognized and affirmed to exercise criminal jurisdiction over all Indians."); 25 U.S.C. § 1304(b)(1) ("[T]he

powers of self-government of a participating tribe . . . include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special Tribal criminal jurisdiction over all persons.").

ii. The Relationship Between Tribal Nations and their People is Political, not Racial.

Separately, the political relationship between each Tribal Nation and its people is one between an inherently sovereign governmental entity and the individuals with whom it establishes a political relationship, including through citizenship. *See Antelope*, 430 U.S. at 645 (recognizing that Tribal Nations have sovereignty over their people, including the power to regulate internal and social relations); Citizenship Code of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Ch. CTZ. 1 ("This ordinance is enacted pursuant to the inherent sovereign authority of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians to determine its Tribal citizenship which predates its Treaties of 1825, 1826, 1837, 1842, 1847, and 1854 with the United States Government."). Citizenship may come with rights and duties, such as the right and responsibility to participate in government through voting. *See, e.g.*, PUEBLO OF LAGUNA CONSTITUTION, art. VII, § 2.

A Tribal Nation's inclusion of a lineal descent or heredity requirement in its citizenship criteria does not transform a political relationship into a racial

one.[9] Determining who it will recognize as part of its polity is a core prerogative of a sovereign, no matter how that sovereign identifies its people. *See Santa Clara Pueblo*, 436 U.S. at 54–55, 71–72 n. 32; *Brackeen*, 599 U.S. at 329 (Gorsuch, J., concurring); Peter J. Spiro, *A New International Law of Citizenship*, 105 Am. J. Int'l L. 694, 697 (2011). Moreover, centering citizenship on one's ancestral ties is common international practice. *See, e.g.*, Act No. 91 of 1992 (Law No. 91/92) (Italy) (allowing citizenship for the children and grandchildren of Italian citizens); Polish Citizenship Act of 1920, arts. 2, 11 (Poland), Polish Citizenship Act of 1951, arts. 9, 11 (Poland), and Polish Citizenship Act of 1962, arts. 6, 7 (Poland) (allowing citizenship under strict circumstances when an unbroken Polish ancestry is present); Irish Nationality and Citizenship Act 1956, § 7(2) (Ireland) (allowing citizenship for grandchildren of Irish citizens in certain circumstances).

C. The U.S. Supreme Court Has Held that Government Action Directed at Tribal Nations and Native People Creates a Political Classification Subject to Rational Basis Review.

In 1974, the United States Supreme Court in *Mancari* unanimously affirmed the principle that the United States can lawfully treat Tribal Nations

[9] Indeed, it is the United States that has encouraged Tribal Nations to include a genealogical connection as one component of their Tribal citizenship criteria. For example, gaining federal recognition through 25 CFR Part 83 requires submitting evidence to the U.S. Department of the Interior showing that present day Tribal citizens lineally descend from a Tribal political entity that existed in the past. 25 C.F.R. § 83.11(e) (2015).

and Native people differently from other groups without running afoul of the Constitution's equal protection requirements. 417 U.S. at 554–55. The Court held that a Bureau of Indian Affairs hiring preference for people who were citizens of federally recognized Tribal Nations and met a blood quantum threshold did not violate equal protection. The Court first held that "this preference does not constitute 'racial discrimination'" and "[i]ndeed, it is not even a 'racial' preference," *id.* at 553, but rather is "political . . . in nature," *id.* at 553 n.24. The Court then went on to the second step of the analysis, holding that the political classification was rationally related to "the fulfillment of Congress' unique obligation toward the Indians" and to more specific governmental interests incorporated within that obligation. *Id.* at 555.

In concluding that the hiring preference was a political classification, and not a racial one, the Court pointed to the political relationship between a Tribal Nation and its people, stating that the hiring preference was directed at "Indians not as a discrete racial group," but, rather, as members of sovereign Tribal Nations. *Id.* at 554; 553 n.24 ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes.").

The Court also referenced the political relationship between the United States and Tribal Nations as supporting its conclusion that the classification was political. It discussed the United States' longstanding treatment of Tribal

Nations as political entities, the United States' ongoing trust and treaty obligations, and the constitutional powers the government uses to carry out those obligations. *Id.* at 551 (citing the unique legal status of Tribal Nations and Congress's power and responsibility to legislate on their behalf); *id.* at 552 (reasoning that the United States, through treaty making and other political actions, in exchange for taking possession of Tribal Nations' lands, "assumed the duty of furnishing [] protection," and thus required "the authority to do all that was required to perform that obligation"); *id.* (noting that the Constitution itself "singles Indians out as a proper subject for separate legislation").[10]

After concluding the hiring preference was a political classification, rather than a racial classification, the Court in *Mancari* applied the second step of the

[10] Courts applying *Mancari* have also pointed to the Constitution's recognition of this political relationship as a basis for their conclusion that legislation benefitting Tribal Nations and Native people is political in nature. *See, e.g., Antelope*, 430 U.S. at 645 ("[C]lassifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians."); *United States v. Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) ("[I]n a sense the Constitution itself establishes the rationality of the present classification, by providing a separate federal power which reaches only the present group."). Courts have also held in other contexts that the Constitution cannot logically be read to explicitly vest power in the United States to take actions directed at fulfilling the United States' trust and treaty obligations to Tribal Nations and Native people and to simultaneously prohibit such actions. *See Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991) ("[t]he federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.").

equal protection analysis. The Court held that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed," and, "[h]ere, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process." *Id.* at 555.

While *Mancari* is the leading case in this arena, courts have continuously upheld the principle that United States actions directed at Tribal Nations and Native people in furtherance of the United States' unique trust and treaty obligations are constitutional and have referenced the unique political relationships involved. *See, e.g.*, *Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979); *Antelope*, 430 U.S. 641; *Del. Tribal Bus. Comm. v. Weeks,* 430 U.S. 73 (1977); *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012); *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011); *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005); *see also* Nation Br. at 35–36.

D. As ICWA Is Grounded in Both Political Relationships, Its Classifications are Political.

The Native children to whom ICWA extends through its "Indian child" definition, 25 U.S.C. § 1903(4), include only those encompassed within the

above-referenced political relationships—making ICWA's classifications political rather than racial.

i. ICWA Applies Only to Children Who Have Political Relationships with Their Tribal Nations.

First and foremost, ICWA applies to children who are citizens of their Tribal Nations. 25 U.S.C. § 1903(4) ("'Indian child' means any unmarried person who is under age eighteen and is . . . a member of an Indian tribe"). This is as clear a connection to a political entity as a person can have.

ICWA also applies to children who are eligible for citizenship in their Tribal Nation and have a biological parent who is a citizen of a Tribal Nation. *Id.* ("'Indian child' means any unmarried person who is under age eighteen and is . . . eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]"). Despite Appellants' assertions otherwise, eligibility for citizenship—while not *equivalent* to formalized citizenship—is as much a *political status* as citizenship: the Tribal Nation, as sovereign, determines—through Tribal law—which people are eligible for participation in the Tribal political entity. This exercise of sovereignty creates a political relationship between the sovereign and the person it has identified for citizenship. A determination that a child is eligible for citizenship is akin to the Tribal Nation reaching its arms out to the child, welcoming the child into the political entity.

That a child has not yet perfected her citizenship does not transfigure a political status into a racial status. Nor does it mean that the child or her parents have rejected the Tribal Nation's embrace. Under many Tribal Nations' citizenship laws, immediate enrollment at birth is not possible. *See, e.g.,* Red Lake Band of Chippewa Indians, *Child Application for Enrollment* (last revision Jan. 13, 2020) https://www.redlakenation.org/wp-content/uploads/2020/01/2020-Application-Child.pdf (requiring submission of birth certificate and application to Tribal Enrollment Department prior to approval for enrollment); WYANDOTTE NATION CONST., art. 5, § 5 (requiring the Nation's Council to make final decisions on citizenship, where the Council consists of all adult citizens of the Nation and the Council only meets annually each September); POARCH BAND OF CREEK INDIANS CONST., art. I, § 1(B)(3) (requiring submission of completed application that is then subject to review and approval by Tribal Council prior to enrollment). Thus, in many Tribal Nations, eligibility for citizenship is the closest political tie an infant could have to the Tribal Nation at birth—a time when ICWA's protections are often most necessary.

ICWA's requirement that children whose Tribal citizenship is not yet formalized have a parent who is a Tribal citizen narrows the category of children covered by ICWA in a way that ensures an even closer connection with the Tribal Nation. Although the child has not yet been able to perfect her own citizenship,

the parent has maintained that reciprocal sovereign-to-citizen relationship; there are arms reaching in both directions of the political relationship.[11]

In *Brackeen*, the petitioners challenging ICWA's constitutionality—like those here—lacked standing to make equal protection arguments, so the U.S. Supreme Court did not address the merits of those arguments. 599 U.S. at 291. The Court below, however—the U.S. Court of Appeals for the Fifth Circuit sitting *en banc*—directly addressed ICWA's constitutionality, pointing to the political relationship between the child and the Tribal Nation in concluding ICWA's "Indian child" definition was a political classification. *Brackeen v. Haaland*, 994 F.3d 249, 339 (5th Cir. 2021), *aff'd in part*, *vacated in part, rev'd in part*, 599 U.S. 255 (2023).[12] With regard to children eligible for citizenship, it explained "ICWA's eligibility standard simply recognizes that some Indian children have an imperfect or inchoate Tribal membership" and "the standard embraces Indian children who possess a potential but not-yet-formalized affiliation with a current political entity—a federally recognized tribe." *Id.*

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[11] While the requirement that a parent be a Tribal citizen is not necessary to establish the child's political ties to her own Tribal Nation, nor does it lessen the political relationship between the child and the Tribal Nation, and it certainly does not transform the child's political status into a racial classification.

[12] Judge Dennis's opinion holding that ICWA's "Indian child" classification does not violate equal protection garnered the majority of votes and thus serves as the *en banc* court's holding on that issue. *Brackeen*, 994 F.3d at 267–68.

ii. ICWA is an Outgrowth of the United States' Political Relationship with Tribal Nations.

That ICWA applies only to children who have a political relationship with their Tribal Nation is enough to establish ICWA as creating a political classification. But ICWA's status as a political classification is also supported by the fact that Congress enacted ICWA in accordance with the United States' political relationship with Tribal Nations.

Congress enacted ICWA in furtherance of its trust and treaty obligations to Tribal Nations and Native people, 25 U.S.C. § 1901(2), which are grounded in political relationships. In ICWA, Congress affirmed its duty to preserve Tribal Nations and acknowledged that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children[.]" 25 U.S.C. § 1901(3). Congress recognized that Tribal Nations and Native families have been harmed by the removal of their children, 25 U.S.C. §§ 1901(4),(5), that Tribal Nations cannot survive without their children, 25 U.S.C. § 1901(3), that the United States, in its role as trustee, has a duty to protect Native children, *id.*,[13] and that ICWA would create better outcomes for children, their families, and their Tribal Nations, 25 U.S.C. § 1902.

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[13] The United States' obligations toward Tribal Nations have, from the very beginning, included the protection of Tribal Nations' children. *See, e.g.*, Treaty of Fort Pitt with the Delaware Nation, art III, Sept. 17, 1778, 7 Stat. 13 (treaty made to construct a fort to protect Native children).

Further, Congress enacted ICWA pursuant to its constitutional authority over Indian affairs. 25 U.S.C. § 1901(1); *Brackeen*, 599 U.S. at 280. As described above, the constitutional Indian affairs powers are themselves political in nature and empower Congress to carry out its political trust and treaty obligations.

E. ICWA Satisfies the Rational Basis Test Applicable to Political Classifications.

Because ICWA is grounded in the United States' political relationships with Tribal Nations, and in Tribal Nations' political relationships with their people, its classifications are political. ICWA does not create suspect classifications, so ICWA need only have a rational basis.

ICWA clearly executes the United States' trust and treaty obligations, and thus its "unique obligation toward the Indians," a vital governmental interest identified in *Mancari*. *See* 417 U.S. at 555. ICWA was a direct response to the assimilation-fueled mass removal of Native children that has had devastating impacts on those children, their families, and their Tribal Nations. *Brackeen*, 599 U.S. at 297–307 (Gorsuch, J. concurring). ICWA's substantive and procedural protections are rationally related to reducing this mass removal, in furtherance of the United States' interest in protecting Native children and Tribal Nations. *See Brackeen*, 599 U.S. at 305 (Gorsuch, J. concurring) ("At bottom, though, the law's operation is simple. It installs substantive and

procedural guardrails against the . . . removal of Indian children from tribal life."); *Holyfield*, 490 U.S. at 32.

ICWA is also rationally related to the more specific governmental interest that was identified in *Mancari*, the United States' interest in furthering Tribal self-government.[14] *See* 417 U.S. at 555. ICWA protects against an existential threat to Tribal self-government, as a Nation cannot survive without its citizens, and children are the future of a Nation. *See* 25 U.S.C. § 1901(3).

The same analysis would apply to a narrower challenge focused on the placement preference for Native foster homes over non-Native foster homes. The placement preference is rationally related to ensuring children are raised in a family that shares their political status as Native people and lives within the context of the historical and cultural experiences of Tribal Nations and Native people in the United States.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to dismiss Appellants' constitutional challenges to ICWA.

[14] While courts have held that furthering Tribal self-governance is a *sufficient* governmental interest to satisfy rational basis review under step two of the equal protection test, courts have not accepted Appellants' argument that a connection to Tribal self-government is *necessary*, under step one of the equal protection analysis, for a classification to be political.

Dated: August 28, 2024.

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CERTIFICATION OF COMPLIANCE WITH MINNESOTA RULES OF APPELLATE PROCEDURE

I hereby certify that *Amici's* brief conforms to the requirements of Minn. R. Civ. P. 132.011 and complies with the typeface requirements using font size 13. The length of this brief is 6987 words, as computed by the word processing program used to prepare this document, Microsoft Word Office 365.

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